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

(DS479)

THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The United States welcomes the opportunity to present its views in this proceeding on *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy* (DS479). In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") as relevant to certain issues in this dispute.

II. THE EUROPEAN UNION'S CLAIMS REGARDING ARTICLE 3 OF THE AD AGREEMENT

A. The European Union's Claims Regarding Articles 3.1 and 4.1 of the AD Agreement

2. The European Union (EU) claims that the Eurasian Economic Commission's (EAEC) definition of the domestic industry that excluded Garkovsky Avtomobilny Zavod (GAZ) is inconsistent with Articles 3.1 and 4.1 of the AD Agreement.[1] The EU asserts that the EAEC defined the domestic industry as consisting of one producer, Sollers-Elabuga LLC (Sollers);[2] Sollers claimed, and the EAEC concluded, that Sollers accounted for at least 85% of domestic production of the subject product.[3] The EU argues that GAZ is also a domestic producer of the subject product and that, because of the EAEC's failure to include GAZ in its domestic industry analysis, the EAEC wrongly defined the domestic industry and failed to conduct an objective examination based on positive evidence of the facts.[4]

3. The Russian Federation (Russia) disagrees. Russia's first written submission challenges the EU's factual assertions and the EU's application of the relevant legal obligations to the EU's factual assertions.

4. The United States takes no position on the factual merits of the EU's claims. The United States provides the following comments on the applicable legal obligations.

5. The United States agrees with the EU that Article 4.1 must be read in conjunction with Article 3.1.[5] Article 4.1 of the AD Agreement provides that, with certain defined exceptions, "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."

6. 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

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[1] EU's First Written Submission, para. 18.
[2] EU's First Written Submission, para. 44.
[3] EU's First Written Submission, para. 22.
[4] EU's First Written Submission, para. 66.
[5] EU's First Written Submission, para. 40.

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.

7. 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 provides the following:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

8. Thus, 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 Appellate Body has endorsed 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."[6] 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. Under this obligation, the domestic industry is to be investigated in an unbiased manner that does not favor the interests of any interested party in the investigation.[7] How an authority chooses to define the domestic industry has repercussions throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority's definition of the domestic industry.

9. 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. First, 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.'"[8] 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.

10. 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

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[6] *Mexico – Anti-Dumping Measures on Rice* (AB), paras. 163-164. *See also EC – Tube and Pipe Fittings* (AB), para. 7.226.

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

[8] *EC – Fasteners (China)* (AB), para. 414.

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. The Appellate Body in *EC – Fasteners (China)* found that "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product."[9] The Appellate Body's analysis focused squarely on whether the definition could have the effect *or risk* of introducing a distortion to the injury analysis.

11. 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.[10] The Panel's analysis on risk of distortion should thus begin with consideration of the domestic production captured by the EAEC's definition of the domestic industry.

12. Accordingly, even if the EAEC's definition meets the "major proportion" of domestic production standard of Article 4.1, the Panel should assess whether the EAEC's exclusion of GAZ from the injury analysis was biased or designed to favor the interest of any group of interested parties in the investigation, including the producer who filed the petition, inconsistent with Article 3.1 of the AD Agreement.[11]

B. The European Union's Claims Regarding Articles 3.1 and 3.2 of the AD Agreement

13. The EU claims that the EAEC's finding of price suppression was inconsistent with Articles 3.1 and 3.2 of the AD Agreement. The EAEC concluded that the pricing of dumped imports prevented the domestic industry from raising prices despite increases to the cost of production.[12] The EU argues that the EAEC failed to make an objective examination based on positive evidence when considering price suppression. Specifically, the EU cites four actions by the EAEC to support its claim that the EAEC's analysis was neither objective nor supported by positive evidence.[13] According to the EU, the Panel should therefore conclude that the EAEC's findings of price suppression violate Articles 3.1 and 3.2 of the AD Agreement.[14]

14. While taking no position on the factual underpinnings of the EAEC's finding on the existence of price suppression due to dumped imports, the United States offers the following comments on the applicable legal standard.

