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

(DS479)

THIRD PARTY EXECUTIVE SUMMARY OF
OF THE UNITED STATES OF AMERICA

April 1, 2016

EXECUTIVE SUMMARY OF U.S. THIRD PARTY WRITTEN SUBMISSION

I. THE EUROPEAN UNION'S CLAIMS REGARDING ARTICLES 3.1 AND 4.1 OF THE AD AGREEMENT

1. The United States agrees with the EU that Article 4.1 must be read in conjunction with Article 3.1. Article 4.1 establishes that the "domestic industry" can be defined as either (1) the "domestic producers as a whole of the like products," *i.e.*, all domestic producers, or (2) a subset of domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production" of the like products. Article 4.1 of the AD Agreement does not require that all domestic producers be included in the domestic industry, nor does it articulate a minimum limit on the percentage of domestic production that must be included to constitute a "major proportion" of the total domestic production of those products.

2. Although undefined in the AD Agreement, the term "major proportion" must be interpreted in the context of Article 3.1 of the AD Agreement. Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence." The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry.

3. The United States recalls that the plain language of Articles 3.1 and 4.1 of the AD Agreement should guide the Panel's analysis. The Panel should consider whether the authority, consistent with Article 4.1 of the AD Agreement, defined the domestic industry as "domestic producers as a whole," or instead defined the domestic industry as those producers whose production constitutes a "major proportion" of total domestic production of the like product. If the Panel determines that the authority's definition of the domestic industry is composed of "domestic producers as a whole," then the inquiry may end. The Appellate Body stated in *EC – Fasteners (China)* that "[t]he risk of introducing distortion will not arise when no producers are excluded and the domestic industry is defined as 'the domestic producers as a whole.'" If, however, the Panel concludes that the domestic industry is claimed to be composed of domestic producers that constitute a "major proportion" of total domestic production, then the inquiry does not end.

4. In this case, the Panel should consider whether the authority, consistent with Article 3.1, defined the domestic industry in a fair and unbiased manner. A flawed definition of the domestic industry can distort an authority's material injury analysis. For a material injury determination to be based on "positive evidence and involve an objective examination," the authority must rely upon a properly defined domestic industry to perform the analysis. The Appellate Body has recognized that a proper definition of the domestic industry is critical to ensuring an accurate and unbiased injury analysis

5. The Panel is to evaluate whether the authority's definition of the domestic industry introduces a distortion to the analysis and, in doing so, it should consider the existence of an inverse relationship between the proportion of producers included in the domestic industry and the absence of a risk of material distortion in the assessment of injury.

II. THE EUROPEAN UNION'S CLAIMS REGARDING ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT

6. The United States agrees with the views expressed by the parties that the obligations of Article 3.2 must be considered in conjunction with the overarching obligations of Article 3.1. Article 3.2 of the AD Agreement outlines the examination that authorities must conduct to determine the price effects of dumped imports on the domestic market. The plain text of Article 3.1 makes clear that these obligations extend to an authority's price effects analysis.

7. First, the United States observes that Article 3.2 requires that an authority "consider" the volume and price effects of the relevant imports. Article 3.1 provides important context for Article 3.2 and serves to frame the level of scrutiny and analysis required of an authority to meet the obligation to "consider" the price effects of dumped imports. Article 3.1 dictates that one element of a determination of injury is the effect of dumped imports on price in the domestic market. Thus, an authority's finding on price effects has broad significance, and contributes to the ultimate determination of injury. For that reason, the authority must provide an evidentiary basis for its finding on price effects.

8. Second, the United States agrees with the EU that, in assessing price suppression, the authority may not confine its consideration to an analysis of domestic prices. Rather, the plain text of Article 3.2 envisions an inquiry into the relationship between subject imports and domestic prices. Article 3.2 introduces the obligations on price effects by clarifying that the nature of the inquiry is to understand the "effect of the dumped imports on prices." An authority's analysis of the three delineated price effects – price undercutting, price depression, and price suppression – must necessarily be in reference to the dumped imports.

III. CLAIMS REGARDING ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

9. Article 3.4 of the AD Agreement specifies an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The United States observes that Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on the domestic industry. The text of Article 3.4 of the AD Agreement expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

10. As recognized by Articles 3.1 and 3.2 of the AD Agreement, subject imports can influence a domestic industry's performance through price effects, as where subject imports depress or suppress domestic like product prices. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry's performance during the period of investigation. Such an examination would necessarily encompass trends over the entire period of investigation because correlations between subject import trends and domestic industry performance trends over time would be highly relevant to an authority's impact analysis, and such trends would clearly constitute "relevant economic factors and indices having a bearing on the state of the industry."

