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

REPORT OF THE PANEL

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China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
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, DSR 2013:IV, p. 1041
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
China – GOES (Article 21.5 – US)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS414/RW and Add.1, adopted 31 August 2015
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
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China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
EC – Bed Linen	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, p. 1269
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Fasteners (China) (Article 21.5 – China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW and Add.1, adopted 12 February 2016
EC – Hormones	Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135

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EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Tube or Pipe Fittings	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, DSR 2003:VI, p. 2613
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
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EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
Thailand – H-Beams	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, DSR 2001:VII, p. 2741
Ukraine – Passenger Cars	Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R and Add.1, adopted 20 July 2015
US – Countervailing Duty Investigation on DRAMS	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, DSR 2005:XVI, p. 8131
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769

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US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wool Shirts and Blouses	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, DSR 1997:I, p. 323

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Application	Sollers-Elabuga LLC, "Application for application of anti-dumping measures regarding import of light commercial vehicles originating in Germany, Italy, Poland, and Turkey", Letter No. 117, 30 September 2011
BCI	Business Confidential Information
DIMD	Department for Internal Market Defence of the Eurasian Economic Commission
Draft Report	Eurasian Economic Commission, *Results of the anti-dumping investigation with regard to light commercial vehicles originating in Germany, Italy, Poland, and Turkey imported into the common customs area of the Customs Union* (Moscow, 28 March 2013)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAEU or CU	Eurasian Economic Union or Customs Union between Republic of Belarus, Republic of Kazakhstan and the Russian Federation
EEC	Eurasian Economic Commission
GATT 1994	General Agreement on Tariffs and Trade 1994
GAZ	Gorkovsky Avtomobilny Zavod
Investigation Report	Eurasian Economic Commission, *Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union of the Domestic Market Protection Department of the Eurasian Economic Commission* (Moscow 2013) (Public and BCI versions)
LCVs	Light commercial vehicles
PCA	Peugeot Citroen Automobiles
POI	Period of investigation
RUB	Russian roubles
Sollers	Sollers-Elabuga LLC
USD	United States dollars
VEB	Vnesheconombank

1 INTRODUCTION

1.1 Complaint by the European Union

1.1. On 21 May 2014, the European Union requested consultations with the Russian Federation pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 18 June 2014. The consultations failed to resolve the dispute.

1.2 Panel establishment and composition

1.3. On 15 September 2014, the European Union requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 20 October 2014, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the European Union in document WT/DS479/2, pursuant to Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the European Union in document WT/DS479/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 8 December 2014, the European Union requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 18 December 2014, the Director-General composed the Panel as follows:

Chairperson:	Mr Simon Farbenbloom
Members:	Mr Matthew Kronby Mr Luis Catibayan

1.6. Following the resignation on 1 December 2015 of the Chairperson and a member of the Panel, the Director-General on 11 December 2015 appointed a new Chairperson and a new member of the Panel. Accordingly, the composition of the Panel is as follows:

Chairperson:	Mr Faizullah Khilji
Members:	Mr Thinus Jacobsz Mr Luis Catibayan

1.7. Brazil, China, India, Japan, Korea, Turkey, Ukraine, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.8. After consulting the parties, the Panel:

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[1] European Union's request for consultations, WT/DS479/1, 21 May 2014.

[2] Request for the establishment of a Panel by the European Union, WT/DS479/2 (European Union's panel request).

[3] See WTO, Dispute Settlement Body, Minutes of meeting held on 20 October 2014, WT/DSB/M/351, 11 December 2014.

[4] *Russia – Anti-Dumping Duties on Light Commercial Vehicles*, Constitution of the Panel established at the request of the European Union, WT/DS479/3, 19 December 2014.

a. adopted its Working Procedures[5] and timetable on 1 December 2015;

b. revised the timetable on 15 January 2016, and again on 1 April 2016; and

c. adopted, on 14 January 2016, additional procedures for the protection of Business Confidential Information (BCI).[6]

1.9. The Panel held its first substantive meeting with the parties on 9 and 10 of March 2016. A session with the third parties took place on 10 March 2016. The Panel held its second substantive meeting with the parties on 7 June 2016. On 22 July 2016, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 26 August 2016. The Panel issued its Final Report to the parties on 30 September 2016.

1.3.2 Preliminary ruling

1.10. In its first written submission dated 22 January 2016, the Russian Federation requested a preliminary ruling that certain claims addressed by the European Union in its first written submission are not within the scope of the request for the establishment of a panel in this dispute and are therefore not within the jurisdiction of this Panel.[7] The European Union responded to the Russian Federation's request in its response to a question posed by the Panel during the Panel's first substantive meeting with the parties[8] and in its second written submission.[9]

1.11. By communication dated 20 April 2016, the Panel did not grant the Russian Federation's request. The Panel's preliminary ruling is set out in Annex D-1.

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. This dispute concerns the levying of anti-dumping duties on certain light commercial vehicles (LCVs) from Germany and Italy by the Russian Federation pursuant to Decision No. 113 of 14 May 2013 of the Board of the Eurasian Economic Commission (EEC), as set forth therein, including any and all annexes, notices and reports of the Department for Internal Market Defence of the EEC (DIMD), and any amendments thereof.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The European Union requests that the Panel find that the measures at issue are inconsistent with the following provisions[10]:

a. Articles 3.1 and 4.1 of the Anti-Dumping Agreement, because, by excluding GAZ[11] from the definition of "domestic industry", the DIMD acted in a biased manner, potentially leading to a risk of materially distorting the injury analysis, contrary to the obligations under Articles 3.1 and 4.1 of the Anti-Dumping Agreement. As a consequence of such a wrongly-defined domestic industry, the DIMD's injury determination was based on an incorrect data set, in violation of Article 3.1 of the Anti-Dumping Agreement;

b. Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement, because, by selecting non-consecutive periods of non-equal duration for the examination of the trends for the whole domestic industry, the DIMD's injury determination was not based on an objective examination of positive evidence, thereby contrary to Article 3.1 of the Anti-Dumping Agreement. Since the DIMD relied on such an examination for the purpose of gauging the effects of the dumped imports on the domestic industry and assessing whether the

[5] See the Panel's Working Procedures in Annex A-1.
[6] See Additional Working Procedures on BCI, Annex A-2.
[7] Russian Federation's first written submission, para. 668. See also second written submission, paras. 306-309.
[8] European Union's response to Panel question No. 2, para. 2.
[9] European Union's second written submission, paras. 7-14.
[10] European Union's first written submission, para. 453.
[11] Gorkovsky Avtomobilny Zavod.

injury found to exist is caused by the dumped imports, the DIMD's injury determination was further inconsistent with Articles 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement;

c. Articles 3.1 and 3.2 of the Anti-Dumping Agreement, because the DIMD failed to make an objective analysis based on positive evidence when considering whether the effects of the dumped imports was to prevent domestic price increases, which otherwise would have occurred, to a significant degree (i.e. price suppression);

d. Articles 3.1 and 3.4 of the Anti-Dumping Agreement, because the DIMD failed to make a proper evaluation of all injury factors in context and thus failed to reach a reasoned and adequate conclusion with respect to the impact of dumped imports on the domestic industry. As a result, the DIMD failed to make a determination of injury on the basis of an "objective examination" of the disclosed factual basis;

e. Articles 3.1 and 3.5 of the Anti-Dumping Agreement, because the DIMD failed to conduct an objective examination, based on positive evidence, of the causal relationship between the imports under investigation and the alleged injury to the domestic industry. The DIMD also failed to conduct an objective examination, based on positive evidence, of factors other than the imports under investigation that have been injuring the domestic industry, and therefore improperly attributed the injuries caused by these other factors to the imports under investigation;

f. Article 6.5 of the Anti-Dumping Agreement, because the DIMD accorded confidential treatment to information that is not confidential by nature, and because the DIMD did not require interested parties to show good cause for the confidential treatment of information, nor did it properly assess whether such good cause was shown;

g. Article 6.5.1 of the Anti-Dumping Agreement, because the DIMD failed to require interested parties to furnish non-confidential summaries of the confidential information provided, and also failed to require them to explain why it was not possible to provide such summaries, and in any event those non-confidential summaries, when submitted, failed to provide sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, including indexes that show meaningful trends;

h. Article 6.9 of the Anti-Dumping Agreement, because the DIMD failed to inform the interested parties of the essential facts under consideration which form the basis of the decision to impose anti-dumping measures, including failing to inform Volkswagen AG and Daimler AG of the essential facts underlying the calculation of the normal value and the export price and failing to inform the interested parties of the essential facts underlying the determination of injury and a causal link between dumping and injury; and

i. Articles 1 and 18.4 of the Anti-Dumping Agreement and Article VI of the GATT 1994, also as a consequence of the breaches of the Anti-Dumping Agreement described above.

3.2. The Russian Federation requests that the Panel reject the European Union's claims in this dispute in their entirety.[12]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their integrated executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1 to B-4).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Japan, Turkey, Ukraine, and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures

[12] Russian Federation's first written submission, para. 1055.

adopted by the Panel (see Annexes C-1 to C-5). China and Korea participated in the third-party session; China, India and Korea did not make formal submissions to the Panel.

6 INTERIM REVIEW

6.1 Introduction

6.1. On 26 August 2016, the Panel submitted its Interim Report to the parties. On 12 September 2016, the European Union and the Russian Federation each submitted written requests for the review of precise aspects of the Interim Report. On 16 September 2016, both parties submitted comments on each other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. Due to changes as a result of our review, the numbering of the paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference.

6.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including those identified by the parties.

6.2 European Union's requests for changes to the Interim Report

6.2.1 Paragraph 1.6

6.4. The European Union requested modifications to paragraph 1.6. The Russian Federation objected to this request. We do not consider it appropriate to make any changes to this paragraph.

6.2.2 Paragraph 7.4, subparagraphs (ii) and (iii)

6.5. The European Union requested that:

a. The words "and was gaining market share" be added to subparagraph (iii).

b. Subparagraph (ii) be modified to state that "GAZ <u>also</u> produced petrol-engine LCVs …".

6.6. We have made these modifications.[13]

6.2.3 Footnote 45 to paragraph 7.8

6.7. The European Union requested the addition of a paragraph more fully setting out its arguments in respect of the obligation in Article 4.1. We have modified this footnote in response to this request.

6.2.4 Footnote 63 to paragraph 7.12

6.8. The European Union requested a reference in this footnote to its submissions; we have provided the reference and made a small typographical modification.

6.2.5 Paragraph 7.14, subparagraphs (a), (b), and (c)

6.9. The European Union requested the addition of certain references in these subparagraphs to its oral statement at the second substantive meeting of the Panel. As these subparagraphs are the Panel's observations, we do not consider it necessary to make the proposed changes.

[13] Except as indicated, the Russian Federation did not object to European Union requests.

6.2.6 Footnote 72 to paragraph 7.14

6.10. The European Union requested the addition of a sentence to this footnote to reflect its own arguments. As this footnote reflects the Panel's observations, we do not consider it necessary to make the proposed changes.

6.2.7 Paragraphs 7.16 and 7.18

6.11. The European Union disagreed with our statement that the European Union "agrees" with the Russian Federation regarding the sequence of events set out in this paragraph. It argued that that "it did not agree with Russia's assertions as to how or when the DIMD defined domestic industry in this case; rather, the European Union responded to the arguments raised by Russia to make its case and showed that, even following Russia's recounting of the facts, the domestic industry definition was inconsistent with Articles 4.1 and 3.1 of the AD Agreement."[14] We have some difficulty with this position.

6.12. To begin with, as the complainant, the European Union has the burden of establishing its case – in this specific instance by identifying exactly what was WTO-inconsistent with the way the DIMD defined the domestic industry. Accordingly, the initial exposition of the European Union's position could not have been a response to the Russian Federation's arguments.

6.13. Turning to that initial position as set out in the first submissions, we observe that it is not a model of clarity. The European Union repeatedly asserted that the DIMD had "excluded" GAZ from the scope of the definition of domestic industry.[15] It also argued, however, that the DIMD had violated Articles 3.1 and 4.1 in this definition.[16] Thus, from its first written submission, it was not clear to us whether the European Union considered the DIMD to have acted inconsistently with Articles 3.1 and 4.1 by defining the domestic industry and then excluding GAZ, or by not including GAZ in the definition in the first instance. For this reason, the Panel put a specific question to both parties as to whether, in their view, there was a difference between "excluding" a producer from the definition of domestic industry or "not including" that producer in that definition from the outset. In paragraphs 33-35 of its response to our question number 9, the European Union stated:

> [T]here is indeed a difference between the failure to include additional producers of the like product in the domestic industry and excluding a domestic producer of the like product from the industry definition.
>
> … Article 4.1 of the AD Agreement provides only two situations in which an investigating authority is permitted to exclude domestic producers of the like product from the scope of the definition of the domestic industry. …
>
> However, a failure to include additional producers of the like product in the domestic industry may lead to a violation of both Articles 4.1 and 3.1.[17]

6.14. The response of the European Union demonstrates that it understood "excluding" to mean defining the domestic industry and removing producers from that definition afterwards, and "failure to include" to mean not including a producer in the definition in the first place. In its first written submission, the European Union repeatedly referred to the "exclusion" of GAZ. We concluded, on this basis, that while not expressly stated, the understanding of the sequence relied upon by the European Union in its first written submission (definition-exclusion) was consistent with the sequence put forward by the Russian Federation in its later submissions, which was different from that in its first submission. Nothing in the European Union's later submissions indicated a shift in its own position because of the apparent change in the position of the Russian Federation. Accordingly, we see no reason to change our understanding of an apparent agreement between the parties in this regard. Nevertheless, we have made a minor modification to reflect the lack of clarity in these arguments. We underline that our findings do not rest on the agreement or lack thereof of the European Union with the Russian Federation on this point.

[14] European Union's comments on the Interim Report, para. 13.
[15] See for example European Union's first written submission, paras. 18, 33, 44, 46, and 60.
[16] European Union's first written submission, para. 46.
[17] European Union's response to Panel question 9. (fn omitted, emphasis added)

Indeed, the absence of evidence on the record to support the sequence of events we understand the parties to have agreed upon is why we made our principal findings on the basis of the Russian Federation's first description of the sequence, which is supported by evidence on the record.

6.15. For these reasons, we see no need to make the changes suggested by the European Union. We have made minor modifications and added additional references to the European Union's submission in this respect.

6.2.8 Paragraph 7.26 (as well as the text in paragraphs 7.14 and 7.20, and footnote 79)

6.16. The European Union requested that the Panel make certain modifications in this paragraph. The Russian Federation objected to the requested modifications and disagreed with the European Union's interpretation of the relevant panel and Appellate Body reports. We recall that the Interim Review stage is not an opportunity for parties to reargue the case. We note however that the European Union is not challenging the findings of the Panel and that the requested modification does, indeed, fall within the meaning of a "precise aspect[]" as set out in Article 15.2 of the DSU. In our view, an injury determination made on the basis of an incorrect definition of domestic industry is necessarily not consistent with a Member's obligation under Article 3.1. For this reason, we have made certain modifications to paragraphs 7.15 and 7.26.

6.2.9 Footnote 105 to paragraph 7.31(d)

6.17. The European Union requested the Panel to provide specific references in this footnote as to where in the Investigation Report the DIMD made comparisons between the situation in 2011 and the situation in 2008 or 2009, and both 2008 and 2009. We have provided these references.

6.2.10 Footnote 157 to paragraph 7.63

6.18. The European Union requested that the Panel make what it describes as clarifications in respect of the European Union's change of position on the question of benchmarks in the course of these proceedings. The Russian Federation objected to this request. We note that the proposed language is in substantial part a restatement of the European Union's position after the first substantive meeting of the Panel with the parties, which has already been reflected in paragraphs 7.53 and 7.59 of our findings. We see no reason to make the requested modifications.

6.2.11 Last sentence of paragraph 7.81

6.19. The European Union requested that a graph containing BCI be adjusted or explained to be accessible in the non-confidential version of these findings. We have made the necessary adjustments for this and all other graphs containing BCI.

6.2.12 Footnote 225 to paragraph 7.116

6.20. The European Union requested that the Panel more fully reflect the European Union's arguments in respect of the systemic implications of relying on confidential investigation reports in dispute settlement proceedings. The Russian Federation did not object to the European Union request, but suggested a modification indicating that the European Union's concern was of a general nature. We have included the European Union's suggested text in the footnote; we do not think it is necessary to incorporate the Russian Federation's proposed modification, as we understand the European Union's suggested text to be general in nature. We note that these are not the findings of the Panel. More important, in our view the concern raised by the European Union in turn risks undermining the presumption of good faith that is at the heart of both Members' observance and implementation of their obligations under the WTO Agreement, as well as their participation in these proceedings.

6.2.13 Paragraph 7.164

6.21. The European Union requested that the Panel more fully reflect the European Union's arguments in respect of the systemic implications of relying on confidential investigation reports in dispute settlement proceedings. As this matter has already been dealt with at paragraph 6.20

above concerning footnote 225, we do not see the need to make additional modifications in this paragraph.

6.2.14 Paragraph 7.139

6.22. The European Union requested the Panel to add a reference to its written submission. We inserted a footnote to the first sentence of paragraph 7.139 to accommodate the European Union's request.

6.2.15 Paragraph 7.207

6.23. The European Union requested the Panel to correct a factual inaccuracy with regard to the production of like product by GAZ prior to its production of the Gazelle diesel-engine LCV in the middle of 2010. The Russian Federation did not object to the European Union request for the factual correction and proposed a more accurate reference. We have made the requested modifications.

6.3 Russian Federation's requests for changes to the Interim Report

6.3.1 Paragraph 7.5

6.24. The Russian Federation requested certain modifications to ensure that this paragraph better reflects its arguments.[18] We have made the necessary adjustments.

6.3.2 Footnote 73

6.25. The Russian Federation requested an addition to ensure that this paragraph better reflects its arguments. We have made the necessary adjustments.

6.3.3 Paragraph 7.19 and Footnote 78

6.26. The Russian Federation requested that this paragraph be modified to better reflect its arguments. Specifically, it argued that "the Russian Federation has not argued that Article 3.1 of the Anti-Dumping Agreement provides 'another *exception* to the domestic industry definition set out in Article 4.1'".[19] The Russian Federation also requested that the reference in the footnote to its second written submission be deleted. The European Union objected to this requested modification on the basis that: (a) this paragraph reflects the understanding of the Panel; and (b) the Russian Federation had not provided a "valid reference" in support of its request.

6.27. We recall that in paragraph 7.19, we observe that the Russian Federation "appears" to make the argument in question. We arrived at this understanding because of the specific wording of the Russian Federation's arguments in its second written submission. In paragraph 52, referenced in footnote 78, the Russian Federation argues[20]:

> If the European Union considers that the "unbiased" and "objective" approach could include GAZ into the domestic industry for the purposes of injury analysis, we believe that the factual circumstances of the case objectively prevented to include the data pertaining to GAZ into the injury analysis.

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[18] In its comments on the Russian Federation's comments on the Interim Report, the European Union states:

> Absent specific reaction or comment from the European Union does not mean that the European Union agrees with Russia's requests. To the extent that Russia requests clarification of its arguments in the parts of the report where the Panel summarises Russia's argument, the European Union agrees with Russia's suggestions provided that Russia makes adequate references to its submissions.

European Union's comments on the Russian Federation's comments on the Interim Report, para. 2
In this light, unless there are specific comments by the European Union, we do not reflect agreement or objection in respect of Russian Federation requests.

[19] Russian Federation's comments on the Interim Report, para. 12. (emphasis original)

[20] Emphasis added.

6.28. The gist of this argument, as we understand it, is that to conduct an objective and unbiased examination of the matter in accordance with Article 3.1, the DIMD was required to not include GAZ in the definition of the domestic industry under Article 4.1, on the basis of the alleged deficiency of its data. To us, although not expressly stated, this argument appears to set the requirements of Article 3.1 as a possible exception to Article 4.1. Accordingly, we see no need to make the requested modifications.

6.3.4 Paragraphs 7.19 and 7.66, and section 7.4.2.2

6.29. The Russian Federation requested significant modifications to provide a fuller summary of its arguments. The European Union requested that the Panel reject the proposed modifications. We recall that the executive summaries of the arguments of the parties are set out in Annexes B1-B4. These executive summaries were prepared by the parties themselves, and reflect, or should reflect, the judgement of each party as to its main arguments and how they should be summarised in the Report. The brief references to the arguments of the parties in our report are not meant to and do not duplicate those executive summaries. Rather, they highlight the principal points of the arguments of the parties that we considered key and addressed in our findings. For this reason, we see no need to make the requested modifications.

6.3.5 Paragraph 7.119

6.30. The Russian Federation requested the addition of the bracketed phrase in order that this paragraph read: "the DIMD provided an evaluation of inventory data [of the producer] in its Investigation Report, and thus complied with this aspect of Article 3.4."[21] We do not consider the proposed addition appropriate, given that Article 3.4 is concerned with the evaluation of information concerning the "domestic industry" and not "the producer". Moreover, in this case, there were at least <u>two</u> domestic producers of the like product. In this light, we have inserted a reference to the inventory data [of Sollers] in this sentence, to clearly reflect the facts as argued.

6.3.6 Paragraph 7.160

6.31. The Russian Federation requested certain modifications to ensure that this paragraph better reflects its arguments. We have made the necessary adjustments.

6.3.7 Paragraph 7.163

6.32. The Russian Federation requested certain modifications to this paragraph, arguing:

> The Russian Federation did not assert that the DIMD met the requirements of Article 3.4 by requesting and receiving the financial accounts of Sollers in confidential form, as it is stated at paragraph 7.163 of the Interim Report.[22]

6.33. We recall the Russian Federation's arguments in its first written submission. In paragraph 280, the Russian Federation asserted[23]:

> Therefore, the EU's statement that "[t]here is nothing in the Report or on the record showing that the DIMD evaluated <these factors>" is wrong. <u>Evidence on the record apparently shows that the DIMD required positive evidence that it needed to consider.</u>

Nothing on the record shows that the Russian Federation actually <u>evaluated</u> the information it gathered. And this is why we put a specific question to the parties on this point. The Russian Federation replied as follows:

> In view of the foregoing, the fact that data was requested and received from the domestic industry can be indicative that the relevant information has been evaluated, although the results of such evaluation were not set forth in the published document. ... <u>the fact that the requested data was submitted in confidential form gives an</u>

[21] Russian Federation's comments on the Interim Report, para. 21.
[22] Russian Federation's comments on the Interim Report, para. 23.
[23] Emphasis added.

indication that the injury factor must have been evaluated but the results of such evaluation were not set forth in the non-confidential version of the report for confidentiality reasons.[24]

6.34. In the light of this statement, we see no reason to make the requested modifications.

6.3.8 Paragraph 7.237

6.35. The Russian Federation requested certain modifications to ensure that this paragraph better reflects its arguments concerning the GAZ Questionnaire response. We have made the necessary adjustments, including a consequential adjustment to paragraph 7.244.

6.3.9 Paragraphs 7.244 and 7.245

6.36. The Russian Federation requested certain modifications to ensure that this paragraph fully reflects its arguments concerning Sollers' letter of 25 December 2012 and the letter of the "Association of Russian Automakers" of 11 February 2013. The European Union objected to this request, noting that it "never agreed" that these letters were available as part of the non-confidential file. We have made the necessary adjustments to paragraphs 7.237, 7.244, and 7.245.

6.37. The Russian Federation further requested certain modifications in respect of information treated as confidential where, in its view, such treatment constituted a "technical error" (Sollers' Application, sections 9.4 and 9.5). Our findings in paragraph 7.244(b) address this issue.

6.3.10 Paragraph 7.267

6.38. The Russian Federation requested that the Panel give specific reasons as to why the DIMD's treatment of information originating from electronic databases of national customs authorities of the Customs Union between Republic of Belarus, Republic of Kazakhstan, and the Russian Federation (CU) as confidential did not meet the requirements of Article 6.5. We have added a paragraph explaining our views in that respect.

6.3.11 Paragraph 7.268

6.39. The Russian Federation argued that "we have not argued that the DIMD has limited disclosure obligations in respect of Daimler AG and Volkswagen AG, which were considered as non-cooperating parties." [25] The European Union disagreed. Our summary of the Russian Federation's arguments accurately captures the essence of the Russian Federation's arguments. We recall that the executive summaries of the arguments of the parties are set out in Annexes B1-B4. These executive summaries were prepared by the parties themselves, and reflect, or should reflect, the judgement of each party as to its main arguments and how they should be summarised in the Report. The brief references to the arguments of the parties in our report are not meant to and do not duplicate those executive summaries. Rather, they highlight the principal points of the arguments of the parties that we considered key and addressed in our findings. For this reason, we see no need to make the requested modifications.

6.3.12 Paragraphs 7.249 and 7.269-7.271

6.40. The Russian Federation argues that "taking into account correct arguments of the Russian Federation, as explained in the previous paragraph, the Panel's discussion of the rights of interested parties should be associated with the scope of disclosure for particular interested parties."[26] We note that this argument somewhat undercuts the Russian Federation's argument, set out in the previous paragraph, that it did not argue that it had limited disclosure obligations in respect of non-cooperating parties. Be that as it may, the Russian Federation appears to be rearguing its case at this stage of the proceedings. We note that this is not an appropriate use of the Interim Review stage. We see no reason to make the requested modifications.

[24] Russian Federation's response to Panel question No. 16, para. 86. (emphasis added)
[25] Russian Federation's comments on the Interim Report, para. 41.
[26] Russian Federation's comments on the Interim Report, para. 42.

6.3.13 Paragraph 7.272

6.41. The Russian Federation considers that this paragraph does not reflect its arguments concerning the disclosure of essential facts to the two non-cooperating German exporting producers. We have modified this paragraph to address these concerns.

6.3.14 Paragraph 248 and Table 12

6.42. The Russian Federation requested a factual correction in respect of the essential facts at issue. Specifically, it considered that a specific fact had not been at issue. The European Union requested that the Panel reject the requested correction, on the basis that it had claimed that the failure to disclose the "source" of that information was inconsistent with Article 6.9. We do not consider that failing to disclose the source of information is the same thing as failing to disclose the information itself. In this light we have made the requested modifications in paragraph 248 and Table 12, and their corresponding footnotes.

7 FINDINGS

7.1 General principles regarding treaty interpretation, standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.[27] Articles 31 and 32 of the Vienna Convention on the Law of Treaties codify in part these customary rules.[28]

7.1.2 Standard of review

7.2. Article 11 of the DSU provides that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

In addition, Article 17.6 of the Anti-Dumping Agreement sets out the special standard of review applicable to disputes under the Anti-Dumping Agreement:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review that a panel is required to apply with respect to both the factual and the legal aspects of the present dispute. This means that in reviewing the investigating authority's determination in this dispute, we must:

[27] Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

[28] Appellate Body Report, *US – Gasoline*, p. 17.

a. examine whether the authority has provided a reasoned[29] and adequate[30] explanation as to:

   i. how the evidence on the record supported its factual findings[31], and

   ii. how those factual findings support the overall determination[32];

b. not conduct a *de novo* review of the evidence or substitute our judgment for that of the investigating authority;

c. limit our examination to the evidence that was before the investigating authority during the course of the investigation[33];

d. take into account all such evidence submitted by the parties to the dispute[34]; and

e. not simply defer to the conclusions of the investigating authority: our examination of those conclusions must be "in-depth" and "critical and searching".[35]

7.1.3 Burden of proof

7.3. In WTO dispute settlement, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".[36] Where a party "adduces 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 adduces sufficient evidence to rebut the presumption".[37] A complaining party establishes a *prima facie* case where, in the absence of effective refutation by the defending party, a panel is required as a matter of law to rule in favour of the complaining party.[38]

7.2 The definition of domestic industry

7.2.1 Introduction

7.4. The European Union claims that the DIMD's definition of the "domestic industry" is inconsistent with Articles 3.1 and 4.1 of the Anti-Dumping Agreement. It argues that that the DIMD did not conduct an objective examination based on positive evidence because it:

a. defined the domestic industry as consisting of one producer, Sollers, which accounted for 87.8%[39] of total domestic production of the like product during the POI; and

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[29] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent."

[30] Ibid.: "[w]hat is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant."

[31] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it."

[32] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103. See also Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93: "[t]he panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence."

[33] Anti-Dumping Agreement, Article 17.5(ii); and Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

[34] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

[35] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

[36] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

[37] Ibid.

[38] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.

[39] Sollers accounted for 87.9% of the total domestic production of the like product over the period of trend analysis (2008-2011), and 87.8% of total domestic production during the POI (2nd half of 2010 and 1st half of 2011). (Eurasian Economic Commission, *Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland, and Turkey and imported into the common customs*

b. excluded GAZ from the definition of the domestic industry.[40]

7.5. Excluding GAZ from the domestic industry led to a risk of materially distorting the injury analysis and resulted in the violation of Articles 3.1[41] and 4.1.[42] This is because:

a. Sollers-Elabuga LLC (Sollers) was an "assembler" and not a "producer" of the domestic like product, diesel-engine LCVs[43];

b. GAZ also produced petrol-engine LCVs that were in competition with the imported diesel-engine LCVs subject to the investigation and the domestic like product[44]; and

c. GAZ accounted for nearly 15% of production of the domestic like product, diesel LCVs, and was gaining market share.[45]

As well, such exclusion is not permitted by Article 4.1 because it does not fall within the specific exceptions set out in that Article.

7.6. The arguments of the Russian Federation evolved over the course of the dispute. In the first instance, the Russian Federation argued that:

a. the DIMD did not intentionally exclude GAZ from the outset. GAZ did not actively participate in the investigation due to its deficient Questionnaire response. The DIMD decided to conduct the injury analysis with respect to Sollers only, which represented 87.9% of the total production of the CU[46];

b. the European Union used data that included products − petrol-engine LCVs − outside the scope of the like product in order to show alleged undisputed leadership of GAZ in the overall LCV market[47];

c. the European Union did not demonstrate how the injury analysis would have changed if the DIMD had included GAZ in the definition of the domestic industry[48];

d. once the domestic industry as defined satisfies the "major proportion" requirement, no further explanation or justification is necessary for conducting the injury analysis in respect of the domestic producer that accounts for a high and substantial share of total domestic production[49]; and

territory of the Customs Union of the Domestic Market Protection Department of the Eurasian Economic Commission (Moscow 2013) (Public version of the Investigation Report), (Exhibits RUS-12 and EU-21) (exhibited twice), Eurasian Economic Commission, *Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union of the Domestic Market Protection Department of the Eurasian Economic Commission* (Moscow 2013) (Confidential version of the Investigation Report), (Exhibit RUS-14) (BCI), section 1.6; and Sollers, "Application for application of anti-dumping measures regarding import of light commercial vehicles originating in Germany, Italy, Poland, and Turkey", Letter No. 117, 30 September 2011 (Application), (Exhibits EU-1 and RUS-1) (exhibited twice), p. 7).

[40] European Union's first written submission, para. 44.

[41] Article 3 is entitled "Determination of Injury". 3.1 provides that:

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 product, and (b) the consequent impact of these imports on domestic producers of such products.

[42] European Union's first written submission, para. 63.

[43] European Union's first written submission, para. 50.

[44] European Union's first written submission, para. 49.

[45] European Union's first written submission, paras. 47-49.

[46] Russian Federation's first written submission, paras. 38 and 41-43.

[47] Russian Federation's first written submission, para. 52.

[48] Russian Federation's first written submission, para. 54.

[49] Russian Federation's first written submission, para. 60.

e. Sollers' share of total domestic production averaged 87.9% for the period of trend analysis (2008-2011)[50]; given this very high proportion, the DIMD's determination does not give rise to a risk of material distortion.[51]

In response to questions from the Panel as to the timing of the definition of the domestic industry, the Russian Federation confirmed that:

a. "[t]he final decision not to include GAZ into the injury analysis is a part of the final Report and the Decision of the Board of the Eurasian Economic Commission"[52]; and

b. "[t]he explanation of impossibility to include GAZ into the definition of the domestic industry, for the purposes of injury analysis, was the absence of correct and verifiable data".[53]

7.7. In its second written submission the Russian Federation provided additional clarity:

> The investigating authority expressed its willingness to include GAZ into the domestic industry for the purposes of the injury analysis (sent a questionnaire for the producer of the like product in the CU, sought clarifications regarding the Questionnaire Reply).[54]
>
> ...
>
> At the outset, the domestic industry was defined as all known domestic producers of the like product. The scope of the domestic industry was defined following the definition of the like product. This is an important step because the domestic industry is limited to only those domestic producers that produce a *like product*.[55]
>
> ...
>
> Hence, the domestic industry, from the outset, included both known domestic producers of the like product, namely Sollers and GAZ.[56]

7.8. In the course of the second substantive meeting of the Panel with the parties, the Russian Federation further clarified that although the domestic industry had included both known domestic producers at the outset, in the course of the investigation the DIMD redefined the domestic industry to include only Sollers.[57]

7.2.2 A Member's obligation under Article 4.1 of the Anti-Dumping Agreement

7.9. Article 4 of the Anti-Dumping Agreement is entitled "Definition of Domestic Industry". Article 4.1 provides that:

> For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of

[50] Russian Federation's first written submission, para. 60.
[51] Russian Federation's first written submission, paras. 64-74.
[52] Russian Federation's response to Panel question No. 13(b), paras. 42 and 43. (emphasis added)
[53] Russian Federation's response to Panel question No. 13(c), para. 44 (emphasis added). In response to Panel question No. 9 (paras. 29 and 30), the Russian Federation argues:

> In our view, there is an important difference between the "exclusion" of the producer from the definition of the domestic industry and inability to include the data on certain producers into the injury analysis.

"Exclusion" of the producer from the domestic industry may occur only in two cases, which are specified in Article 4.1 (i) and (ii) of the Anti-Dumping Agreement.
[54] Russian Federation's second written submission, para. 24. (fns omitted)
[55] Russian Federation's second written submission, para. 46. (emphasis original)
[56] Russian Federation's second written submission, para. 47. (emphasis added)
[57] Russian Federation's response to Panel question No. 64, paras. 20-22.

them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

> (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;
>
> (ii) in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.[58]

Thus, "domestic industry" may be interpreted as either the domestic producers as a whole of the like products or domestic producers whose collective output constitutes a major proportion of the total domestic production of those products. On its face, Article 4.1 does not establish a hierarchy between the two different ways of defining the domestic industry.[59] There are two express exceptions to the chapeau rule set out in Articles 4.1(i) and 4.1(ii). Article 4.1 does not provide for other exceptions.

7.10. The use of the passive voice ("shall be interpreted") in the chapeau may give rise to some ambiguity as to who bears the obligation to interpret "domestic industry". The context of that provision strongly suggests that Article 4.1 imposes an obligation on the investigating authority of a Member as it defines the domestic industry in the context of an investigation. In this respect, we make the following two observations about the context of the chapeau:

a. Article 4.1(ii) is an exception to the chapeau. It is also drafted in the passive voice.[60] It nevertheless is unambiguous: it specifies what an investigating authority can do differently under that exception in respect of the obligation set out in the chapeau. Because the exception and the obligation must necessarily apply to the same entity, it is clearly the investigating authority that must bear the obligation in the chapeau of Article 4.1.

b. Article 4.2 is also written in the passive voice, and describes consequences if the exception in Article 4.1(ii) is applied.[61] This obligation ("anti-dumping duties shall be

[58] Fn omitted.