15. The United States agrees with the views expressed by Russia and the EU in their respective First Written Submissions 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

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[9] *EC – Fasteners (China)* (AB), para. 414.
[10] *EC – Fasteners (China)* (AB-21.5), para. 5.302.
[11] *US – Hot-Rolled Steel* (AB), para. 193.
[12] EU's First Written Submission, para. 116.
[13] EU's First Written Submission, para. 136.
[14] EU's First Written Submission, para. 159.

outlines the examination that authorities must conduct to determine the price effects of dumped imports on the domestic market. Article 3.2 of the AD Agreement states the following:

> [w]ith regard to the effect of dumped imports on prices, the investigating authorities shall consider whether [1] there has been significant price undercutting by the dumped imports as compared with the price of a like product of an importing Member, or whether the effect of such imports is to [2] depress prices to a significant degree or [3] prevent price increases, which otherwise would have occurred, to a significant degree.

The text contemplates three inquiries with regard to the effects of dumped imports on prices: price undercutting, price depression, and price suppression.[15]

16. As explained above, Article 3.1 imposes two requirements on authorities in reaching an injury determination: the determination must be based on "positive evidence," and it must involve an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. The plain text of Article 3.1 makes clear that these obligations extend to an authority's price effects analysis.[16]

17. The United States offers the following views on the applicable obligations of Articles 3.1 and 3.2 of the AD Agreement.

18. First, the United States observes that Article 3.2 requires that an authority "consider" the volume and price effects of the relevant imports. The EU's and Russia's interpretations of the analytical rigor required under Article 3.2 differ significantly. The United States recalls that the Appellate Body in *US – GOES* found that Article 3.2 does not require an authority "to make a *definitive determination*" on price effects, recognizing the distinction between use of the verb "consider" in Article 3.2 of the AD Agreement and the verb "demonstrate" in Article 3.5.[17] However, the fact that no definitive determination is required "does not diminish the scope of *what* the investigating authority is required to consider."[18]

19. The United States agrees with the EU's observation that the nature of the "consideration" contemplated in Article 3.2 is informed by Article 3.1 of the AD Agreement.[19] 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, as discussed further in section II.D below. For that reason, the authority must provide an evidentiary basis for its finding on price effects. The Appellate Body has explained that the inquiry must provide the

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[15] *China – HP-SSST (Japan) / China – HP-SSST (EU)*(AB), para. 5.155.

[16] *China – GOES* (AB), para. 130; *see also id.*, para. 201 ("[A] price effects finding is subject to the requirement that a determination of injury be based on 'positive evidence' and involve an 'objective examination.'").

[17] *China – GOES* (AB), para. 130.

[18] *China – GOES* (AB), para. 131 (emphasis in original).

[19] EU's First Written Submission, para. 123.

authority with a "meaningful understanding of whether subject imports have explanatory force"[20] for price suppression, and, as dictated by Article 3.1, that understanding must be based on positive evidence and an objective examination.

20. 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."[21] 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.

21. The Appellate Body has endorsed this interpretation that it is not enough for an authority to simply observe what is happening to domestic prices. The Appellate Body described the "type of link contemplated by the term 'the effect of' under Articles 3.2 and 15.2" as follows:

> The language of Articles 3.2 and 15.2 thus expressly link significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable – that is, subject imports – has explanatory force for the occurrence of significant depression or suppression of a second variable – that is, domestic prices.[22]

22. The United States agrees with Russia's observation that the AD Agreement does not prescribe a particular methodology to be used in a price effects analysis. Nevertheless, while use of a specified methodology may not be required, the AD Agreement does set certain parameters for how the analysis is to be performed. In evaluating the EAEC's price suppression analysis, the United States believes the Panel should ensure consistency with the plain text of Article 3.2 of the AD Agreement, as elaborated above.

