RUSSIA – ANTI-DUMPING DUTIES ON LIGHT COMMERCIAL VEHICLES FROM GERMANY AND ITALY

(AB-2017-3 / DS479)

EXECUTIVE SUMMARY OF THE
THIRD PARTICIPANT SUBMISSION OF THE
UNITED STATES OF AMERICA

March 17, 2017

ARTICLES 4.1 AND 3.1 OF THE AD AGREEMENT[*]

1. Article 4.1 is subject to only two exceptions. There is no basis for inferring an additional exception to Article 4.1 based on the quality of the data submitted by certain producers. Article 3.1 does not support the exclusion of producers from the domestic industry based on such deficiencies. Article 3.1 sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. Article 4.1 should be read in context with Article 3.1, but Article 3.1 does not set out an exception to Article 4.1.

2. Nor does Article 3.1 suggest that the definition of the domestic industry hinges on the quality of the evidence submitted by domestic producers. If a producer submits deficient data, the authority could disregard the data in its injury analysis, on the basis that the data does not constitute positive evidence.

3. Neither Article 4.1 nor Article 3.1 of the AD Agreement mandates the precise order of analysis suggested by the Panel. Article 3.1 does not address timing and sequencing with respect to the definition of the domestic industry. In establishing the timing and sequencing of the investigation, an authority must not compromise the objectivity of the injury determination.

4. In some cases, an authority's decision to collect and assess evidence before defining the domestic industry may be relevant in determining whether the authority complied with Article 3.1. But the United States is not persuaded that collecting and reviewing data before defining the domestic industry is *per se* contrary to Article 3.1. Likewise, an authority may "redefine" the domestic industry after collecting and analyzing evidence.

ARTICLE 3.2 OF THE AD AGREEMENT

5. Article 3.2 must be considered in conjunction with the overarching obligations of Article 3.1. Article 3.2 requires that an authority "consider" the volume and price effects of the relevant imports. Article 3.2 does not prescribe a particular methodology or set of factors that must apply in a price effects analysis. In some cases, constructing a hypothetical target price may be a useful analytic tool. But the text of Articles 3.2 and 3.1 does not suggest that authorities are required to construct hypothetical prices in every case.

6. The United States does not view the Panel as having conflated the price effects analysis under Article 3.2 with the causation inquiry under Article 3.5. In conducting its determination

[*] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 833 words (including footnotes), and the U.S. Third Participant Submission contains 8,346 words (including footnotes).

under Article 3, an authority may find that certain facts or events are relevant at multiple stages of the injury analysis.

ARTICLE 3.4 OF THE AD AGREEMENT

7. The inquiry under Article 3.4 is not limited to an evaluation of factors such as "inventories" that are expressly enumerated. The list of enumerated factors is not exhaustive, and no one factor is necessarily decisive. In an appropriate case, an authority may need to evaluate additional factors in its analysis under Article 3.4. Such factors could include information pertaining to entities that are related to producers within the domestic industry. The manner in which an authority chooses to articulate the evaluation of these economic factors may vary.

ARTICLES 6.5 AND 6.9 OF THE AD AGREEMENT

8. The Panel's apparent attempt to distinguish "essential facts" from "essential facts under consideration" misconstrues the nature of the inquiry under Article 6.9. The term "essential" implies that a subset of the facts before the investigating authority needs to be disclosed under Article 6.9. The term "essential facts under consideration" is properly understood in relation to the other terms of Article 6.9.

9. The Panel erred in finding that a source of data cannot constitute an "essential fact" for purposes of Article 6.9. The assessment of what qualifies for disclosure depends on the facts of a given case. Without a full disclosure of the essential facts under consideration, it would not be possible for a party to identify mathematical or clerical errors or even whether the investigating authority collected probative evidence. In a given case, the source of data may be an important fact that a party needs to defend its interests.

10. Articles 6.5 and 6.9 are distinct obligations. Article 6 of the AD Agreement balances the protection of confidential information with the right of parties to be given a full and fair opportunity to see relevant information and defend their interests. Article 6.5 requires that investigating authorities ensure the confidential treatment of information. By contrast, Article 6.9 imposes a disclosure obligation. Articles 6.5 and 6.9 have a different scope of application, such that failure to comply with the requirements of Article 6.5 need not always trigger a breach of Article 6.9.