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

(DS479)

RESPONSES OF THE UNITED STATES OF AMERICA
TO THE PANEL'S QUESTIONS TO THE THIRD PARTIES

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China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
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Thailand – H-Beams (Panel)	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

QUESTIONS FOR THE THIRD PARTIES

I. Definition of the domestic industry

1. Does Article 4.1 impose an express obligation on Members to define the "domestic industry" in a specific manner?

1. No, Article 4.1 of the AD Agreement[1] does not impose an obligation on a Member to use a particular methodology to define the domestic industry. Rather, a Member's obligation is to define the domestic industry in a manner that is not inconsistent with Article 4.1, read in conjunction with the overarching obligations of Article 3.1. The United States provided its views on the nature of these obligations in its third-party submission and further expands on its views in responses to several of the following questions.

2. With reference to the Vienna Convention, please explain what it means, in your view, to interpret Article 4.1 of the AD Agreement "in conjunction with" Article 3.1 of the AD Agreement. For instance, does it mean that Article 4.1 could be found to contain an obligation not evident in the text, by reading it in conjunction with Article 3.1?

2. No, the obligations of WTO Members are those that exist in the text of the covered agreements, including the AD Agreement, as expressly reflected in Articles 3.2 and 19.1 of the DSU. The United States has elaborated on the obligation of Article 4.1 of the AD Agreement "in conjunction with" Article 3.1 of the AD Agreement because of the critical context the latter provides to the former.

3. Where an authority defines the domestic industry under Article 4.1 as those producers that constitute a "major proportion of the total domestic production," Article 3.1 provides context for the applicable obligation. Article 3.1 requires that a final material injury determination be based on "positive evidence" and an "objective examination" of the facts. Logically, then, the constituent findings on which the determination of material injury is based must themselves be based on "positive evidence" and an "objective examination" of the facts.

4. The Appellate Body has referenced with approval a description of "positive evidence" as "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy."[2] The Appellate Body has further stated that, to be "objective," an injury analysis must be "based on data which provides an accurate and unbiased picture of what it is that one is examining" and be conducted "without favouring the interests of any interested party, or group of interested parties, in the investigation."[3] Thus, the obligation to define the domestic industry must be informed by the context of Article 3.1, which requires that the injury analysis be based on an unbiased picture of what one is examining and be conducted in an unbiased manner.

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.*

[2] *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 163-64. *See also EC – Tube or Pipe Fittings (AB)*, para. 7.226.

[3] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 180.

5. The overarching obligations of Article 3.1 necessarily provide context to the obligation in Article 4.1 to define the domestic industry; a flawed definition of the domestic industry could introduce a material distortion to the injury analysis that favors the interests of one party. As explained in the U.S. third-party submission, an authority's definition of the domestic industry has a direct bearing on the authority's ability to reach a determination consistent with the obligations of Article 3.1. This is because information gathered from or pertaining to the domestic industry, however defined by the investigating authority, is central to multiple elements of the injury analysis.

6. For example, Article 3.4 requires an analysis on the impact of dumped imports "on the domestic industry," and Article 3.5 requires an analysis of the causal relationship between dumped imports and injury "to the domestic industry." An analysis that is based on skewed or distorted data cannot be said to be based on "positive evidence" or an "objective examination" of the facts. For these intermediate analyses to be performed in a manner consistent with Article 3.1, the domestic industry itself must likewise meet the obligations of Article 4.1, as informed by the context of Article 3.1.

3. Does Article 4.1 impose a "positive obligation" on an investigating authority to make "active, independent efforts", or "reasonable efforts", to identify the universe of domestic producers of the like product? If so, how is that obligation expressed in the text of Article 4.1? If not an express obligation, on what basis could this obligation be inferred from the text?