C. Claims Regarding Articles 3.1 and 3.4 of the AD Agreement

23. The EU claims that the EAEC's examination of the domestic industry was inconsistent with Articles 3.1 and 3.4 of the AD Agreement. The EU criticizes the EAEC's analysis on the state of the domestic industry as unsupported by positive evidence and incomplete for its failure to properly consider and evaluate all relevant factors.[23] Accordingly, the EU argues that the EAEC failed to reach a "reasoned and adequate conclusion" on the effect of dumped imports on the domestic industry.[24]

24. Russia argues that the EAEC conducted an objective examination, based on positive evidence, of all injury factors that it was required to analyze, consistent with Articles 3.1 and 3.4

[20] *China – GOES* (AB), para. 144.
[21] AD Agreement, Article 3.2.
[22] *China – GOES* (AB), para. 149.
[23] EU's First Written Submission, para. 160.
[24] EU's First Written Submission, para. 238.

of the AD Agreement.[25] Russia's argument focuses on the EU's factual assertions, and the EU's application of the factual assertions to the applicable legal obligations.

25. The United States does not comment on the parties' factual assertions, but offers the following views on the appropriate legal interpretation.

26. Article 3.4 of the AD Agreement specifies an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The article provides that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and enumerates certain factors that an authority must include in its evaluation.

27. 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.

28. 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."

29. This interpretation is supported by the Appellate Body's observations in *China – GOES*:

> Articles 3.4 and 15.4…do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2.[26]

30. Thus, in examining "the relationship between subject imports and the state of the domestic industry"[27] 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

[25] Russia's First Written Submission, para. 282.
[26] *China – GOES* (AB), para. 149.
[27] *China – GOES* (AB), para. 149.

of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[28]

31. 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.[29] 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

D. Claims Regarding Articles 3.1 and 3.5 of the AD Agreement

32. The EU claims that the EAEC's causation analysis was inconsistent with Articles 3.1 and 3.5 of the AD Agreement. The EU argues that the EAEC did not undertake a proper analysis of the causal relationship between dumped imports and injury on the domestic industry. The EU further alleges that the EAEU failed to establish that it did not attribute injury caused by other factors to the subject imports.[30]

33. Russia argues that the EAEC's causation determination properly analysed the volume and price effects of dumped imports on the domestic industry and properly included an analysis of all relevant other known factors contributing to injury to the domestic industry.

34. Article 3.5 states:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of the Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.[31]

35. 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

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[28] *Thailand – H-Beams* (Panel), para. 7.236.

[29] *EC – Tube or Pipe Fittings* (AB), para. 131. Indeed, in that dispute, an internal "note for the file" setting out the European Commission's consideration of some of the injury factors listed in Article 3.4 was found to satisfy the requirements of Articles 3.1 and 3.4 of the AD Agreement. *Id.* at paras. 119 and 133.

[30] EU's First Written Submission, section 5.5.

[31] AD Agreement, Art. 3.5 (emphasis in original).

AD Agreement. Accordingly, any determinations or findings made in connection with Article 3.5 must be based on "positive evidence" and "involve an objective examination," as required by Article 3.1 of the AD Agreement.

36. The EU suggests that the requirements of Article 3.5 of the AD Agreement, read in conjunction with Article 3.1 of the AD Agreement, can be separated into two categories: (1) an authority's demonstration that dumped imports are causing injury to the domestic industry ("causation"), and (2) an authority's examination of known factors other than dumped imports that could be the cause for injury to the domestic industry ("non-attribution").[32] The United States addresses each category in turn.

1. An Inconsistency with Article 3.2 of the AD Agreement Can, Under Certain Circumstances, Produce a Finding of Causation Inconsistent with Article 3.5 of the AD Agreement

37. As noted above, the United States does not take a position on the EU's claim that the EAEC's finding of price suppression was inconsistent with Article 3.2 of the AD Agreement. The United States, however, agrees with the EU's suggestion that a deficient price effects analysis could compromise a causation analysis where the findings on price effects serve as a key element of the causation analysis. As the Appellate Body explained in *China – GOES*, the provisions in Article 3 "contemplate a logical progression in an authority's examination leading to the ultimate injury and causation determination."[33] Fatal deficiencies in a price effects analysis could compromise the objective nature of the causation analysis.

38. 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.

39. 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."[34] 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.

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[32] EU's First Written Submission, para. 253.
[33] *China – GOES* (AB), para. 143.
[34] *China – Autos (US)* (Panel), para. 7.327.