[59] Panels and the Appellate Body have not made specific findings in this respect. In *EC – Fasteners (China)*, the Appellate Body observed that "Article 4.1 thus juxtaposes two methods for defining the term 'domestic industry'", but did not elaborate further. (Appellate Body Report, *EC – Fasteners (China)*, para. 411). In our view, the use of the word "or" indicates the lack of a hierarchy between the two options. The disputing parties appear to accept the view that there is no hierarchy between the two methods. (European Union's first written submission, para. 35; and Russian Federation's first written submission, para. 67). However, the European Union argues that there could be a "practical" preference by investigating authorities to define domestic industry on the basis of total domestic production, precisely to avoid any risks of violating Articles 4.1 and 3.1. (European Union's response to Panel question No. 11, paras. 40-43).

[60] Article 4.1(ii) provides in part:

> [I]n exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry … In such circumstances, injury may be found to exist … .

We note that the exception set out in Article 4(i) is also in the passive voice.

[61] Article 4.2 provides:

> When the domestic industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied only on the products in question consigned for final consumption to that area. (fn omitted)

> levied" in a more limited fashion) is imposed on the Member whose investigating authority conducted the investigation and defined the domestic industry.

Accordingly, where a Member's definition of "domestic industry" does not meet the requirements of Article 4.1, that Member acts inconsistently with its obligations under that provision.[62]

7.11. Article 4.1 imposes a substantive obligation on a Member to "define" the "domestic industry" subject to the injury analysis under Article 3 as either "the domestic producers as a whole of the like products" or "those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". "A major proportion" is one that is "important, serious or significant"[63], but that may be less than 50% of the total domestic production.[64] Finally, producers of domestic like products may not be left out of the definition of domestic industry on the basis of considerations or selection methods that, by their nature, are likely to distort the subsequent injury determination. For example, it is clear that an investigating authority may not leave out an entire group of domestic producer of the like product, as happened in *EC – Salmon (Norway)*[65] or limit the domestic industry to only those producers willing to participate in the investigation by providing data for a sample, as happened in *EC – Fasteners (China)*.[66]

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[62] Indeed, we note that in *Argentina – Poultry Anti-Dumping Duties* the panel arrived at the same conclusion:

> Article 4.1 provides that the term "domestic industry" "shall" be interpreted in a specific manner. In our view, this imposes an express obligation on Members to interpret the term "domestic industry" in that specified manner. Thus, if a Member were to interpret the term differently in the context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1.

See Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.338.

[63] Panel Report, *EC – Fasteners (China)*, para. 7.226.

[64] The use of the indefinite rather than the definite article modifying "major" suggests that the drafters did not intend that the term "major proportion" in Article 4.1 mean "more than 50%". See Panel Reports, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341; and *EC – Fasteners (China),* para 7.226.

[65] The European Communities had defined the product under consideration as "farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen". (Panel Report, *EC – Salmon (Norway)*, para. 7.108). It then did not include in the domestic industry:

> [C]ertain categories of enterprises in the domestic industry based on the nature of their specific activities (filleting-only undertakings, organic producers, and producers of "certain kinds" of salmon).

Panel Report, *EC – Salmon (Norway)*, para. 7.107. (fn omitted)
The panel concluded that it saw:

> [N]o basis in the text of Article 4.1 which would allow for the exclusion from the domestic industry, as a category or group, of producers of any form of the like product – in this case, producers of any of the "presentations" identified by the EC as the like product – "farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen".

Panel Report, *EC – Salmon (Norway)*, para. 7.112.

[66] As the Appellate Body found:

> It is not disputed, however, that the Commission limited the definition of the domestic industry to those producers who "fully cooperated in the investigation". …
>
> In our view, by defining the domestic industry on the basis of willingness to be included in the sample, the Commission's approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion. First, we fail to see the reason why a producer's willingness to be included in the sample should affect its eligibility to be included in the domestic industry, which is a universe of producers that is by definition wider than the sample.
>
> …
>
> [B]y limiting the domestic industry definition to those producers willing to be part of the sample, the Commission excluded producers that provided relevant information. In so doing, the Commission 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.

Appellate Body Report, *EC – Fasteners (China)*, paras. 426, 427, and 430.

7.2.3 Evaluation by the Panel

7.12. The Russian Federation's initial argument in respect of the definition of domestic industry indicated that the domestic industry was defined as Sollers after both Sollers and GAZ had submitted their data. According to the Russian Federation, the DIMD was unable to include the deficient data of GAZ in its analysis and for this reason GAZ was not included in the definition of domestic industry. As the Russian Federation observed[67], the Investigation Report proceeds chronologically, from the Application to the conclusion of the investigation by the DIMD. We recall the facts as set out in the Investigation Report and explained in the Russian Federation's early submissions:

a. Sollers filed the Application on 3 October 2011[68];

b. the DIMD initiated the investigation on 16 November 2011[69];

c. the DIMD identified the domestic like product in the notice of initiation[70];

d. the DIMD identified the universe of domestic producers of the like product as comprising Sollers and GAZ[71];

e. the DIMD then sent "domestic producer" questionnaires to both Sollers and GAZ, and received responses from both[72];

f. the DIMD reviewed the responses received and determined that the data from GAZ were "deficient"[73];

g. the DIMD defined the "domestic industry" as comprising Sollers[74]; and

h. the DIMD conducted its injury determination solely on the basis of data regarding Sollers.[75]

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[67] Russian Federation's response to Panel question No. 13, para. 40:
Thus, the domestic industry, as defined for the purpose of the injury analysis, was defined in Section 4.2 of the Report.

Russian Federation's response to Panel question No. 13(a), para. 41:

GAZ is not part of the domestic industry, as defined for the purposes of the injury analysis and explained in Section 4.2 of the Report.

Russian Federation's response to Panel question No. 13(b), para. 43:
The final decision not to include GAZ into the injury analysis is a part of the final Report and the Decision of the Board of the Eurasian Economic Commission.

[68] European Union's first written submission, para. 10. The Russian Federation does not disagree.
[69] Investigation Report, Section 1.1; and Order of the Ministry of Industry and Trade of the Russian Federation No. 1587, Notice of Initiation (15 November 2011), (Exhibit RUS-2), p. 1.
[70] Order of the Ministry of Industry and Trade of the Russian Federation No. 1587, Notice of Initiation (15 November 2011), (Exhibit RUS-2), p. 1.
[71] Investigation Report, section 1.1; Russian Federation's response to Question 1 posed by the European Union, paras. 1 and 2; Russian Federation's response to Panel question No. 14, para. 45.
[72] Investigation Report, section 1.2.
[73] Investigation Report, sections 4.2 and 5.3.2; Russian Federation's first written submission, para. 42 (referring to JSC "Gorkovsky Avtomobilny Zavod" GAZ Questionnaire response, Letter No. 15/OD/3/2012, 16 March 2012, (Exhibit RUS-15) (BCI); Russian Federation's response to Panel question No. 13, paras. 42 and 44; Russian Federation's response to Panel question No. 14, para. 45; Russian Federation's response to Question 1 posed by the European Union, para. 1.
[74] Investigation Report, section 4.2; Russian Federation's response to Panel question No. 13, paras. 40, 41 and 43;Russian Federation's response to Panel question No. 14, para. 45. Russian Federation's response to Question 1 posed by the European Union, para. 1.
[75] Russian Federation's first written submission, para. 43; and Investigation Report, section 4; Russian Federation's response to European Union's question No. 3, para. 6.

According to this version of events[76], the investigation proceeded on the basis of an initial identification of domestic producers of the like product, a review of data provided by those producers and the definition by the DIMD of the "domestic industry" as comprising Sollers on the basis of its 87.9% share of total domestic production of the like product.

7.13. If the definition of domestic industry as "a major proportion" of the domestic producers of the like product rested solely on quantitative considerations, in our view the DIMD's definition of the domestic industry as comprising only Sollers would be unexceptionable. It is not necessary for us to determine precisely what percentage constitutes "a major proportion"; indeed, this is a matter that must be determined based on the facts of each case. In the facts of this case, we find that an 87.9% share of total domestic production falls well within the quantitative bounds of the term "a major proportion".[77] As well, we note that there is no hierarchy between the two possible ways of defining "domestic industry". Accordingly, where an investigating authority properly defines the domestic industry on the basis of "a major proportion", it is no more required to explain or justify[78] either its choice of how it defined domestic industry, or its definition, than if it had defined the domestic industry on the basis of "domestic producers as a whole."

7.14. It is useful, in this context, to address the first and second bases on which the European Union challenges the domestic industry definition: that Sollers was merely an "assembler" of the like product, and that GAZ was also a producer of petrol-engine LCVs. Neither consideration is relevant to the definition of domestic industry in this case. First, Article 4.1 does not make a distinction between "assemblers" and "producers" (in the sense these terms are used by the European Union). There may well be a case where the actual activity of an "assembler" might justify the conclusion that that particular assembler is not, in fact, a "producer" of the like product. There is no evidence before us that that was the case here[79]; indeed, the European Union does not argue that Sollers is not a "domestic producer", only that GAZ is a more integrated producer and therefore should also have been included in the definition of domestic industry. Second, the domestic like product was defined as certain diesel-engine LCVs[80]; nothing in Article 4.1 requires the inclusion in the "domestic industry" of a producer of a potentially competitive product that is not the like product.[81] Neither singly nor cumulatively do these arguments vitiate the findings of the DIMD under Article 4.1.

7.15. Meeting the quantitative threshold of Article 4.1 is a necessary but not a sufficient condition of fulfilling its requirements as a whole. As indeed the parties to this dispute agree, the definition of domestic industry under Article 4.1 has both a quantitative and a qualitative aspect.[82] They also agree that at a minimum, a qualitative assessment of "a major proportion" definition of domestic industry implies ensuring that the approach of the investigating authority to the definition of or its methodology for selecting the domestic industry does not create a risk of material distortion.[83] Viewed in this light, the approach of the DIMD to the domestic industry definition in this case gives

[76] We underline that this chronology is based on the text of the Investigation Report and the first written submission of the Russian Federation. It was not further argued by the Russian Federation.

[77] We do not consider persuasive the fourth basis of the European Union for its challenge of the domestic industry definition by the DIMD. (See European Union's first written submission, para. 58). In quantitative terms, an average of 87.9% of total domestic production of the like product over the period considered constitutes "a major proportion" of that production.

[78] European Union's first written submission, paras. 35-43; second written submission, paras. 26-34; opening statement at the first meeting of the Panel, paras. 19-22; and response to Panel question No. 1, paras. 1-4.

[79] We have not been made aware of any evidence to this effect before the investigating authority.

[80] FEACN CU Code 8704 21 310 0, Motor vehicles for the transport of products, other, with internal combustion piston engine with compression ignition (diesel or semi), with a gross vehicle weight not exceeding 5 tons, other, with an engine cylinder capacity exceeding 2500 cc., new; FEACN CU Code 8704 21 910 0, Motor vehicles for the transport of products, other, with internal combustion piston engine with compression ignition (diesel or semi), with a gross vehicle weight not exceeding 5 t., other, with an engine cylinder capacity not exceeding 2500 cc., new.

[81] Indeed, to do so would likely be inconsistent with that provision.

[82] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.298-5.303.

[83] The European Union, in its statement at the second substantive meeting with the Panel, suggested that there may be instances where a qualitative assessment of the producers themselves might be required before "a major proportion" is defined. (European Union's opening statement at the second meeting of the Panel, paras. 11-15; closing statement at the second meeting of the Panel, para. 8). For the reasons set out in this part of the analysis, we are sceptical about the appropriateness of a qualitative assessment of the producers before the domestic industry is defined.

rise to three concerns that, considered together, lead us to find error in its definition of domestic industry:

a. The investigating authority decided to not include in its definition a known producer of the like product that had provided data and sought to cooperate in the investigation after having reviewed that producer's data. This sequence of events gives rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome, resulting in an obvious risk of material distortion in the subsequent injury analysis.

b. The reasons given by the Russian Federation for the DIMD's decision to not include GAZ in the definition of domestic industry were not set out in the Investigation Report and thus constitute impermissible *post hoc* rationalization.

c. Even if the reasons given were actually those of the DIMD (albeit unexpressed), they are not such reasons as a reasonable and unbiased investigating authority could have relied upon to not include GAZ in the definition of domestic industry. Specifically, the Russian Federation argues that "it was impossible to distinguish confidential and non-confidential data" in GAZ's Questionnaire response.[84] Nothing in Article 4.1 provides for defining the domestic industry on the basis of the alleged failure of a producer in separating out confidential and non-confidential data; the only required quality for domestic industry is to be a producer of the like product. The Russian Federation further argues that data from GAZ suffered from gaps and inaccuracies. Nothing in Article 4.1 suggests that a Member may ignore a domestic producer for the purposes of defining the domestic industry on the basis of alleged "gaps" in the information the producer has provided to the investigating authority. Data problems can always arise in the course of an investigation, but the issue here is the definition of the domestic industry and not the quality of the data that might be provided by the producers included in the domestic industry.[85]

7.16. As a matter of fact, based on the events set out in the Investigation Report, we conclude that the DIMD defined the domestic industry as Sollers only after it received Questionnaire responses from both Sollers and GAZ.[86] As a matter of law, we find that, for the reasons set out above, the DIMD acted inconsistently with Article 4.1 in its definition of "domestic industry". Where an investigating authority makes injury and causation determination on the basis of information related to an improperly defined domestic industry, it acts inconsistently with various provisions of Article 3.[87] In the light of the claims of the European Union in this case, based on our findings above in respect of Article 4.1, we find that the DIMD consequently acted inconsistently with Article 3.1.

7.17. Having found inconsistency on the basis of the evidence on the record, we ordinarily would end our examination of the claim regarding domestic industry here and proceed to the other

[84] Russian Federation's first written submission, para. 47.

[85] We appreciate the challenges faced by an investigating authority in terms of data collection. In particular, we are deeply sensitive to the expressed desire of the Russian Federation to ensure that the findings of the DIMD are based on positive evidence in accordance with Article 3.1. We reiterate, however, that the definition of domestic industry and the collection and use of data from that domestic industry are separate issues. Where producers included in the domestic industry fail to cooperate with the investigation, the investigating authority faces obvious challenges. It may be forced to repeatedly seek additional information, and may face difficulties in verifying information received. It may ultimately have to proceed on the basis of less than complete information regarding the domestic industry, or facts available from secondary sources. However, the possibility of such consequent difficulties cannot affect the legal obligations of the investigating authority under Article 4.1. Where – as in this case – an investigating authority is choosing among domestic producers for purposes of defining the domestic industry, data collection concerns cannot be a consideration for determining which specific producers are included in the domestic industry and which are not. This is especially the case where, as in this instance, the investigating authority has already reviewed producer data. Without impugning the integrity of the DIMD, the risk of result-driven choices and a distorted determination is simply too great for such a procedure to be acceptable.

[86] The notice of initiation described the domestic industry as Sollers only. The Russian Federation explained, however, that the notice of initiation did not in fact reflect the definition of the domestic industry, but the standing of Sollers. (Russian Federation's response to Panel question No. 14(a), para. 46).

[87] Panel Report, *EC – Salmon (Norway)*, para. 7.124.

claims in this dispute. Three considerations persuade us to address the full range of arguments presented by the Russian Federation:

a. the Russian Federation's later assertions in respect of the timing of its definition of domestic industry appear to be consistent with the sequence of events presented by the European Union in its submissions[88];

b. aside from the apparently chronological order of events set out in the Investigation Report, there is no direct evidence of what happened from the time of the Application up to the Draft Report in respect of the definition of the domestic industry, and the Russian Federation is quite emphatic, in its later representations, that the correct sequence of events is set out in these later representations; and

c. a more comprehensive set of findings may facilitate implementation in the event our findings are adopted by the DSB.

7.18. In this light, we address, in the alternative[89] the arguments of the Russian Federation that the DIMD:

a. initially defined the domestic industry as comprising both Sollers and GAZ, and determined to consider only data from Sollers because of deficiencies in GAZ's data; and

b. redefined the domestic industry as comprising only Sollers after an initial definition comprising both.

7.19. In respect of what we consider to be the first alternative argument, in its second written submission, the Russian Federation sets out the following chronology[90]:

a. the DIMD initially defined the "domestic industry" as including both GAZ and Sollers;

b. having received and reviewed GAZ's data, the DIMD did not find the data to be usable; and

[88] European Union's first written submission, paras. 23-33; second written submission, para 22.

[89] We stress that the Russian Federation does not make these arguments in the alternative. Rather, the various arguments may be seen as evolutions of the initial argument over the course of the proceedings.

[90] Russian Federation's second written submission, para. 24:

> The investigating authority expressed its willingness to include GAZ into the domestic industry for the purposes of the injury analysis (sent a questionnaire for the producer of the like product in the CU, sought clarifications regarding the Questionnaire Reply). (fns omitted)

Russian Federation's second written submission, para. 46:

> At the outset, the domestic industry was defined as all known domestic producers of the like product. The scope of the domestic industry was defined following the definition of the like product. This is an important step because the domestic industry is limited to only those domestic producers that produce a *like product*. (emphasis original)

Russian Federation's second written submission, para. 47:

> Hence, the domestic industry, from the outset, included both known domestic producers of the like product, namely Sollers and GAZ.

Russian Federation's second written submission, para. 48:

> After the initiation of the investigation the investigating authority sent questionnaires to both known domestic producers. Both of them replied to the questionnaires.

Russian Federation's second written submission, para. 52:

> [A]s the data of GAZ could not be included into the injury analysis, GAZ could not be considered as part of the domestic industry for the purposes of injury determination. This statement, however, is without prejudice to a priori definition of the domestic industry that included both known domestic producers, namely GAZ and Sollers.

c. in the light of the data deficiency, the DIMD ultimately defined the domestic industry to include only Sollers.

We note that this sequence of events, though unsupported by evidence[91], is not disputed by the European Union.[92]

7.20. In this regard, the Russian Federation appears to argue that the "positive evidence" requirement of Article 3.1 constitutes another exception to the domestic industry definition set out in Article 4.1.[93]

7.21. We do not find this line of argument persuasive, for four reasons:

a. Article 4.1 expressly provides for only two exceptions from an already-defined domestic industry, and data deficiency is not one of these.

b. Nothing in either Article 4.1 or Article 3.1 suggests that the "positive evidence" requirement of Article 3.1 creates an additional exception to Article 4.1.[94] Indeed, the definition of domestic industry necessarily precedes the examination and consideration of the data collected from domestic producers, including the quality of the data, in the context of making a determination of material injury to the domestic industry as defined.

c. Nothing in Article 4.1 conditions the definition of the domestic industry on an *a priori* assessment of the quality of the data provided by individual producers in the domestic industry as defined. In this regard, we recall that Sollers itself was required to provide additional supplemental data. If the Russian Federation's position were correct, the DIMD could not have "defined" the domestic industry as comprising Sollers until Sollers' data had been submitted and found not to be deficient. Nothing on the record suggests that that was the case.

d. As explained above, assessing the data collected from domestic producers before defining the domestic industry in itself gives rise to a risk of material distortion in the ensuing injury analysis.

7.22. We emphasize that the arguments of the Russian Federation in this respect are not supported by the chronology of events set out in the Investigation Report itself. Nevertheless, even if we were to accept as a matter of fact the Russian Federation's contention that the DIMD made an "*a priori* definition of the domestic industry that included both known domestic producers, namely GAZ and Sollers", we would consider that the DIMD acted inconsistently with Article 4.1 by excluding GAZ from a previously defined industry on a basis other than one of those permitted by the exceptions in Article 4.1. Where an investigating authority makes injury and causation determination on the basis of information related to an improperly defined domestic industry, it acts inconsistently with various provisions of Article 3.[95] In the light of the claims of the European Union in this case, based on our findings above in respect of Article 4.1, we find that the DIMD consequently acted inconsistently with Article 3.1.

[91] Neither the Russian Federation nor the European Union directs us to any evidence on the record to support this particular chronology or the conclusion that GAZ was excluded from the definition of domestic industry because of deficiency in the data it submitted.

[92] In its second written submission, the European Union asserts that the domestic industry was originally defined as including both GAZ and Sollers, and GAZ was subsequently excluded from further consideration.

[93] Russian Federation's second written submission, para. 52; first written submission, paras. 41-43; opening statement at the first meeting of the Panel, paras. 7-11; and response to Panel question No. 7, para. 27.

[94] This is separate from the question of whether Articles 3.1 and 4.1 should be "read together" such that the definition of "domestic industry" under Article 4.1 is subject to the "objective assessment" and "positive evidence" requirements of Article 3.1, a question that we need not resolve in this case. (European Union's first written submission, paras. 18, 40-43, and 66; Brazil's third-party submission, paras. 8-19; Japan's third-party submission, paras. 11-17; Turkey's third-party submission, paras. 5-16; and United States' third-party submission, paras. 5-12).

[95] Panel Report, *EC – Salmon (Norway)*, para. 7.124.

7.23. In respect of what we consider the second alternative argument (or an ancillary to the first alternative argument), the Russian Federation argues that the DIMD initially defined the domestic industry as comprising both Sollers and GAZ, but that in the course of the investigation and in the light of data problems, it redefined the domestic industry to comprise only Sollers. That is, the Russian Federation asserts that, first, as a matter of law, an investigating authority has the right to redefine the domestic industry where the evidence requires it to do so; and second, this is what happened in this case: there was an initial definition of the domestic industry as comprising both Sollers and GAZ, with a subsequent redefinition leaving GAZ out.

7.24. In support of its legal position, the Russian Federation makes the following arguments:

a. "neither the Anti-Dumping Agreement, nor the WTO jurisprudence specifies the precise moment at which the domestic industry shall be defined and the circumstances when the domestic industry may be redefined"[96];

b. "at the outset [of an anti-dumping investigation] all known domestic producers of the like product constitute the domestic industry"[97]; and

c. "[t]he final definition of the domestic industry is linked to the scope of information on domestic producers that is available at the time when the final determination is made. … the domestic industry at the final stage may be different from the domestic industry defined at the outset of the investigation."[98]

The Russian Federation then sets out the circumstances in which the definition of domestic industry may evolve over the course of the investigation. These are: evidence of the existence of domestic producers not known to the investigating authority, failure of a domestic producer to respond to the questionnaire or provide a complete response, or redefinition of the like product.

7.25. The European Union does not disagree that under Article 4.1 an investigating authority may "redefine" the domestic industry. It argues that:

> [I]t could happen that a so-considered "known domestic producer" in reality does not make the product concerned, or that it is related to an exporting producer. In those cases, the investigating authority can adjust its definition of "domestic industry" within the parameters of Article 4.1 of the AD Agreement.[99]

It disagrees, however, that an investigating authority may adjust the definition of the domestic industry on the basis of deficiency of questionnaire responses or "any other reason not foreseen in Article 4.1".[100]

7.26. We do not consider it appropriate − or necessary − to make a definitive finding in respect of the possibility or modalities of "redefinition" of domestic industry under Article 4.1 on the basis of these arguments. Nor are we convinced that the scenarios set out by either the European Union or the Russian Federation are helpful in defining the scope of a right to redefine domestic industry for the purposes of this case. We make the following observations:

a. Nothing in Article 4.1 justifies the use of data problems of the kind identified by the Russian Federation as a basis for redefinition. The disputing parties have identified instances where the definition of domestic industry may be adjusted to take account of new or changed facts relevant to the specific parameters of Article 4.1. However, this does not mean that a redefinition that has the potential of materially distorting an injury analysis would be consistent with Article 4.1.

b. On the facts of this case, neither the asserted initial definition nor the alleged redefinition finds support in the record. The first mention of the definition of "domestic industry" is found in section 4.2 of the Investigation Report, and it refers only to Sollers.

[96] Russian Federation's response to Panel question No. 62, para. 1.
[97] Russian Federation's response to Panel question No. 62, para. 2.
[98] Russian Federation's response to Panel question No. 62, para. 3.
[99] European Union's response to Panel question No. 62, para. 3.
[100] European Union's response to Panel question No. 62, paras. 3 and 4.

> There is no evidence of a "redefinition" of the domestic industry in the Investigation Report, or any other document in the record brought to our attention by the parties.

7.27. We underline that the arguments of the Russian Federation in this respect are not supported by the chronology of relevant actions and events set out in the Investigation Report itself and thus in our view constitute attempts at *post hoc* rationalization. Nevertheless, even if we were to accept as a matter of fact the Russian Federation's argument that the DIMD made an "*a priori* definition of the domestic industry that included both known domestic producers, namely GAZ and Sollers", we would consider that the DIMD acted inconsistently with Article 4.1 by including GAZ in the initial definition of the domestic industry and then purporting to redefine the domestic industry to not include GAZ on the basis of considerations not consistent with the parameters of Article 4.1. Where an investigating authority makes injury and causation determination on the basis of information related to an improperly defined domestic industry, it acts inconsistently with various provisions of Article 3.[101] In the light of the claims of the European Union in this case, based on our findings above in respect of Article 4.1, we find that the DIMD consequently acted inconsistently with Article 3.1.

7.3 Selection of "non-consecutive periods of non-equal duration" for the injury and causation analyses

7.3.1 Introduction

7.28. The European Union claims that by selecting "non-consecutive periods of non-equal duration" for the examination of the trends for the domestic industry, the DIMD's injury determination was not based on an objective examination of positive evidence, contrary to Article 3.1 of the Anti-Dumping Agreement. In the light of the alleged breach of Article 3.1, the European Union also makes consequential claims under Articles 3.2, 3.4, and 3.5.[102] Specifically, the European Union argues that:

a. the DIMD examined the data on a non-equal basis because it considered data relating to the two half-year periods of the period of investigation (POI, i.e. the 2nd half of 2010 and the 1st half of 2011)[103], whereas for the rest of the period of trend analysis it examined full year data (i.e. 2008, 2009, 2010, and 2011). The comparison of half-year data with data examined on an annual basis cannot lead to any meaningful conclusions on the trends in the development of an industry and, therefore, does not constitute an objective examination of the data[104];

b. the DIMD examined the data on a non-consecutive basis by comparing the two half-year periods of the POI (i.e. the 2nd half of 2010 and the 1st half of 2011) with the corresponding periods of the respective previous years (i.e. it compared the 2nd half of 2010 with the 2nd half of 2009, and the 1st half of 2011 with the 1st half of 2010).[105] The DIMD's use of non-consecutive periods makes it impossible to follow the temporal development of the state of the domestic industry and "to obtain an accurate and representative picture of the state of the industry"[106];

c. the DIMD failed to provide an explanation as to why the use of "non-consecutive periods of non-equal duration" was necessary in this case[107]; and

[101] Panel Report, *EC – Salmon (Norway)*, para. 7.124.
[102] European Union's first written submission, para. 70.
[103] The DIMD split the POI into two periods (2nd half of 2010 and 1st half of 2011) and compared data for each of these periods with data for the corresponding period of the preceding year (i.e. it compared the 2nd half of 2010 with the 2nd half of 2009, and the 1st half of 2011 with the 1st half of 2010). (See European Union's first written submission, para. 89).
[104] European Union's first written submission, para. 93.
[105] European Union's first written submission, paras. 99 and 100.
[106] European Union's first written submission, para. 101.
[107] European Union's first written submission, para. 68.

d. the DIMD failed to systematically compare data for the entire period on an end-point to end-point basis (i.e. 2008 compared to 2011) for all factors it examined, and selectively sought to depict the most negative picture of developments in the domestic industry.[108]

7.29. The Russian Federation argues that the European Union has failed to demonstrate that the DIMD acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement.[109] Specifically, the Russian Federation argues that:

a. the DIMD analysed the data pertaining to the state of the domestic industry for each of the calendar years 2008, 2009, 2010, and 2011, including the changes on a year-on-year basis. The evaluation of the trends for the two half-year periods of the POI compared to the corresponding periods of the respective previous years was supplementary to the trend analysis conducted on a year-on-year basis[110];

b. the European Union did not demonstrate or even mention how the selection of the periods could, in itself, lead to a result that would be more favourable to any interested party or group of interested parties or how, in this case, the DIMD favoured the interests of any interested party, or group of interested parties.[111] The European Union is factually incorrect in asserting that the DIMD followed an approach suggested by Sollers in the Application[112];

c. the half-year periods compared by the DIMD can be considered comparable by definition, as they correspond to the same intervals in the respective previous years. Moreover, these periods are in consecutive calendar years, and thus may be considered consecutive[113];

d. the DIMD's methodology of comparing the two half-year periods of the POI with corresponding periods of the previous years is reasonable and appropriate, and does not require any additional explanation.[114] Nevertheless, the DIMD provided an explanation concerning its consideration of half-year periods of the POI in its Investigation Report[115]; and

e. an end-point to end-point comparison of data for 2008 and 2011[116] is not separately reflected in the tables in the Investigation Report, but can be understood by taking the data in the tables and making a simple mathematical comparison.[117] Further, in the narrative section of the Investigation Report, the DIMD did compare the data on certain economic indicators for 2011 with that for 2008 (and/or in some cases 2009, in light of the influence of the economic recovery).[118]

7.3.2 Evaluation by the Panel

7.3.2.1 Relevant provisions

7.30. The periods of investigation[119] and data collection established by an investigating authority determine the scope of its data collection and the time periods for its dumping and injury analysis

[108] European Union's second written submission, paras. 72 and 78.
[109] Russian Federation's first written submission, para. 80.
[110] Russian Federation's first written submission, paras. 121-123; second written submission, paras. 56-58.
[111] Russian Federation's first written submission, para. 133; second written submission, paras. 78-82.
[112] Russian Federation's first written submission, para. 136.
[113] Russian Federation's first written submission, para. 142.
[114] Russian Federation's first written submission, para. 142.
[115] Russian Federation's first written submission, para. 143 (referring to Public version of the Investigation Report, (Exhibit RUS-12), part 6).
[116] By the term end-point to end-point comparison, we refer to the comparison of data for the first and last years of the period of consideration. In the present case, this term refers to a comparison of data on injury factors for 2008 and 2011.
[117] Russian Federation's second written submission, para. 70.
[118] Russian Federation's second written submission, para. 71.
[119] The term of period of investigation is used in the Anti-Dumping Agreement only with respect to the investigation and determination of dumping. However, the term is generally used by investigating authorities

and determinations. The Anti-Dumping Agreement does not establish any specific period of investigation or period of data collection in an anti-dumping investigation, or any guidance for the selection of such periods.[120] However, the selection of a period of investigation and period of data collection for the purposes of the dumping and injury investigations must be one that enables the investigating authority to make an injury determination based on an objective examination of positive evidence, as required by Article 3.1.[121] Article 3.1 provides:

> 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.

7.31. In an injury investigation, the evidence relevant to the examination of the volume of dumped imports, their effect on prices of like products and their consequent impact on the domestic industry will be collected for the periods established by the investigating authority, which must then make its determination of injury consistently with Article 3.1.

7.3.2.2 The periods of investigation and data collection of the DIMD's injury and causation analyses

7.32. As we understand it, the relevant and undisputed facts are as follows. The DIMD defined the POI (and data collection) for the dumping investigation as the 12-month period comprising the second half of 2010 and the first half of 2011. The DIMD defined the period of data collection for the injury analysis as the calendar years from 1 January 2008 to 31 December 2011. In the Investigation Report, the DIMD employed the following approach in evaluating the evidence with respect to injury and causation:

a. The injury and causation sections of the Investigation Report contain tables reporting data, narrative evaluations of that data and conclusions.

b. The tables report the data for each of the economic indicators for each calendar year for the period 2008-2011, and for the two half-year periods comprising the POI. They also report the changes in the data for each period as compared with the corresponding previous calendar year or half-year period of the previous year. The table below illustrates the format of the tables:

Table 1: format of the tables in the Investigation Report

Injury factor	2008	2009	2010	POI 1st half (2nd half of 2010)	POI 2nd half (1st half of 2011)	2011
	Data	Data	Data	Data	Data	Data
		Change compared with 2008	Change compared with 2009	Change compared with 2nd half of 2009	Change compared with 1st half of 2010	Change compared with 2010

c. In its injury analysis the DIMD evaluated the data on the economic indicators by comparing data for one period with the data for the previous year or the corresponding half-year period of the previous year.

to refer to the period for which data is collected and analysed with respect to either the dumping or injury determinations, or both.

[120] See Panel Report, *Egypt – Steel Rebar*, paras. 7.130 and 7.131.

[121] The parties do not disagree that the choice and duration of the POI and the period of data collection is subject to the legal requirement of Article 3.1. (See European Union's second written submission, para. 66; and Russian Federation's second written submission, paras. 72-76).

d. In addition, the DIMD also described, in the narrative portions of the investigation report, comparisons between the situation in 2011 and the situation in 2008[122], or 2009[123] or both 2008 and 2009.[124]

7.3.2.3 The use of allegedly "non-equal and non-consecutive" periods

7.33. The European Union presents three main arguments to challenge the DIMD's selection of the periods. We examine each in turn.

7.3.2.3.1 Inappropriate comparison

7.34. The European Union argues that the DIMD compared half-year data with full calendar year data.[125] The European Union does not, however, identify any instance in which the DIMD made such a comparison. The European Union also asserts that the data for the POI was contrasted with the data for the previous calendar years.[126] The record does not support this characterization of the DIMD's analysis. For each of the economic indicators, the DIMD analysed changes from 2008 to 2011 on a year-on-year basis: from 2008 to 2009, from 2009 to 2010, and from 2010 to 2011. In addition, it analysed the change between the second half of 2010 (i.e. the first half of the POI) and the second half of the previous year, 2009, and the change between the first half of 2011 (i.e. the second half of the POI) and the first half of the previous year, 2010. Therefore, the DIMD compared half-year data only with other half-year data, and compared full calendar year data only with other full calendar year data; in each instance, the DIMD compared the data with the data for the corresponding period of the previous year. Nowhere in the Investigation Report can we find an indication that the DIMD compared or contrasted half-year data with full calendar year data.

7.35. Accordingly, the European Union's argument is not supported by the record as a matter of fact.

7.3.2.3.2 Splitting the period of investigation

7.36. The European Union argues that the POI was split into two half-year periods in order to "artificially show negative trends".[127] We understand that the European Union does not argue that splitting the POI into two half-year periods for comparison with the corresponding periods of the respective previous years is in itself inconsistent with Article 3.1.[128] Rather, it argues that in this case, the DIMD split the POI into two half-year periods in order to artificially show negative trends and in having done so, it failed to objectively examine the evidence and acted inconsistently with Article 3.1.

7.37. In support of its position, the European Union relies on the panel reports in *Mexico – Anti-Dumping Measures on Beef* and *Rice* and *Mexico – Steel Pipes and Tubes*.[129] The

[122] The DIMD compared the situation in 2011 with the situation in 2008 concerning consumption volume and labour productivity. (See Investigation Report, sections 4.2.6 and 4.3).
[123] The DIMD compared the situation in 2011 with the situation in 2009 concerning domestic industry's market share, profitability, capacity utilisation, prices, and cost of production. (See Investigation Report, section 4.3).
[124] The DIMD compared the situation in 2011 with the situation in both 2009 and 2008 concerning volume of production and sale. (See Investigation Report, section 4.3).
[125] European Union's first written submission, para. 93.
[126] European Union's response to the Panel question No. 26, para. 87.
[127] European Union's second written submission, para. 70.
[128] European Union's response to Panel question No. 24, para. 84; second written submission, para. 69. We note that nothing in Article 3.1, Article 3 as a whole, or indeed the Anti-Dumping Agreement as a whole, sets out any rules or guidance for the selection of periods of investigation or data collection. In the absence of such rules, whether the selection of a particular period results in an analysis and determination inconsistent with Article 3.1 can only be determined on a case-by-case basis. Where the POI is a 12-month period spread across two calendar years, as in the present case, splitting the POI into two half-year periods may allow the investigating authority to make a closer and more accurate evaluation of developments in the data relating to the injury factors during the POI.
[129] European Union's first written submission, paras. 85-88; second written submission, para. 64.