11. Thus, in examining "the relationship between subject imports and the state of the domestic industry" pursuant to Article 3.4 of the AD Agreement, an authority must consider whether changes in the state of the industry are the consequences of subject imports and whether subject imports have explanatory force for the industry's performance trends. The "examination" contemplated by Article 3.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."

12. The manner in which an authority chooses to articulate the "evaluation" of economic factors may vary. Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out. The United States observes that the Panel must be able to discern that the authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination

IV. CLAIMS REGARDING ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT

13. As with Articles 3.2 and 4.1 of the AD Agreement, the Appellate Body has recognized that it is appropriate to read the obligations of Article 3.5 in conjunction with Article 3.1 of the AD Agreement.

14. The first sentence of Article 3.5 sets out the general requirement for a demonstration that dumped imports are causing injury under the AD Agreement, and contains an explicit link back to Articles 3.2 (volume and price effects) and 3.4 (impact on domestic industries). If the volume or price effects findings are found to be inconsistent with Articles 3.1 and 3.2, or the impact findings are found to be inconsistent with Articles 3.1 and 3.4, an Article 3.5 causal link analysis relying on such findings would fail. That is, if an authority relies on a price effects finding to support its impact and injury determinations, its decision must be supported by positive evidence on these counts. In such circumstances, a failure to demonstrate price effects or significant impact would constitute a failure to demonstrate that dumped imports are causing injury, as required by the first sentence of Article 3.5 of the AD Agreement.

15. Recent panels have reached this very understanding. The panel in *China – Autos (US)* explained "it would be difficult, if not impossible, to make a determination of causation consistent with the requirements of Articles 3 and 15 of the Anti-Dumping and SCM Agreements, respectively, in a situation where an important element of that determination, the underlying price effects analysis, is itself inconsistent with the provisions of those Agreements." The panel properly recognized that a final injury determination is the product of multiple intermediate determinations, each of which must be supported by positive evidence and an objective examination.

16. The third sentence of Article 3.5 of the AD Agreement provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. Under Article 3.5, the premise of a non-attribution analysis is that there is at least one known factor other than the dumped imports that is injuring the domestic industry. As the Appellate Body has found, if a known factor other than dumped imports is a cause of injury, the third sentence of Article 3.5 requires the authority

to engage in a non-attribution analysis to ensure that the effects of that other factor are not attributed to the dumped imports. If there are no other known factors other than the dumped imports that are injuring the domestic industry, Article 3.5 does not require an authority to conduct a non-attribution analysis. Indeed, in such circumstances, the authority can appropriately attribute all injury to the dumped imports.

17. The AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis. The question of whether an investigating authority's analysis is consistent with Article 3 should turn on whether the authority has in fact evaluated these factors and whether its evaluation is supported by positive evidence and reflects an objective examination, as required by Article 3.1.

V. THE EUROPEAN UNION'S CLAIMS REGARDING ARTICLE 6 OF THE AD AGREEMENT

A. Articles 6.5 And 6.5.1 Of The AD Agreement Require Designation Of Confidential Information And Public Summaries

18. The United States considers that Article 6.5 requires that investigating authorities ensure the confidential treatment of information. Article 6.5.1 then balances the need to protect confidential information against the disclosure requirements of other Article 6 provisions by requiring that, if an investigating authority accepts confidential information, it shall require that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information. Furthermore, footnote 17 of the AD Agreement contemplates one mechanism by which authorities can balance these competing interests, which is through a narrowly-drawn protective order.

19. Under Article 6.5 of the AD Agreement, investigating authorities must treat as confidential information that is "by nature" confidential or that is provided "on a confidential basis," and for which "good cause" is shown for such treatment. Without taking a position on the appropriate classification of the export and import statistics, the U.S. agrees with the parties' observations that any information which is by nature confidential may be treated as confidential upon a showing of good cause.

20. The Appellate Body in *EC – Fasteners (China)* supported this view when it explained that a party must show good cause for confidential treatment at the time the information is submitted, after which the investigating authority "must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request." An investigating authority that accepts confidential information from an interested party must ensure that a non-confidential summary of such information is provided to other parties. Such a summary must convey a "reasonable understanding of the substance of the information submitted in confidence."

21. The United States also notes that Article 6.5 does not obligate the investigating authority to provide a separate or detailed explanation whenever the authority accepts a claim of confidential treatment. Further, nothing in the standard of review employed in trade remedy disputes leads to an unwritten obligation for an authority to provide such explanations.