2. Article 3.5 of the AD Agreement Requires an Authority to Examine Known Factors Which at the Same Time Were Injuring the Domestic Industry

40. 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.[35] 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.

41. The AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis.[36] 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.[37]

42. The United States does not take a view on the EU's factual assertions that the EAEC's analysis of the effects of factors other than subject imports is unsupported by positive evidence and fails to consider all known factors other than subject imports that were alleged to be causing injury to the domestic industry. Based on the above discussion of the applicable provisions, however, the United States observes that the Panel must determine if the investigating authority demonstrated that it examined other "known factors" within the meaning of Article 3.5 of the AD Agreement, and based its causation analysis on an examination of all relevant evidence.

III. 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

43. The EU asserts that Russia breached its obligations outlined in Articles 6.5 of the AD Agreement when it failed to require interested parties to show good cause for the confidential treatment of a wide range of information and failed to properly assess whether good cause was shown. The EU also argues that Russia breached Article 6.5.1 of the AD Agreement when it failed to require interested parties to furnish non-confidential summaries that provide sufficient

[35] *US – Tyres (AB)*, para. 252.

[36] *US – Hot-Rolled Steel (AB)*, para. 224; *see also US – Tyres (AB)*, para. 252 (stating, in safeguard proceedings conducted under the China Accession Protocol, "[t]he extent of the analysis of other causal factors that is required will depend on the impact of the other factors that are alleged to be relevant and the facts and circumstances of the particular case").

[37] *EC – Countervailing Measures on DRAM Chips (Panel)*, paras. 7.272-7.273 (citing *US-Hot-Rolled Steel (AB)*, paras. 192-193).

detail to permit a reasonable understanding of the substance of the information submitted in confidence, or to explain why such summaries would not be possible.[38]

44. Russia argues that it acted consistently with Article 6.5 of the AD Agreement because the EAEC required Sollers and Turin-Auto to provide good cause for information submitted as confidential.[39] Russia claims that its actions comported with the requirements of Article 6.5.1 of the AD Agreement because, where possible, the interested parties provided non-confidential summaries that included a reasonable understanding of the confidential information.[40]

45. While the United States takes no position on the merits of the factual allegations made by both parties, the United States focuses its comments on the relevant legal obligations.

46. The chapeau of Article 6.5 provides:

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

47. Additionally, Article 6.5.1 of the AD Agreement states:

> The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

48. 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.[41] 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

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[38] *See generally* EU's First Written Submission, paras. 310-412.

[39] Russia's First Written Submission, para. 344.

[40] *Id.*

[41] *See, e.g.,* AD Agreement, Article 6.2, first sentence ("Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests."); AD Agreement, Article 6.9, second sentence ("Such disclosure should take place in sufficient time for the parties to defend their interests.").

AD Agreement contemplates one mechanism by which authorities can balance these competing interests, which is through a narrowly-drawn protective order.[42]

49. 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. In their first written submission, the EU and Russia disagree as to what information should be considered "by nature" confidential. The EU alleges that certain statistics and data are expected to be reasonably available if not public, and consequently by their nature are considered non-confidential.[43] On the other hand, Russia asserts that the import/export statistics and data at issue are by their nature confidential.[44] 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.[45]

50. 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."[46]

51. 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."[47] Thus, as the panel in *Mexico – Olive Oil* found in interpreting the parallel provision of the Agreement on Subsidies and Countervailing Measures, Article 12.4.1: "Where confidentiality is claimed with respect to a specific document… the provision of a public version of that document, from which confidential information has simply been removed, may not necessarily satisfy the requirements of Article 12.4.1."[48] In this regard, it noted that "what is required to be summarized pursuant to Article 12.4.1 is the confidential information," and "[t]he remaining non-confidential parts of the document may not, by themselves, be sufficient to convey a 'reasonable understanding' of the substance of the confidential information." Although there may be circumstances in which the remaining information is sufficient, and no additional summary required, these circumstances are "likely to be limited."[49]

52. 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. Indeed, in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body noted that the level of

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[42] AD Agreement, footnote 17 ("Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.").

[43] EU's First Written Submission, paras. 340 - 342.