European Union also identifies three instances in which, by splitting the POI, the DIMD allegedly "artificially" revealed negative trends[130]:

a. in the second half of the POI, when the cost of production dropped by 0.4%, suggesting that Sollers was capable of cutting costs during the POI. However, the trend from 2008 to 2011 shows a continuous upward movement in production costs;

b. in the first half of the POI, when the domestic prices decreased by 1%, suggesting that Sollers was required to reduce prices in 2010. However, domestic prices increased from 2008 to 2011 on a year-on-year basis; and

c. in the second half of the POI, when Sollers incurred losses. However, if the profits of the first half of the POI and the loss of the second half of the POI are combined, Sollers would still have made profits over the POI as a whole.[131]

7.38. We recall that in *Mexico – Anti-Dumping Measures on Beef and Rice*, the period of investigation covered March to August 1999 for the purposes of the dumping determination, and March to August of 1997, 1998, and 1999 for purposes of the injury analysis. The panel in that case noted that the Mexican investigating authority had limited its injury analysis to only six months (March to August) of each of the years 1997, 1998, and 1999, and entirely disregarded data from the period September to February of each of these years. The panel found that an examination on the basis of an incomplete set of data, characterized by the selective use of data for limited periods of successive years for the injury analysis, could not be "objective" within the meaning of Article 3.1, unless a proper justification were provided.[132] The panel also noted that the domestic producers had themselves, in their petition, suggested that the six-month period of March to August should be used because it reflected the period of highest import penetration.[133] The panel's finding was upheld by the Appellate Body on appeal.[134] The facts were similar in *Mexico – Steel Pipes and Tubes*: *a*s proposed by the petitioner, the Mexican investigating authority relied principally upon data from three six-month periods (July-December 1998, 1999, 2000) in its injury analysis. The panel concluded that such a truncated temporal approach, considering only certain data for the injury analysis, did not constitute a proper establishment of the facts on which to base the determination.[135]

7.39. These cases are clearly distinguishable on the facts from the dispute before us. Unlike in those two cases, in the underlying investigation at issue here, the DIMD:

a. did not make an injury determination by looking only at half-year snapshots of data; and

b. did not conduct the injury analysis on the basis of an incomplete set of data.

Therefore, while the findings in the two cases relied upon by the European Union clarify the scope and relevance of Article 3.1 insofar as the selection of periods for data collection and analysis is concerned, the facts are so different that it is not a given that the outcome of our examination must be the same.

7.40. We now turn to the allegation that the DIMD split the POI into two half-year periods to "artificially show negative trends". We make the following observations:

a. The date of initiation of the investigation was 16 November 2011.[136] At the time the investigation was initiated − the point at which the POI was established − a complete set of data was not available for the second half of 2011. The DIMD could therefore not have intentionally selected the POI to "artificially show negative trends".

[130] European Union's response to the Panel question No. 26, paras. 88-91. See also second written submission, paras. 70 and 82-83.
[131] European Union's response to the Panel question No. 26, paras. 88-91. See also second written submission, paras. 70 and 82-83.
[132] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.81.
[133] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.83.
[134] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 188.
[135] Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.252 and 7.261.
[136] Investigation Report, p. 4.

b. The narrative portion of the Investigation Report discussing costs and prices sets out the data without drawing, or suggesting, any conclusions, contrary to the European Union's allegations.

c. The tables on which the narratives are based set out data, in the form of indexes, for all of 2011.

We do not read these tables and narratives to suggest anything other than what they actually say. We find nothing in the record that supports the proposition that either the POI or the period of data collection was selected to artificially generate a finding of injury. We find nothing in the record that supports the proposition that the selection did, in fact, lead to such an artificial result.

7.41. Finally, nothing in Article 3.1 prohibits an investigating authority from focussing on a part of the period of investigation for a more detailed analysis of developments during that part of the period of investigation. In this instance, for each of the indicators analysed in the Investigation Report, the DIMD analysed a complete set of data for the period from 2008 to 2011 on an annual basis[137], and the data for the POI as compared with the corresponding periods of the respective previous years. The DIMD did not focus its analysis on the POI only, or on any part of the POI only. Furthermore, in focussing on the intervening trends over the POI, the DIMD applied the same approach consistently to each of the economic indicators it examined. The DIMD's more detailed analysis of the intervening trends during the POI revealed for some indicators, such as profits, negative trends either in the first half or the second half of the POI. However, that alone cannot lead to the conclusion that the DIMD did not conduct an objective examination. We further recall that an investigating authority is not precluded from considering the intervening trends during the period of consideration; in fact, it is generally necessary that it do so.[138]

7.42. Accordingly, the European Union has not established that the DIMD's approach had the intent or the effect of "artificially creating" negative trends.

7.3.2.3.3 Accepting a data collection period proposed by the Applicant

7.43. The European Union argues that the fact that the DIMD accepted the periods proposed in the Application contributed to the lack of objectivity in the present case.

7.44. We note that, in the Application, Sollers did not propose the POI actually determined by the DIMD, i.e. the second half of 2010 and the first half of 2011. Nor did it suggest comparing data for those two half-year periods with data for the corresponding periods of the respective previous years. The following table illustrates the approach used in the Application[139]:

Table 2: format of the tables used in the Application

Injury factor	2008	2009	2010	1st half 2010	1st half 2011
	Data	Data	Data	Data	Data

Source: Application, (Exhibits EU-1 and RUS-1) (exhibited twice).

7.45. We note that the data in the Application were collected on an annual basis for three years (2008 to 2010) and the first half of 2011. For the first half of 2011, the Application compared data with the data for the previous corresponding half year period, i.e. the first half of 2010. Accordingly, the third argument of the European Union is once again not supported by the record.

[137] Except the cost of production, for which the DIMD analysed data from 2008 to the end of the POI.

[138] In this regard, the Appellate Body in *US – Steel Safeguards* warned against the risk of a simple end-point to end-point comparison because "a simple end-point-to-end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points". (See Appellate Body Report, *US – Steel Safeguards*, paras. 354 and 355). The Appellate Body has also stated that "more recent data is likely to provide better indications about current injury". (See Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 166). The Panel in *Ukraine – Passenger Cars* stated that "without any analysis of the intervening trends … it is not clear whether the position of the domestic industry was improving or deteriorating towards the end of the period of investigation." (See Panel Report, *Ukraine – Passenger Cars*, para. 7.269).

[139] Application, (Exhibits EU-1 and RUS-1) (exhibited twice).

7.46. For the reasons stated above, we conclude that the European Union has failed to establish that the DIMD acted inconsistently with Article 3.1 by the alleged use of "non-equal and non-consecutive" period in its injury and causation analyses.

7.3.2.4 Explanation for the selection of the period of data collection

7.47. The European Union also argues that the DIMD failed to provide an explanation as to why the use of the "non-equal and non-consecutive" periods was necessary. The European Union relies on the Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations (hereinafter "the Recommendation") adopted by the Committee on Anti-Dumping Practices on 5 May 2000 to support its argument that the DIMD should have explained its selection of the POI and period of data collection in this case.[140]

7.48. In its submissions, the European Union does not address the legal status of the Recommendation or its relevance for purposes of clarifying and interpreting the obligations of the Members in accordance with Article 3.2 of the DSU. While previous panels and the Appellate Body have had occasion to consider the Recommendation, they have generally refrained from definitively ruling on its status and, indeed, from relying on it for interpretive purposes.[141]

7.49. Three considerations militate heavily against giving undue prominence to the Recommendation in our consideration of the European Union's claim regarding the alleged need to explain the use of "non-equal and non-consecutive" periods:

a. The text of the Recommendation does not evince any intention on the part of Members that it should be treated as anything other than a "useful guide to the common understanding of Members".[142] On its face, the Recommendation is a non-binding document that sets out a common understanding of WTO Members, not of their legal obligations, but of best practices under the Anti-Dumping Agreement.

b. Nothing in the Recommendation suggests that it was meant to guide or influence the interpretation, by panels or the Appellate Body, of the legal obligations of Members under the Anti-Dumping Agreement.

c. Members should feel confident that not every document produced by a WTO body will be interpreted as having legislative content or will have legal consequences for dispute settlement purposes. Giving undue weight to recommendations and exhortations by, or exchanges of ideas in, WTO bodies risks inhibiting the work of the political and policy organs of the WTO.

[140] European Union's first written submission, para. 93; second written submission, para. 65.

[141] The panel in *US – Hot-Rolled Steel* stated that "the recommendation is a non-binding guide to the common understanding of Members on appropriate implementation of the AD Agreement. It does not, however, add new obligations, nor does it detract from the existing obligations of Members under the Agreement. See G/ADP/M/7 at para. 40, G/ADP/AHG/R/7 at para. 2. Thus, any obligations as to the length of the period of investigation must, if they exist, be found in the Agreement itself." (Panel Report, *US – Hot-Rolled Steel*, fn 152). The Panel in *Guatemala – Cement II*, stated that "this recommendation is a relevant, but non-binding, indication of the understanding of Members as to appropriate implementation practice regarding the period of data collection for an anti-dumping investigation." (Panel Report, *Guatemala – Cement II*, para. 8.266 and fn 868). In *Mexico – Anti-Dumping Measures on Rice*, Mexico contested upon appeal the Panel's reference to the Recommendation. The Appellate Body noted that the Panel's reference to the Recommendation was made "not as a legal basis for its findings, but simply to show that the Recommendation's content was not inconsistent with its own reasoning". Furthermore, the Appellate Body said the Recommendation was not a "decisive factor" in the Panel's decision. (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 169).

[142] WTO, Committee on Anti-Dumping Practices, Minutes of the Meeting held on 29 April 1996, G/ADP/M/7 (2 October 1996), para. 40. The Recommendation states explicitly that "[t]he Committee also recognizes, however, that such guidelines do not preclude investigating authorities from taking account of the particular circumstances of a given investigation in setting the periods of data collection for both dumping and injury, to ensure that they are appropriate in each case." (WTO, Committee on Anti-Dumping Practices, Recommendation concerning the periods of data collection for Anti-Dumping investigations, G/ADP/6 (adopted 5 May, circulated 16 May 2000), (Exhibit EU-24)).

7.50. Given our understanding of the Recommendation, we see no basis for the view put forward by the European Union, that the DIMD was required to explain its selection of the POI or the period of data collection.[143]

7.51. In any event, as a matter of fact the European Union's assertion that the DIMD failed to provide an explanation as to its selection of "non-equal and non-consecutive" periods is incorrect. Even assuming *arguendo* it was required to provide such a justification, the DIMD did so in this instance in the Investigation Report. Specifically, the DIMD explained that its approach: (a) enabled a more detailed assessment of the trends in the injury data over the POI; and (b) helped establish the time lag between dumped imports and the injury suffered by the domestic industry. This is clearly reflected in the Investigation Report:

> [W]e believe that the division of the period of investigation into equal parts (6 months long) helps to carry out an objective analysis of the condition of the domestic industry of the CU, thanks to a more detailed assessment of the changes of economic indicators pertaining to the domestic industry of the CU during the period of investigation, both in relation to the same period last year, and also for the assessment of overall trends on the CU market, and it also helps to establish the time lag of the injury suffered by the domestic industry of the CU as a result of dumped imports of the product and to possible elimination of such an economic factor in the case such injury is detected.[144]

Thus, as a matter of fact the DIMD provided in its Investigation Report an explanation for its selection of the periods of investigation and data collection that in our view is relevant, specific, and adequate.

7.52. For the above reasons, the European Union has not established that the DIMD failed to explain its selection of the periods.

7.3.3 Conclusion

7.53. For the reasons set out above, we conclude that the European Union has failed to establish that the DIMD acted inconsistently with Article 3.1 by purportedly using "non-equal and non-consecutive" periods in the examination of developments in injury indicators for the domestic industry. Having reached this conclusion, we also reject the European Union's consequential claims of inconsistency under Articles 3.2, 3.4, and 3.5.

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[143] Moreover, for the sake of completeness, we note that the Recommendation does not even stand for the proposition asserted by the European Union, that if the data is not collected on an annual basis, the investigating authority has to explain the reasons for its methodology. Paragraph 3 of the Recommendation states in relevant part that:

> In order to increase transparency of proceedings, investigating authorities should include in public notices or in the separate reports provided pursuant to Article 12.2 of the Agreement, an explanation of the reason for the selection of a particular period for data collection if it differs from that provided for in: paragraph 1 of this recommendation, national legislation, regulation, or established national guidelines. (emphasis added)

Paragraph 1 of the Recommendation contains only one rule concerning the period of data collection for the examination of injury:

> As a general rule: ... (c) the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation.

There is no rule in the Recommendation that would require an investigating authority to collect the data on an annual basis. In any event, as the period examined by the DIMD was at least three years, and there is no allegation that the period differed from that provided for in national legislation, regulation or established national guidelines, nothing in the Recommendation itself would have suggested that any explanation should have been provided.

[144] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), p. 54.

7.4 Price suppression

7.4.1 Introduction

7.54. The European Union claims that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to make an objective examination of the price suppressive effect of dumped imports based on positive evidence. The European Union challenges four aspects of the DIMD's findings[145]:

a. The DIMD constructed[146] the estimated prices that would otherwise have occurred in the absence of dumping using an abnormally high profit rate reported for 2009 as the benchmark without further adjustments.[147]

b. The DIMD failed to properly consider the trends of import and domestic prices in an objective manner by mixing up data expressed in Russian roubles (RUB) and US dollars (USD) in different sections of the Investigation Report.[148]

c. The DIMD did not conduct its analysis on the basis of positive evidence because the DIMD did not examine:

   i. import and domestic price trends that were moving in "contrary directions", and how consistently higher import prices could explain the price suppression;

   ii. the reasons for Sollers' cost increases, and consequently, whether the market would have accepted additional price increases by the domestic industry after increases of over 30% between 2008 and 2011[149]; and

   iii. the impact of competition from the other domestic producer, GAZ.[150]

d. The DIMD did not explain or demonstrate why the alleged price suppression was "to a significant degree". In particular, the DIMD did not compare the constructed target domestic prices and the actual prices of the domestic like product, nor did it consider the gap between those prices. There would not be significant price suppression if domestic prices remained consistently below the import prices, as they had during 2008-2011, because Sollers could still increase the domestic prices to at least the level of import prices.[151]

7.55. The Russian Federation argues that:

a. The DIMD constructed the estimated prices that would have been reached in the absence of dumped imports on the basis of cost of production plus a rate of return. The DIMD selected the domestic industry's 2009 rate of return as the benchmark because in 2009 dumped imports had their lowest market share and had minimal impact on domestic prices.[152] This rate of return was verified by internal analysis, on the basis of publicly available information, and on the basis of high inflation and refinancing rates and the average rates of return of the Sollers Group and GAZ.[153]

[145] European Union's first written submission, para. 136.
[146] European Union's first written submission, para. 140; opening statement at the first meeting of the Panel, paras. 40-42.
[147] European Union's response to Panel question No. 35, para. 113.
[148] European Union's first written submission, para. 143.
[149] European Union's first written submission, paras. 153 and 154; opening statement at the first meeting of the Panel, paras. 43 and 44.
[150] European Union's first written submission, para. 155.
[151] European Union's first written submission, para. 158; opening statement at the first meeting of the Panel, paras. 45-47.
[152] Russian Federation's first written submission, paras. 161 and 166; second written submission, para. 101.
[153] Russian Federation's second written submission, paras. 102 and 103. The Russian Federation provided the following consolidated table regarding these rates:

b. Data concerning the evolution of domestic costs of production and prices were presented in domestic currency (RUB) in table 4.2.5 of the Investigation Report concerning the state of the domestic industry. For purposes of the price effects analysis, the DIMD converted domestic prices from RUB into USD to compare with the prices of the dumped imports, which were reported in USD in table 5.2 of the Investigation Report.[154] The DIMD assessed the price trends objectively, and took into account currency fluctuations in its Investigation Report.[155]

c. The DIMD conducted its price suppression analysis in line with the views of the Appellate Body in *China – GOES* by comparing actual prices and estimated prices that would have occurred in the absence of dumped imports:[156]

   i. the fact that there was no undercutting or price depression cannot preclude a determination of the existence of price suppression.[157] There was a margin for increase of domestic prices, given that the import prices were higher than domestic prices[158];

   ii. the DIMD considered the competition from GAZ as part of its non-attribution analysis[159]; and

   iii. because the DIMD constructed target domestic prices that would have been achieved in the absence of dumped imports, it was not required to analyse whether the market would absorb price increases.[160] The investigating authority is only obliged to examine this issue if it is faced with evidence that calls into question the "explanatory force" of the subject imports for significant price suppression. There was no such evidence on the record.[161]

d. Article 3.2 does not require a comparison between the estimated prices that would exist for the domestic like product in the absence of dumped imports and the prices that actually occurred or the gap between these prices. The DIMD compared the weighted average prices of the dumped imports and of the domestic like product, and compared the profitability and prices that actually occurred with the situation which would have occurred in the absence of dumped imports.[162]

7.4.2 Evaluation by the Panel

7.4.2.1 Relevant provisions

7.56. Article 3.1 of the Anti-Dumping Agreement is set out in paragraph 7.30 above. Article 3.2 provides:

Table 3: Inflation rates of the Russian Federation and the rate of return of Sollers Group

	2008-2011, average	2010	2011	2010-2011, average
Inflation rate,%	9.2	8.8	6.1	7.4
Refinancing rate,%	10.0	8.25 (on average)	8.0 (on average)	8.1
Rate of return, Sollers Group,%	**[***]**	**[***]**	**[***]**	**[***]**

[154] Russian Federation's first written submission, para. 168.
[155] Russian Federation's first written submission, paras. 169 and 170; second written submission, para. 93.
[156] Russian Federation's first written submission, para. 178.
[157] Russian Federation's first written submission, para. 185 (citing Panel Report, *Korea – Certain Paper*, para. 7.243).
[158] Russian Federation's first written submission, para. 189.
[159] Russian Federation's first written submission, para. 190.
[160] Russian Federation's second written submission, para. 125.
[161] Russian Federation's second written submission, paras. 120 and 121.
[162] Russian Federation's first written submission, paras. 195 and 196 (referring erroneously to Exhibit RUS-37, table 5.2.2; it is Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI)).

> With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

7.57. Article 3.2 thus requires an investigating authority to consider, *inter alia*, whether the effect of the dumped imports is to "prevent domestic price increases, which otherwise would have occurred, to a significant degree". Article 3.2 does not require an investigating authority to make a definitive determination on whether the effect of dumped imports is significant price suppression.[163] Article 3.2 provides no methodological guidance as to how an investigating authority is to "consider" whether there has been significant price suppression. However, an investigating authority's consideration of price effects under Article 3.2 is subject to the principles of Article 3.1 regarding an objective examination of positive evidence in the determination of injury.[164]

7.4.2.2 The use of 2009 rate of return as a benchmark

7.58. Before examining the European Union's claim, we briefly describe the DIMD's price suppression analysis, as set out in section 5.2 of the Investigation Report. The DIMD constructed estimated domestic prices that would have occurred in the absence of dumped imports on the basis of the actual costs of production and a reasonable rate of return. As to what constitutes a "reasonable rate of return", the DIMD used the actual rate of return of Sollers for 2009. The Investigation Report shows that the DIMD chose the 2009 rate of return as the benchmark because that was the year in which the market share of dumped imports was the lowest and, for that reason, the year in which the impact of the dumped imports was minimal. The DIMD compared the data pertaining to a number of economic indicators (e.g. domestic industry's prices and profits) during the period of consideration with the data pertaining to the constructed counterfactual, and concluded that dumped imports significantly supressed domestic prices.[165]

7.59. The European Union argues that the DIMD's price suppression analysis was not objective because the high rate of return reported by the domestic industry for 2009 (**[***]**) that the DIMD used as the benchmark for constructing domestic prices that would have been realized in the absence of dumped imports was not an appropriate benchmark.[166] The European Union asserts that in 2009 the domestic industry was not healthy, as evidenced by certain negative injury indicators in that year.[167] The European Union contends that 2009 was marked by temporary shifts in consumer preferences due to the financial crisis.[168] According to the European Union, the rate of return for 2009 was "abnormally high" relative to both 2008 and 2010.[169]

7.60. The Russian Federation makes three arguments in support of the DIMD's choice of 2009 as the benchmark year and **[***]** as the benchmark rate of return:

a. the DIMD used the 2009 rate of return because that was the year when the dumped imports' market share was the lowest;

b. the 2008 rate of return could not have been used because it was the start-up year for the domestic industry[170]; and

[163] Appellate Body Report, *China – GOES*, para. 130.
[164] Appellate Body Report, *China – GOES*, para. 130.
[165] Investigation Report, section 5.2.
[166] European Union's first written submission, paras. 138-142; second written submission, para. 95.
[167] European Union's second written submission, para. 96.
[168] European Union's response to Panel question Nos. 29, para. 98, and 35, paras. 113 and 116; opening statement at the first meeting of the Panel, para. 41.
[169] European Union's first written submission, paras. 139, 140, 208, and 281; opening statement at the first meeting of the Panel, para. 41. See also second written submission, para. 95, where the European Union consider the 2009 rate of return to be "extremely high" compared with those in 2008 and 2010.
[170] Russian Federation's first written submission, para. 165.

c. the 2009 rate of return was considered reasonable in the light of an internal analysis of the publicly available high inflation and refinancing rates in the Russian Federation and high profit levels achieved by the Sollers Group during the period considered.[171]

7.61. The reference price for assessing price suppression under Article 3.2 is the domestic price "which otherwise would have occurred". Accordingly, the consideration of price suppression is counterfactual in nature.[172] This means that in considering whether prices have been suppressed to a significant degree, an investigating authority must consider hypothetical domestic prices that would have occurred if dumped imports had not taken place. Article 3.2 does not provide any guidance on how such a counterfactual consideration should be conducted. Accordingly, an investigating authority has a degree of discretion in this regard. That discretion is guided, in turn, by the principle set out in Article 3.1 that the determination of injury, including the consideration of price effects, must be based on an objective examination of positive evidence. Where, as in this case, the investigating authority constructs a hypothetical domestic price that would have occurred in the absence of dumped imports (target domestic price) on the basis of a rate of return and the actual costs of production, an investigating authority must use a rate of return that is objective and that is based on positive evidence. Such a rate of return would take into account the particular circumstances of the industry and market at issue in the investigation. Given the nature of the required counterfactual, a rate of return that may reasonably be used as a benchmark for the calculation of a target domestic price that would have been realized in the absence of dumped imports would be one that the domestic industry could have expected to achieve under normal conditions of competition in the absence of dumped imports.[173] That is to say, an objective rate of return based on positive evidence for the purposes of considering price suppression under Article 3.2 is not a rate of return that the domestic industry might wish to achieve, but one that it might actually be able to achieve.

7.62. The DIMD chose the 2009 rate of return as the benchmark because, the Russian Federation asserts, 2009 was the year in which the market share of dumped import was the lowest.[174] The Investigation Report states:

> When considering a reasonable rate of return, the Department chose the rate of return earned by the domestic industry of the CU when selling like Product on the territory of the Customs Union in 2009. The aforementioned period was chosen to determine reasonable rate of return due to the fact that the year 2009 saw the lowest share of dumped imports of Product subject to the investigation in consumption on the territory of the Customs Union and, therefore, the impact of the dumped imports on the domestic industry of the CU during the aforementioned period was minimal.[175]

7.63. In the light of the counterfactual nature of the consideration of price suppression, we do not find it unreasonable for the DIMD to have used the 2009 rate of return as a starting point for its construction of the target domestic price. It was the rate of return actually achieved by the domestic industry during a period in which the subject imports had a low market share and did not have any major negative effects on the domestic industry. We note that the European Union does not argue that the DIMD should have used the rate of return for 2008 or 2010.[176] Indeed, use of the rates of return for either of those years would have given rise to particular problems, because:

[171] Russian Federation's second written submission, para. 102. The inflation rate in the Russian Federation from 2008 to 2011 was around 9.2% on average. The refinancing rate in the Russian Federation from 2008 to 2011 was 10% on average. The rate of return of the Sollers Group from 2008 to 2011 was 16.3% on average.

[172] We note that the Appellate Body stated in *China – GOES*, that price suppression "cannot be properly examined without a consideration of whether, in the absence of subject imports, prices 'otherwise would have' increased". (See Appellate Body Report, *China – GOES*, para. 141).

[173] We note that this is the shared view of the parties. (See European Union's response to Panel question No. 29, para. 97; and Russian Federation's second written submission, para. 111).

[174] Russian Federation's second written submission, para. 101.

[175] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), p. 47.

[176] See European Union's second written submission, para. 97. We note that the European Union initially argued that the DIMD should have used the 2008 rate of return as a benchmark for its price suppression analysis. (See European Union's opening statement at the first meeting of the Panel, paras. 39 and 40).

a. 2008 was a start-up year for Sollers' production of the like product[177], and as a general matter, industry performance in a start-up period is likely to be out-of-line with normal operations[178]; and

b. 2010 saw a sharp increase in dumped imports, and the beginning of the injury identified by the DIMD, as indicated by factors regarding the state of the domestic industry.

Accordingly, neither would necessarily have been a more appropriate benchmark than the rate of return for 2009. Finally, we do not see the fact that the 2009 rate of return was the highest reported during the period considered as a problem in itself. In the absence of dumped imports, or if the level of dumped imports had remained low, the profitability of the domestic industry might have remained at that level, or been even higher during the remainder of the period considered.

7.64. If the rate of return used in constructing a counterfactual target domestic price is not one that the domestic industry could reasonably have expected to achieve in the subsequent years in normal conditions and in the absence of dumped imports, then using that rate of return would result in a consideration of the price suppressive effect of dumped imports inconsistent with Articles 3.1 and 3.2. For this reason, a reasonable and objective investigating authority may need to go beyond identifying the rate of return achieved in a given year if it undertakes such an analysis. If there is evidence before the investigating authority of market conditions during the selected year that bring into question whether that rate of return could be achieved in subsequent years under normal conditions of competition and in the absence of dumped imports, an investigating authority may not ignore such evidence.

7.65. In the present case, the rate of return of the domestic industry increased significantly from 2008 to 2009, and returned to a lower level in 2010 overall. In the first half of 2011, the domestic industry began to suffer losses, showing a negative rate of return.

Table 4: Rates of return of the domestic industry

Year	2008	2009	2010	2nd half 2010	1st half 2011	2011
Rate of Return	[***]	[***]	[***]	[***]	[***]	[***]

Source: Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), table 5.2.2.

7.66. As the DIMD acknowledged in the Investigation Report, Sollers' performance in 2009 was positively affected by the financial crisis, during which "consumers preferred the cheaper light commercial vehicles, manufactured on the territory of the Customs Union".[179] In our view, the financial crisis was an extraordinary event affecting the domestic industry's operations in 2009. We do not consider it reasonable for an investigating authority to base its analysis on facts relating to a period in which extraordinary conditions prevailed without, at a minimum, explaining why the extraordinary conditions are not relevant to its counterfactual analysis. In our view, an investigating authority may take such extraordinary conditions into account in its consideration of price effects in different ways. However, it may not ignore the possibility that such conditions will not continue, and should account for that fact in its analysis, including in the construction of a target domestic price. This could involve making an adjustment to the chosen rate of return, or otherwise taking extraordinary circumstances into account in considering the "explanatory force"[180] of dumped imports for price suppression. We do not mean to suggest that an investigating authority may not rely on a benchmark rate of return in constructing a target domestic price that is less than ideal, so long as it recognizes and takes into account relevant factors in its consideration. An objective and unbiased investigating authority in the underlying investigation would, in our view, have questioned whether the effects of the financial crisis, including the

[177] See Soller's Updated Questionnaire response, 31 January 2013, (Exhibits RUS-3 and EU-4) (exhibited twice), para. 2.5. See also Russian Federation's second written submission, para. 106.

[178] This is recognized in Article 2.2.1.1 and footnote 6 of the Anti-Dumping Agreement, which recognize that costs of production are likely to be affected during start-up operations and provide for adjustments for such effects.

[179] Investigation Report, section 4.3.

[180] Appellate Body Report, *China – GOES*, para. 151. According to the Appellate Body, Article 3.2 requires an investigating authority to consider the relationship between subject imports and domestic prices, so as to understand whether the former may have "explanatory force" for the occurrence of significant depression or suppression of the latter.

preference for the domestic product, would continue and thus whether the high rate of return reported in 2009 could reasonably be expected in the subsequent years in the absence of dumped imports. Nothing in the DIMD's Investigation Report suggests that it undertook such an assessment in its consideration of price suppression.[181]

7.67. For the reasons above, we conclude that the DIMD acted inconsistently with Articles 3.1 and 3.2 by failing to take into account the impact of the financial crisis in determining the appropriate rate of return in its consideration of price suppression.

7.4.2.3 The alleged mixing of currencies

7.68. The European Union argues that:

a. the DIMD mixed data expressed in USD and RUB without any explanation in its price suppression analysis[182]; and

b. because of exchange rate fluctuations, the trend of domestic prices expressed in RUB is different from the trend expressed in USD.

7.69. The parties agree that an objective comparison of the domestic prices and subject import prices requires that the prices be expressed in the same currency.[183] The Investigation Report shows that in discussing the state of the domestic industry, the DIMD analysed the evolution of domestic prices in RUB, the currency in which those prices were reported.[184] In considering the effect of dumped imports on the prices of the domestic like product, the DIMD converted the domestic prices from RUB into USD, and compared these with the subject import prices, which were reported in USD.[185] Given that the domestic and subject import prices were not reported in the same currency, in order to be able to make an objective consideration of price suppression, the DIMD was obliged to either convert domestic prices from RUB to USD or convert subject import prices from USD to RUB. The European Union has not pointed to any convincing reason why converting import prices from USD into RUB was required or more appropriate for the consideration of the effect of the subject imports on domestic prices in this case, as opposed to converting domestic prices from RUB into USD.[186] It is clear to us that either conversion would have reflected the effects of exchange rate fluctuations, and in particular the RUB devaluation in 2009. Accordingly, we do not consider that, in the present case, the DIMD was obliged to convert the import prices from USD into RUB in considering price suppression.

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[181] In response to questions from the Panel and in its second written submission, the Russian Federation argued that the 2009 rate of return (**[***]**) was not abnormally high when compared with the average rate of return achieved by the Sollers Group from 2008 to 2011, and the prevailing inflation and refinancing rates in the Russian Federation. The Russian Federation argues that some of these figures were "public" and that others were part of its "internal analysis". There is no evidence in the Investigation Report of any such "internal analysis" related to inflation figures and rates of return for Sollers and/or GAZ. In the absence of evidence on the record, we consider the Russian Federation's assertion regarding this "internal analysis" as a *post hoc* rationalization, and the tables it submitted in this regard (see fn 153) as evidence not on the record of the investigation and therefore not to be considered.

[182] In response to the Russian Federation's question No. 5, the European Union argues that in comparing the domestic prices and the import prices, the DIMD should have taken into account the impact of the exchange rate fluctuation and the change of customs duties.

[183] Russian Federation's first written submission, para. 168; and European Union's response to the Russian Federation's question No. 6, para. 12.

[184] Investigation Report, section 4.2.5. See Russian Federation's response to Panel question No. 69, para. 44.

[185] Investigation Report, section 5.2. See Russian Federation's response to Panel question No. 69, para. 43. According to the Russian Federation, the statistical value of imported goods in the customs declaration must be indicated in USD in accordance with paragraph 44 of Article 15 of the Instruction on the procedure for filling in the goods declaration adopted by the Decision of the Board of EEC No. 39 on 26 April 2012.

[186] The European Union argues that the DIMD should have converted the import prices into RUB to compare with domestic prices in RUB because it is the local currency. (See the European Union's response to the Russian Federation's question No. 6, para. 12). However, the European Union has not demonstrated that consideration of prices in the local currency is more appropriate, much less required, in considering price suppression.

7.70. As well, given the volatility of the RUB in this time-frame[187] and, in particular, the RUB devaluation in 2009, whichever way the conversion was done, the price trends observed in one currency are not likely to match the trends observed when prices are converted to another currency. In this regard, we note that in the Investigation Report the DIMD addressed the European Union's concern that the trend in domestic prices expressed in RUB differed from the trend when prices were converted to USD. In section 4.2.5 of the Investigation Report, the DIMD observed an upward trend in the evolution of domestic prices in RUB from 2008 to 2011. 2009 was singled out as the year in which the main increase in domestic prices was observed:

> As the table [4.2.5] shows, the period from 2008 to 2010 saw an increase in the weighted average price of the Product produced by the domestic industry of the CU and sold in the CT CU. In general, during the period from 2008 to 2010 the price of Product increased by 25.8% (**[***]**). The main increase in the price of the Product was observed in 2009 in relation to 2008 when the increase amounted to 25.5% (**[***]**). In 2010, as compared to 2009, there was a slight increase in price of 0.2% (**[***]**). During the period of investigation, in the 2nd half of 2010, the weighted average price of the Product dropped by 1% (**[***]**) whereas in the 1st half of 2011 the price rose by 10.4% (**[***]**). In 2011, the increase in the price of the Product was 6.2% (**[***]**).[188]

The DIMD accounted for the difference in the trends expressed in RUB and USD by factoring in the exchange rate fluctuations in its consideration of price suppression in section 5.2. of its Investigation Report:

> Between 2008 and 2010, the weighted average price of the Product produced by the domestic industry of the CU grew by 2.8% (**[***]**). In 2009, as a result of the 27.7% increase in the exchange rate of the USD versus RUB, the price fell by 1.7% (**[***]**) whereas in 2010 the price rose by 4.6% versus 2009 (**[***]**). During the period of investigation, in the 2nd half of 2010, the price of the Product produced by the domestic industry of the CU decreased by 1.9% (**[***]**). Whereas in the 1st half of 2011 the price increased by 15.9% (**[***]**). In 2011, the weighted average price of the Product produced by the domestic industry of the CU increased by 9.8% (**[***]**) versus 2010.[189]

7.71. As the passage above shows, in its price suppression analysis, the DIMD highlighted the underlying reason for the decrease in domestic prices in USD in 2009, attributing it to "the 27.7% increase in the exchange rate of the USD versus RUB". Sections 4.2.5 and 5.2 of the Investigation Report, when read together, do not give rise to any confusion or distortion about the overall upward trend of domestic prices expressed in RUB.

7.72. The European Union does not point to any evidence suggesting that the DIMD relied on the 1.7% decrease of domestic prices in USD in 2009 to support any incorrect conclusions concerning price effects. The DIMD's conclusion that there was neither price undercutting nor price depression[190] is supported by the trends of prices expressed both in RUB and in USD. Indeed, the 2009 decrease in domestic prices due to exchange rate fluctuations (i.e. lower domestic prices in USD terms) made a finding of any price undercutting more unlikely. In its consideration of price suppression, the DIMD focused on a counterfactual analysis rather than the prices and trends set out in table 5.2. The DIMD's ultimate conclusions on price suppression are therefore based on the consideration of the actual situation (in terms of prices and the profit/losses) compared with the situation which would have occurred in the absence of dumped imports, rather than on whether the domestic prices increased (in RUB) or decreased (in USD) in 2009.

[187] There was a 27.7% increase in the exchange rate of USD to RUB in 2009. (See section 5.2. of the Investigation Report). The parties do not disagree that the exchange rates fluctuation was volatile during this period.