7. Yes, an investigating authority must ensure that it has collected the information necessary to define the domestic industry in an objective manner in order to conduct the necessary analysis of injury to provide a basis to impose an antidumping duty. This understanding is consistent with the ordinary meaning of the word "investigate" as used in the provisions of the AD Agreement that set forth principles governing the conduct of antidumping duty investigations. Specifically, Article 1 provides that antidumping measures may only be imposed "pursuant to investigations initiated and conducted in accordance with the provisions of" the AD Agreement. Similarly, Article 5.1 contemplates that investigating authorities will conduct "an investigation to determine the existence, degree and effect of any alleged" dumping. Article 9.1 refers to the decision whether to impose an antidumping duty "where all requirements for the imposition have been fulfilled," including those related to material injury to the domestic industry. Thus, an investigating authority may not remain passive when confronted with an investigative record that lacks the information necessary to conduct an injury investigation in accordance with the AD Agreement or it will lack the basis to conduct the investigation of and make the determination of injury.

8. The centrality of the definition of the domestic industry to an investigating authority's injury analysis under Articles 3 and 4 of the AD Agreement suggests that an authority's collection of the requisite information is of utmost importance. For example, compliance with Article 3.2 requires the collection of information on subject import volume and prices; domestic industry sales volume, prices, and production; and apparent consumption. Compliance with Article 3.4 requires the collection of a broad range of information concerning domestic industry performance, including sales, profits, market share, productivity, return on investment, utilization

of capacity, cash flow, inventories, employment, wages, growth, and ability of raise capital or investments. Therefore, an investigating authority cannot conduct an "objective examination" of "positive evidence," as required under Article 3.1 of the AD Agreement, without ensuring that it has identified the universe of domestic producers as a whole, which may necessitate undertaking active efforts.

9. For example, domestic producers that petition for the imposition of antidumping duties may be more likely to be suffering from material injury than non-petitioning producers. An authority that limits its domestic industry definition to petitioners, or to those producers volunteering to participate, could therefore be limiting its injury analysis to only those domestic producers that are suffering injury. Without other relevant facts to confirm the appropriateness of its analysis, under such circumstances, the authority could hardly conduct an "objective examination" of "the consequent impact of {subject} imports on domestic producers," as required under Article 3.1 of the AD Agreement. Nor would the investigating authority possess the "positive evidence" necessary to conduct such an analysis because its data set would not provide an accurate and unbiased picture of domestic industry performance. In such circumstances, only by making active, independent efforts to identify the universe of domestic producers as a whole can investigating authorities satisfy these obligations.

6. The European Union asserts that the investigating authority's definition of the domestic industry in this case "introduced a material risk of skewing the economic data and consequently of distorting the injury determination". The notion of "skewing" data presupposes that there is a reference or standard – the "unskewed" data – with respect to which it can be concluded that the data is skewed. Similarly, the notion of "distorting" the injury determination presupposes that there is some injury determination which would be considered "undistorted".

a. What, in your view, is the appropriate reference or standard for assessing whether there is a risk of "skewing the economic data" in the context of defining a domestic industry? Is it a differently-defined domestic industry, for instance an industry defined as the producers as a whole, or as producers accounting for some different proportion of total domestic production?

b. On what basis could it be concluded that that a differently-defined domestic industry is the appropriate reference or standard for assessing whether there is a material risk of skewing the data?

c. Does this consideration of whether the definition of the domestic industry risks skewing the data not imply that a domestic industry defined as producers of the like product as a whole is the standard, and therefore is to be preferred, while a domestic industry defined as producers of a major proportion is somehow a second-best option, and therefore an investigating authority must ensure that it resembles what an industry defined as producers as a whole would be?