22. In many trade remedy proceedings, the merits underlying the grant of confidential treatment will be plain on the face of the record of a proceeding. For example, the authority may set up a procedure in which parties requesting confidential treatment may certify that specific information is confidential because it is not publicly available and the release will cause harm to the submitter. Where a party submits such a request, for example, involving sensitive information such as costs, or prices given to specific customers, the good cause for confidential treatment is plainly evident. In such situations, it would be a major departure from the text of the AD Agreement to require a separate and detailed explanation whenever an authority accepts a plainly reasonable request for confidential treatment.

23. The United States observes that the Panel should first determine if the investigating authority appropriately designated information as confidential. The Panel should then determine whether an investigating authority that accepted confidential information ensured that a summary of that confidential information was provided to other parties in sufficient detail to permit a reasonable understanding of the substance of the information.

B. Article 6.9 of the AD Agreement Requires Disclosure of Essential Facts

24. The United States agrees with the views expressed by Russia and the EU that Article 6.9 requires that the investigating authority disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties. The meaning of "essential facts" in this context is informed by the description that these facts "form the basis for the decision whether to apply definitive measures" and the requirement that they be disclosed "in sufficient time for the parties to defend their interests." Indeed, the ability of interested parties to defend their interests lies at the heart of the disclosure obligation of Article 6.9.

25. Without a full disclosure of the essential facts under consideration in the underlying dumping, injury, and causation determinations, it would not be possible for a party to identify whether the determinations contain clerical or mathematical errors or even whether the investigating authority actually did what it purported to do. The panel's analysis in *China – Broiler Products* provide further guidance regarding "essential facts" that must be disclosed to interested parties. In that dispute, the panel stated that, under Article 6.9, "the 'essential facts' underlying the findings and conclusions relating to (dumping, injury, and a causal link)…must be disclosed." As to the determination of the existence and margin of dumping specifically, the panel reasoned that the investigating authority must disclose data used in: (1) the determination of normal value (including constructed value); (2) the determination of export price; (3) the sales that were used in the comparison between normal value and export prices; (4) any adjustments for differences which affect price comparability; and (5) the formulas that were applied to the data.

26. The calculations relied on by the investigating authority to determine normal value and export prices, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9. Without such information, no affirmative determination could be made and no definitive duties could be imposed. Additionally, if the interested parties are not provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

27. Regarding the interpretation of the domestic industry, Article 4.1 of the AD Agreement defines the "domestic industry" as referring to the industry as a whole, or those producers whose production constitutes a "major proportion" of the total domestic production. For the purpose of our comments today, we focus on the latter situation, where an authority seeks to define the domestic industry as a "major proportion" of domestic production. Under such circumstances, the "major proportion" requirement is to be read in conjunction with the overarching obligation of Article 3.1. That provision requires that a final material injury determination be based on "positive evidence" and an "objective examination" of the facts. To result in such a determination, the authority's definition of the domestic industry must be unbiased so as not to give rise to a material risk of distortion.

28. An investigating authority's need to define the domestic industry is a critical early step to the injury analysis. The definition of the domestic industry affects several of the intermediate conclusions that flow into the final determination. Thus, a definition of the domestic industry that introduces a material risk of distortion may have broad repercussions on the injury determination and subsequent impact and causation analyses.

29. The Appellate Body has opined that the "major proportion" obligation of Article 4.1 has both quantitative and qualitative connotations. The Appellate Body has suggested an inverse relationship between the proportion of producers represented in the domestic industry and the absence of a risk of material distortion. The United States does not take issue with the concept of an inverse relationship; to consider the issue in this manner can be a helpful analytical tool. But, the United States stresses that Article 3.1 stands on its own. The conceptual framework articulated by the Appellate Body cannot be used to excuse an authority from its obligation to define the domestic industry in a manner that is unbiased and does not favor the interests of one party over another. For this reason, an authority must take care to define the domestic industry in a manner that satisfies the "major proportion" requirement of Article 4.1 *and* Article 3.1's obligation that the definition be unbiased and objective so as not to give rise to a material risk of distortion.

30. The United States will next address a narrow aspect of the legal obligation found in Article 3.2 of the AD Agreement. The article requires an investigating authority to "consider" the volume and price effects of dumped imports. The AD Agreement does not define how an authority is to "consider" the volume and price effects of the relevant imports

31. The United States submits that the requirement "to consider" price effects in Article 3.2, read in the context of Article 3.1, requires an authority to identify an evidentiary basis for a finding on price effects and conduct an examination that provides a meaningful understanding of those effects. The text does not require an authority to make a definitive determination on price effects, but a passive recitation of the facts will not suffice. The context of Article 3.1, and the primary role of the price effects analysis in the injury determination, dictate that an authority is to articulate a finding of price effects that is based on positive evidence and an objective examination.