[188] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), p. 40. (emphasis added)

[189] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 5.2. (emphasis added)

[190] The DIMD concluded that "based on the information received by the Department in the course of the investigation and analysed above, the prices of Product affected by dumped imports were not lower than the prices of like Product sold in the market of the Customs Union. Furthermore, the dumped imports did not lead to significant depression of the prices of like Product sold on the market of the Customs Union." (See Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), p. 47).

7.73. For the reasons above, we find that the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.2 because the DIMD "mixed up" data expressed in USD and RUB without any explanation in its consideration of price suppression.

7.4.2.4 Whether price suppression is the effect of dumped imports

7.74. The European Union claims that the DIMD did not properly consider evidence relevant to the question whether the subject imports have "explanatory force"[191] for the occurrence of significant suppression of domestic prices in four aspects.

7.4.2.4.1 The trends in dumped import prices and domestic prices

7.75. The European Union presents three arguments in support of its contention that the DIMD failed to properly consider the trends in dumped import prices and domestic prices:

a. the fact that dumped import prices were higher than domestic prices may suggest that other factors unrelated to the dumped imports were responsible for the alleged price suppression[192];

b. the long term price trends of dumped imports and the domestic like product do not support the conclusion of price suppression[193]; and

c. there was no price suppression during the POI.[194]

7.76. We begin with the European Union's argument that higher import prices may suggest that other factors unrelated to dumped imports were responsible for the alleged price suppression. As we understand it, the European Union does not argue that the fact that the import prices were higher than domestic prices is in itself evidence that dumped imports did not have the effect of significant price suppression of domestic prices. Rather, as we understand the European Union, as long as the import price is higher than the domestic price, there is room for increase in the domestic prices, unless the market would not allow for such an increase. The European Union argues that this price gap calls into question the "explanatory force" of the dumped imports for the alleged price suppression. The European Union argues that the DIMD should have explained why the dumped imports have "explanatory force" for the alleged price suppression in the presence of such a price gap.[195]

7.77. As the European Union acknowledges, the fact that dumped import prices were higher than domestic prices is not in itself evidence that dumped imports do not have "explanatory force" for the effect of significant suppression of domestic prices. In certain situations, higher dumped import prices can have a suppressing effect on domestic prices. This is most commonly observed in situations where imports command a price premium over the domestically produced product. In these situations, when dumped import prices decline, prices for the domestic product may well follow suit, or increase at a slower pace, or to a lesser extent, to maintain the price differential necessary for the domestic industry to make sales.[196] Accordingly, the absence of price undercutting, or the presence of a "price gap" in the European Union's term, does not necessarily preclude or call into question the "explanatory force" of the dumped imports for the alleged price suppression.

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[191] Appellate Body Report, *China – GOES*, para. 151. According to the Appellate Body, Article 3.2 requires an investigating authority to consider the relationship between subject imports and domestic prices, so as to understand whether the former may have "explanatory force" for the occurrence of significant depression or suppression of the latter.

[192] European Union's first written submission, paras. 150 and 151; second written submission, para. 110; and response to Panel question No. 67, paras. 17-20.

[193] European Union's second written submission, para. 112.

[194] European Union's response to Panel question No. 67, para. 20; and Detailed undercutting and injury calculations, (Exhibit EU-32) (BCI).

[195] European Union's response to Panel question No. 67, paras. 17-20.

[196] Indeed, the record shows that the present case may well have been such a situation. During the investigation, the exporting producers such as Mercedes consistently argued that their LCVs were of much higher quality. Furthermore, as discussed below in paragraph 7.81, the trends in domestic and dumped import prices show that, since 2009, the dumped import prices decreased and remained at a lower level, thereby creating downward pressure on domestic prices.

7.78. In addition, where an investigating authority constructs a target domestic price that otherwise would have occurred in the absence of the dumped imports, the methodology itself ensures that the failure of actual domestic prices to rise to the level of the target domestic price is an effect of the dumped imports.[197] Thus, in the present case, the DIMD's use of that methodology itself explained the effect of the dumped imports to suppress domestic prices in the absence of price undercutting and despite the price gap. In the Investigation Report, the DIMD noted first that there was no price undercutting. The DIMD then identified a benchmark rate of return in the year with the lowest dumped import penetration. On the basis of the rate of return in that year, it constructed the target domestic prices that would otherwise have occurred in the absence of the dumped imports, and compared these with the actual price situation during the period considered. Because the actual prices were lower than the target domestic prices (which factored out the effect of dumped imports), the DIMD ultimately concluded that the effect of the dumped imports was to suppress domestic prices significantly.[198] We underline that the target domestic price is the benchmark against which the existence and extent of "price suppression" is considered; this target domestic price is calculated independently of the dumped import price. Where the gap between the actual domestic price and the target domestic price is considered, an investigating authority is not required to further explain any gap between actual domestic and dumped import prices. Given that the DIMD's methodology explained that the effect of the dumped imports was to suppress domestic prices, the DIMD is not required to explain separately why, despite being higher priced, the effect of dumped imports was to prevent domestic price increases.

7.79. We turn to the second argument of the European Union, that the long term price trends of dumped imports and the domestic like product do not support a conclusion of price suppression. The European Union notes that from 2008 to 2011, domestic prices in RUB increased by **[***]** while import prices increased by only **[***]**. The European Union contends that in a price suppression situation, the domestic prices should fail to increase or increase less than would otherwise be the case, while import prices decrease.[199]

7.80. We observe first that the European Union's argument is premised on a simple end-point to end-point (2008 to 2011) comparison of domestic and import prices. Such a simple comparison cannot in our view be determinative of the question whether the effect of the dumped imports was to suppress domestic prices to a significant degree, as it ignores intervening developments over the period considered. Looking at the trends in the dumped import prices during the period of consideration, as shown in the tables below, we see that dumped import prices increased from 2008 to 2009 but then decreased in 2010, and eventually converged with steadily increasing domestic prices in 2011.[200] Significantly, after 2009, dumped import prices continued on a deep downward trend, despite an additional 15% customs duty[201] imposed after 2009. This downward trend in dumped import prices is seen throughout the entire period of investigation.

[197] To give an example, the domestic price would have been higher (constructed target domestic price A) in the absence of dumped imports; it increased only to a lower level (actual domestic price B) during the period when dumping occurred; it follows that the inability of domestic prices to increase from B to A was the effect of dumped imports.

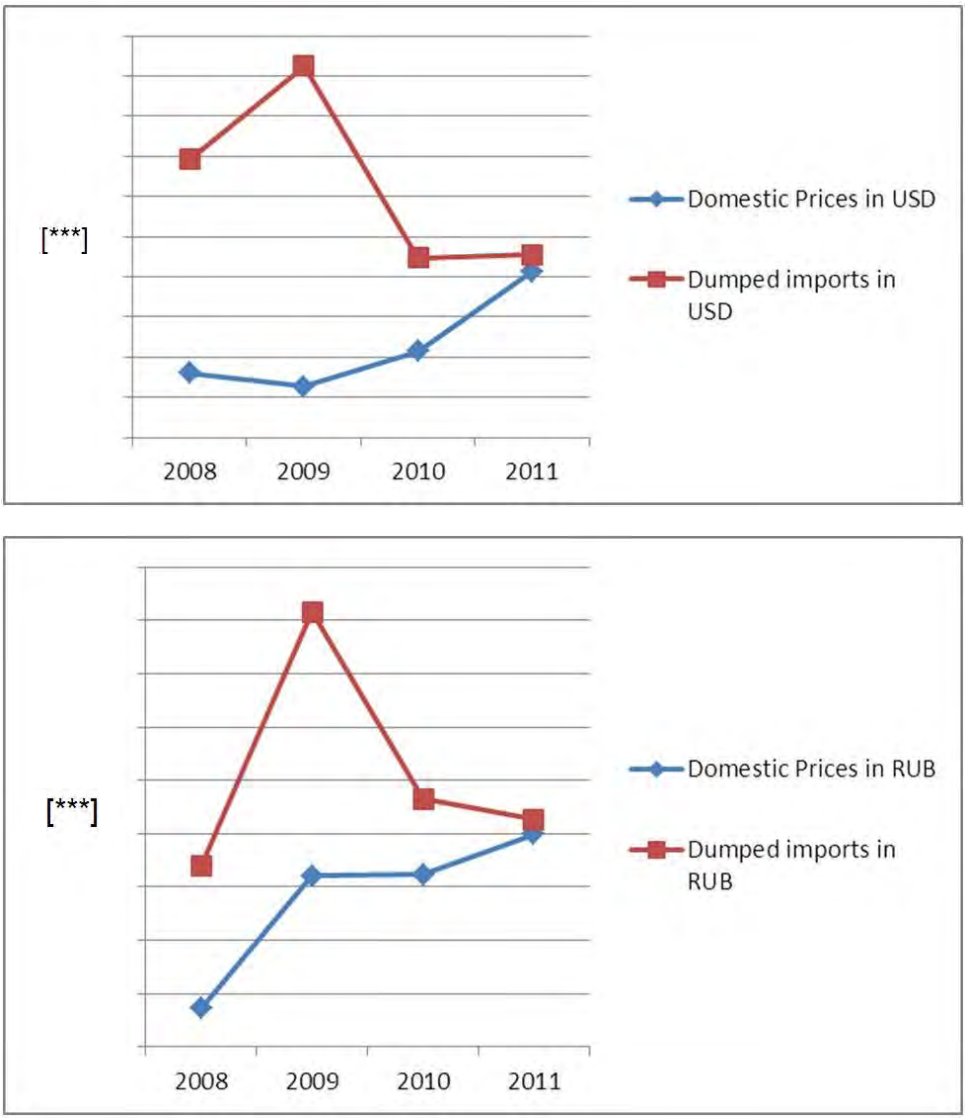
[198] Investigation Report, section 5.2.

[199] European Union's second written submission, para. 112.

[200] Dumped import prices in USD increased by 9.3% from 2008 to 2009 but decreased in 2010 by 17.6% compared with 2009, rebounding slightly in 2011 by 0.4% compared with 2010, and eventually converged with the steadily increasing domestic prices in 2011.

[201] The customs tariff for the product concerned increased from 10% to 25% as of 1 January 2009 for reasons unrelated to the investigation at issue here.

Figure 1: Trends of domestic prices and dumped import prices (in USD and RUB)



Source: European Union's second written submission (BCI).

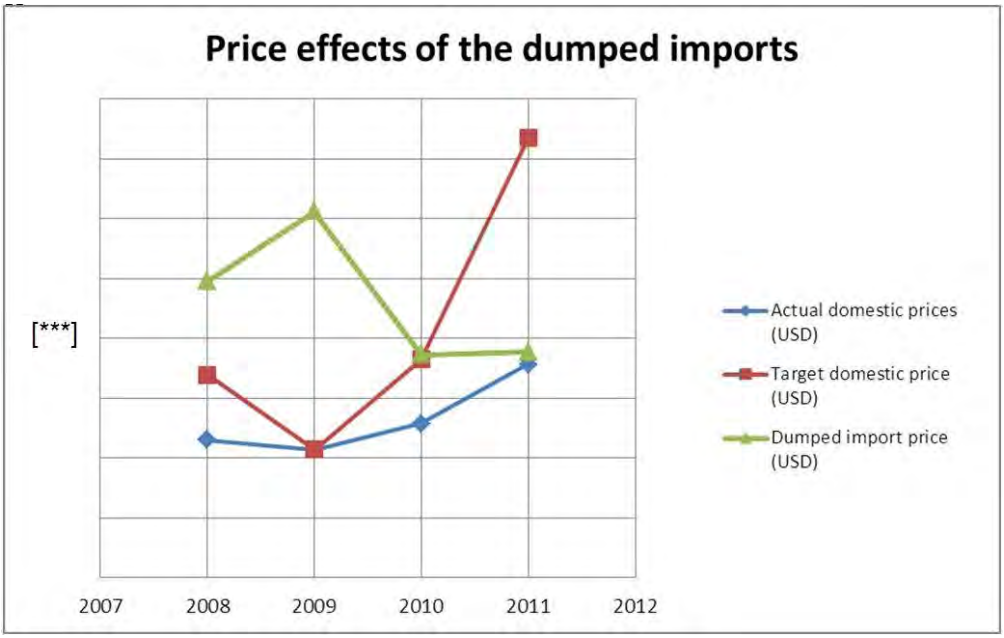
7.81. In its Investigation Report, the DIMD relied on the downward pressure of dumped imports on prices in considering price suppression. The DIMD focused on the POI and 2011:

> During the period of investigation, the domestic industry of the CU incurred losses as a result of downward pressure on prices which **[***]**. The situation deteriorated significantly in 2011.[202]

We consider that in the light of the downward pressure exercised by dumped imports on prices at least since 2009, the long term price trends do not, as the European Union argues, call into question the "explanatory force" of dumped imports for price suppression. To the contrary, the long term price trends corroborate the DIMD's counterfactual analysis, as the following graph shows.

[202] Emphasis added.

Figure 2: Price effects of the dumped imports



Source: Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 5.2.

7.82. We now turn to the European Union's argument that there actually was no price suppression during the POI. In support of this argument, the European Union relies on a calculation it made on the basis of data it first obtained during the present proceedings.[203] According to the European Union, this calculation shows that, using the same rate of return of **[***]** that the DIMD relied upon to construct a target domestic price in RUB and comparing that price with the import prices converted to RUB, there was no price suppression during the POI.[204] The Russian Federation argues, *inter alia*, that the European Union's argument is flawed because its calculation is based on an incorrect conversion of the import prices from USD to RUB.[205] According to the Russian Federation, when converting import prices expressed in USD to RUB, the European Union divided import prices expressed in USD by the exchange rate of USD to RUB (e.g. 1 USD equals 29.366 RUB for 2011) instead of multiplying by that exchange rate. The Russian Federation submits its own calculation that shows that there was price suppression based on the same data but making the proper conversion, contrary to the European Union's argument.[206] Having examined the calculations in the parties' exhibits EU-32 and RUS-31, we conclude, as the Russian Federation asserted, that the European Union's calculation was based on an incorrect conversion of import prices from USD to RUB, which materially affected the result. Accordingly, we find that the European Union has not established that there was no price suppression during the POI.[207]

[203] See European Union's response to Panel question No. 67, para. 20; and Detailed undercutting and injury calculations, (Exhibit EU-32) (BCI).

[204] We note that we have doubts about the European Union's argument in this regard. The European Union has not explained why its calculation methodology is preferable to that relied upon by the DIMD, much less demonstrated that it is required. However, as we find that the European Union's argument is based on an erroneous calculation, we find it unnecessary to consider this point further.

[205] The Russian Federation also argues that the European Union used incorrect data in Exhibit RUS-30, and the European Union relied on the margin of price underselling while ignoring the difference between actual and estimated domestic prices. (See Russian Federation's comments on the response of the European Union to the Panel question No. 67, paras. 19-22). We rejected the European Union's argument because it is premised on an incorrect calculation which affected the result. Therefore, we do not need to address these arguments.

[206] See Russia's comments on the response of the European Union to the Panel question No. 67, para. 23; and Calculations with respect to price suppression, (Exhibit RUS-31) (BCI).

[207] In the light of this conclusion, we do not consider it necessary to consider the other arguments of the Russian Federation in paragraphs 19-22 of its comments on the European Union's response to Panel question No. 67.

7.4.2.4.2 Whether the market would accept additional domestic price increases

7.83. The European Union argues that the DIMD failed to examine the reasons for the increase in the domestic industry's costs[208] and the likelihood that the market would accept additional domestic price increases.[209] The European Union argues that the DIMD should have considered this issue for three reasons:

a. domestic prices increased between 2008 and 2009 and again between 2010 and 2011;

b. there were "quality issues" with Sollers' LCVs that would have limited any price increases; and

c. there was a significant increase in the domestic industry's cost of production due to the increasing cost of raw materials.[210]

7.84. The Russian Federation argues that there was a margin for domestic price increases given that the dumped import prices were higher than domestic prices.[211] The Russian Federation also argues that because the DIMD constructed a target domestic price in the absence of dumped imports, it did not have an additional obligation to analyse whether the market would or could absorb price increases.[212] According to the Russian Federation, an investigating authority is only required to examine this issue if it is presented with evidence that calls into question the "explanatory force" of the subject imports for the significant price suppression. The Russian Federation asserts that this was not the case here.[213]

7.85. We recall that the DIMD's price suppression analysis was based on the counterfactual that the domestic industry would achieve and maintain a certain level of prices and consequently rate of return under normal market conditions in the absence of dumped imports. The Investigation Report does not contain any indication that the DIMD considered whether the market would accept additional price increases by the domestic industry. The notion that there was a margin for domestic prices to increase is not a part of the analysis set out by the DIMD in the Investigation Report. For this reason, we view the Russian Federation's argument that there was a margin for domestic price increases as *post hoc* rationalization and do not rely on this assertion.

7.86. Turning to the question of whether the DIMD was obliged to examine whether the market would have accepted additional price increases in the present case, we note that the parties do not disagree that where there is evidence before the investigating authority that calls into question the ability of the market to absorb price increases, the investigating authority should consider this question.[214] Article 3.2 does not explicitly require an investigating authority to address whether the market will continue to accept additional price increases as part of its consideration of price suppression. Nevertheless, the term "which otherwise would have occurred" in Article 3.2 suggests that an investigating authority should at least consider whether the market would accept price increases in the absence of dumped imports, when faced with relevant evidence suggesting it would not. If the market would not accept price increases in the absence of dumped imports, it seems unlikely that price increases "otherwise would have occurred". It follows in that situation

[208] The European Union argues that "[w]hilst the [DIMD] did not explain why Sollers' costs increased, evidence on the record shows that the Fiat Ducato presented several problems and several deficient parts had to be replaced". (European Union's first written submission, para. 154). The European Union also argues that the significant rise in the cost of production was "due to the raising costs of raw materials [sic]". (European Union's second written submission, para. 113). To the extent that the European Union argues that the rise in domestic costs of production was due to the alleged "quality problems", we refer to our analysis in paragraph 7.89 below, where we conclude that the evidence before the DIMD did not demonstrate the existence of "quality problems" that would affect the cost of production or the willingness of the market to accept further price increases.

[209] European Union's first written submission, paras. 153 and 154; response to Panel question No. 30, para. 99.

[210] European Union's first written submission, paras. 153 and 154; second written submission, paras. 113-116.

[211] Russian Federation's first written submission, para. 189.

[212] Russian Federation's second written submission, para. 125.

[213] Russian Federation's second written submission, paras. 120 and 121.

[214] Russian Federation's response to Panel question No. 24, para. 65; and European Union's response to Panel question No. 30, paras. 101 and 102.

that the dumped imports could not be found to have the effect of suppressing prices − that is, preventing price increases "which otherwise would have occurred" − as such price increases would not have occurred regardless of the effect of dumped imports.

7.87. As a preliminary matter, we observe that the record does not indicate that interested parties questioned the ability of the market to absorb additional price increases, made arguments, or presented evidence in this regard, before the DIMD. The European Union's argument is based on the fact that prices had already increased in the domestic market, and refers to aspects of the record evidence it categorizes in the present proceedings as evidence calling into question the ability of the market to absorb additional price increases. For example, Daimler and Peugeot Citroen Automobiles (PCA) relied on alleged quality problems in support of their argument that the injury to the domestic industry was self-inflicted.[215] Interested parties, including Sollers, PCA, and Association of Turkish Exporters from the Automotive Industry referred to trends in the cost of production in their submissions, but did not make any argument concerning the ability of the market to absorb further price increases.[216] Against this background, we will consider whether, in the absence of any clearly raised arguments concerning the ability of the market to accept additional price increase, the evidence before the DIMD was such that an objective and unbiased investigating authority should nonetheless have considered this issue.

7.88. Concerning the first basis of the European Union's argument, we consider that the fact that domestic prices increased during the period of consideration cannot in itself call into question the market's ability to absorb additional price increases in the future. There must be evidence that the price increases have resulted in prices having reached a level where the market will not accept any further increases. In the present case, there is no such evidence on the record. Indeed, the European Union does not even argue that the market would not accept price increases beyond the level they were at during the period considered.

7.89. Concerning the alleged quality problems, the European Union refers to Daimler's allegation during the investigation that there had been quality problems with Sollers' Fiat Ducato. According to the European Union, this "raised doubts that consumers would be willing to continue paying ever higher prices for Sollers' LCVs".[217] However, the only evidence of the alleged quality problems on the record is a single article from Auto Review Magazine reporting on the testing of one Fiat Ducato LCV on a cobblestone road.[218] Given the limited sample in Auto Review's testing of Sollers' LCVs, we consider that this magazine article cannot suffice to demonstrate the existence of quality problems with Sollers' product of a degree that would support the conclusion DIMD acted unreasonably in failing to consider whether such problems affected the likelihood that the market would accept further price increases.

7.90. Concerning the increasing costs of production, we note that producers will normally seek to pass increased costs of production on to consumers in order to maintain their profit margins. There is no evidence and no arguments on the record to indicate that the rising cost of production could not have been passed on, in the form of increased prices, to consumers in the absence of dumped imports. Accordingly, we consider that the increasing costs of production cannot call into question the market's ability to accept additional price increases.

7.91. For the above reasons, we conclude that the evidence on the record of the present case was not sufficient to require an objective and unbiased investigating authority to consider whether the market would absorb price increases beyond those that actually took place in the context of its consideration of price suppression.

[215] Comments by Daimler and Mercedes-Benz RUS on the Report of 28 March 2013, (Exhibit EU-19), p. 6 and Comments by Daimler of 16 March 2012 regarding the Public Hearing, (Exhibit EU-8), p. 8 and attachment 7: Auto Review Magazine testing of Fiat Ducato and Gazelle; Minutes of the Public Hearing of 22 March 2012, (Exhibit EU-9), p. 28; and PCA's Injury Submission of 6 April 2012 following the Public Hearing of 22 March 2012, (Exhibit EU-13), p. 15.

[216] PCA's Submission of 11 April 2013, (Exhibit EU-20), p. 4, point 1.3(e).

[217] European Union's second written submission, para. 116.

[218] Comments by Daimler and Mercedes-Benz RUS on the Report of 28 March 2013, (Exhibit EU-19), p. 6; Comments by Daimler of 16 March 2012 regarding the Public Hearing, (Exhibit EU-8), p. 8 and attachment 7: Auto Review Magazine testing of Fiat Ducato and Gazelle; and Minutes of the Public Hearing of 22 March 2012, (Exhibit EU-9), p. 28.

7.4.2.4.3 Domestic competition

7.92. The European Union argues that the DIMD failed to examine whether any price suppression was the effect of competitive pressure exerted by the other domestic producer, GAZ.[219] The Russian Federation argues that the DIMD considered competitive pressure from GAZ as part of its non-attribution analysis in the context of Article 3.5.[220] There are two issues before us:

a. whether the Russian Federation was required to consider any alleged competitive pressures exerted by GAZ in the context of its consideration of price suppression; and if so,

b. whether the DIMD's discussion of competition from GAZ in its non-attribution analysis is sufficient to fulfil that obligation.

7.93. Article 3.2 requires that an investigating authority consider whether any price suppression was the effect of dumped imports. This analysis does not duplicate the causation analysis required by Article 3.5, which has a broader scope[221] leading to a specific determination.[222] At the same time, where there is evidence that any observed price suppression is the effect of factors other than dumped imports, an investigating authority is required to consider that evidence.[223]

7.94. In our view, given its broader scope, it seems reasonable that the Article 3.5 causation analysis may, in the circumstances of a particular case, encompass elements that are relevant to the consideration called for under Article 3.2 of whether the effect of the dumped imports is to prevent price increases which otherwise would have occurred. If an investigating authority considers such elements in its causation analysis, it seems to us an unnecessary formality to require that this consideration be duplicated in a separate consideration of the price suppressive effect of dumped imports under Article 3.2. We recall in this regard that no determination is required under Article 3.2.[224]

7.95. In the present case, the DIMD considered competition from GAZ as an "other factor" causing injury. The Investigation Report states that:

> Based on the information obtained by the Department in the course of the investigation, the share of light commercial vehicles manufactured by OOO "Avtozavod "GAZ" on the CU market in the period between 2008 and 2010 was **[***]**. In 2011, the increase in share of this producer's Product up **[***]** was observed.
>
> However, this indicator is significantly less than the share of the dumped imports on the CU market. Besides, as mentioned in the Report, the deterioration of the financial state of the domestic industry of the CU caused by price suppression was observed starting from 2010, when the share of OOO "Avtozavod "GAZ" was insignificant. Therefore, OOO "Avtozavod "GAZ", starting from 2011, competed with the domestic

[219] European Union's first written submission, para. 155.
[220] Russian Federation's first written submission, para. 190.
[221] In *China – GOES* the Appellate Body observed that:
> Interpreting [Article 3.2] as requiring a consideration of the explanatory force of subject imports for significant depression and suppression of domestic prices does not result in duplicating the causation analysis under [Article 3.5]. Rather, the analysis under Article 3.5 concerns the causal relationship between subject imports and *injury to the domestic industry*, and covers a broader scope of elements than those relevant to an analysis under [Article 3.2].

Appellate Body Report, *China – GOES*, para. 161 (emphasis original)
[222] Under Article 3.2, an investigating authority is required to *consider* the explanatory force of dumped imports on price suppression; under Article 3.5 the investigating authority is required to *demonstrate* that the dumped imports cause material injury through, *inter alia*, price effects. Having done so, Article 3.5 further requires the investigating authority to ensure that the injuries caused by other factors are not attributed to the dumped imports.
[223] Appellate Body Report, *China – GOES*, para. 152.
[224] See Panel Report, *Korea – Certain Paper*, para. 7.253. See also Appellate Body Report, *China – GOES*, para. 151.

> industry of the CU; however, this factor was not determining in causing the material injury to the domestic industry of the CU.[225]

7.96. In the context of its causation/non-attribution analysis, the DIMD considered the relationship between price suppression, that is, the failure of prices to increase as would have been expected in the absence of dumped imports, and competition from GAZ. In particular, the DIMD observed that there was no temporal correlation between injury resulting from price suppression and the competition from GAZ. The DIMD stated in this regard that "the deterioration of the financial state of the domestic industry of the CU caused by price suppression was observed starting from 2010, when the share of OOO 'Avtozavod 'GAZ' was insignificant".[226] Given that Article 3.2 only requires the investigating authority to consider the effect of the dumped imports on domestic prices and significant price suppression, we conclude that, to the extent consideration of whether competition from GAZ had "explanatory force" for price suppression was necessary for the consideration of price suppression under Article 3.2, the DIMD undertook the necessary consideration in the context of its causation/non-attribution analysis.

7.97. For this reason, we find that the European Union has not demonstrated that the DIMD acted inconsistently with Article 3.2 by failing to consider the effect on prices of competitive pressure from domestic producer GAZ.

7.4.2.4.4 The change in the level of the applicable customs tariff

7.98. The European Union argues that in assessing the development of import prices, the DIMD failed to examine the relevance of the 2009 increase in customs duties on imported LCVs from 10% to 25%.[227] According to the European Union, the DIMD identified a "sudden drop" in import prices between 2009 and 2010; this drop was entirely due to the increase in customs duties in 2009. The European Union asserts that the failure of the DIMD to give due account to the impact of the customs duty increase on import prices vitiated the objectivity of the price suppression analysis.[228] The Russian Federation argues that the DIMD provided, in table 3.4 of the Investigation Report, information on import prices both including and excluding customs duties, and that this shows that import prices dropped in 2010 irrespective of whether customs duties were included in those prices or not.[229]

7.99. In table 5.2.2 of the Investigation Report, the DIMD set out data on dumped import prices inclusive of customs duties, and compared it with the actual domestic prices (on an ex works basis[230]) and the target domestic prices. This section does not contain any discussion on the impact of the 2009 increase in the customs duty rate on dumped import prices. However, the DIMD noted in section 3.1 of the Investigation Report, that:

> Import duties under FEACN codes of Russia, applied to deliveries of light commercial vehicles for the period from 1 January 2007 to 31 December 2008, amounted to 10% of the customs value. As regards supplies of light commercial vehicles to the territory of the Russian Federation during the period from 1 January 2009 to 31 December 2009 under codes 8704 21 310 0 and 8704 21 910 0 FEACN CU, an import duty of 25% of the customs value was applied. During the period from 1 January 2010 to 22 August 2012 the rate of import duty on light commercial vehicles imported into the Customs Union under the aforementioned codes FEACN CU codes amounted to 25% of the customs value.[231]

Moreover, in section 3.4 of the Investigation Report, the DIMD did set out the prices of the dumped import both inclusive and exclusive of customs duties.

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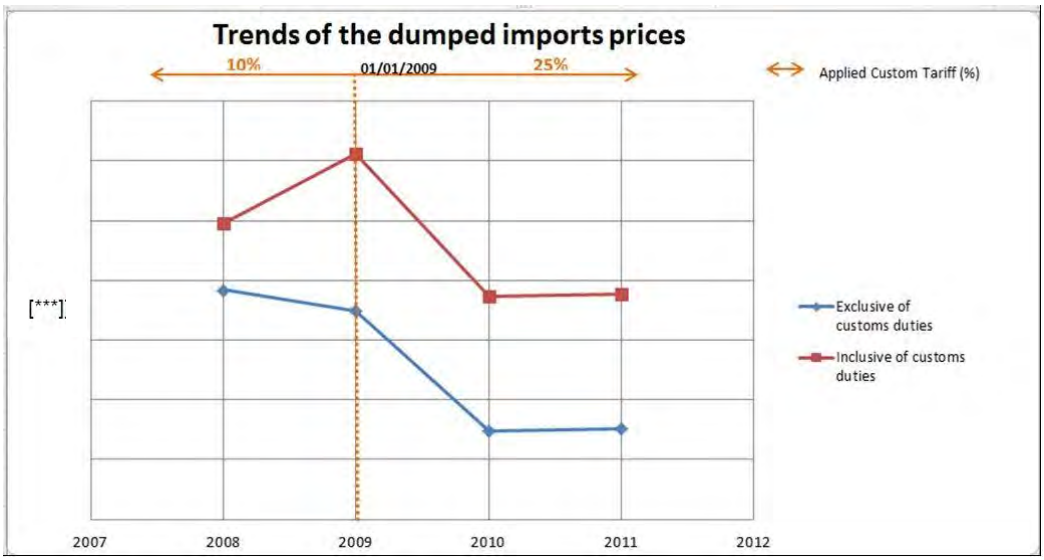
[225] Investigation Report, section 5.3.2. (emphasis added)
[226] Emphasis added.
[227] European Union's response to Panel question No. 28, para. 95.
[228] European Union's response to Panel question No. 28, para. 95.
[229] Russian Federation's second written submission, para. 87.
[230] An *ex works* price is one where the seller makes goods available to the buyer at the seller's factory, and the buyer is responsible for paying for them to be transported to where they are needed. (See International Chamber of Commerce, *Incoterms® 2010 English Edition*, ICC Product No. 715E (Paris: ICC Publications, 2010)).
[231] Investigation Report, section 3.1.

7.100. The increase in the customs duty took effect on 1 January 2009. We note that the customs duty rate remained at the increased level (25%) throughout the remainder of the period of consideration and the POI − that is, from 1 January 2009 to 31 December 2011. Because the dumped import prices in 2009 and 2010 both included the same 25% rate of customs duties, the sudden drop in dumped import prices from 2009 to 2010 could not have been, as the European Union asserts, due to the increase in the customs duty. To the contrary, as the graph below shows, the level of customs duty played no role in this sudden drop. We therefore conclude that the European Union has failed to demonstrate that the increase in customs duties on imported LCVs had any effect on the comparability of prices or the consideration of the explanatory effect of dumped imports for price suppression.

Figure 3: trends of the prices of dumped imports



Source: Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 3.4.

Accordingly, we find that the European Union's argument is incorrect as a matter of fact.

7.4.2.5 "To a significant degree"

7.101. The European Union argues that the DIMD did not demonstrate that the alleged price suppression was "to a significant degree", because it failed to compare the target domestic prices and the actual prices of the domestic like product, and did not consider the gap between those prices.

7.102. Article 3.2 requires the investigating authority to consider "whether the effect of the dumped imports is to prevent price increases, which otherwise would have occurred, to a significant degree". A straightforward comparison of the constructed target domestic price that would have been achieved in the absence of dumped imports with the actual domestic prices would provide a basis for an investigating authority to consider whether the difference between those prices suggested that there was significant price suppression. We recall, however, that Article 3.2 requires consideration of whether the effect of dumped imports is significant price suppression, but no conclusion to that effect is necessary for the analysis of whether dumped imports cause material injury to proceed. Moreover, Article 3.2 does not set out any methodological guidance on how to consider price suppression, much less on how to consider whether any price suppression was significant. In this light, there is no basis for us to conclude that Article 3.2 requires a comparison between target domestic prices in the absence of dumped imports and the actual prices of the domestic like product in a market including dumped imports. Rather, we will review what DIMD actually did and said with respect to the significance of price suppression in the Investigation Report, and evaluate whether its consideration was that of a reasonable and unbiased investigating authority, on the basis of the facts and arguments that were before the DIMD.

7.103. The DIMD set out the following information in table 5.2.2 for each year of the period considered, and for the two half-year periods comprising the POI:

a. Weighted average domestic costs of production.

b. Actual weighted average domestic prices.

c. Actual rate of return of the domestic industry.

d. Actual profit/loss of the domestic industry.

e. Benchmark rate of return (2009 rate of return).

f. Target domestic prices.

g. Target profit/loss of the domestic industry.

h. Difference between target profit/loss and actual profit/loss (g-d).

i. Dumped import prices.

j. Difference between actual domestic prices and dumped import prices (b-i).

k. Difference between target domestic prices and dumped import prices (f-i).

l. Difference between target domestic prices and dumped import prices as a percentage of target domestic price ([f-i]/f).

The DIMD stated:

> The results of calculations presented above show that the dumped imports significantly prevented the growth of prices for the like Product produced by the domestic industry in the CU. The enterprise of the domestic industry of the CU was forced to keep prices down regardless of the increase in the production cost of like Product. Starting from the 1st half of 2011, the actual import prices were lower than the prices of like Product produced by enterprise belonging to the domestic industry of the CU, which may have occurred in the absence of dumped imports. During the period of investigation, the domestic industry of the CU incurred losses as a result of downward pressure on prices which **[***]**. The situation deteriorated significantly in 2011.
>
> Therefore, the prices of the dumped imports had a significant adverse effect on the prices and profits at the sales of like Product on the territory of the Customs Union, thus significantly suppressing the prices.[232]

7.104. The DIMD did not explicitly compare the actual domestic prices and the constructed target domestic prices. However, table 5.2.2 of the Investigation Report sets out both the actual and target domestic prices. The difference between these prices is evident on the face of the table. Starting from the second half of the POI and in 2011, the difference was larger than at any previous point:

Table 5: Actual and target domestic prices

Indicator	Unit	2008	2009	2010	POI 1st half	POI 2nd half	2011
Actual domestic prices	USD	[***]	[***]	[***]	[***]	[***]	[***]
Target domestic prices	USD	[***]	[***]	[***]	[***]	[***]	[***]

Source: Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), table 5.2.2.

[232] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 5.2.

Nothing in Article 3.2 requires an investigating authority specifically to compare actual and target domestic prices in considering whether the effect of dumped imports was price suppression to a significant degree. It is for the European Union, as the complaining party in this dispute, to demonstrate that the DIMD did not consider evidence that was self-evidently before it, or that its consideration of that evidence was biased or otherwise lacked objectivity. The European Union has not done so in this case; it merely contends that a comparison of actual and target domestic prices was necessary. There is no basis for us to draw the conclusion that, having set out the relevant data in the Investigation Report, the DIMD did not in fact consider it, including the self-evident fact that the actual domestic prices were consistently below the target domestic prices, apart from 2009, the benchmark year.