10. The United States agrees with the notion that the definition of "domestic industry" in Article 4.1 indicates that this concept should be understood in relation to the domestic producers

as a whole. Article 4.1 of the AD Agreement provides that "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." The ordinary meaning and context of these provisions can only be understood in light of the principle of effectiveness. As the Appellate Body explained in *Japan – Alcoholic Beverages II*:

> A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 {of the Vienna Convention} is the principle of effectiveness (ut res magis valeat quam pereat). In United States - Standards for Reformulated and Conventional Gasoline, we noted that "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"[4]

11. Applying the principle of effectiveness to the text of Article 4.1 of the AD Agreement confirms that investigating authorities must endeavor to define the domestic industry in relation to the "producers as a whole" including when resorting to the definition of the domestic industry as producers "whose collective output . . . constitutes a major proportion . . . of total domestic production." That is, the "major proportion" definition can be understood as an alternative means to reach an understanding of the domestic industry akin to obtaining information on the "producers as a whole". But if instead a "major proportion" of the domestic industry meant a lower standard, investigating authorities could comply with Article 4.1 by stopping their investigation once producers accounting for a "major proportion" are identified. Investigating authorities would therefore be permitted to conduct their injury analysis of a potentially limited and non-representative self-defined industry, without considering whether the data were representative of that which would be obtained on the producers as a whole. Such an interpretation would therefore effectively read "producers as a whole" out of Article 4.1 of the AD Agreement, reducing the clause to redundancy or inutility.

12. Other text in Article 4.1 supports this understanding of "domestic industry". In Article 4.1(i), a situation is described in which a domestic producer is related to an exporter or importer. The provision establishes that the "term 'domestic industry' may be interpreted as referring to the rest of the producers", suggesting that all of the non-related producers ("the rest of") would constitute the domestic industry. Similarly, in exceptional circumstances where a domestic market has been divided into two or more parts under Article 4.1(ii), injury may be found to exist where, among other requirements, "the dumped imports are causing injury to the producers of all or almost all of the production within such market." Again, the notion is that the domestic

[4] *Japan – Alcoholic Beverages II (AB)*, p. 12 (quoting *U.S. – Gasoline (AB)*, p. 23).

industry experiencing injury represents all of the domestic producers or the producers of "almost all" the production.

13. In light of this, Article 4.1 should be interpreted as requiring a definition of the domestic industry in relation to the producers as a whole, even if it is necessary in a particular investigation to examine a "major proportion" of domestic production.

7. The European Union argues that the definition of a domestic industry as producers accounting for a major proportion of the total domestic production of the like product cannot rest on the proportion in question, even if it is as high as 87% of total domestic production of the like product, but that the investigating authority must also consider "qualitative" factors. Do you agree?

a. If so, what is the nature of the "qualitative assessment" you consider is necessary in defining the domestic industry?

b. Is such a qualitative assessment only required if the domestic industry is defined as producers of a major proportion of total domestic production, or is it also necessary if the industry is defined as the producers as a whole of the like product?

c. If a qualitative assessment is not necessary if the domestic industry is defined as producers as a whole, does that not suggest that there is a hierarchy in Article 4.1, with the domestic producers as a whole above producers of a major proportion?

14. As discussed in response to Question 6 above, under Article 4.1, an authority should endeavor to define the industry in relation to the producers as a whole, even if it is necessary in a particular investigation to examine a major proportion of domestic production only. And, as discussed in the U.S. Third Party Oral Statement,[5] where an investigating authority seeks to define the domestic industry as a "major proportion" of domestic production, the investigating authority must ensure that the definition of the domestic industry is consistent with the obligations of Article 3.1. Such an analysis may require a qualitative assessment if relevant to ensuring that the "major proportion" is representative of producers as a whole.

8. Article 4.1 of the AD Agreement provides that the "term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." Do you agree with the view that if a domestic industry is defined as producers accounting for a major proportion of total domestic production, those producers then constitute the entirety of the domestic industry? If so, then presumably the injury analysis and determination must be undertaken with respect to that industry, based on information provided by those producers. In that case, please explain how, in your view, the failure to include additional producers in the domestic industry as defined introduces a risk of materially distorting the injury analysis?

[5] United States Third Party Oral Statement, paras. 6-8.

15. As discussed in response to Question 6 above, under Article 4.1, an authority should endeavor to define the domestic industry in relation to producers as a whole. If it is necessary in a particular investigation to examine a "major proportion" of domestic production, the domestic industry is to be defined in such a manner that is representative of producers as a whole. A distortion of the injury analysis and determination could arise where the producers found to constitute the domestic industry are not representative of the domestic industry as a whole.