[44] Russia's First Written Submission, paras. 355, 356.

[45] EU's First Written Submission, para. 319; Russia's First Written Submission, para. 356.

[46] *EC – Fasteners (China)* (AB), para. 539.

[47] AD Agreement, Article 6.5.1.

[48] *Mexico – Olive Oil*, para. 7.87- 7.88.

[49] *Id.*

explanation required for the operation of the standard of review turns on the substantive provision at issue.[50]

53. 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. For sensitive business information the disclosure of which would damage a party's interests or provide an advantage to a party's competitor, the "good cause shown" requirement will be met by the nature of the information itself.

54. Based on the discussion of the applicable Article 6 provisions above, 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. Without providing a way to effectively communicate pertinent information to interested parties to an investigation, such parties are unable to adequately defend their interests.

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

55. The EU also alleges that Russia breached its obligations under Article 6.9 of the AD Agreement by failing to disclose a wide range of facts upon which it based its final determination in the March 28, 2013, Draft Report (Draft Report) circulated to the parties prior to the final decision.[51] Specifically, the EU claims that the EAEC's Draft Report did not disclose the calculation of the dumping margins or its injury and causation analyses,[52] and that Russia omitted other essential facts from the Draft Report, including those that were relied on by the EAEC for purposes of calculating normal value[53] and export price,[54] and determining the existence of dumping[55] as well as injury[56] and causation.[57] The EU argues that due to Russia's failure to observe the requirements of Article 6.9, Volkswagen AG and Daimler AG, as interested parties to the investigation, were unable to defend their respective interests in the

[50] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 165 (noting the "evidence [reviewed by the panel] was on the record of the investigation and it was not put before the Panel in support of a new reasoning or rationale").
[51] EU's First Written Submission, paras. 413, 415.
[52] *Id.*, para. 416.
[53] *Id.*, paras. 424 - 425.
[54] *Id.*, para. 428.
[55] *Id.*, para. 431.
[56] *Id.*, paras. 438, 448.
[57] *Id.*, para. 444.

investigation, including through, *inter alia*, challenging any omissions or the use of incorrect facts.

56. In contrast, Russia argues that the EU erroneously interpreted Article 6.9 of the AD Agreement when it claimed that Russia was required to provide a non-cooperating party with confidential dumping disclosure.[58] Russia also disagrees with the EU's application of the factual assertions to the relevant legal obligations.[59]

57. As previously stated, the United States does not take a position on the factual allegations made by the parties. However, 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.[60] Article 6.9 states:

> [A]uthorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

58. 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. As the panel in *EC – Salmon (Norway)* stated: "We consider that the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts."[61]

59. 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. Such failure to provide this information would result in an interested party being unable to defend its interests because it could not identify in the first instance the particular issues that are adverse to its interests.

60. As stated by the Appellate Body in *China – GOES*:

> [T]he 'essential facts' refer to those facts that are…salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive

[58] Russia's First Written Submission, para. 696.
[59] *Id.*, paras. 697 - 701.
[60] Russia's First Written Submission, para. 715; EU's First Written Submission, paras. 417 – 419.
[61] *EC – Salmon (Norway)*, para. 7.805.

> measures…[D]isclosing the essential facts…is paramount for ensuring the ability of the parties concerned to defend their interests.[62]

61. 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."[63] 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.[64]

62. 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. The panel in *EC – Salmon (Norway)* noted that the calculations and underlying data are "facts necessary to the process of analysis and decision-making by the investigating authority" with respect to the determination of the existence and magnitude of dumping.[65] 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.

63. Accordingly, the Panel should assess whether the EAEC properly disclosed essential facts so as to permit companies concerned to understand clearly the data the investigating authority used and how that data was used to determine the margin of dumping. Absent such a disclosure of the essential facts, the interested parties are unable to adequately defend their interests during the antidumping proceeding.

IV. CONCLUSION

64. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the AD Agreement.

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[62] *China – GOES* (AB), para. 240.
[63] *China – Broiler Products*, para. 7.86.
[64] *Id.*, para. 7.93.
[65] *EC – Salmon (Norway)*, para. 7.807.