7.105. Moreover, the DIMD did compare the actual domestic prices and dumped import prices, and the target domestic prices and the dumped import prices. The DIMD also considered the difference between the total profit/loss actually reported by the domestic industry, and that which would have occurred in the absence of dumped imports during the POI. The DIMD then concluded that "dumped imports significantly prevented the growth of prices". In our view, it is beyond question that the DIMD did, in fact, consider whether the effect of dumped imports is significant price suppression, and in fact ultimately concluded that this was the case, taking account of the effect of the dumped imports on the prices of the domestic like product and the profits of the domestic industry.

7.106. Finally we note that the European Union also argues that, because dumped import prices were consistently above the actual domestic prices, any price suppression cannot be significant.[233] As discussed above in paragraph 7.77, the absence of price undercutting does not necessarily preclude a finding of price suppression. For the same reason, we consider that the absence of price undercutting does not demonstrate that price suppression is not "to a significant degree".

7.107. For the reasons above, we conclude that the European Union has failed to establish that the DIMD did not demonstrate that the alleged price suppression was "to a significant degree" because it did not compare the target domestic prices and the actual prices for the domestic like product.

7.4.3 Conclusion

7.108. For all the reasons set out above, we conclude that:

a. the DIMD acted inconsistently with Articles 3.1 and 3.2 by failing to take into account the impact of the financial crisis in determining the appropriate rate of return in its consideration of price suppression;

b. the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.2 because the DIMD "mixed up" data expressed in USD and RUB without any explanation in its consideration of price suppression;

c. the European Union has not established that the DIMD's consideration of whether the subject imports have "explanatory force" for the occurrence of price suppression of domestic prices was inconsistent with Articles 3.1 and 3.2; and

d. the European Union has not established that the DIMD did not demonstrate that the alleged price suppression was "to a significant degree" because the DIMD did not compare the estimated prices and the actual prices for the domestic like product.

7.5 State of the domestic industry

7.5.1 Introduction

7.109. The European Union claims that the DIMD's examination of the impact of the dumped imports on the state of the domestic industry does not constitute an objective examination based on positive evidence. Specifically, the European Union alleges that the DIMD failed to:

[233] European Union's first written submission, para. 158.

a. base its evaluation of the injury factors on positive evidence, as evidenced by certain discrepancies between data in the Investigation Report and in the Application and/or Questionnaire response of Sollers;

b. make a proper evaluation of the injury factors in context;

c. consider certain facts and arguments on the record; and

d. examine all relevant factors, including those explicitly listed in Article 3.4.

7.110. The Russian Federation argues that, in respect of certain of its claims, the European Union fails to make a *prima facie* case. The Russian Federation further argues that the DIMD's examination of the state of the domestic industry was internally consistent and properly took into account all facts and arguments on the record relating to the state of the domestic industry, and thus constituted an objective examination of positive evidence.

7.5.2 Evaluation by the Panel

7.5.2.1 Relevant provisions

7.111. Article 3.1 is set out in paragraph 7.30 above. Article 3.4 provides:

> The examination of the impact of the 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, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Article 3.4 requires that the injury examination shall include an evaluation of all relevant economic factors, including each of the fifteen listed in that provision.[234] An "evaluation" of each of the factors in Article 3.4 requires a process of analysis and assessment of the role, relevance and relative weight of each factor in the particular investigation. Where an investigating authority concludes that a particular factor listed in Article 3.4 is not relevant, this conclusion must be explained.[235]

7.5.2.2 Data discrepancies

7.112. The European Union identifies the following discrepancies in data that was before the DIMD:

a. data in the Investigation Report concerning profit/profitability do not match those in Sollers' Questionnaire response; and

b. data in the Investigation Report concerning inventories do not match those in the Application.[236]

The European Union further argues that the Russian Federation's explanations in the present proceedings are not sufficient to clarify the discrepancies.[237]

7.113. The Russian Federation does not dispute the existence of the data discrepancies identified by the European Union. The Russian Federation argues that:

[234] Appellate Body Report, *Thailand – H-Beams*, para. 125.
[235] Panel Report, *EC – Bed Linen (Article 21.5 –India)*, para. 6.162.
[236] European Union's first written submission, para. 192.
[237] European Union's second written submission, para. 127; opening statement at the first meeting of the Panel, para. 50.

a. discrepancies in data do not, on their own, establish a *prima facie* case of violation of Articles 3.1 and 3.4[238]; and

b. the observed discrepancies can be explained in the light of the sources of the data in question.[239]

7.5.2.2.1 Profit/profitability

7.114. The European Union argues that:

a. data in the Investigation Report concerning profit/profitability do not match those in the Questionnaire response[240]; and

b. developments based on the data in the Investigation Report and Sollers' Questionnaire response show notable unexplained differences.[241]

7.115. In our view, as a general matter, discrepancies between two sets of data do not in themselves bring into question the quality of the data or demonstrate the relevance of the existence of the discrepancy to the determinations that follow; mere discrepancy does not mean that the data sets are not "positive evidence"[242] or that an evaluation based on such data is not objective. In the same vein, discrepancies in data sets on the record or different trends observed in the different data sets on the record do not, in themselves, bring into question the reasonableness or the objectivity of the evaluation conducted by an investigating authority under Article 3.4. Indeed, such discrepancies often arise in anti-dumping investigations. This is because during an anti-dumping investigation, data are submitted with the initial application, and further data are collected from questionnaire responses and other sources. Data may be verified, revised, corrected or supplemented before being considered in the decision-making process and relied upon in the final determination. Where data in questionnaire responses are verified and corrected before being evaluated in the final determination, the investigating authority is certainly entitled to rely on the verified data in its evaluation. To demonstrate that a discrepancy in data vitiates the cogency of the evidence or the objectivity of the analysis, a complainant must demonstrate more than the mere existence of a discrepancy. It must demonstrate that the discrepancy had consequences in terms of the analysis and conclusions: for example, that different data from that considered and relied upon was not only better, but that the discrepancy was so meaningful as to bring into question the reasonableness or objectivity of the evaluation required under Article 3.4.

7.116. On the facts of this case, the European Union has identified discrepancies between the data supplied by Sollers in its Questionnaire response, and the data relied on by the DIMD in its Investigation Report. However, the European Union has not demonstrated in what way any identified discrepancy brings into question the probative value of the evidence actually relied upon by the DIMD, or the reasonableness and objectivity of the determination based on that evidence. We note that the Questionnaire response of Sollers was submitted to the DIMD on 30 March 2012, and was updated and corrected on at least two occasions during the investigation, upon request from the DIMD.[243] Therefore, discrepancies between the data in these documents and that in the

[238] Russian Federation's first written submission, para. 204; see also, paras. 206, 213, and 214.

[239] Russian Federation's first written submission, paras. 206, 207, 211, and 212; second written submission, paras. 137-140.

[240] European Union's first written submission, paras. 193-204.

[241] European Union's opening statement at the second meeting of the Panel, para. 44.

[242] We recall that "positive evidence" is:

> [E]vidence that is relevant and pertinent with respect to the issue to be decided, and that has the characteristics of being inherently reliable and creditworthy. Under the positive evidence criterion of Article 3.1, the question whether the information at issue constitutes "positive evidence" – i.e., is relevant, pertinent, reliable, and creditworthy – is assessed with respect to the particular issue at stake and the particular circumstances of a given case.

Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.213 (citing Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 164 and 165)

[243] The Questionnaire response was submitted by Sollers on 3 March 2012 and subsequently updated on 31 January of 2013 and on 13 February of 2013. (See Russian Federation's second written submission, fn 221). See also Sollers' Questionnaire response, 3 March 2012, (Exhibit EU-3); and Soller's Updated Questionnaire response, 31 January 2013, (Exhibits RUS-3 and EU-4) (exhibited twice).

Investigation Report are not surprising and are not in themselves sufficient to prove that the DIMD failed to base its evaluation of profit/profitability on positive evidence. We stress that, other than referring to the discrepancies, the European Union does not even attempt to call into question the relevance, pertinence or quality of the aggregated profit/profitability data that the DIMD actually relied upon or the reasonableness and objectivity of the evaluation of that data.[244]

7.117. Accordingly, we find that the European Union has failed to demonstrate that the DIMD's evaluation of profit/profitability was not based on an objective examination of positive evidence before it and thus has not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 in this regard.

7.5.2.2.2 Inventories

7.118. The European Union argues that:

a. data in the Investigation Report concerning inventories do not match those in the Application[245]; and

b. by not taking into account the inventories of Turin Auto, an LCV dealer related to Sollers, the DIMD relied on a partial picture of the domestic industry's inventories.[246]

7.119. The Russian Federation confirmed that the inventory data in the Investigation Report pertained to Sollers only.[247] However, the Russian Federation argues, the European Union failed to establish a *prima facie* case by merely pointing out the discrepancies.[248] The Russian Federation further argues that Article 3.4 requires an investigating authority to evaluate inventories, but does not provide any guidance on how this is to be done. The Russian Federation contends that the DIMD provided an evaluation of inventory data of Sollers in its Investigation Report, and thus complied with this aspect of Article 3.4.[249]

7.120. In our view, with regard to the discrepancies between the data in the Application and the Investigation Report, as discussed above, the mere existence of discrepancies between the data in the Application and that ultimately relied upon by the investigating authority in its determination does not, without more, establish that the DIMD acted inconsistently with Articles 3.1 and 3.4. We note in particular that the purpose of an application is to provide evidence to allow an investigating authority to decide whether initiation of an investigation is warranted. It is generally understood that the evidentiary standard for initiation is lower than for a final determination.[250] After the initiation, an investigating authority is required to investigate and gather evidence relevant to all aspects of the analysis and determinations to be made, and then to consider, examine, and evaluate that entire body of evidence in the light of the arguments made by interested parties in making its determination of injury. Discrepancies between the evidence in an application, or in questionnaire responses, and the evidence on which a determination of injury is based are to be expected, and cannot, standing alone, call into question the determination of injury of an investigating authority.

[244] While it may be true that there was little that the European Union could do to advance its claim in this case other than pointing to the discrepancies before receipt of the Russian Federation's first written submission and accompanying exhibits, given it did not have access to the confidential data and analysis in the Investigation Report, that does not relieve it of its burden of proof, particularly once it did have relevant information available to it. The European Union nevertheless raises the concern that production of the confidential version of the Report and the subsequent acceptance by a panel in a WTO dispute, risks opening the door for WTO Members to be able to adjust the confidential version of the Investigation Report in light of the arguments made by the complaining party in the dispute. (European Union's second written submission, para. 4).

[245] European Union's first written submission, paras. 200-204.

[246] European Union's second written submission, para. 130; response to Panel question No. 45, para. 141.

[247] Russian Federation's response to the European Union's question No. 7, para. 12; and Investigation Report, fn 6 (indicating that the source for information on the changes in stocks was "questionnaire data from OOO Sollers-Elabuga"). See also Russian Federation's first written submission, para. 211.

[248] Russian Federation's first written submission, para. 213.

[249] Russian Federation's second written submission, paras. 139-142.

[250] See, for example, Panel Reports, *US – Softwood Lumber V*, para. 7.54; and *Mexico – Steel Pipes and Tubes*, para. 7.22.

7.121. In this case, the European Union has identified discrepancies between the data in the Application and the Investigation Report. It has not, however, demonstrated how these discrepancies bring into question the data actually relied upon by the DIMD in its evaluation of the state of the domestic industry, or the objectivity and reasonableness of its evaluation of that data. Accordingly, the European Union has not demonstrated that the DIMD's evaluation of inventories was not based on an objective examination of positive evidence.

7.122. We turn next to the European Union's argument that, by not considering the inventories of Sollers' related dealer Turin Auto[251], the DIMD relied on a partial picture of inventories, and consequently, that it failed to objectively examine positive evidence of the domestic industry's inventories. We recall that Article 3.4 requires the evaluation of "all relevant economic factors and indices having a bearing on the state of the industry". One factor that is specifically set out in Article 3.4, and therefore must be evaluated, is "inventories". We further recall that Article 3 is concerned with the determination of injury; that is, "material injury to a domestic industry".[252] As a rule, the evidence to be considered and evaluated for this purpose must be evidence pertaining to the domestic industry as defined in the investigation. We find nothing in Article 3.4 that suggests to us that an investigating authority is generally required to consider the inventories of a dealer related to a domestic producer, but not itself a producer of the like product and therefore by definition not part of the domestic industry. We do not exclude the possibility that in certain circumstances, evidence pertaining to such a related trader may constitute evidence pertaining to "a relevant economic factor[]" having a bearing on the state of the industry such that an investigating authority is required to evaluate it. However, the relevance of such evidence would have to be demonstrated to the investigating authority, on the basis of the facts of the particular investigation, in order that the investigating authority can be satisfied that it relates to the domestic industry and is therefore to be considered.

7.123. In the present case, the DIMD defined the domestic industry as Sollers. The evaluation of the state of the domestic industry required by Article 3.4 therefore required the DIMD to consider the state of Sollers, including its inventories.[253] The European Union has not pointed to any evidence before the DIMD that would support the conclusion that Turin Auto's inventories were a relevant economic factor having a bearing on the state of the domestic industry producing LCVs.[254] For this reason, we conclude that the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 in not considering the inventories data of Sollers' related trader in the Investigation Report.

7.5.2.3 Failure to properly examine all relevant injury factors in a proper context

7.124. The European Union argues that the DIMD failed to examine all injury factors in a proper context in four respects. We examine each of these arguments in turn.

[251] There is no dispute that Turin Auto is a trading house related to Sollers. (See Russian Federation's response to the European Union's question No. 5, para. 10).

[252] Article 3, fn 9 to the title. (emphasis added)

[253] The panel in *Egypt – Steel Rebar* took a similar approach regarding profits. That panel concluded that an investigating authority is not required to examine "all factors affecting profits," taking the view that the text of Article 3.4 only requires an examination of the domestic industry's profits:

> [T]he text [of Article 3.4] … lists a variety of such factors and indices that are presumptively relevant to the investigation and must be examined, one of which is "profits". The text does not say … "all factors affecting profits". To us, this text means that in its evaluation of the state of the industry, an investigating authority must include an analysis of the domestic industry's profits.

Panel Report, *Egypt – Steel Rebar*, para. 7.60

[254] We further note that, in the present proceedings, the European Union has not presented any evidence or argument in support of its proposition that the inventories of Turin Auto should have been taken into account by the DIMD in its evaluation of the state of the domestic industry.

7.5.2.3.1 "End-point to end-point" comparison

7.125. The European Union argues[255] that the DIMD did not systematically undertake an "end-point to end-point"[256] analysis of the data. For this reason, the DIMD did not conduct an objective evaluation of the evidence before it. The European Union contends that the DIMD had to assess the trends by making both an end-point to end-point comparison (i.e. comparing 2011 with 2008) and a year-on-year comparison (2008-2009, 2009-2010, 2010-2011) in order to make an objective evaluation based on positive evidence.[257] The Russian Federation asserts that the DIMD did in fact conduct an end-point to end-point comparison in the narrative discussion in the Investigation Report. The Russian Federation contends that the DIMD's injury analysis should be viewed as a whole to include the tables, the narratives, and the conclusions.[258]

7.126. We recall that an investigating authority is required, pursuant to Article 3.1, to base its determination of injury on positive evidence and an objective examination of, *inter alia*, the impact of dumped imports on the domestic industry, and that Article 3.4 sets out factors to be considered in this regard. However, neither provision sets out requirements as to how an investigating authority is to conduct its examination or make its determination. One common method of analysis is to examine trends in the data concerning the Article 3.4 factors over time, in order to evaluate changes in the state of the domestic industry. In general, when examining trends in the data pertaining to the Article 3.4 factors over the period being considered, there are various options. An investigating authority may examine trends by comparing the data from the beginning of the period considered and the end of that period (end-point to end-point comparison), or by comparing data for specified intervals (for instance, on an annual, semi-annual, monthly, or other basis), or some combination of approaches. Which approach an investigating authority may choose in a particular case will depend on the nature of the particular industry it is examining and the information before it.

7.127. If an investigating authority only compares data from the last year of the period of consideration to data for the first year, without also examining changes, or trends, over the intervening period, concerns may arise about the adequacy, and ultimately, the objectivity, of the examination. This is because an end-point to end-point comparison is open to manipulation by selecting different end points. The outcome of such a comparison, in terms of the direction of any changes, will depend on the choice of the two end points.[259] An end-point to end-point comparison could also mask intervening trends and thus the developments in the data for the injury factors during the period considered. If there are such changes, these may well be relevant to consideration of both the state of the industry at the end of the period, as well as during the

[255] The European Union makes arguments concerning the DIMD's failure to make end-point to end point comparisons in two separate sections of its submissions. We consider it appropriate to analyse the European Union's arguments in the context of its claims concerning the state of the domestic industry.

In its first written submission, the European Union had addressed this argument in the section concerning the state of the domestic industry (section 5.4.3.3.1). In its second written submission, the European Union argued, in the section concerning the selection of time periods (section 3.2.2.3), that the DIMD failed to systematically make an end-point to end-point comparison of data for all of the economic indicators. (See European Union's second written submission, paras. 72-78). In response to our question, the European Union clarified that its end-point to end-point argument is made in the context of its claims under Articles 3.1 and 3.4. The European Union explained that it had also referred to this argument in the context of its claims concerning the selection of the time-periods to illustrate the significant contrast between the DIMD's use of the alleged "non-equal and non-consecutive" periods, and the objective picture that would follow from consideration of consecutive time periods of equal duration in the context of a longer-term comparison of data from 2008 to 2011. (See the European Union's response to Panel question No. 65, paras. 12 and 13). The Russian Federation argues that the European Union's end-point to end-point argument does not in any way touch upon the issue of selection of periods at the initial stage of the process of injury analysis, and is thus irrelevant to the European Union's claim concerning the selection of time-periods. (See Russian Federation's response to Panel question No. 65, para. 23). In the light of the parties' submissions, and the fact that we have rejected above the European Union's claims concerning the selection of the time-periods, we do not find it necessary to address the European Union's end-point to end-point argument in the context of its claims concerning the selection of the time-periods.

[256] In the present case, the European Union uses this term to refer to a comparison of data for injury factors in 2008 and 2011.

[257] European Union's second written submission, paras. 72-78.

[258] Russian Federation's second written submission, para. 61.

[259] Appellate Body Report, *US – Steel Safeguards*, para. 354. The Appellate Body's statement in that case was made in reference to the increase of imports. However, the same would apply by analogy in relation to the data for economic indicators in the context of the injury analysis.

period, and the impact of the dumped imports on the state of the industry over the period considered. Such concerns do not arise if the investigating authority undertakes only a year-on-year comparison of data, because in such a case, the end-point to end-point comparison is not masked, but is readily apparent in the data describing the year-on-year changes. Indeed, in the present proceeding the European Union presented its own end-point to end-point comparison based on the data in the public version of the Investigation Report.[260] It might be preferable for an investigating authority undertaking a year-on-year analysis of data also to explicitly set out the end-point to end-point changes observed, but this is not required.

7.128. We note that, in respect of some of the data it examined, the DIMD did set out an end-point to end-point comparison. In the narrative sections of the Investigation Report, the DIMD set out the data showing changes from 2008 to 2011 for labour activity, domestic production by volume and domestic sales by volume[261], and from 2009 to 2011 for domestic market share, capacity utilisation, production costs, and domestic prices.[262] For certain economic indicators such as consumption, domestic production by volume and domestic sales by volume, the DIMD made end-point to end-point comparisons between 2011 and both 2008 and 2009.

7.129. In this respect, where an investigating authority compares data for different factors on an end-point to end-point basis, but uses different starting points within the period of consideration without justification or explanation[263], concerns may arise about the sufficiency and objectivity of the examination.[264] It leaves open the possibility that the selection of the starting points may have been result-driven.[265] Nevertheless, in the absence of a specific requirement in the Anti-Dumping Agreement, we do not consider that lack of consistency in the selection of beginning or ending points in an end-point to end-point comparison in itself gives rise to an inconsistency with Articles 3.1 and 3.4. Such an inconsistency must be demonstrated by reference to the examination under Article 3.4 as a whole. Thus, the question before us is whether, on the facts of this case, the European Union has demonstrated that the fact that the DIMD used different starting points for the end-point to end-point comparisons it made in the course of its analysis resulted in a determination that a reasonable and objective investigating authority could not have made.

7.130. In support of its claim, the European Union refers to two instances in which the DIMD allegedly used different starting points "to depict the most negative picture of the developments in the domestic industry"[266]:

a. The DIMD found that the domestic industry's market share decreased by 20.1% between 2009 and 2011. However, if 2008 had been used as the starting point, the domestic industry's market share would have shown an increase of **[***]**%.

b. The DIMD found that the domestic industry's cost of production increased by 42.7% whereas domestic prices increased by only 6.4% between 2009 and 2011. However, if

[260] European Union's first written submission, fn 91; see also second written submission, para. 78. The European Union stated that "the European Union reconstructed based on the public version of the Final Report the 2008-2011 trends".

[261] Investigation Report, section 4.2.6; Russian Federation's answers to the European Union question No. 11, para. 22; and European Union's second written submission, para. 74.

[262] Investigation Report, section 4.3; European Union's second written submission, para. 75; and Russian Federation's second written submission, para. 71.

[263] The Russian Federation argues that the DIMD compared the situation in 2011 with 2008 or 2009, in light of the impact of the financial crisis. (See Russian Federation's second written submission, para. 71; and response to Panel question No. 65, paras. 33-36.). However, there is no indication in the Investigation Report that the choice of the beginning and ending points for comparison was linked to the impact of the financial crisis. Therefore, we consider the Russian Federation's arguments in this regard to be *post hoc* rationalization.

[264] We recall that the panel in *Argentina – Poultry Anti-Dumping Duties* considered that "there is a *prima facie* case that an investigating authority fails to conduct an 'objective' examination if it examines different injury factors using different periods. Such a *prima facie* case may be rebutted if the investigating authority demonstrates that the use of different periods is justifiable on the basis of objective grounds (because, for example, data for more recent periods was not available for certain injury factors)." (Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.283).

[265] Appellate Body Report, *US – Steel Safeguards*, para. 354. The Appellate Body stated that "a simple end-point-to-end-point analysis could easily be manipulated to lead to different results, depending on the choice of end points. A comparison could support either a finding of an increase or a decrease in import volumes simply by choosing different starting and ending points".

[266] European Union's second written submission, paras. 76-78.

> 2008 had been used as the starting point, the cost of production would have increased by **[***]**% while domestic prices increased by **[***]**%.

7.131. In addressing these arguments, we recall the nature of the concern we have identified with end-point to end-point comparisons: where an investigating authority compares data from the last year of a period to data for the first year without also examining intervening trends, the concern is that the analysis could be manipulated to provide different, possibly desired, results. We recall that in the present case, the DIMD examined the data from multiple perspectives, rather than relying exclusively on an end-point to end-point comparison. Indeed, the DIMD primarily relied on a year-on-year comparison in considering the data. Moreover, the DIMD's determination of material injury during the POI is primarily based on developments in the latter years of the period considered, in the light of the impact of the financial crisis (that is, post-2009).

7.132. With respect to the domestic industry's market share, it is true that, had the DIMD used 2008 as a starting point, the domestic industry's market share would have shown an increase rather than a decrease. However, the 2008-2011 comparison is only one of the different possible ways to look at the same data and does not undermine the conclusion that the domestic industry's market share decreased from 2009 to 2011 on a year-on-year basis.

7.133. With respect to the cost of production, using 2008 as the starting point of comparison results in a numerically different comparison between the increase in costs and the increase in prices from beginning to end of the period, but does not change the nature or direction of the comparison. What the European Union has presented is simply an alternative way of looking at the data. However, it has failed to demonstrate that this alternative was the only, or the necessary, way of looking at this data objectively in this case. Nor has the European Union demonstrated how failing to use 2008 as the starting point undermined the DIMD's conclusion on the basis of the data it considered, that the increase in domestic prices did not keep up with the rising cost of production. Accordingly, in the present case, based on the facts before us, we consider that the failure of the DIMD to compare the data for 2011 with 2008 in these two contexts did not undermine its evaluation of these economic indicators. We therefore find that the European Union has failed to demonstrate that the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to systematically compare data for 2011 with data for 2008 for all economic indicators in the present case.

7.5.2.3.2 Profit/profitability for the first half of 2011 and the full year 2011

7.134. The European Union argues that in table 4.2.5 of the Investigation Report the DIMD only indicated that there were "losses" in the first half of 2011 and the full year 2011, without giving actual figures for the losses. The European Union argues that this approach "breaks" the presentation of a trend in the evolution of the profit/loss.[267] The European Union contends that the mere suggestion that some undisclosed amount of "losses" would have happened during a small part of the POI is not sufficient to support a conclusion of material injury.[268] The European Union also argues that evidence in the record contradicts the DIMD's suggestion of a negative trend in the domestic industry's profits during the POI.

7.135. We note that the European Union's argument is made under the heading "failure to properly examine all injury factors in a proper context". However, the European Union in fact asserts that the DIMD failed to provide the actual figures for the losses it referred to. It is true that table 4.2.5 of the non-confidential version of the Investigation Report only indicates "losses" or "negative value" for the 1st half of 2011 and the full year 2011, without setting out the relevant figures. Indeed, this table does not set out any of the actual figures for profit or loss for any period, reporting only percentage changes and the challenged references to "losses".

[267] European Union's first written submission, paras. 218-220.
[268] European Union's second written submission, para. 135.

Table 6: profit/loss of the domestic industry (non-confidential version)

Indicator	Unit	2008	2009	2010	POI		2011
					H2 of 2010	H1 of 2011	
Profit/loss of enterprises of the domestic industry in the CU from the sale of Products in the CT CU (in relation to the same period in the preceding year, percentage)	%	-	+233.8	-17.1	+26.1	losses	losses
Change in the profitability of sales of Products in the CT CU (in relation to the same period in the preceding year, in percentage points)	pp	-	+9.4	-9.0	-6.1	negative value	negative value

Source: Public version of the Investigation Report, (Exhibits RUS-12 and EU-21) (exhibited twice).

However, the confidential version of table 4.2.5 does set out the actual figures for profit and loss, and profitability, which were treated as confidential:

Table 7: profit/loss of the domestic industry (confidential version)

Indicator	Unit	2008	2009	2010	POI		2011
					H2 of 2010	H1 of 2011	
Profit/loss of enterprise of the domestic industry of the CU from the sales of Product in the CT CU (in relation to the same period in the preceding year, percentage)	RUB million	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**
Return on sales of Product in the CT CU (in relation to the same period in the preceding year, in percentage points)	%	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**

Source: Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI).

To the extent that the European Union challenges the failure to set out in the public decision the figures for the actual profits/losses, this is not an issue under Article 3.4. It is quite clear to us that an investigating authority may examine confidential information in its evaluation of the Article 3.4 factors and indices. While there may be an issue in such a case as to whether the information in question was properly treated as confidential pursuant to Article 6.5, that issue is in no way determinative of, or even relevant to, whether the investigating authority properly examined the factors and indices at issue. In any event, the European Union has made no claim under Article 6.5 in respect of this issue in this dispute.[269] The European Union makes no other arguments as to alleged error in the DIMD's evaluation of the profit/profitability trends in its Investigation Report.

7.136. We now turn to the last argument of the European Union in this context, that evidence on the record contradicts the DIMD's finding of a negative trend in the domestic industry's profits during the POI, which we recall comprised the 2nd half of 2010 and the 1st half of 2011. The European Union argues that the fact that "profits decreased significantly in the first half of 2010, i.e. before the investigated period … contradicts the DIMD's suggestion of a negative trend in the domestic industry's profits during the investigated period".[270] The European Union does not, however, explain how the fact of a decrease in profits in the 1st half of 2010, before the POI, contradicts the finding of negative profit performance during the POI. In its second written submission, the European Union argues that **[***]**, i.e. after the end of the POI, and that if the POI is considered on a 12-month basis (by combining the profits/losses of the two half-year

[269] The European Union did make a claim under Article 6.9 concerning the DIMD's use of the terms "losses" and "negative value" in its final disclosure, which is addressed later in this Report.

[270] European Union's first written submission, para. 220.

periods), Sollers made profits. The European Union argues that this shows that by 2011, the domestic industry was still doing very well.[271]

7.137. The European Union re-organizes and recasts the data in making this argument. However, merely showing that a different way of looking at the data could support a different conclusion is not enough to demonstrate error in the investigating authority's evaluation, unless there is some reason to conclude that the proposed different approach was necessary, either as a matter of law, or because the evidence could not be objectively examined otherwise. The European Union has demonstrated neither of these. None of its arguments contradicts or otherwise calls into question the objectivity of the findings of the DIMD concerning profit/profitability, which are set out in its Investigation Report:

> 2010 saw the reduction of profit by 17% (**[***]**) in comparison with 2009. During the period of investigation – in the 2nd half of 2010 profit increased by 26.1% (**[***]**), in the 1st half of 2011 the domestic industry of the CU suffered losses which amounted to **[***]**.The overall losses in 2011 amounted to **[***]**.[272]

7.138. Accordingly, we conclude that the European Union has not established that the DIMD failed to base its evaluation on an objective examination of the evidence concerning the domestic industry's profit/profitability during the POI, that is, the 2nd half of 2010 and the 1st half of 2011.

7.5.2.3.3 Comparison between the period 2008-2009 and the period 2010-2011

7.139. The European Union argues that the DIMD split the analysis into two periods, and then compared the "abnormal" period 2008-2009, which was affected by the start-up of the domestic industry and the financial crisis, with the period 2010-2011.[273] The European Union asserts that the DIMD assumed that the exceptional positive developments in the domestic industry during 2009 could continue during 2010-2011 without more explanation, and "base[d] its conclusions on a comparison between these two time periods".[274]

7.140. The European Union does not identify where in the Investigation Report the DIMD compared the period 2008-2009 with the period 2010-2011. Nor does the European Union provide any argument as to how this alleged approach undermined the DIMD's injury analysis. As discussed earlier, the DIMD compared the data and looked at trends principally on a year-on-year basis. In addition, the DIMD also compared the data for 2011 with the data for 2008 or 2009, or both. Nothing in the Investigation Report suggests that DIMD relied on a comparison of the period 2008-2009 with the period 2010-2011.

7.141. Accordingly, we conclude that the European Union has not established as a matter of fact that the DIMD assumed that the exceptional positive developments in the domestic industry during 2009 could continue during 2010-2011 without more explanation, and "base[d] its conclusions on a comparison between these two time periods".

7.5.2.3.4 Failure to consider whether the market will accept further price increases

7.142. The European Union argues that the DIMD relied on an assumption that the market would have accepted a continuous increase in price in line with rising costs.[275]

7.143. The European Union's argument is identical to the one it makes in its price suppression analysis claims, which we addressed above in paragraph 7.91. Our finding there applies *mutadis muntandis* to the European Union's argument in this context.

7.5.2.3.5 Failure to consider certain facts and arguments on the record

7.144. The European Union argues that the DIMD failed to consider the following sets of facts and arguments relevant to the state of the domestic industry that were before it:

[271] European Union's second written submission, para. 136.
[272] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), p. 41.
[273] European Union's second written submission, para. 115.
[274] European Union's first written submission, para. 221.
[275] European Union's first written submission, para. 223.

a. the DIMD did not address interested parties' arguments that, despite a slight decrease in the domestic industry's market share during the POI, that market share remained at a very high level during the period 2010 and 2011, when compared to 2008[276];

b. the DIMD ignored information on the record concerning independent dealers' inventories when evaluating the evolution of the inventories[277]; and

c. the DIMD failed to consider Volkswagen's argument that the increase in the domestic industry's inventories was due to the termination of the licence agreement between Sollers and Fiat.[278]

7.5.2.3.5.1 Domestic industry's market share

7.145. The European Union notes that the domestic industry's market share in 2011 was above its level in 2008. The European Union argues that this is very hard to reconcile with the DIMD's conclusion that the domestic industry was suffering material injury during the POI.[279] The European Union contends that interested parties, including PCA, raised the increased market share in 2010 relative to 2008 during the course of the investigation, arguing that this increase contradicts the DIMD's finding of negative trends.[280] The European Union contends that the DIMD failed to provide a reasoned and adequate explanation addressing this evidence and argument in reaching its conclusions.[281] The Russian Federation does not comment on the relevance of the domestic industry's market share in 2011 as compared with that of 2008 to the DIMD's determination. The Russian Federation asserts that no interested party presented positive evidence that would put in question the credibility and the affirmative, objective and verifiable character of the information in questionnaires and import statistics used for the calculation of market shares.

7.146. Section 4.2 of the Investigation Report sets out the following data on the market share of the domestic industry (Sollers):

Table 8: Domestic industry's market share

Indicator	Unit	2008	2009	2010	POI		2011
					H2 of 2010	H1 of 2011	
Share of consumption accounted for by Product manufactured by the domestic industry of the CU and sold in the CT CU	%	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**	**[***]**

Source: Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI).

With regard to market share, the DIMD stated that:

> Between 2008 and 2010, the share of Product produced by the domestic industry in consumption within the CT CU increased by 37.9 percentage points (**[***]**) whereas in the period of investigation, the 2nd half of 2010 saw a decline in the share of consumption in the CT CU accounted for Product produced by the domestic industry of the CU by 8.9 percentage points (**[***]**), and by 11.5 percentage points in the 1st half of 2011 (**[***]**). In 2011, the share of consumption in the CT CU accounted for Product produced by the domestic industry in the CU was 18.1 percentage points lower than the 2010 figure.

[276] European Union's first written submission, paras. 226-230.
[277] European Union's first written submission, paras. 232 and 233.
[278] European Union's first written submission, para. 233 (referring to Volkswagen's submission of 6 April 2012 regarding the Public Hearing of 22 March 2012, (Exhibit EU-11), p. 13).
[279] See European Union's first written submission, paras. 228 and 229. We note that, in making this argument, the European Union relies on the market share of the domestic producers (Sollers and GAZ), rather than the market share of the domestic industry as determined by the DIMD. Therefore, the European Union's argument does not demonstrate anything about the determination actually made by DIMD.
[280] European Union's first written submission, paras. 226 and 227.
[281] European Union's first written submission, para. 234.

In its conclusions, the DIMD stated that:

> [I]n the context of the financial and economic crisis, consumers preferred the cheaper light commercial vehicles, manufactured on the territory of the Customs Union, and, as a result, the volumes of production of like Product by the domestic industry of the CU shrank by 37.7% in 2009 compared with 2008 whereas the sales volume in the same period decreased by 8.6%. The share of like Product produced by the domestic industry of the CU in the volume of consumption in the CT CU also increased significantly: by 39.9 percentage points.
>
> The share of like Product produced by the domestic industry of the CU in the consumption volume in the CT CU decreased by 20.1 percentage points between 2009 and 2011 …
>
> Thus, despite the recovery of production and volumes of sales of like product by the domestic industry of the CU in the CT CU following the financial and economic crisis of 2009, the domestic industry of the CU failed to maintain its position in the CT CU. Starting form [sic] 2010, the domestic industry of the CU underwent a decline in profits and profitability of sales, a shrinking share of like product on the CU market and an increase in stocks. In 2011, the aforementioned negative trends intensified significantly in the context of growing dumped imports, and, as a result, the business of the domestic industry of the CU involving the production and sale of Product became unprofitable.[282]

7.147. The Investigation Report shows that the DIMD's analysis of the domestic industry's market share was principally based on an examination of the trends on a year-on-year basis and for the period of investigation. In its ultimate conclusion regarding material injury caused by dumped imports, the DIMD attributed the increase in domestic industry market share from 2008 to 2009 to the impact of the financial crisis on consumer's preferences for lower priced domestic LCVs. The DIMD found that from 2009 to 2011, the domestic industry's market share decreased by 20.1%. The DIMD focused primarily on the continued decline in domestic industry market share in 2010 and 2011 in its finding.