16. A failure to include certain producers in the definition could introduce a distortion to the analysis. A material risk of skewing the data could arise, for example, when an investigating authority limits its definition of the domestic industry to the producers voluntarily participating in the investigation, to the exclusion of other producers that may show different trends or levels of performance. As the Appellate Body held in *EC – Fasteners (China)*, "[b]y limiting the domestic industry definition to those producers willing to be part of the sample. . . the {investigating authority} reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination," in breach of Article 4.1 of the AD Agreement.[6]

17. The material risk arises because domestic producers posting the weakest performance would have the most to gain from the imposition of an antidumping or countervailing duty measure, and would therefore have the greatest financial incentive to participate in the injury investigation. Conversely, domestic producers with a strong financial performance would generally have little incentive to join the petition, or to otherwise participate in the investigation. Indeed, in many circumstances, domestic producers posting the strongest performance would have every incentive not to participate or make themselves known. That is because withholding their performance data from the investigating authority would increase the probability of an affirmative injury or threat determination and hence, higher duties on competing products sold by importers.

18. By limiting inclusion in the domestic industry, and particularly by inviting domestic producers to define the domestic industry in a self-interested manner, an investigating authority could introduce a bias that makes an affirmative injury determination more likely, thus introducing a material risk of distortion, in violation of the objectivity requirement under Article 3.1.[7]

[6] *EC – Fasteners (China) (AB)*, para. 427. The Appellate Body did not address the issue of whether the domestic industry defined by the investigating authority in the fasteners investigation was consistent with Article 3.1 of the ADA, because China did not raise such a claim in the appeal. *Id.* at para. 438.

[7] As a corollary, Article 5.2 of the AD Agreement requires that the application requesting initiation of an investigation include, *inter alia*, "a list of all known domestic producers of the like product (or associations of domestic producers of the like product)." At the minimum, this required list should be the starting point for defining the domestic industry.

II. Selection of Periods for the Injury and Causation Analyses

9. What is the scope of the obligation of an investigating authority in defining the period of investigation (POI) and the period of injury analysis? Please explain with specific reference to the provisions of the AD Agreement.

19. The United States observes that the period of data collection for an injury analysis may depend on the type of product and industry at issue and will often span a number of years. Article 3 contemplates a comparative evaluation of the import volume and prices of the dumped imports over time. Article 3.2 explicitly requires the investigating authority to consider whether there has been a significant increase in the absolute volume or market share of dumped imports, and whether there has been significant price undercutting by the dumped imports, or whether the effect of the dumped imports is to depress or suppress prices to a significant degree. In order to make an objective examination whether there have been significant volume or price effects on the basis of positive evidence, the investigating authority will need to examine data over an appropriate period of time, which may depend on the product and industry at issue. Thus, the investigating authority may need to look at the volumes and prices of both the imports and the domestic like product over a period of several years.

11. Does an investigating authority have to provide a justification/rationale as to: (a) its determination of the periods for the injury and causation determination and (b) its methodology for making comparisons? Absent such an explanation, is it your view that an investigating authority acted inconsistently with the WTO Agreement? Please explain, with specific reference to the relevant AD Agreement provisions.

20. Article 12 of the AD Agreement sets out the obligations of an investigating authority to provide an explanation for the injury determination. Article 12 requires authorities to disclose "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities," and Article 12.2.1 provides that the report shall contain "considerations relevant to the injury determination as set out in Article 3." Article 12.2.2 elaborates further, directing that a public notice contain "all relevant information on matters of fact and law" "which have led to the imposition of final measures."

12. Is it your view that a choice to examine "non-consecutive" periods in itself gives rise to a violation? Please explain with specific reference to the text of specific provision(s) of the AD Agreement you consider are violated.

21. Generally, an objective examination based on positive evidence would engender examination of full year data, and an examination of trends over consecutive periods, although there could be exceptions (for example, seasonal patterns of sales). As the Appellate Body explained in *US – Hot-Rolled Steel*, Article 3.1 of the AD Agreement requires that investigating authorities conduct their investigations "in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the investigation."[8]

[8] *US – Hot-Rolled Steel (AB)*, para. 193.

22. In *Mexico – Anti-Dumping Measures on Rice,* for example, the panel and Appellate Body found that Mexico's investigating authority had acted inconsistently with the Article 3.1 objectivity requirement by accepting the petitioner's suggestion that it limit its injury analysis to data from the six month period in each of the three years examined when subject import penetration happened to be highest.[9] In that case, this approach biased the investigation by focusing on the periods of high import penetration, which were opposite to the months in which domestic production was at its peak. As noted by the Appellate Body, however, there could, in some cases, be a rational explanation provided by an investigating authority for focusing on partial year data.[10] Also, particularly where an investigating authority has the ability to gather interim data for the most recent quarters for which such data is available, a separate analysis comparing that interim data to equivalent interim data from prior years also could comply with Article 3.

13. For a panel to conclude that a determination of injury was based on an "objective examination", is it necessary for the panel to evaluate the methods of analysis employed by the investigating authority in the abstract, or can a panel base its judgement on an evaluation of the determination itself?

23. The objective assessment to be made by a panel reviewing an investigating authority's determination should be informed by an examination of whether the authority provided a reasoned and adequate explanation as to: (1) how the evidence on the record supports its factual findings; and (ii) how those factual findings supported the overall determination. This explanation should be discernible from the determination itself.[11] It is not clear to the United States to what precisely is meant by the reference in the question to "the methods of analysis employed by the investigating authority in the abstract."

IV. State of the domestic industry

18. What is the nature of the "magnitude of the margin of dumping" as an injury factor? Is the reference to dumping margins above *de minimis* in the context of the analysis of whether a cumulative assessment of the effects of imports under Article 3.3 is appropriate sufficient to demonstrate that the magnitude of the margin of dumping was evaluated under Article 3.4, or is a separate evaluation of that factor specifically under Article 3.4 required? If so, what is the nature of that separate evaluation?

24. In order to meet its obligations under Article 3.4, investigating authorities must evince that they considered each of the "relevant economic factors and indices having a bearing on the state if the industry." The manner in which an authority chooses to conduct and articulate its evaluation of the relevant 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

[9] *See Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 183, 187-88 (affirming the panel's finding that the Mexican investigating authority had acted inconsistently with the objectivity requirement under Article 3.1 of the AD Agreement by predicating its injury determination on data from only the first six months of each of the three years examined, which petitioners had advocated as the period in which import penetration was highest).
[10] *Id.* at para. 183.
[11] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186.

evaluation are to be set out.[12] Nor does Article 3.4 require that each of the factors considered be given equal weight.[13]

25. The Appellate Body has made clear that an authority is not required to make specific findings for each impact factor set forth in Article 3.4 of the AD Agreement. In *EC - Malleable Pipe and Tube Fittings*, Brazil argued that the European Commission did not specifically make factual findings for the industry's growth in its determination and therefore failed to evaluate this issue, as required by the provisions in Article 3.4 of the AD Agreement.[14] The Appellate Body rejected the argument, explaining that, under Article 3.4, an investigating authority need not make specific findings for every factor set forth in Article 3.4.[15] The Appellate Body went on to observe that, while it is mandatory to evaluate all fifteen factors set forth in Article 3.4, the text of the Article "does not address the *manner* in which the results of the investigating authority's analysis of each injury factor are to be set out in the published documents."[16]

26. The obligations under Article 3.4 concern the indicators that are to be considered, and do not prescribe the manner in which the authority is to articulate its consideration of these indicators.

V. Confidential treatment of information

20. What is the relevance of the terms "significant" and "significantly" in Article 6.5 to a determination that certain information is "by nature confidential"?