7.148. The issue before us is whether the DIMD provided a reasoned and adequate explanation for the conclusions it reached in the light of the alternative explanations argued by at least one interested party.[283]

7.149. During the investigation, PCA made the following statement concerning the domestic industry's market share:

> Sollers market share increased by almost 35 percentage points from 2008 to 2010, but there was a relative drop in the market share of Sollers, as its production did not keep up with the important increase in consumption. …
>
> … (domestic) market share increased significantly overall.[284]

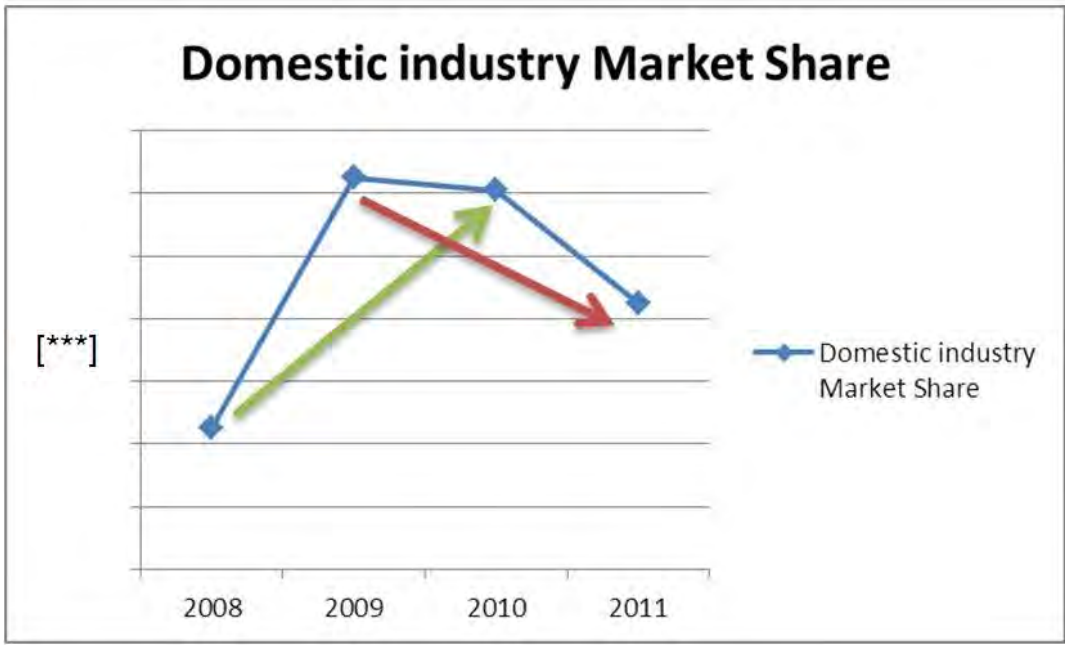
7.150. The graph below shows the domestic industry's actual market share (the blue line), the comparison relied on by the DIMD (the red arrow) on the one hand and the comparison referred to by PCA (the green arrow) on the other hand.

[282] Emphasis added.

[283] See, for example, Appellate Body Reports, *US – Tyres (China)*, para. 280; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93

[284] PCA's Injury Submission of 6 April 2012 following the Public Hearing of 22 March 2012, (Exhibit EU-13), p. 10.

Figure 4: Domestic industry's market share



Source: Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 5.1.

7.151. We consider that PCA merely identified an alternative way of interpreting the data that was before the DIMD. PCA did not explain, however, why the DIMD should have relied on this 2008 to 2010 end-point to end-point comparison rather than the year-on-year changes it identified, as well as the 2009 to 2011 comparison it made. Nor has the European Union demonstrated in this proceeding why PCA's interpretation of the data was necessary, either as a matter of law or because the evidence could not be objectively examined otherwise. The mere existence of this alternative interpretation of the data does not automatically render the DIMD's explanation "implausible". However, we will go on to consider, in the light of this alternative interpretation, whether the DIMD's explanation for its conclusion based on its approach to the data is adequate and reasoned.

7.152. The DIMD explained in the Investigation Report that the significant increase in the domestic industry's market share from 2008 to 2009 was due to the impact of the financial crisis on consumer preferences for lower priced domestic LCVs. The DIMD contrasted this earlier increase with the more recent downward trend from 2009 to 2011, and particularly the shrinking market share starting from 2010 through the POI and 2011 as a whole.[285] In our view, more recent data during the period of consideration is likely to be particularly relevant to the determination of material injury during the POI, which in this case included the second half of 2010 and the first half of 2011.[286] PCA's alternative interpretation is based on a 2008-2010 end-point to end-point comparison without reference to the intervening trends; it does not demonstrate that the DIMD's explanation was not reasoned and adequate. And, as we note above, the European Union has not made additional arguments that would support the conclusion that PCA's interpretation of the data was necessary. Thus, it is clear that the DIMD rejected PCA's interpretation of the data in favour of its own interpretation, which we find to be reasonable and adequately explained.

7.153. Accordingly, we conclude that the European Union has failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to specifically address the interested parties' argument on the comparison of the domestic industry's market share in 2010 and 2008.

[285] Investigation Report, section 4.3.

[286] The DIMD stated in its Investigation Report that it established the existence of material injury during the POI. (Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), p. 53: "according to the requirements of Article 13(3) of the Agreement the investigating authority established the existence of injury to the domestic industry of the CU during the period of investigation (the 2nd half of 2010 to the 1st half of 2011)").

7.5.2.3.5.2 Inventories of independent dealers

7.154. The European Union argues that the DIMD ignored information on the record concerning independent dealers' inventories when evaluating the evolution of the domestic industry's inventories.[287] The Russian Federation argues that the DIMD is not required, for the purpose of an objective examination of inventories, to assess the inventories of downstream independent dealers, which are not part of the domestic industry.[288]

7.155. As discussed above, insofar as inventories are concerned, an investigating authority must evaluate the data concerning the inventories of the domestic industry at issue in the investigation, and not the inventories of entities that do not form part of that domestic industry. For this reason, we conclude that there is no basis for finding that DIMD acted inconsistently with Articles 3.1 or 3.4 by failing to evaluate the inventories of independent dealers in its consideration.

7.5.2.3.5.3 The reason for the increase in domestic industry's inventories

7.156. The European Union argues that the DIMD failed to consider Volkswagen's argument that the increase in the domestic industry's inventories was due to the termination of the licence agreement between Sollers and Fiat.[289]

7.157. We note that the European Union's argument pertains to the issue of causation, rather than the DIMD's evaluation of inventories in the context of its examination of the state of the domestic industry. We refer to section 7.6.2.4.1 of our Report concerning causation and non-attribution.

7.5.2.4 Failure to examine all factors

7.158. The European Union argues that in arriving at its determination, the DIMD failed to examine the following required factors:

a. magnitude of the margin of dumping;

b. return on investments;

c. actual and potential effects on cash flow; and

d. the ability to raise capital or investments.[290]

7.5.2.4.1 The magnitude of the margin of dumping

7.159. The magnitude of the margin of dumping is one of the fifteen injury factors expressly listed in Article 3.4, evaluation of which is required in every case.[291] Accordingly, the DIMD was under an obligation to examine this factor. Article 3.4 does not require that the magnitude of the margin of dumping be evaluated in any particular way or be given any particular weight.[292] Nor is there any guidance in Article 3.4 or, indeed, elsewhere in the Anti-Dumping Agreement, as to how the investigating authority's evaluation should be set out in its determination.

7.160. The DIMD set out its examination of the Article 3.4 factors relating to the state of the domestic industry in section 4.2 of the Investigation Report. This section does not mention or discuss the magnitude of the margin of dumping. Nor is there any explicit discussion of the magnitude of the margin of dumping, in relation to the state of the domestic industry, elsewhere

[287] European Union's first written submission, paras. 232 and 233.
[288] Russian Federation's first written submission, paras. 257-261.
[289] European Union's first written submission, para. 233 (referring to Volkswagen's submission of 6 April 2012 regarding the Public Hearing of 22 March 2012, (Exhibit EU-11), p. 13).
[290] European Union's first written submission, para. 236.
[291] See e.g. Panel Reports, *Egypt – Steel Rebar*, para. 7.36; *EC – Bed Linen*, para. 6.159; *Mexico – Corn Syrup*, para. 7.128; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.159; and Appellate Body Report, *Thailand – H-Beams*, para. 128.
[292] Except to the extent that Article 3.4 makes clear that no one or several of the factors listed can necessarily give decisive guidance.

in the Investigation Report. The Russian Federation concedes that this factor was "not explicitly explained" in the Investigation Report.[293] The Russian Federation argues, however, that it suffices for compliance with Article 3.4 that the margin of dumping was discussed in section 4.1 of the Investigation Report, where the DIMD analysed whether the margin of dumping for each country investigated was more than 2%, in the context of determining whether one of the conditions for a cumulative assessment of the effects of dumped imports under Article 3.3 of the Anti-Dumping Agreement was met.[294]

7.161. Articles 3.1 and 3.4 do not require that an investigating authority set out its assessment of injury factors in any particular section of its report. At issue here, however, is not the placement of the evaluation, but whether it was done at all. Under Article 3.4, the issue is the impact of dumped imports on the domestic industry; thus, it requires an evaluation of the magnitude of the margin of dumping in that context. In the present case, in section 4.1 of the Investigation Report, the DIMD was addressing the issue whether the margin of dumping for each of the countries potentially subject to a cumulative assessment was greater than *de minimis* (2%). There is no discussion of the impact of dumped imports on the domestic industry, or the magnitude of the margin of dumping in that context. There is no basis for us to conclude that the analysis in section 4.1 for the purposes of Article 3.3 was relevant to, or considered in, the context of the Article 3.4 examination.[295] Section 4.1 of the Investigation Report does not, therefore, contain an evaluation of the magnitude of the margin of dumping for purposes of Article 3.4.

7.162. For this reason, we conclude that the DIMD failed to evaluate the magnitude of the margin of dumping, and thus acted inconsistently with Article 3.4.

7.5.2.4.2 Return on investments, actual and potential effects on cash flow, and the ability to raise capital or investments

7.163. The European Union argues that the non-confidential version of the Investigation Report shows that the DIMD failed to examine the domestic industry's return on investments, actual and potential effects on cash flow, and the ability to raise capital or investments. The Russian Federation argues that the DIMD evaluated these factors in the confidential version of the Investigation Report. The Russian Federation also contends that the European Union is incorrect to state that there is nothing in the Investigation Report or the record which shows that the DIMD evaluated these factors. The Russian Federation asserts that the DIMD met the requirements of Article 3.4 by requesting and receiving the financial accounts of Sollers in confidential form.[296] According to the Russian Federation, the fact that data were requested and received from the domestic industry indicates that the relevant information has been evaluated, although the results of the evaluation of such data were not set forth in the published document.[297]

7.164. The European Union argues that the Panel should not base its assessment under Articles 3.1 and 3.4 on the confidential version of the Investigation Report that was submitted by the Russian Federation as Exhibit RUS-14 in these proceedings, to the extent that the same information was not apparent from the non-confidential version of the Investigation Report on which the European Union based its claims.[298] The European Union also argues that the obligation to examine these factors under Article 3.4 cannot be fulfilled by simply requesting or even obtaining information concerning a given factor. Rather, this information must be analysed and interpreted by the investigating authority.[299]

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[293] Russian Federation's first written submission, para. 273.

[294] The Russian Federation also argues that the DIMD implicitly evaluated the magnitude of the margin of dumping in the context of the analysis of the effect of the prices of dumped imports on the domestic prices. (Russian Federation's second written submission, paras. 180–203). We find no support for this argument in the record.

[295] We recall in this regard the conclusion of the panel in *China – HP-SSST (Japan)/China – HP-SSST (EU)* that "MOFCOM's simple assertion that the margins of dumping are more than *de minimis* provides no basis on which we can conclude that MOFCOM actually evaluated the magnitude of those margins in the context of its Article 3.4 analysis." (See Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.159-7.161).

[296] Russian Federation's first written submission, para. 280.

[297] Russian Federation's response to Panel question No. 34, para. 86.

[298] European Union's second written submission, para. 144.

[299] European Union's second written submission, para. 145.

7.165. We address first the issue whether we may base our assessment of the European Union's claim on the confidential version of the Investigation Report. The evaluation of the Article 3.4 factors at issue is absent, in its entirety, from the non-confidential version of the Investigative Report; the DIMD did not even indicate that confidential information had been redacted from the non-confidential version in this context. This fact may give rise to concerns, particularly with respect to whether the published report of the investigation is consistent with the requirements of Article 12 of the Anti-Dumping Agreement.[300] We recall that the Article 3.1 requirement that an injury determination be based on positive evidence and involve an objective examination of the required elements of the volume, price effects, and impact of the dumped imports, does not imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation.[301] Therefore, there is no basis for the proposition that we may not base our assessment of the European Union's claim on the confidential version of the Investigation Report.

7.166. We proceed on the basis of all the evidence on the record, including that found in the confidential version of the Investigation Report and in the underlying record as appropriate, and the arguments presented, to examine the European Union's assertion that the factors at issue were not examined by the DIMD as required under Article 3.4. Section 4.2.7 of the confidential version of the Investigation Report states, concerning the factors at issue:

> **[***]**
>
> **[***]**
>
> **[***]**
>
> **[***]** [sic].[302]

7.167. Concerning return on investments, the DIMD explicitly stated that **[***]**.[303] We consider that this passage suffices to demonstrate that the DIMD evaluated the return on investments of the domestic industry.

7.168. Concerning cash flow, the DIMD stated that the **[***]**.[304] Article 3.4 requires the evaluation of "actual and potential negative effects on cash flow", and not merely the cash flow of the domestic industry itself. Logically, the **[***]** during the period of consideration at least potentially affect cash flow negatively. The passage above suffices to demonstrate that the DIMD evaluated the actual and potential negative effects on cash flow of the domestic industry.

7.169. Concerning the ability to raise capital or investments, the DIMD noted that **[***]**. The DIMD also noted that the financial accounts of Sollers confirmed that **[***]**.[305] We consider that information is relevant to, and this discussion suffices to demonstrate that DIMD did evaluate, the industry's ability to raise capital or investments.

7.170. The European Union asserts that, even if we were to rely on the confidential version of the Investigation Report in considering this aspect of its arguments, the analysis in the confidential version of the Investigation Report would still be inconsistent with Articles 3.4 and 3.1.[306] However, the European Union did not substantiate this assertion with argument or evidence. Thus, we have no basis on which to further consider our view of the adequacy of the DIMD's evaluation of these factors. Accordingly, we conclude that the European Union has not established that the DIMD acted inconsistently with Article 3.4 by failing to evaluate the domestic industry's return on

[300] The European Union argues that total silence on a factor *may* call into question whether the DIMD actually examined it. (See European Union's second written submission, para. 146; and response to Panel question No. 50, para. 156). However, the European Union has not presented any evidence suggesting that the confidential version of the Investigation Report is not genuine. Moreover, although the European Union stated a claim under Article 12 in its request for establishment (para. 9), it did not pursue that claim in this proceeding, making no arguments and presenting no evidence in that regard.

[301] Appellate Body Report, *Thailand – H-Beams*, para. 111.

[302] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 4.2.7, p. 42.

[303] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 4.2.7, p. 42.

[304] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 4.2.7, p. 42.

[305] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 4.2.7, p. 42.

[306] European Union's second written submission, para. 144.

investments, actual and potential effects on cash flow and the ability to raise capital or investments.

7.171. In the light of the above, on the basis of the confidential version of the Investigation Report, we conclude that the DIMD evaluated the factors in question. For this reason, we are of the view that there is no need for us also to consider the parties' arguments concerning whether the fact that data was requested and received from the domestic industry can indicate that the relevant information has been evaluated where the results of such evaluation were not set forth in the published document.

7.172. Accordingly, we conclude that the European Union failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to examine the domestic industry's return on investments, actual and potential effects on cash flow and the ability to raise capital or investments.

7.5.3 Conclusion

7.173. For the reasons stated above, we conclude that the European Union has not established that:

a. the DIMD acted inconsistently with Articles 3.1 and 3.4 in its evaluation of profit/profitability data in the Investigation Report;

b. the DIMD acted inconsistently with Articles 3.1 and 3.4 in its evaluation of inventory data in the Investigation Report;

c. the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to systematically compare data for 2011 with data for 2008 for all economic indicators in the present case;

d. the DIMD failed to objectively examine the domestic industry's profit/profitability during the POI;

e. the DIMD assumed that the exceptional positive developments in the domestic industry during 2009 could continue during 2010-2011 without more explanation, and "base[d] its conclusions on a comparison between these two time periods";

f. the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to consider whether the market will accept further price increases;

g. the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to specifically address the interested parties' argument on the comparison of the domestic industry's market share in 2010 and 2008;

h. the DIMD acted inconsistently with Articles 3.1 and 3.4 in failing to evaluate the inventories of independent dealers and the reason for the increase in inventories; and

i. the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to evaluate the domestic industry's return on investments, actual and potential effects on cash flow and the ability to raise capital or investments.

7.174. We further conclude that the DIMD acted inconsistently with Article 3.4 by failing to evaluate the magnitude of the margin of dumping.

7.6 Causation

7.6.1 Introduction

7.175. The European Union claims that the DIMD acted inconsistently with Articles 3.1 and 3.5 by failing to properly establish a causal link between the dumped imports and the alleged injury, and by failing to conduct a proper non-attribution analysis of factors other than the dumped imports

that were known to the DIMD and that were injuring the domestic industry at the same time as dumped imports.[307] The European Union further argues that, insofar as the DIMD relied on its price suppression analysis in determining causation, that inadequate analysis also undermined the causation analysis.[308]

7.176. The Russian Federation argues that, in its causation analysis, the DIMD provided a coherent and consistent explanation for its conclusion that dumped imports captured a share of the growing market which they otherwise would not have done in the absence of dumping and thereby caused injury.[309] With regard to the DIMD's non-attribution analysis, the Russian Federation argues that the DIMD analysed the comments of the interested parties and provided explanations with respect to the alleged impact of the two "other factors" that were clearly raised before it.[310]

7.6.2 Evaluation by the Panel

7.6.2.1 Relevant provisions

7.177. Article 3.1 is set out in paragraph 7.30 above. Article 3.5 provides that:

> 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 this 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.

7.178. Together, these provisions require that an investigating authority demonstrate, on the basis of an objective examination of positive evidence, that:

a. dumped imports are causing injury to the domestic industry; and

b. injury caused by other known factors is not attributed to the dumped imports.[311]

In making such a determination, the investigating authority must demonstrate a relationship of cause and effect, such that dumped imports are shown to have contributed to the injury to the domestic industry. Dumped imports need not be "the" cause of the injury suffered by the domestic industry, provided they are "a" cause of such injury[312]; that other factors may also have caused injury to the domestic industry is no bar to establishing this causal relationship.

7.179. With respect to non-attribution, Article 3.5 requires an investigating authority to examine other known factors that are causing injury to the domestic industry at the same time as dumped imports, and sets out an illustrative list of such factors.[313] It further requires that the investigating authority not attribute to dumped imports injuries caused by such other factors. The investigating authority must undertake an assessment that enables it to "separat[e] and distinguish[] the

[307] European Union's first written submission, para. 239.
[308] European Union's first written submission, para. 275 (referring to Panel Reports, *China – GOES (Article 21.5 – US)*, para. 7.124; *China – X-Ray Equipment*, para. 7.239; *China – Autos (US)*, paras. 7.327 and 7.328; and *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 7.191).
[309] Russian Federation's first written submission, para. 296.
[310] Russian Federation's first written submission, paras. 315-318.
[311] Panel Reports, *Mexico – Steel Pipes and Tubes*, para. 7.352; and *Thailand – H-Beams*, para. 7.262.
[312] Appellate Body Report, *US – Wheat Gluten*, para. 67.
[313] Panel Report, *Thailand – H-Beams*, para. 7.275.

injurious effects of the other factors from the injurious effects of the dumped imports".[314] For this assessment to be required, however, Article 3.5 requires that the "other factor" at issue be:

a. "known" to the investigating authority;

b. a factor "other than dumped imports"; and

c. injuring the domestic industry at the same time as the dumped imports.[315]

7.180. Article 3.5 contains no guidance on how an investigating authority is to analyse either the causation of injury by dumped imports, or non-attribution.[316]

7.6.2.2 The DIMD's consideration of the price effects of the dumped imports in the context of its causation analysis

7.181. The DIMD's finding of a causal link between material injury to the domestic industry and the dumped imports was based on both the increased volume[317] and the price suppressive[318] effects of the dumped imports. The European Union makes arguments concerning both aspects of the DIMD's causation determination in support of its claim. We will first address the DIMD's causation determination with respect to the price suppressive effects of the dumped imports.

7.182. We have found above that the DIMD acted inconsistently with Articles 3.1 and 3.2 by failing to taken into account the impact of the financial crisis in its consideration of price suppression. The error we have found in the DIMD's consideration of price suppression under Article 3.2 undermines the DIMD's determination of a causal link between the dumped imports and the injury suffered by the domestic industry.[319] Consequently, we find that the DIMD acted inconsistently with Articles 3.1 and 3.5 insofar as it relied on price suppression in its causation determination.

7.6.2.3 The DIMD's consideration of the volume of the dumped imports in the context of its causation analysis

7.183. We now turn to the DIMD's consideration of the volume of the dumped imports in the context of its causation analysis, after which we turn to the DIMD's non-attribution analysis.

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[314] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 223; *China – GOES*, para. 151; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283.

[315] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.

[316] Appellate Body Report, *US – Hot-Rolled Steel*, para. 224.

[317] Regarding the volume of the dumped imports, the DIMD concluded that the dumped imports displaced the domestic like product in the market based on the fact that after declining from 2008 to 2009, the volume of dumped imports increased steadily throughout the rest of the period of consideration (2009-2011) both in absolute terms and relative to domestic consumption, domestic production and total imports. The DIMD also relied on the fact that the market share of the dumped imports increased rapidly from 2009 through the end of the POI (an increase of 13 percentage points) at the same time as there was a proportionate decrease in the market share of the domestic industry (a decrease of 12.3 percentage points). (See Investigation Report, section 5.1).

[318] Regarding price effects, the DIMD concluded that there was no price undercutting or price depression during the period of consideration. However, the DIMD concluded that there was significant price suppression on the basis of a comparison of the actual domestic prices observed and the target domestic prices which it calculated would have occurred in the absence of dumped imports. The DIMD constructed the target domestic prices on the basis of what it found to be a reasonable rate of return and the actual costs of production of the domestic industry. The DIMD used the rate of return achieved by the domestic industry in 2009 as the benchmark because 2009 saw the lowest share of dumped imports. The DIMD also considered whether the injury was caused by other known factors including the termination of a licence agreement between Sollers and Fiat and domestic competition, and concluded that the termination of the licence agreement was not a factor causing injury to the domestic industry, and that the injury caused by the domestic competition was not determinative in the material injury suffered by the domestic industry. (See Investigation Report, sections 5.2 and 5.3).

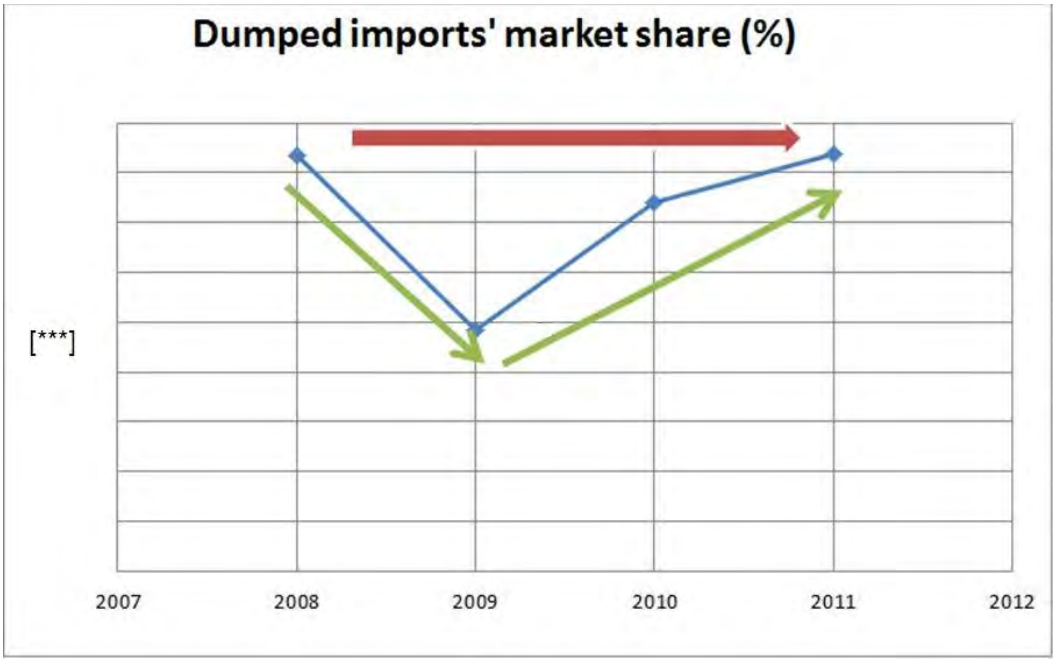
[319] European Union's first written submission, para. 275 (referring to Panel Reports, *China – GOES (Article 21.5 – US)*, para. 7.124; *China – X-Ray Equipment*, para. 7.239; *China – Autos (US)*, paras. 7.327 and 7.328; and *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 7.191).

7.6.2.3.1 Trends in dumped imports' market share

7.184. The European Union argues that the increased market share of the dumped imports was not injurious, because dumped imports simply recovered from the effects of the financial crisis and merely reached their pre-crisis level in 2011. The European Union contends that the DIMD could not assume that the exceptional situation existing during the financial crisis would persist indefinitely, and that the domestic industry would retain the market share it had gained in that situation.[320] The Russian Federation argues that dumped imports did not only reach pre-crisis level, but were substantially higher than that level at the end of the period considered. The Russian Federation asserts that the volume of dumped imports in 2011 was at least 1.2 times larger than in 2008.[321]

7.185. In section 5.1 of the Investigation Report, the DIMD examined the volume of dumped imports in absolute terms, relative to total imports, relative to domestic production and relative to total domestic consumption. During the investigation, interested parties had argued that in 2010 and 2011 dumped imports recovered from the financial crisis and merely reached their pre-crisis level in 2011, comparing the end points of the period of consideration, as shown by the red arrow in the graph below.[322] The DIMD found that from 2008 to 2009, during the financial crisis, the dumped imports' volume and market share decreased because of the impact of the financial crisis on consumers' preferences for lower priced domestic LCVs. However, in the post-financial crisis period, 2010 and 2011 (including the POI), the dumped imports' market share increased steadily, displacing the domestic like product in the market, as shown by the green arrows in the graph below.[323] The DIMD thus concluded that the dumped imports displaced domestic like product in 2010 and 2011, including during the POI, thereby causing injury to the domestic industry.

Figure 5: Dumped imports' market share



Source: Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 5.1.

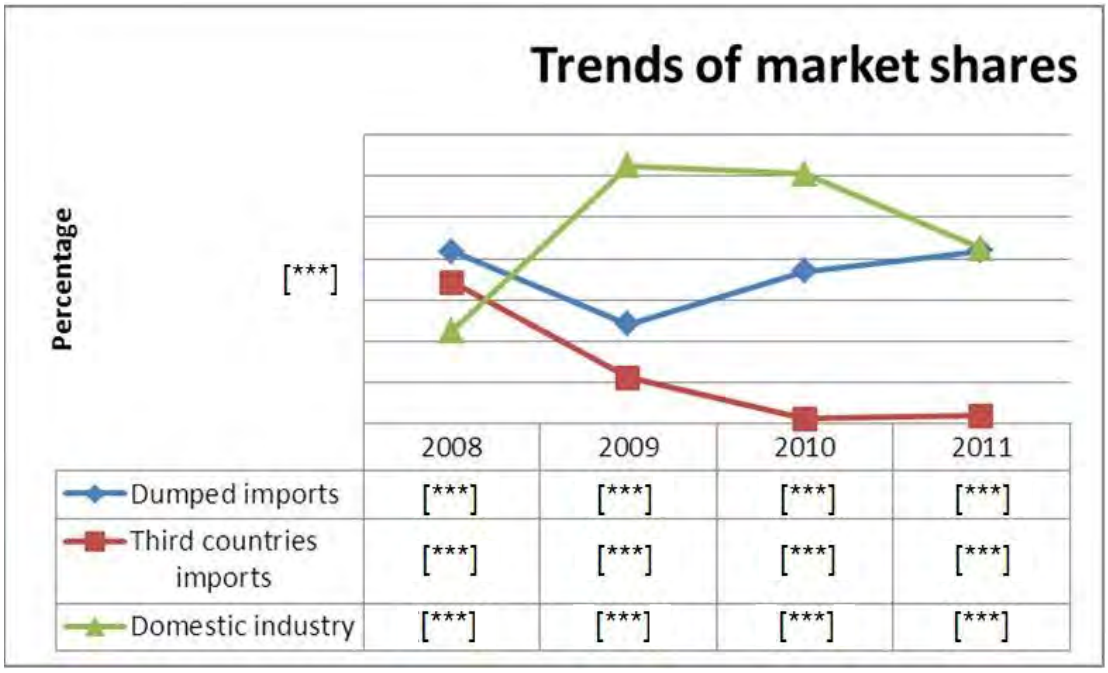
[320] European Union's first written submission, para. 273.
[321] Russian Federation's first written submission, para. 297.
[322] European Union's first written submission, para. 269.
[323] The DIMD stated in its Investigation Report that:
Starting from 2009, the share of like Product manufactured by the domestic industry of the CU in consumption decreased in parallel with an increase in the share of dumped imports. In the period from 2009 to the 1st half of 2011, the share of dumped imports in total consumption rose by 13 percentage points whereas the share of like products produced by the domestic industry of the CU dropped by 12.3 percentage points. The trend persisted in 2011.

Section 5.1 of the Public version of the Investigation Report, (Exhibit RUS-12), and Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI).

7.186. The European Union does not dispute the underlying facts and evidence relied upon by the DIMD in reaching its conclusion of domestic sales displacement.[324] Rather, it considers that the fact that dumped imports' market share returned to the 2008 level in 2011 undermines the DIMD's causation analysis.

7.187. As a general matter, the fact that the dumped import market share was not higher in 2011 than in 2008 does not necessarily preclude or undermine a finding of causation. While "significant increases in imports have to be 'consider[ed]' by investigating authorities under Article 3.2 … the text does not indicate that in the absence of such a significant increase, these imports could not be found to be causing injury" within the meaning of Article 3.5.[325] As well, a reasonable and unbiased investigating authority may well take the view that consideration of the intervening trends of the dumped imports market share, rather than merely making an end-point to end-point comparison of the situation in 2008 and 2011, provides a better understanding of the trends in dumped imports' volume and their possible contribution to injury. In the present case, the DIMD noted that the dumped import volume and market share decreased during the financial crisis, but increased thereafter, thereby displacing domestic sales after the financial crisis, i.e. in 2010 and 2011, the period including the POI. This displacement largely corresponded to the increase of dumped imports' market share, as shown on the graph below.

Figure 6: Trends of market shares of the domestic industry, dumped imports and third country imports



Source: Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 5.1.

7.188. The DIMD also addressed the interested parties' argument that the dumped import market share was "stable" in 2011 when compared with 2008, while the domestic market share increased in 2011 when compared with 2008. The DIMD found that the domestic industry market share during the period of consideration increased mainly at the expense of non-dumped imports from third countries, which declined to a negligible level of 1% of market share. The DIMD also observed that displacement of the domestic like product by the dumped imports continued throughout 2011. The DIMD thus rejected the interested parties' argument and found that the domestic like product was displaced in the market by the dumped imports during the POI and in 2011 as a whole. The DIMD did not explicitly discuss the assertion that the dumped imports' market share was "stable" in 2011 as compared with 2008. However, the DIMD's analysis relied on the intervening changes in market share. Neither the interested parties during the investigation, nor the European Union in this proceeding, has explained why the comparison relied

[324] European Union's first written submission, paras. 263-266.
[325] Appellate Body Report, *EC – Tube or Pipe Fittings*, fn 114.

on by the interested parties was necessary or undermined the cogency of the DIMD's analysis. For these reasons, we consider that the DIMD did not have to respond further to this argument.

7.6.2.3.2 The market share of all domestic producers in 2011

7.189. The European Union notes that the combined market share of the two domestic producers of LCVs, Sollers and GAZ, was approximately 57% in 2011. The European Union argues that "it seems unlikely that dumped imports replaced the domestic sales if the domestic market share remained at the high level of 57%".[326] The Russian Federation argues that a 57% market share does not make it less plausible that the decrease in domestic producers' market share in 2011 (from 2009 and 2010 levels by 8% and 6% respectively) was caused by the effects of dumping.[327]

7.190. The European Union's argument is based on the 2011 market share of the two domestic producers (Sollers and GAZ) combined. However, the market share of the domestic industry (Sollers), upon which the DIMD relied in its analysis, was lower (**[***]**).[328] In our view, the market share of domestic producers (Sollers and GAZ) in 2011 does not explain anything about developments in the market share of the domestic industry, which is the proper focus for an investigating authority. More to the point, the fact that the market share of the two domestic producers (Sollers and GAZ) in 2011 was "high" does not, in itself, preclude a finding of causation of injury to the domestic industry. Nor would the fact that the market share of the domestic industry was "high" preclude a finding of causation. A domestic industry with a high market share may still be found to have suffered material injury caused by dumped imports, particularly in a situation where it is losing market share to those imports.

7.6.2.3.3 Dumped imports displaced third country imports rather than the domestic like product

7.191. The European Union notes that the market share of the dumped imports increased by 18 percentage points from 2009 to 2011, while the domestic market share decreased by only 8 percentage points during the same period.[329] The European Union argues that, rather than displacing domestic sales, the dumped imports "largely" displaced imports from third countries.[330]

7.192. The fact that dumped imports displaced third country imports does not, on its own, preclude or undermine a finding that dumped imports also displaced the domestic like product. The European Union's own wording, that dumped imports "largely" displaced third country imports, acknowledges that the dumped imports displaced the domestic like product in the market, at least to some extent. Indeed, the European Union does not argue that the dumped imports did not displace the domestic like product at all. Nor has the European Union demonstrated that the DIMD acted unreasonably in considering the displacement of the domestic like product by the dumped imports on the market relevant and significant in the causation determination.

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[326] European Union's first written submission, paras. 272 and 273. We note that, in making this argument, the European Union calculated the market share of domestic producers (Sollers and GAZ combined) rather than the market share of the domestic industry as defined by the DIMD (Sollers). The domestic industry's market share in 2011 was **[***]**, rather than 57%. The Russian Federation does not dispute these figures.

[327] Russian Federation's first written submission, para. 298.

[328] The European Union does not explain how the domestic producers' market share in 2011 is relevant to the determination actually made by the DIMD, concerning the causal relationship between the dumped imports and the injury suffered by the domestic industry (Sollers).