27. Article 6.5 of the AD Agreement does not define information that is "by nature confidential," but offers two non-exhaustive examples of what such information may comprise. This includes information that, if disclosed, (i) "would be of significant competitive advantage to a competitor," or (ii) "would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information."

28. The dictionary definition of the term "significant" is "important, notable, consequential".[17] The United States considers that the use of "significant" and "significantly" indicates Article 6.5 protects information the disclosure of which by its nature would have an important or consequential effect on the party seeking confidential treatment. Accordingly, the examples set forth in Article 6.5 suggest that disclosure providing a trivial competitive advantage or causing an inconsequential adverse effect would not constitute information that is "by nature confidential."

[12] *EC – Tube or Pipe Fittings (AB)*, para. 131.
[13] *See, Thailand – H-Beams (Panel)*, para. 7.236 (certain factors enumerated in Article 3.4 may not be relevant, or their relative importance can vary significantly from case to case).
[14] *EC - Tube or Pipe Fittings (AB)*, para. 152.
[15] *EC - Tube or Pipe Fittings (AB)*, paras. 151-166.
[16] *EC - Tube or Pipe Fittings (AB)*, para. 157.
[17] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2860.

21. Is it enough for an investigating authority to require that good cause be shown, or must it make a specific determination on the record that good cause has been shown with respect to each request for confidential treatment of information?

29. As the United States noted in its third-party Submission, Article 6.5 does not require an investigating authority to provide a separate or detailed explanation when it accepts an objectively reasonable claim of confidential treatment, for example with respect to the identity of its customers. With respect to such information, the basis for providing confidential treatment is self-evident.

VI. Disclosure

22. What is the relationship between Articles 6.9 and 6.5?

a. Where a Member relies on the investigating authority's treatment of information as confidential under Article 6.5 in not disclosing that information under Article 6.9, which party in dispute settlement has the burden of establishing that the requirements of Article 6.5 were met?

30. A party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim. In *US – Wool Shirts and Blouses*, the Appellate Body noted that it is a generally-accepted canon of evidence that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative claim or defense.[18] Similarly, "it is for the party asserting a fact to prove it."[19] If the party presents evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it presents sufficient evidence to rebut the presumption.[20]

b. If a panel concludes that a Member failed to act consistently with Article 6.5 in treating information as confidential, does this establish a violation Article 6.9 if it does not disclose the information at issue?

31. Articles 6.9 and 6.5 strike a balance between the duty imposed on the investigating authority to protect any confidential information on the one hand, and the duty to disclose the "essential facts under consideration" on the other hand.[21] That is, where information is protected as confidential, a non-confidential summary that can be disclosed to interested parties is required. If an investigating authority improperly treated information as confidential under Article 6.5 and withheld the information on that basis, such conduct could be inconsistent with Article 6.9 to the extent information withheld formed "essential facts under consideration which form the basis for the decision whether to apply definitive measures." Conversely, if the information erroneously treated as confidential under Article 6.5 were not an "essential fact", the non-disclosure of that information would not constitute a breach of Article 6.9.

[18] *US – Wool Shirts and Blouses (AB)*, p. 14.
[19] *Turkey – Textiles (Panel)*, para. 9.57. See also *Japan – Apples (AB)*, para. 157.
[20] *US – Wool Shirts and Blouses (AB)*, p. 14.
[21] *China – Broiler Products (Panel)*, para. 7.321.

23. Does Article 6.9 permit a Member to make a distinction between "cooperating" and "non-cooperating" interested parties in the context of disclosure of information? If so, please indicate where in the text of the AD Agreement you find the legal basis for your view.

32. The EU and Russia disagree as to whether an alleged non-cooperating party is entitled to receive a confidential dumping disclosure under Article 6.9 of the AD Agreement. The United States notes 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. Interested parties, as defined in Article 6.11 of the AD Agreement, include (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product; (ii) the government of the exporting Member; and (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member. The obligation to inform interested parties of essential facts that form the basis for the investigating authority's decision applies to "all" interested parties. Article 6.9 does not distinguish between cooperating and non-cooperating parties.