[329] The European Union calculates the market share on the basis of data in the record as follows:

Table 9: Trends of market share as calculated by the European Union

	2008	2009	2010	2011
Domestic market share (Sollers + GAZ)	24	65	63	57
Dumped imports market share	42	24	37	42

Source: European Union's first written submission, para. 271.

The Russian Federation does not dispute the correctness of this market share information.

[330] European Union's first written submission, para. 272.

7.6.2.3.4 Conclusion

7.193. For the reasons above, we find that the European Union has failed to establish that the causation determination of the DIMD was one that a reasonable and objective investigating authority could not have reached on the basis of the evidence and arguments before it.

7.6.2.4 Non-attribution

7.194. The European Union identifies five "factors other than the dumped imports which at the same time are injuring the domestic industry" that it alleges were known to the DIMD but which it did not examine properly, or failed to examine at all, in its non-attribution analysis:

a. the termination of the licensing agreement between Fiat and Sollers[331];

b. competition by GAZ during the POI[332];

c. self-inflicted injury[333];

d. the financing difficulties[334]; and

e. the discontinuance of government support programmes.[335]

7.195. The Russian Federation argues that, for a factor to be "known" to the investigating authority, it must be clearly raised before the investigating authority[336] and be supported and justified by evidence.[337] Only those factors that were found by the investigating authority to be substantiated needed to be taken into account in the non-attribution analysis.[338] The Russian Federation contends that the DIMD analysed the interested parties' comments and explained in the Investigation Report its conclusions regarding the alleged impact of two factors that were clearly raised before it: the termination of the license agreement and the competition from other domestic producers.[339] The Russian Federation contends that the other three factors identified by the European Union were not substantiated before the DIMD, and therefore were not "known" to it and did not require further consideration.[340]

7.196. We turn first to the DIMD's assessment of the two factors that it concluded were clearly raised before it, before turning to its treatment of the other three factors identified by the European Union.

7.6.2.4.1 The termination of the licence agreement

7.197. During the investigation, several interested parties argued that the announcement in early 2011 that the licence agreement between Fiat and Sollers would be terminated as of 31 December 2011 became a disruptive factor for Sollers' business.[341] In examining this argument, the DIMD found that the domestic industry was entitled to produce the like product throughout the period of investigation, which ended on 30 June 2011, and beyond

[331] European Union's first written submission, para. 293; second written submission. paras. 160-164.
[332] European Union's first written submission, paras. 294 and 298-304; second written submission, para. 165; and opening statement at the first meeting of the Panel, paras. 72 and 73.
[333] European Union's first written submission, para. 305; second written submission, paras. 166-168.
[334] European Union's first written submission, para. 306; second written submission, para. 169.
[335] European Union's first written submission, para. 307; second written submission, para. 170.
[336] Russian Federation's first written submission, para. 322 (citing Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.359; and *Thailand – H-Beams*, para. 7.273).
[337] Russian Federation's first written submission, para. 323 (citing Panel Report, *EU – Footwear (China)*, para. 7.484).
[338] Russian Federation's first written submission, para. 324 (citing Appellate Body Report, *US – Steel Safeguards*, para. 491).
[339] Russian Federation's first written submission, paras. 315-318.
[340] Russian Federation's first written submission, para. 342.
[341] PCA's Injury Submission of 6 April 2012 following the Public Hearing of 22 March 2012, (Exhibit EU-13), p. 14; Comments by Daimler and Mercedes-Benz RUS on the Report of 28 March 2013, (Exhibit EU-19), p. 6; and Volkswagen's submission of 6 April 2012 regarding the Public Hearing of 22 March 2012, (Exhibit EU-11), section IV.1.c.

through 2012.[342] The DIMD also noted that production decreased by only 7% in 2011, despite the serious deterioration of the state of the domestic industry. The DIMD concluded that the announced termination of the licence agreement was not a factor causing injury to the domestic industry at the same time as dumped imports.[343]

7.198. The European Union argues that the DIMD's analysis of the effects of the termination of the licence agreement between Fiat and Sollers was contradicted by evidence.[344] The European Union contends that the fact that Sollers was entitled to produce the like product throughout 2011 and 2012 is not sufficient to conclude that the dwindling cooperation with Fiat did not cause difficulties to Sollers' activities, requiring it to sell its LCV models at lower prices than would otherwise have been the case.[345] The European Union argues that the Russian Federation itself considers that the announcement of the termination was "'likely to exert a significant impact on changing of market share, price and net profit margin' of Sollers"[346], and refers to section 2.3 of Exhibit RUS-5 to this effect. The Russian Federation argues that there was no evidence in the record which would have allowed the DIMD to conclude that the termination of the license agreement itself could be considered as a known factor other than the dumped imports which at the same time was injuring the domestic industry.[347]

7.199. The parties do not dispute the fact that the termination of the cooperation agreement did not happen during the period of consideration or the fact that the domestic industry was entitled to produce the like product throughout the period of consideration. The European Union argues that the DIMD's explanation for its conclusion that the termination did not cause injury at the same time as the dumped imports is not sufficient, because in its view the fact that production continued does not lead to the conclusion that injury was not caused by the termination of the licence agreement.

7.200. The European Union's argument that the DIMD acknowledged that the announcement of the termination was likely to have exerted a significant impact on the domestic industry is not supported by the record. Exhibit RUS-5 contains the written arguments and evidence submitted by two interested parties at the public hearings in the underlying investigation. The section of this submission referred to by the European Union does not contain any acknowledgement by the DIMD or the Russian Federation of the impact of the announcement of the termination.[348]

7.201. We agree with the European Union to the extent that, in principle, the fact that Sollers was entitled to produce Fiat Ducato LCVs both during and after the period of consideration does not necessarily preclude that the forthcoming termination of the underlying licence agreement might have disruptive effects on the domestic industry during the period of consideration. In some situations, the announcement of a strategic business decision may, in itself, affect market behaviour. However, there is no indication that there was any evidence before the DIMD during the investigation to suggest that this was the case here. No interested party submitted any

[342] The DIMD stated in section 5.3.3 of the Investigation Report that:

> The term of the license agreement for the production of Fiat-brand light commercial vehicles expired on 31 December 2011. In line with the arrangements with Fiat Group Automobiles S.p.A., the applicant was entitled in 2012 to conduct the assembly of previously supplied automobile components and sell the manufactured light commercial vehicles via a network of authorized dealers.

[343] Section 5.3.3 of the Investigation Report.

[344] European Union's second written submission, paras. 160-164; opening statement at the first meeting of the Panel, para. 71..

[345] European Union's first written submission, para. 293.

[346] European Union's second written submission, para. 161 (referring to Daimler's and Mercedes' comments regarding the Public Hearing of 22 March 2012, Letter No. 21-1204/EAPP, 5 April 2012, (Exhibit RUS-5), section 2.3); response to Panel question No. 51, para. 163.

[347] Russian Federation's first written submission, paras. 333-335.

[348] Section 2.3 of Exhibit RUS-5 contains, in relevant part, the following statement by Daimler AG and Mercedes-Benz RUS CJSC:

> We would like to direct attention of the Ministry to other factors which appear reasonably likely to exert a significant impact on changing of market share, price and net profit margin of the Applicant.

Daimler's and Mercedes' comments regarding the Public Hearing of 22 March 2012, Letter No. 21-1204/EAPP, 5 April 2012, (Exhibit RUS-5), p. 56

evidence to substantiate the allegation that the termination of the licence agreement, which happened after the period of consideration, caused injury to the domestic industry at the same time as the dumped imports.[349] To the contrary, the record shows conflicting views expressed by interested parties as to the impact of the announced termination of the licence agreement on Sollers' performance.[350]

7.202. The interested parties furnished no evidence to support the allegation that the termination of the licence agreement or its announcement caused injury to the domestic industry. Accordingly, we find that the European Union has not established that the DIMD acted unreasonably in concluding that the termination of the license agreement was not a known factor other than the dumped imports which at the same time was injuring the domestic industry.

7.6.2.4.2 Competition from GAZ

7.203. In relation to the allegation that competition from GAZ caused injury to the domestic industry, the DIMD found that the market share of GAZ was negligible from 2008 to 2010, then increased in 2011, but only to a level much lower than that of the dumped imports. The DIMD also found that the deterioration of the state of the domestic industry started from 2010, when the market share of GAZ was still insignificant. The DIMD concluded that the impact of competition from GAZ was not determinative in causing material injury to the domestic industry.[351]

7.204. The European Union argues that the DIMD's analysis suffered from several shortcomings:

a. the DIMD did not analyse whether the imminent entry of GAZ on the diesel-engine LCV market was likely to have exerted considerable competitive pressure on Sollers during 2010, which may have had an impact on prices[352];

b. the DIMD did not consider the effect of the competition between diesel- and petrol-engine LCVs that existed before GAZ started production of its Gazelle diesel-engine LCV in the middle of 2010. In support of this argument, the European Union refers to a marketing report in which the author discussed the LCV market structure in the Russian Federation during the year 2010 without differentiating between diesel- and petrol-engine LCVs[353]; and

c. the injury suffered by Sollers in 2010 and 2011 must have been caused by competition from GAZ, due to the fact that the domestic producers' (i.e. Sollers and GAZ) market share remained at a significantly high level (57%) in 2011.[354]

7.205. The Russian Federation argues that the DIMD's analysis of the allegedly injurious effects of competition from GAZ was adequate. The DIMD examined the nature and extent of injury caused by competition from GAZ and determined that such injury was not decisive, as opposed to the

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[349] PCA referred to one newspaper article entitled "Sollers and Fiat did not go far", published by the Kommersant on 21 February 2011. (See appendix 10 to Annexes to PCA's Injury Submission of 6 April 2012, (Exhibit EU-14), p. 42). However, this article does not contain any evidence supporting the allegation that the termination caused injury to Sollers.

[350] For instance, Daimler argued that the termination of the licence agreement was "disruptive and not conducive to supporting the Applicant's core business". (Comments by Daimler of 16 March 2012 regarding the Public Hearing, (Exhibit EU-8), p. 8; and Comments by Daimler and Mercedes-Benz RUS on the Report of 28 March 2013, (Exhibit EU-19), p. 6). PCA acknowledged that the termination of the licence agreement and the consequent switch of business partners did not have any major impact on the performance of Sollers during the period of consideration, stating that:

> The Sollers Group switched business partner (Fiat to Ford) in the middle of investigation period, although the situation was not so critical in terms of their commercial performance during that period.

PCA's Injury Submission of 6 April 2012 following the Public Hearing of 22 March 2012, (Exhibit EU-13), p. 14 (emphasis added)

[351] Investigation Report, section 5.3.2.

[352] European Union's first written submission, para. 297.

[353] European Union's first written submission, para. 298 (referring to Autostat, *Marketing Report LCV Market in Russia: Results, Trends, and Perspectives* (April 2011), (Exhibit EU-15), p. 10).

[354] European Union's first written submission, para. 303.

effects of the dumped imports.[355] The Russian Federation argues that the effect of competition from GAZ was separated and distinguished from the effect of the dumped imports, as required by Article 3.5.[356]

7.206. We address in turn each of the European Union's three arguments concerning the DIMD's analysis.

7.6.2.4.2.1 The impact of imminent market entry of Gazelle diesel-engine LCVs on the domestic industry's prices

7.207. The European Union challenges the DIMD's conclusion that injury to the domestic industry was found during a period when GAZ's market share for the like product was still negligible. The European Union argues that the imminent entry of GAZ on the diesel-engine LCV market was likely to have exerted considerable competitive pressure on Sollers during 2010 and may have had an impact on prices.[357] The Russian Federation maintains that the DIMD made conclusions on the basis of evidence before it concerning the nature and extent of injury caused by competition from GAZ, and asserts that the DIMD was right to look at the timing of the injury caused by GAZ, because the other known factor must be causing injury to the domestic industry at the same time as the dumped imports.[358]

7.208. The parties do not dispute that GAZ started production of the Gazelle and Sobel diesel-engine LCVs in the middle of 2010.[359] In principle, the imminent entry of a new competitor may exert competitive pressure on existing players in the domestic market for the like product, with negative effects for the domestic industry. However, in the present case the European Union has pointed to no evidence on the record that shows that interested parties argued, or presented evidence, during the investigation to the effect that the imminent entry of Gazelle diesel-engine LCVs had a negative impact on the domestic industry, including its prices, in 2010, when the DIMD found that injury caused by dumped imports was already occurring. There is no express requirement in Article 3.5 that investigating authorities seek out and examine in each case on their own initiative the effects of all possible factors other than dumped imports that may be causing injury to the domestic industry under investigation. Accordingly, we conclude that the DIMD did not act inconsistently with Articles 3.1 and 3.5 by not analysing the imminent entry of GAZ on the diesel-engine LCV market during 2010.

7.6.2.4.2.2 Competition between diesel- and petrol-engine LCVs

7.209. The European Union argues that the DIMD failed to consider the impact of the competition between diesel- and petrol-engine LCVs that allegedly existed before GAZ launched its Gazelle diesel-engine LCVs in the middle of 2010. In support of this argument, the European Union refers to submissions of the interested parties who argued that petrol-engine LCVs should be included in the scope of the like product.[360]

7.210. The European Union's argument rests on the premise that:

a. there was a competitive relationship between diesel- and petrol-engine LCVs, in particular GAZ's petrol-engine LCVs[361]; and

[355] European Union's first written submission, para. 296; and Russian Federation's first written submission, para. 338 (quoting Public version of the Investigation Report, (Exhibit RUS-12), section 5.3.2).
[356] Russian Federation's first written submission, para. 339.
[357] European Union's first written submission, para. 297.
[358] Russian Federation's first written submission, para. 340.
[359] Before that, GAZ only produced a very small quantity of diesel-engine LCVs. (See JSC "Gorkovsky Avtomobilny Zavod" Reply on Volumes of Production, Letter No. 18/ОД/2/2013, 21 February 2013, (Exhibit RUS-16 (BCI)). See also Minutes of the Public Hearings (exhibit EU-9), p. 12.
[360] European Union's first written submission, para. 299 (referring to Comments by Daimler of 16 March 2012 regarding the Public Hearing, (Exhibit EU-8), attachment 7: Auto Review Magazine testing of Fiat Ducato and Gazelle; and Minutes of the Public Hearing of 22 March 2012, (Exhibit EU-9), p. 12); and Comments by Daimler of 16 March 2012 regarding the Public Hearing, (Exhibit EU-8), attachment 8.
[361] European Union's first written submission, paras. 298-300.

b. the LCVs of GAZ and Sollers are not within the same price segments as imported LCVs.[362]

7.211. These allegations were investigated and rejected by the DIMD during the investigation.[363] Because the DIMD had already considered and rejected the interested parties' factual premise in the context of the definition of the like product, we do not consider that the DIMD was required to repeat that analysis in the context of its determination of causation.[364] Accordingly, we conclude that the DIMD did not act inconsistently with Articles 3.1 and 3.5 by failing to consider the impact of competition between diesel- and petrol-engine LCVs.

7.6.2.4.2.3 Domestic producers' market share in 2011

7.212. The European Union asserts that the injury suffered by Sollers in 2010 and 2011 must have been caused by competition from GAZ, due to the fact that the domestic producers' (Sollers and GAZ) market share remained at a significantly high level, 57%, in 2011.[365] This argument overlaps to a great extent with the European Union's argument concerning the DIMD's demonstration of a causal link on the basis of the volume effects of the dumped imports. We refer to our discussion of the similar argument of the European Union in section 7.6.2.3.2 above. The same considerations apply, *mutatis mutandis*, to the European Union's argument concerning the DIMD's non-attribution analysis of the competition from GAZ in 2011.

7.213. Furthermore, the European Union argues that the market share lost by Sollers was actually taken by GAZ, rather than the dumped imports.[366] However, the European Union has not shown that this argument was clearly raised by the interested parties before the DIMD during the investigation.

7.214. For the reasons above, we conclude that the European Union has not established that the DIMD's non-attribution analysis of competition from GAZ was inconsistent with Articles 3.1 and 3.5.

7.6.2.4.3 Other factors

7.215. The European Union argues that in its non-attribution analysis, the DIMD did not consider *at all* certain "other known factors", referring specifically in this regard to:

a. self-inflicted injury[367];

b. the difficulties encountered by Sollers in obtaining financing for its joint venture with Fiat[368]; and

c. the discontinuation of government support programmes by the end of 2010.[369]

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[362] European Union's first written submission, para. 301.

[363] The DIMD addressed the alleged competitive relationship between diesel- and petrol-engine LCVs in section 2.1 of the Investigation Report in the context of its conclusions regarding the scope of the subject imports and the domestic like product. The DIMD found that the technical parameters of diesel engines (torque, fuel efficiency, the degree of compression, the method of mixture ignition, durability) are significantly different from those of a petrol engine. The DIMD also found that diesel engines are preferable in terms of operation of LCVs. The DIMD concluded that the technical characteristics of diesel engines can affect buyers' preference when choosing between petrol and diesel versions of a LCV. (See Public version of the Investigation Report, (Exhibit EU-21), p. 18).

Concerning the allegedly different price segments, the DIMD found that interested parties did not present sufficient evidence to substantiate their claims. The DIMD also found that the evidence before it did not confirm the existence of the allegedly different price segments. The DIMD concluded that the price of the domestic like product was in the same range as the export price of the allegedly dumped imports. (See Public version of the Investigation Report, (Exhibit EU-21), p. 17).

[364] See by analogy, Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178.

[365] European Union's first written submission, para. 303.

[366] European Union's opening statement at the first meeting of the Panel, figure 6.

[367] European Union's first written submission, para. 305.

[368] European Union's first written submission, para. 306.

[369] European Union's first written submission, para. 307.

7.216. The Investigation Report does not contain any reference to these three allegedly known other factors causing injury at the same time as dumped imports. The Russian Federation argues that interested parties did not present evidence to substantiate their claims that these "other factors" were injuring the domestic industry as the same time as the dumped imports. Consequently, the Russian Federation argues, these factors were not clearly raised before the DIMD and were therefore not "known" to the DIMD.[370] The Russian Federation contends that an investigating authority is only required to undertake a non-attribution analysis with respect to factors other than the dumped imports which are known to the investigating authority and which are injuring the domestic industry at the same time as dumped imports.

7.217. We recall that the obligation under Article 3.5 to conduct a non-attribution analysis only arises where the alleged "other factor" is:

a. "known" to the investigating authority;

b. a factor "other than dumped imports"; and

c. injuring the domestic industry at the same time as the dumped imports.[371]

7.218. An investigating authority is not required to address every argument and element of evidence raised by interested parties – indeed, such a requirement would make the investigating authority's task largely impossible. In the circumstances of this case, where there is nothing on the face of the Investigation Report concerning these alleged other factors, we will examine the record of the investigation to determine whether there was evidence before the DIMD based on which it should have addressed whether the alleged "other factors" referred to by the European Union were injuring the domestic industry as the same time as the dumped imports. If we conclude that there was indeed no such evidence before the DIMD with respect to any of these factors, we may conclude that there was no inconsistency with Articles 3.1 and 3.5 in not addressing that alleged other factor at all.[372] If we find there was evidence suggesting that one or more of these "other factors" was injuring the domestic industry at the same time as the dumped imports, we may conclude that the DIMD erred in not making findings with respect to such factor(s).[373]

7.6.2.4.3.1 Self-inflicted injury

7.219. The European Union argues that the DIMD did not examine the interested parties' arguments that the injury suffered by Sollers was largely self-inflicted as an "other factor" causing injury:

a. PCA argued before the DIMD that Sollers' business plan for its joint-venture with Fiat was "very ambitious", with a plan to launch nine new models at once[374] and a target to sell 75,000 Fiat Ducato vans per year[375];

b. both PCA and Daimler argued before the DIMD that there were quality problems with Sollers' Fiat Ducato.[376] According to the European Union, the ambitious business plan and the quality problems explained why Sollers was making less profit than expected and could not raise prices; and

[370] Russian Federation's response to Panel question No. 36, paras. 91-103.
[371] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.
[372] We note that this was also the approach taken by the panel in *China – X-Ray Equipment*. (See Panel Report, *China – X-Ray Equipment*, para. 7.267).
[373] We note in this regard that it might have been preferable for the DIMD to, at a minimum, explain that while interested parties asserted certain other factors were causing injury, they failed to submit evidence suggesting that these factors were causing injury, rather than to remain silent.
[374] Annexes to PCA's Injury Submission of 6 April 2012, (Exhibit EU-14), p. 39.
[375] PCA's Injury Submission of 6 April 2012 following the Public Hearing of 22 March 2012, (Exhibit EU-13), p. 14.
[376] PCA's Injury Submission of 6 April 2012 following the Public Hearing of 22 March 2012, (Exhibit EU-13), p. 14; Comments by Daimler and Mercedes-Benz RUS on the Report of 28 March 2013, (Exhibit EU-19), p. 6; Comments by Daimler of 16 March 2012 regarding the Public Hearing, (Exhibit EU-8), p. 8 and attachment 7: Auto Review Magazine testing of Fiat Ducato and Gazelle; and Minutes of the Public Hearing of 22 March 2012, (Exhibit EU-9), p. 28.

c. Daimler pointed out that Sollers reduced the number of Fiat Ducato models produced in the second half of 2010.[377]

7.220. The Russian Federation argues that the interested parties simply did not provide any evidence concerning the allegedly ambitious business plan beyond certain press articles stating the view that the business model of Fiat/Sollers cooperation was not viable.[378] The Russian Federation argues that the interested parties similarly provided no supporting evidence that Sollers had overall quality problems. The Russian Federation contends that interested parties failed to show how such factors explained the decrease in Sollers' profits and its ability to raise prices.[379]

7.221. Turning first to the alleged quality issues, we note that the only evidence of any quality problems on the record was an article from Auto Review Magazine on the testing of one Fiat Ducato LCV on a cobblestone road.[380] As discussed above in paragraph 7.89, given the narrow sample of Auto Review's testing of Sollers' LCVs, we consider that this magazine article cannot suffice to demonstrate the existence of quality problems with Sollers' products to the degree that would suggest that DIMD acted unreasonably in failing to consider whether the alleged quality problems affected Sollers profits and ability to raise prices and thereby caused injury. Accordingly, we find that the DIMD did not act inconsistently with Articles 3.1 and 3.5 by not conducting a non-attribution analysis of the alleged quality issues.

7.222. Concerning the alleged reduction in the number of Fiat Ducato models produced in the second half of 2010, we note that Daimler, the interested party making this argument, did not explain how this fact, if substantiated, could have caused or contributed to injury suffered by Sollers. We do not consider that a reduction in the number of models produced would necessarily cause injury to the domestic industry in the circumstance of this case at all. Indeed, in certain situations, a reduction in the number of models produced could contribute to improving the performance of a domestic industry. In other situations, such a reduction could indicate the existence of injury. In the absence of any explanation, it is difficult to understand the view that such a reduction is itself a cause of injury. Accordingly, we find that the DIMD did not act inconsistently with Articles 3.1 and 3.5 by not conducting a non-attribution analysis of the reduction of the number of Fiat Ducato models produced.

7.223. Concerning the allegedly ambitious business plan, the record shows that PCA relied upon several newspaper articles in arguing that the allegedly ambitious business plan of Sollers caused self-inflicted injury. However, these articles do not support PCA's argument. First, these articles concerned the Sollers Group's planned joint venture with Fiat for passenger cars and off-road vehicles, rather than the licensing agreement pertaining to production of the like product.[381] Second, one of the newspaper articles comments on Sollers' business model as being "well established and scalable", a statement which would seem positive rather than negative, assuming it referred to the business model for production of the like product.[382] We find nothing in these articles to suggest that DIMD acted unreasonably in failing to consider whether Sollers' business plan for the like product was so ambitious as to be unlikely to succeed, and thus a cause of self-inflicted injury.

[377] Comments by Daimler and Mercedes-Benz RUS on the Report of 28 March 2013, (Exhibit EU-19), p. 6; and Comments by Daimler of 16 March 2012 regarding the Public Hearing, (Exhibit EU-8), p. 9.

[378] Russian Federation's response to Panel question No. 36, para. 92.

[379] Russian Federation's response to Panel question No. 36, para. 94; opening statement at the second meeting of the Panel, para. 64.

[380] Comments by Daimler and Mercedes-Benz RUS on the Report of 28 March 2013, (Exhibit EU-19), p. 6; Comments by Daimler of 16 March 2012 regarding the Public Hearing, (Exhibit EU-8), p. 8 and attachment 7: Auto Review Magazine testing of Fiat Ducato and Gazelle; and Minutes of the Public Hearing of 22 March 2012, (Exhibit EU-9), p. 28.

[381] Annexes to PCA's Injury Submission of 6 April 2012, (Exhibit EU-14), appendix 7, p. 36, appendix 8, p. 37, and appendix 9, p. 39.

[382] Annexes to PCA's Injury Submission of 6 April 2012, (Exhibit EU-14), appendix 9, p. 39. It was stated that "Sollers doesn't have that massive fictitious force, as the AutoVA vehicles do, it is like a stone on your ankles, − commented Boris Rohin, the head of the Automobile Society Ward Howell. − The company possesses a well-established and scalable business model, while the AutoVAZ is not even on the 'basic correctness'".

7.224. The confidential data on capacity and capacity utilization on the record does lend some support to PCA's argument that Sollers' plan to launch nine new models at once and a target to sell 75,000 Fiat Ducato vans per year was overly ambitious. PCA argued that:

> Following the Licensing agreement between the Complainant and Fiat to produce Fiat Ducato in the Russian Federation, the production started late in 2008 on the eve of the economic crisis. The announced capacity dedicated to Ducato model was 75,000 vehicles per year- which appeared overly ambitious. In fact, the realization of such production capacity of Ducato in historical, current and near future market conditions, would mean that Sollers would replace all imports, but also a major part of its main local competitor's (GAZ Gazelle) market share.[383]

PCA's argument relates to the impact of a high level of installed capacity on the state of the domestic industry, in particular with respect to capacity utilisation. PCA argued essentially that Sollers installed too much capacity from the beginning of its production of the like product and that production at or near full capacity would be difficult to realize under normal market conditions. The confidential data concerning the domestic industry in section 4.2.3 of the Investigation Report, **[***]**, lends support to this argument:

Table 10: Capacity and capacity utilisation of the domestic industry

Indicator	Unit	2008	2009	2010	POI		2011
					H2 of 2010	H1 of 2011	
Capacity of the domestic industry of the CU	units	[***]	[***]	[***]	[***]	[***]	[***]
Volume of production of the domestic industry of the CU	units	[***]	[***]	[***]	[***]	[***]	[***]
Capacity utilization	%	[***]	[***]	[***]	[***]	[***]	[***]

Source: Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), table 4.2.3.

7.225. We recognize that, in some situations, the installation or existence of a large amount of production capacity could by itself result in low capacity utilisation, and cause injury to the domestic industry. It is not necessarily unreasonable for a start-up operation to install capacity sufficient to, if the enterprise is successful, serve its domestic market. However, we would have expected a reasonable and objective investigating authority to have considered, in the light of the facts and arguments in this case, whether the level of installed capacity in the domestic industry was an "other factor" causing injury and addressed it in its non-attribution analysis. There is nothing in the Investigation Report to suggest that the DIMD considered the possible cause of low capacity utilisation, an allegedly overly ambitious business plan and excessive capacity, in its assessment of non-attribution. To the contrary, despite the evidence of an overly ambitious capacity installation at the outset of Sollers' operations, the DIMD relied on low capacity utilisation in its finding of material injury.[384]

7.226. For the reasons above, we find that by failing to address PCA's argument regarding the possible cause of Sollers' low capacity utilisation during the period of consideration in its non-attribution analysis, the DIMD acted inconsistently with Articles 3.1 and 3.5.

7.6.2.4.3.2 Financing difficulties

7.227. The European Union argues that interested parties pointed out during the investigation that the Russian Federation's public bank Vnesheconombank (VEB) backed out of its plan to extend a line of credit, at subsidised rates of interest, meant to cover the vast majority of the

[383] PCA's Injury Submission of 6 April 2012 following the Public Hearing of 22 March 2012, (Exhibit EU-13), p. 14. (emphasis added)

[384] We note that the DIMD found that "the production capacity of the domestic industry of the CU during the analysed period remained unchanged", and that "[n]otwithstanding the increase of the capacity utilization during the analysed period this indicator remained at a low level". (See Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 4.2.3 (emphasis added)).

costs of a planned Fiat-Sollers joint venture project concerning the assembly of passenger cars and off-road vehicles, and asserts that the DIMD failed to consider this as an "other factor" causing injury.[385] The European Union contends that facts on the record suggest that VEB pulled out of the project before the joint venture with Fiat was ended, and that one of the reasons for its decision to do so was the absence of a credible business plan. The European Union refers to two documents in the record:

a. Letter of Volkswagen dated 15 October 2013, (Exhibit EU-44), section 4; and

b. PCA's Injury Submission of 6 April 2012 following the Public Hearing of 22 March 2012, (Exhibit EU-13), p. 14, and Annexes 1 and 8 to PCA's Injury Submission of 6 April 2012, (Exhibit EU-14) (newspaper articles relating to financing of the planned Fiat-Sollers joint venture).

7.228. The Russian Federation argues that the letter of Volkswagen dated 15 October 2013 (Exhibit EU-44) was not on the investigation record because it post-dated the entry into effect of the measure. Nor did the European Union provide this letter during the present proceedings.[386] The Russian Federation contends that the newspaper articles referred to by PCA did not indicate to the DIMD that the injury caused to the domestic industry was due to this allegedly financing difficulty.[387]

7.229. The question for us is whether there was evidence on the record that would have led a reasonable and objective investigating authority to know that the financing difficulties were an "other factor" possibly causing injury to the domestic industry at the same time as dumped imports. PCA relied upon the following documents in its arguments to the DIMD in this regard:

a. Annex 1 to PCA's injury submission is an article dated 18 February 2011 from the Russian newspaper Vedomosti stating that the Fiat-Sollers joint-venture project could not be structured based on the business plan presented by the two companies. It also mentioned that Sollers had failed to provide the necessary documents by December 2010. Sollers General Director Vadim Shevtsov said that the joint venture could get a loan from commercial banks.

b. Annex 8 to PCA's injury submission is an article dated 6 December 2010 from the Russian newspaper RIA Novosti stating that Sollers had not presented all necessary documents for VEB to consider the financing the joint project between Sollers and Fiat.

These articles do not address any matters having to do with the Fiat-Sollers licensing agreement underlying the production of Fiat Ducato LCVs, the like product, and thus do not appear to relate to the domestic industry at issue in the underlying investigation. The articles suggest that VEB decided not to finance the planned Fiat-Sollers joint venture project for the assembly of passenger cars and off-road vehicles[388] because Sollers had not presented all necessary documents.

7.230. The European Union argues that VEB "most likely" had access to information relating to Sollers' capacity and production of LCVs. The European Union contends that "the doubts that banks had with regard to Sollers' business plans for the elaborated joint venture with Fiat (producing other cars) were affected by the general doubts that banks had with regard to the state of Sollers. This in turn affected Sollers' position further."[389] In our view the possibility that VEB's decision was affected by information concerning the existing Sollers-Fiat project or the state of the domestic industry does not support the conclusion that VEB's decision not to go forward with financing plans for the planned joint venture project injured the domestic industry. Moreover, nothing in the newspaper articles themselves, or in PCA's submissions, explains how VEB's

[385] European Union's first written submission, para. 306; second written submission, para. 169.

[386] In response to our question at the second meeting of the Panel, the European Union clarified that this was an incorrect reference. The European Union did not submit this letter to the Panel.

[387] Russian Federation's response to Panel question No. 36, paras. 95-98.

[388] It is not entirely clear from these articles whether the planned Fiat-Sollers joint venture project concerned Sollers-Elabuga LLC (i.e. the domestic industry) or Sollers JSC. However, taking into account the arguments concerning Sollers planned joint venture with Fiat discussed at paragraph 7.223 above, it seems most likely to us to be the latter.

[389] European Union's response to Panel question No. 72, paras. 28-30.

decision not to finance the planned joint venture affected the state of the domestic industry producing diesel-engine LCVs. We find therefore that the European Union has not established that the alleged financing difficulties of the planned Fiat-Sollers joint-venture project for the assembly of passenger cars and off-road vehicles was a "known factor" causing injury to the domestic industry producing diesel-engine LCVs.

7.6.2.4.3.3 Discontinuation of government support programmes

7.231. The European Union argues that the DIMD did not examine the discontinuation of certain Russian government programmes supporting local car manufacturers at the end of 2010 as an "other factor" causing injury to the domestic industry. The European Union refers to Daimler's comments that:

> Important governmental support programs were discontinued at the end of 2010. Prior to this time the Applicant used the opportunities of the local support provided by the Russian Government to increase sales and gain SoM (e.g. subsidizing of credits for the customers on the local market, subsidizing of a number of lease companies, state credits, massive public procurements of the vehicles, etc. (cf. Attachment 6).
>
> The governmental "Sole Supplier" decree supporting local producers was also stopped at the end of 2010. In accordance with this governmental resolution there was a list of producers whose products could be purchased by state bodies through the placement of the order with a single supplier. Moreover, there was an increase in the amount of state advancing by 50% when concluding a state contract for the purchase of vehicles through the placement of the order with a single supplier.[390]

The European Union contends that the discontinuation of this programme meant that an important incentive for consumers to purchase local cars was removed, affecting Sollers.[391]

7.232. The Russian Federation contends that the alleged discontinuation of the support programmes was not only unsubstantiated but also factually incorrect. The Russian Federation argues that Daimler provided evidence of only one support programme, concerning the sales of vehicles at a discount in return for recycled vehicles under the Order of the Ministry of Industry and Trade dated 14 January 2010. The Russian Federation asserts that this programme was not discontinued by the end of 2010, but remained in force throughout the period of consideration.[392] Moreover, the Russian Federation argues that, contrary to the European Union's allegation, only the dealers, and not domestic car producers, could claim the discounts under this programme.[393] In any event, the alleged discontinuation of this support programme was not a "known other factor" within the meaning of Article 3.5 because it could not have caused injury to the domestic industry at the same time as the dumped imports.[394]

7.233. Daimler advanced two arguments before the DIMD, one concerning the "subsidized discounts" programme and the other the "Sole Supplier" programme. Daimler asserted that Sollers' diesel-engine LCVs benefited from the "subsidized discounts" programme. Daimler does not, however, appear to have provided any evidence that the support programme was discontinued or that Sollers' LCVs no longer benefited from it after the end of 2010. Absent evidence to suggest that a benefit to Sollers' LCVs was no longer available after 2010, there is no basis for the argument that the termination of the programme, if true, caused injury to the

[390] Comments by Daimler of 16 March 2012 regarding the Public Hearing, (Exhibit EU-8), p. 8 and attachment 6: List of models and producers of new vehicles, produced in Russia, eligible to be sold at discounted prices as part of a test to stimulate the acquisition of new vehicles in return for used and to be recycled vehicles.

[391] European Union's first written submission, para. 307; second written submission, para. 170.

[392] Russian Federation's response to Panel question No. 36, para. 102 (referring to the Order of the Government of the Russian Federation dated 31 December 2009, No. 1194, as revised by the Order of the Government of the Russian Federation dated 28 December 2010 No. 1171); opening statement at the second meeting of the Panel, paras. 62 and 63.

[393] Russian Federation's response to Panel question No. 36, para. 102 (referring to the Order of the Government of the Russian Federation dated 31 December 2009, No. 1194, Rules of provision of subsidies from the Federal budget for recovering revenue losses of trading companies from selling new vehicles, produced in the Russian Federation, with discounts).

[394] Russian Federation's response to Panel question No. 36, para. 103.

domestic industry. Accordingly, we find that the European Union has not demonstrated that the discontinuation of the "subsidized discounts" programme was a "known factor" causing injury to the domestic industry.

7.234. Second, the record contains no indication that Daimler submitted any evidence to support its allegations that: (a) there was a "Sole Supplier" programme; (b) Sollers benefited from this programme; and (c) the programme was discontinued or Sollers no longer benefited from it after the end of 2010. In fact, the record shows that Daimler did not even allege that Sollers was a beneficiary of the "Sole Supplier" programme with respect to its diesel-engine LCVs, but merely mentioned that the programme supported "local producers" without further explanation. In the absence of any evidence to suggest that Sollers ever benefitted from this programme, there is again no basis for the argument that the termination of the programme, if true, caused injury to the domestic industry. Accordingly, we find that the European Union has not established that the discontinuation of the "Sole Supplier" programme was a "known factor" causing injury to the domestic industry.

7.235. For the reasons above, we find that the DIMD did not act inconsistently with Articles 3.1 and 3.5 by failing to undertake a non-attribution analysis with respect to the alleged discontinuation of government support programmes.

7.6.3 Conclusion

7.236. For the reasons set out above, we conclude that the DIMD acted inconsistently with Articles 3.1 and 3.5, insofar as it relied on its price suppression analysis in its causation determination.

7.237. We also conclude that the European Union failed to establish that:

a. the DIMD's determination that the increased volume and market share of dumped imports caused material injury to the domestic industry was inconsistent with Articles 3.1 and 3.5;

b. the DIMD acted inconsistently with Articles 3.1 and 3.5 by failing to conduct a proper non-attribution analysis of the termination of the Fiat licence agreement;

c. the DIMD acted inconsistently with Articles 3.1 and 3.5 in its non-attribution analysis of competition from GAZ;

d. the DIMD acted inconsistently with Articles 3.1 and 3.5 by failing to consider the alleged financing difficulties as an "other factor" causing injury; and

e. the DIMD acted inconsistently with Articles 3.1 and 3.5 by failing to consider the alleged discontinuation of the government support programmes as an "other factor" causing injury.

We further conclude that the DIMD acted inconsistently with Articles 3.1 and 3.5 by failing to (a) examine whether the alleged overly ambitious business plan of Sollers, in particular the level of capacity, was causing injury to the domestic industry at the same time as dumped imports, and if so, (b) separate and distinguish the injurious effects of that factor from the injurious effects of the dumped imports.

7.7 Confidential Treatment

7.7.1 Introduction

7.238. The European Union argues that confidential treatment by the DIMD of certain information submitted by interested parties was inconsistent with Articles 6.5 and 6.5.1 because, with respect to each item of information in question, one or more of the following occurred:

a. the DIMD failed to require a showing of good cause for confidential treatment;

b. the DIMD did not assess whether the cause shown was sufficient to warrant the confidential treatment;

c. there was no "meaningful" summary of the confidential information submitted; or

d. no explanation of why a summary was not possible was provided.[395]

7.239. The Russian Federation rejects these arguments. In general terms, the Russian Federation contends that:

a. with respect to requiring that good cause be shown, the CU law contains an unconditional requirement that an interested party submitting information show good cause for confidential treatment and provide a non-confidential summary of such confidential information.[396] Such a legal requirement, along with "recommendations" issued by the investigating authority, meets the requirements of Articles 6.5 and 6.5.1[397];

b. the Anti-Dumping Agreement does not provide for specific sanctions to penalize interested parties if they fail to provide a sufficient non-confidential summary or a statement of the reasons why summarization is not possible and the Anti-Dumping Agreement does not require an investigating authority to reject confidential information submitted in the absence of good cause shown[398];

c. with respect to whether good cause was actually shown, "in some instances the nature of information itself may show justification, this applies mainly to the information which is by nature confidential. With respect to such information, the basis for providing confidential treatment is self-evident"[399]; and

d. with respect to the requirement to assess good cause shown, "the Anti-Dumping Agreement could not be understood as to require an investigating authority to explain why it accepted whatever the Anti-Dumping Agreement provides for … Rather it required to explain the reasons why an investigating authority *did not*"[400], and so "the fact that confidential treatment is granted signifies that an investigating authority is satisfied with the good cause shown and finds that a request for confidentiality is warranted"[401]; "the DIMD assessed the reasons for withholding the information from the public file and was satisfied with the 'good cause' shown."[402]

In respect of specific information, the Russian Federation further argues that:

e. import/export statistics could be treated as confidential, where for example there is "risk of potential disclosure of the details on the individual transactions, including the terms of transactions and personal information of the entities, exists"[403], and "[t]he provisions of the Protocol on the Status of the Customs Statistic Centre of the CU clearly define the absence of the Centre's competence to provide the statistics on foreign trade of the CU to anyone except the government bodies of the CU Member States"[404];

f. material redacted as confidential in the "textual part of particular sections of the Application" could be found in the accompanying tables either in whole or in summarised

[395] European Union's second written submission, para. 174.
[396] Russian Federation's first written submission, para. 349.
[397] Ibid. para. 352; second written submission, para. 252.
[398] Russian Federation's first written submission, para. 449.
[399] Russian Federation's second written submission, para. 255.
[400] Russian Federation's second written submission, para. 260. (emphasis original)
[401] Ibid. para. 264.
[402] Ibid. para. 266.
[403] Russian Federation's first written submission, para. 359.
[404] Ibid. para. 369. (fn omitted)

format[405], and this was sufficient to permit interested parties to have a reasonable understanding of the substance of the information submitted in confidence[406]; and

g. the GAZ Questionnaire response was not included in either the confidential or the non-confidential record of the investigation, because:

   i. GAZ had not made a distinction between confidential and non-confidential information[407], and

   ii. the information supplied by GAZ was deficient.[408]

h. Sollers' letter of 25 December 2012 and the letter of the "Association of Russian Automakers" of 11 February 2013 were referenced in the non-confidential version of the investigation report and were not treated as confidential by the DIMD.

7.7.2 Evaluation by the Panel

7.7.2.1 Relevant provisions

7.240. 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.

Article 6.5.1 provides:

> 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.

Articles 6.5 and 6.5.1 thus strike a balance between confidentiality and due process,

> [B]y protecting information where good cause has been shown for confidential treatment, while providing an alternative method for its communication so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information.[409]

7.7.2.2 Article 6.5

7.241. "Confidential information" is defined in Article 6.5 as information that is: (a) by nature confidential; or (b) provided on a confidential basis by parties to an investigation. Under Article 6.5, "upon good cause shown" an investigating authority must:

a. treat such information as confidential; and

b. not disclose such information without the permission of the submitter.

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[405] Ibid. para. 374.
[406] Ibid. para. 377.
[407] Russian Federation's first written submission, paras. 677 and 678; second written submission, para. 272.
[408] Russian Federation's first written submission, para. 678.
[409] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.36.

Showing good cause is thus a "condition precedent for according confidential treatment to information submitted to an authority".[410] The condition applies to all information to be treated as confidential, whether it is by nature confidential or submitted on a confidential basis.[411] An interested party fulfils this requirement where it demonstrates "the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information".[412] Article 6.5 does not require a showing of good cause in respect of each item of such information. Rather, depending on the information and the documents in question, good cause may be shown in respect of general categories of information. Where an investigating authority treats as confidential information in respect of which no good cause has been shown, that investigating authority acts inconsistently with its obligation under Article 6.5.

7.242. In this case, the Russian Federation does not identify any instance of an actual showing of good cause by the submitter of information in respect of documents containing information to which the DIMD extended confidential treatment. Indeed, the Russian Federation agrees that many of these documents do not contain an express showing of good cause.[413] The Russian Federation raises three general arguments in defence of its position that in spite of the absence of an express showing of good cause, the DIMD met the requirements of Article 6.5 in treating the information as confidential.

7.243. First, the Russian Federation argues that it is acting consistently with Article 6.5 because CU law[414] and certain "recommendations" issued by the investigating authority[415] "require" that interested parties show good cause. We recall the specific words of Article 6.5: "upon good cause shown". By its express terms, Article 6.5 envisages more than a formal requirement in a Member's anti-dumping law or regulations; it sets out an obligation of results: it is not enough for a Member merely to "require" the showing of "good cause" in its legal regime; under Article 6.5, authorities that conduct an anti-dumping investigation may extend confidential treatment to information only where good cause is, in fact, shown. The Russian Federation's position is not consistent with the words of the Article 6.5 of the Anti-Dumping Agreement. As well, were it to prevail, the interpretation proposed by the Russian Federation would permit Members to be in apparent compliance with Article 6.5 of the Anti-Dumping Agreement while at the same time providing no basis on which to ensure that, in substance, the requirements of Article 6.5 are met by the interested parties to an investigation and the investigating authority. The facts of this case are instructive. We note the Russian Federation's claim that the interested parties were "required" to show good cause. But the interested parties did not, in fact, do so in respect of any of the information at issue.[416] Having received information that, inconsistently with the alleged requirement[417] under CU law[418], did not contain or was not accompanied by a showing of good cause, the DIMD nevertheless extended confidential treatment to such information.

7.244. Second, the Russian Federation argues that the Anti-Dumping Agreement does not require an investigating authority to reject confidential information submitted without good cause. This

[410] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.38.

[411] Appellate Body Reports, *EC – Fasteners (China)*, para. 537; and *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.37: "Article 6.5 applies to both information that is confidential by nature, and information that has been submitted to authorities on a confidential basis. … the requirement to show 'good cause' applies to both categories of information." (fn omitted)

[412] Appellate Body Report, *EC – Fasteners (China)*, para. 537.

[413] Russian Federation's first written submission, paras. 344, 347, and 349-354; second written submission, paras. 261-267.

[414] Russian Federation's first written submission, para. 349.

[415] Ibid. para. 352; second written submission, para. 252.

[416] The Russian Federation argues that in some instances an express showing of good cause was not necessary because the confidential nature of the information was "self-evident". We address this argument below in paragraph 7.245.

[417] We observe that, according to the Russian Federation, this "requirement" was set out in CU law and "recommendations" or "Guidelines" in the various documents sent out by the DIMD. There is therefore some question as to whether on its own terms, the DIMD "required" that good cause be shown. Indeed, the failure to observe this requirement by the submitters of information seems to have been without any consequence for either the submitter or the information submitted.

[418] We note that the European Union alleges that regardless of the Russian Federation's municipal legal requirements, on the facts and on the record of this case good cause was not shown for confidential treatment of items of information. Even if relevant in law, the arguments of the Russian Federation merely demonstrates that its anti-dumping regime is not *as such* inconsistent with Article 6.5; they do not respond to whether in this case and in respect of the documents and information in question the Russian Federation acted consistently with its obligations under Article 6.5.

argument does not address the requirements of Article 6.5. An investigating authority may not extend confidential treatment to information in respect of which the submitter of the information has not shown good cause for confidential treatment. Accordingly, where a submitter fails to show good cause to maintain the confidentiality of the information it submits, it has three choices. It may: seek to show good cause, thereby fulfilling the condition precedent for confidential treatment by the investigating authority; withdraw the request for confidential treatment; or withdraw the information.

7.245. Third, the Russian Federation argues that with respect to information that is by nature confidential, "the basis for providing confidential treatment is self-evident". This argument again does not address the requirements of Article 6.5. We recall the specific words of Article 6.5: "upon good cause shown". These words imply the performance of an act − the showing of good cause − above and beyond the submission of information that is self-evidently confidential. The arguments of the Russian Federation would reduce the "upon good cause shown" condition to inutility by merging the requirement into the other parts of Article 6.5: the task of a panel would be to review not whether good cause was shown, but whether the information was of such nature as to contain within itself the required showing of good cause. As well, we recall that the obligation to show good cause applies equally to information that is by nature confidential and to information that is provided on a confidential basis by parties to an investigation. The Russian Federation further argues that "the fact that confidential treatment is granted signifies that an investigating authority is satisfied with the good cause shown and finds that a request for confidentiality is warranted".[419] That may well be − if good cause were, in fact, shown. For much of the information at issue the Russian Federation admits that no showing of good cause was made[420], and for the rest of the information at issue, nothing in the record indicates that a showing of good cause was made. We find it difficult to see how an investigating authority could be "satisfied" with a condition precedent that by its own admission has not been met.

7.246. In respect of specific information, the Russian Federation raises the following additional arguments:

a. The Russian Federation argues that "[t]he provisions of the Protocol on the Status of the Customs Statistic Centre of the CU clearly define the absence of the Centre's competence to provide the statistics on foreign trade of the CU to anyone except the government bodies of the CU Member States".[421] We consider that this does not detract from the obligation of the DIMD, under Article 6.5, not to extend confidential treatment to information unless good cause has been shown to justify such treatment.

b. In respect of certain material redacted as confidential in the "textual part of particular sections of the Application" (sections 9.4 and 9.5 of Sollers' Application), the Russian Federation argues that the information could be found in the accompanying tables either in whole or in summarised format.[422] However, in our view, to the extent that information that is set out in one part of a document is treated as confidential in another part of the document, this aggravates rather than responds to concerns about compliance with Article 6.5: not only is there no good cause shown, it is difficult to see how good cause could be shown in respect of such information.

c. With respect to the GAZ Questionnaire response, the Russian Federation argues that the information at issue was not in either the confidential or non-confidential versions of the record. We find the Russian Federation's argument difficult to reconcile with the Investigation Report. We note in particular that data set out in the Investigation Report up to section 4.2 includes data related to GAZ as one of two domestic producers of the like product. We recall in particular our findings in paragraph 7.14. Specifically, we found that:

[419] Russian Federation's second written submission para. 264. (emphasis added)
[420] Russian Federation's first written submission, paras. 344, 347, and 349-354; second written submission, paras. 261-267.
[421] Russian Federation's first written submission, para. 369. (fn omitted)
[422] Russian Federation's first written submission, paras. 374 and 394-396; response to Panel question Nos. 79 and 80, paras. 45-48.

i. The investigating authority decided to not include in its definition a known producer of the like product that had provided data and sought to cooperate in the investigation after having reviewed that producer's data. This sequence of events gives rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome, resulting in an obvious risk of material distortion in the subsequent injury analysis.

ii. The reasons given by the Russian Federation for the DIMD's decision to not include GAZ in the definition of domestic industry were not set out in the Investigation Report and thus constitute impermissible *post hoc* rationalization.

That is, we have already found that information submitted by GAZ in the form of a questionnaire response was on the record.[423] Aggregate data in part informed by this information was treated as confidential. According to the Russian Federation itself, GAZ did not distinguish between confidential and non-confidential information: by definition, it could not have shown "good cause." In this light, the DIMD's treatment as confidential of the information in the Questionnaire response was in contravention of Article 6.5.

d. Concerning the Sollers letter of 25 December 2012 and the letter of the Association of Russian Automakers of 11 February 2013, there was some disagreement between the parties as to whether these two letters were treated by the DIMD as confidential. The European Union argues that these letters were not placed in the non-confidential file. The Russian Federation asserts that the documents were not given confidential treatment in the first place and were made available to interested parties in the non-confidential file. The Russian Federation contends that the non-confidential version of the Investigation Report also contained a reference to these letters. In the circumstances, we find that the European Union has not established that the DIMD treated these two letters as confidential.

7.247. In respect of the items of information treated as confidential by the DIMD at issue in this dispute, the European Union has demonstrated that the submitters of that information did not show good cause for confidential treatment. On that basis, in respect of all the information at issue, treated as confidential by the DIMD, the DIMD did not act consistently with Article 6.5. The specific items of information to which this conclusion applies are set out in Table 11.

Table 11: Information treated as confidential in respect of which no good cause was shown

Information	Description
Sollers' Application, section 3	Information on the production of LCVs by GAZ
Sollers' Application, section 7	Information on major consumers of Sollers' goods
Sollers' Application, table 8.1.1	Information on export volumes
Sollers' Application, sections 9.1 and 9.2; fn 8 and annex 3; tables 9.1.1 and 9.1.3	Information on the volume of imports to Kazakhstan and Belarus
Sollers' Application, section 9.4	Information on aggregated import volumes
Sollers' Application, section 9.5	Information on the volumes of dumped imports
Sollers' Application, section 10.2	Information on export price data
Sollers' Application, table 11.2.1	Information on Sollers' sales prices on the domestic market
Sollers' Application, section 11.4	Information on changes in stocks
Sollers' Application, sections 11.5 and 11.6	Information on the drop in the profit and profit margin
Sollers' Application, section 11.7	Information on the supposed effect of the allegedly dumped

[423] We note in particular the following assertion by the Russian Federation:
Specifically, the information pertaining to GAZ, which was used in the final determination, was requested additionally. The investigation record demonstrates that this information was received in a Letter No. 18/ОД/2/2013 dated 21 February 2013 that contains only GAZ's data on volume of production. Importantly, this information differed from the information contained in the deficient Questionnaire response.

Russian Federation's first written submission, para. 679 (footnote omitted). We do not understand the Russian Federation to be suggesting that the DIMD compared the new information received from GAZ to information that was not on the record to determine whether and how much they differed from one another. For this reason, we understood from this paragraph that deficient or not, the GAZ Questionnaire response was indeed part of the record.

Information	Description
	imports on Sollers' obligations
Sollers' Application, section 11.9	Information on the supposed effect of the allegedly dumped imports on the diesel engine production project
Sollers' Application, section 12.2	Information on the market shares of imported and domestic products
Sollers' Application, annexes listed in the Annex List	The annexes to Sollers' Application
Sollers' Questionnaire response[424], section 1.3	Information on the legal organizational form of Sollers
Sollers' Questionnaire response, sections 2.5 and 2.6	Information on catalogues, brochures and Application areas
Sollers' Questionnaire response, section 2.7	Information on quality complaints
Sollers' Questionnaire response, section 2.8	Information on the major consumers of LCVs
Sollers' Questionnaire response, sections 3.2 and 4.2	Information on production capacity
Sollers' Questionnaire response, section 7.1	Information on accounting system and principles
Sollers' Questionnaire response, section 8.2	Information on prices
Sollers' Questionnaire response, section 8.3	Information on terms of sale
Sollers' Questionnaire response, tables in sections 3-7	Information on production volume and capacities, sales volume, profit/loss, employment, salary, investments, purchase of the products from other sources, volume of inventories, sales of the products, average weighted prices for the sales, and production cost structure
Turin-Auto's Questionnaire response[425], section 1.3	Information on Turin-Auto's Articles of Association
Turin-Auto's Questionnaire response, tables in sections 3-6	Information on volume of product purchases, stock level volume, staff number, salaries, investments, volume of product sales, weighted prices, profit/losses, profitability, and costs structure
Sollers' comments after the hearing[426], p. 1, subheading 1	Information on stakeholders and their commercial interests
Sollers' comments after the hearing, pp. 2 and 3	Information on the goods subject to the investigation
Sollers' comments after the hearing, pp. 7 and 8	Information on the production of the goods by Sollers
Sollers' comments after the hearing, p. 10	Information on capacity utilisation
Sollers' comments after the hearing, p. 10	Information on the sales of goods in the domestic market to independent buyers
Sollers' comments after the hearing, p. 12	Information on the financial and economic results from the sales of goods in the domestic market
Sollers' comments after the hearing, pp. 13 and 14	Information on the dynamics of investments, staff headcount and salaries
Sollers' comments after the hearing, p. 16	Information on price suppression
Sollers' comments after the hearing, tables 4-7, 11-15, and 17-20	Information on production, capacity utilisation, sales of products, financial and economic results from sales, investments, staff, salaries, consumption, and volume of sales
Sollers' comments after the hearing, annexes numbered 1 and 2	Annexes to Sollers' comments after the hearing
Public version of the Investigation Report, (Exhibits RUS-12 and EU-21) (exhibited twice), section 1.2 confirms receipt of GAZ's Questionnaire response	GAZ's Questionnaire response

[424] Sollers' Questionnaire response, 3 March 2012, (Exhibit EU-3).
[425] Turin Auto's Questionnaire response, 3 March 2012, (Exhibit EU-5).
[426] Sollers' Comments of 6 April 2012 regarding the Public Hearing of 22 March 2012, (Exhibit EU-10).

7.7.2.3 Article 6.5.1

7.248. Under Article 6.5.1 an investigating authority must require an interested party submitting information that satisfies the requirements of Article 6.5 for confidential treatment to:

a. furnish a non-confidential summary of the information that is in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence; and

b. in exceptional circumstances, where the submitter indicates that confidential information is not susceptible of summary, provide a statement of the reasons why summarization is not possible.[427]

7.249. Article 6.5.1 applies in respect of information properly treated as confidential under Article 6.5. Because we find that the DIMD has not acted consistently with Article 6.5 in extending confidential treatment to the items of information at issue, we do not need to address the claims of the European Union under Article 6.5.1 to resolve this dispute. Nonetheless, in the light of the parties' extensive arguments and integrated approach to their arguments concerning Articles 6.5 and 6.5.1, we make the following observations:

a. The obligations of these provisions apply in respect of all information submitted by all interested parties that falls under Article 6.5, whether or not the information is otherwise complete or used by the investigating authority. This is because the obligation applies to the interested party submitting information at the time it submits the information in question. The interested party has no way of knowing *ex ante* whether an investigating authority will ultimately consider the information "complete" or use it.

b. Where non-confidential summaries are provided, they must be in "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". A "summary" is not a facsimile. In providing a summary, an interested party is not required to ensure a full understanding of the confidential information, but rather a reasonable understanding of the substance of that information. The Anti-Dumping Agreement does not provide any guidance on how summaries may be prepared. Accordingly, whether a summary meets the requirements of Article 6.5.1 must be determined on a case-by-case basis. We note that much of the confidential information provided to the DIMD consists of figures set out in tables. Such information may be summarised in a number of ways. A "range of figures" may, as the European Union suggests, be one way of summarising such information. So are indexes, and the European Union does not argue that the fact of being summarised in the form of indexes (rather than, for example, ranges) would in itself constitute a violation of Article 6.5.1.

c. Article 6.5.1 is not complied with where a Member seeks to demonstrate that a summary of confidential information was provided, or provides a statement of reasons why confidential information could not be summarized, in the course of WTO dispute settlement. In this case, many of the explanations linking confidential information to alleged "summaries" in the Investigation Report were set out in the Russian Federation's submissions to the Panel, rather than having been in the submitted documents or found elsewhere in the record of the investigation; all statements of reasons explaining the absence of a non-confidential summary were likewise provided by the Russian Federation in the course of this dispute settlement proceeding.

d. In accepting summaries of information to be treated confidentially, an investigating authority might find it useful to consider its own disclosure obligations under Article 6.9. In respect of information properly treated as confidential, "the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the 'essential' but confidential facts."[428] At a minimum, non-confidential

[427] Emphasis added.
[428] Panel Report, *China – GOES*, para. 7.410.

summaries provided by a submitter of information to be treated as confidential could serve as a starting point for the required disclosure of essential facts under Article 6.9.[429]

7.8 Essential Facts

7.8.1 Introduction

7.250. The European Union alleges violations of Article 6.9 in respect of the alleged failure to inform interested parties of essential facts under consideration concerning all aspects of the decision to impose the definitive measure: the existence of dumping and the determination of material injury caused by dumped imports.[430] The interested parties in question, to whom the required disclosure was not made, are the exporters of the subject LCVs, Daimler AG and Volkswagen AG.[431] The European Union alleges that the following essential facts were not disclosed to these interested parties, either in full or in the form of "meaningful" summaries:

a. the actual volumes of imports of subject products to the CU effected by Daimler AG and Volkswagen AG that were used for the purpose of calculation of the normal value and of the export price[432];

b. the weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG respectively[433];

c. the weighted average export price for subject products exported by each of the abovementioned companies into the CU[434];

d. the source of the information concerning import volumes and values used by the DIMD[435];

e. the actual figures that show "the consumption volumes of LCVs in the Customs Union", "the production and sales volume of LCVs in the Customs Union", "the evolution of the profits and profitability of the domestic industry in 2011"[436];

f. the profit/loss of Sollers from the sale of LCVs in the CT CU in 2011[437];

g. "dynamics of profitability of sales of Goods in the CT CU (versus the respective period of the preceding year, in percentage points)"[438];

h. the source of the data used to compile tables 4.1.1.3 (import volume and volume of dumped imports)[439];

i. return on investments, actual and potential negative effects on cash flow and ability to raise capital or investments for Sollers[440];

[429] For reasons that are set out below, we do not make any findings in respect of non-confidential summaries under Article 6.9 in this dispute.
[430] European Union's first written submission, para. 416; second written submission, para. 278. See also the Panel's preliminary ruling in respect of the scope of this claim.
[431] Investigation Report, section 1.2.
[432] European Union's first written submission, paras. 428, 431, and 432; second written submission, para. 278.
[433] European Union's second written submission, para. 278.
[434] European Union's first written submission, paras. 428 and 429; second written submission, para. 278.
[435] European Union's first written submission, paras. 430-433; second written submission, para. 278.
[436] European Union's first written submission, paras. 436-438; second written submission, para. 278.
[437] European Union's first written submission, paras. 219, 437, and 438; second written submission, para. 278.
[438] European Union's first written submission, paras. 437 and 438; second written submission, para. 278.
[439] European Union's first written submission, paras. 448-450; second written submission, para. 278.
[440] Table contained in section 4.2.7 of the Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI); European Union's second written submission, para. 301.

j. the market share held by GAZ in 2011[441];

k. information on the relation of the volume of export to the total volume of production[442];

l. the figures for the production capacity of the domestic industry[443];

m. the figures for the structure of the costs of production of the domestic industry[444];

n. the production volumes, consumption volumes and sales volumes in aggregate form[445];

o. return on investments, actual and potential negative effects on cash flow and ability to raise capital or investments[446]; and

p. the figures for the numbers and salaries of staff.[447]

7.251. In general terms, the Russian Federation argues that:

a. the European Union did not demonstrate that "the DIMD had an opportunity to disclose" the information at issue because the information was confidential[448];

b. "where facts available are by nature confidential, or are submitted to the investigating authority on a confidential basis, are also part of the 'essential facts under consideration' the investigating authority has to meet dual obligations"[449];

c. the two interested parties were non-cooperating and a Member has limited disclosure obligations in respect of such interested parties[450];

d. "in cases where the relevant essential facts are already in the possession of the respondents, a narrative description of the data used cannot *ipso facto* be considered insufficient disclosure"[451]; and

e. to establish a violation of Article 6.9 of the Anti-Dumping Agreement, a complaining party must demonstrate that the omitted facts affected the interested parties' right of defence. Thus, an incomplete disclosure document will satisfy the requirements of

[441] European Union's first written submission, para. 443; second written submission, para. 278.
[442] Investigation Report, section 4.1.2; Eurasian Economic Commission, *Results of the anti-dumping investigation with regard to light commercial vehicles originating in Germany, Italy, Poland, and Turkey imported into the common customs area of the Customs Union* (Moscow, 28 March 2013) (Draft Report), (Exhibits EU-16 and RUS-10) (exhibited twice), section 4.1.2; and European Union's second written submission, para. 302.
[443] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), table in section 4.2.3; Draft Report, (Exhibits EU-16 and RUS-10) (exhibited twice), table in section 4.2.3; and European Union's second written submission, para. 302.
[444] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 4.2.4 and table 4.2.4.2; Draft Report, (Exhibits EU-16 and RUS-10) (exhibited twice), section 4.2.4 and table 4.2.4.2 (not complete); and European Union's second written submission, para. 302.
[445] European Union's first written submission, paras. 210, 355, and 356; second written submission, para. 296.
[446] European Union's first written submission, para. 236; second written submission, para. 301.
[447] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 4.2.6 and table 4.2.6; Draft Report, (Exhibits EU-16 and RUS-10) (exhibited twice), section 4.2.6; and European Union's second written submission, para. 302.
[448] Russian Federation's first written submission, paras. 343, 344, 359-363, 371, 976, and 990; second written submission, paras. 243, 244, 269, 274, 313, 382, 419, 453, 489, 500, 503, 512, 514, 524-537, and 610; opening statement at the first meeting of the Panel, para. 78; and response to Panel question No. 44, para. 161.
[449] Russian Federation's first written submission, para. 722.
[450] Russian Federation's first written submission, paras. 696, 760, 827, and 877, and fn 325; second written submission, paras. 347-358; opening statement at the first meeting of the Panel, para. 79; and response to Panel question No. 44, paras. 145-161.
[451] Russian Federation's first written submission, para. 719.

> Article 6.9 of the Anti-Dumping Agreement if this incompleteness does not affect interested parties' right of defence.[452]

The Russian Federation also raises specific arguments in respect of certain essential facts; these we discuss below.

7.8.2 Evaluation by the Panel

7.8.2.1 Relevant provisions

7.252. Article 6.9 provides:

> The authorities 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.

7.253. The first sentence is the operative part of Article 6.9. Broken down to its constituent parts, it has the following required elements:

a. shall inform

b. all interested parties

c. before a final determination is made

d. of the essential facts

   i. under consideration

   ii. which form the basis for the decision whether to apply definitive measures.

Thus, a complaining party demonstrates that an investigating authority has acted inconsistently with Article 6.9 where it establishes that any one of these required elements has not been satisfied.

7.254. The second sentence of Article 6.9 is, on its face, a temporal exhortation. As context for the central obligation in Article 6.9[453], it gives an indication both of why disclosure is to be made[454] and when it must be made. Nothing in the second sentence suggests that it is an element noncompliance with which must be independently demonstrated by the complaining party to establish inconsistency with Article 6.9. For this reason, to establish inconsistency with Article 6.9, a complaining party is not required to demonstrate that a failure to disclose essential facts did "affect interested parties' right of defence".[455]

7.255. In view of the questions at issue in this dispute and the required elements of Article 6.9, our analysis will proceed in three steps:

a. What are the "essential facts" at issue? In particular, how is the obligation in Article 6.9 to be met in respect of confidential information?

b. Are there any limits on who is entitled to receive disclosure?

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[452] Russian Federation's response to Panel question No. 89, para. 65.
[453] Appellate Body Report, *China – GOES*, para. 240.
[454] The panel in *EC – Salmon (Norway)* at para. 7.805:
> 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.

[455] Russian Federation's response to Panel question No. 89, para. 65.

c. How are interested parties to be "informed"?

7.8.2.2 "Essential facts"

7.256. Article 6.9 requires the disclosure of "the essential facts under consideration which form the basis for the decision whether to apply definitive measures".[456] There are three cumulative elements as to the kinds of information an investigating authority is required to disclose:

a. Article 6.9 requires the disclosure of facts: the information underlying a decision rather the reasoning, calculation or methodology that led to a determination.[457]

b. A fact is essential where it is "extremely important and necessary"[458], "indispensable"[459] or "significant, important or salient"[460] in the process of reaching a decision as to whether or not to apply definitive measures.

c. Not every "essential fact" is required to be disclosed. Article 6.9 requires the disclosure of "essential facts under consideration": the "facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping and/or countervailing duties."[461]

7.8.2.2.1 The facts at issue

7.257. The European Union has not demonstrated that three of the alleged "essential facts" meet these requirements:

a. The source of the data used to compile tables 4.1.1.3 (import volume and volume of dumped imports). In itself, the source of data is not an essential fact under consideration. Knowledge of the sources of data might be useful to establish the credibility of information used by investigating authorities, but the sources of data are not themselves essential facts under consideration.

b. The source of the information concerning import volumes and values used by the DIMD, for the same reasons as above.

c. The market share held by GAZ. This information does not appear to have been under consideration in the investigation.

Accordingly, we make no findings in respect of these alleged essential facts.

7.258. In respect of disclosure of facts related to investments, the return on investments, the actual and potential negative effects on cash flow, the ability to raise capital or investments, relation of the volume of export to the total volume of production, production capacity, structure of production costs and numbers and salaries of staff the Russian Federation argues that these are "new claims" that the European Union raises for the first time in its second written submission.[462] The European Union points out that its claim in this dispute is that the DIMD failed to disclose essential facts related to the determination of dumping and injury, including causation. Additional instances of allegedly undisclosed essential facts became known only after the Russian Federation

[456] Emphasis added.
[457] Panel Report, *China – Broiler Products*, para. 7.90.
[458] Merriam-Webster dictionary online, definition of "essential", available at: http://www.merriam-webster.com/dictionary/essential.
[459] Oxford English dictionary online, definition of "essential", available at: http://www.oed.com/view/Entry/64503?redirectedFrom=essential#eid
[460] Appellate Body Report, *China – GOES*, para. 240:
Moreover, we note that Articles 6.9 and 12.8 do not require the disclosure of all the facts that are before an authority but, instead, those that are "essential"; a word that carries a connotation of significant, important, or salient.

[461] Appellate Body Report, *China – GOES*, para. 240.
[462] Russian Federation's opening statement at the second meeting of the Panel, paras. 77 and 78; response to Panel question No. 88, para. 60.

submitted the confidential version of the Investigation Report.[463] The European Union notes further that "Russia does not appear to have actually made any legal objection to their raising, and has been able to fully engage with them on the merits in these proceedings."[464]

7.259. We recall the structure of a claim under Article 6.9: a complaining party alleges that an investigating authority has acted inconsistently with its obligations by not disclosing essential facts under consideration. The European Union's claim follows this structure − in its request for establishment of a panel, the European Union claimed that the Russian Federation failed to inform interested parties of the essential facts under consideration, referring specifically to the essential facts underlying the determinations of the existence of dumping and the calculation of the margins of dumping and the determination of injury.[465] It is in the nature of a claim under Article 6.9 that a complaining party may not know everything that the investigating authority did not disclose. Indeed, in certain instances a complaining party may only become aware of non-disclosure of certain essential facts in the course of WTO dispute settlement, when it has access to a less-redacted published report. For this reason, a panel should exercise caution in unduly narrowing the scope of a claim under Article 6.9 on the basis that specific facts known to the investigating authority but not to the complaining party were not identified as undisclosed essential facts by the complaining party early in the dispute. This does not mean that a complaining party may expand the scope of its Article 6.9 claims as the case develops or is excused from providing the evidentiary basis for establishing its case, only that if a claim regarding non-disclosure of essential facts is properly before it, a panel should not *ex ante* exclude certain evidence and argument from consideration.

7.260. In this case, the European Union's claim in respect of Article 6.9 is properly before us.[466] The parties agree that the European Union did not mention certain allegedly undisclosed essential facts in its earlier submissions. At issue is the legal relevance of this omission for the European Union's claim under Article 6.9. We have compared the Draft Report, which constitutes the Russian Federation's disclosure under Article 6.9, with the confidential version of the Investigation Report. As a matter of fact, we find that:

a. tables containing figures in sections 4.2.6 and 4.2.7 of the confidential version of the Investigation Report are missing in their entirety, and in sections 4.1.2 and 4.2.3 in part, from the Draft Report; and

b. in the Draft Report, there is no indication that there were tables containing figures in sections 4.2.6 and 4.2.7. However, the Draft Report does contain tables showing that figures were redacted as indicated by the use of the term "CONFIDENTIAL".

That is, in respect of the "essential facts" at issue, entire pieces of information are missing from the Draft Report; nothing in the Draft Report suggested the existence of confidential information that had been redacted; the contrast with other instances where confidential information was redacted from the Draft Report suggested the exact opposite.

7.261. We further note that:

a. the Russian Federation has been aware of the full scope of the European Union's claims under Article 6.9 since 15 September 2014 and at the latest 20 April 2016;

b. the European Union raised these matters at the earliest opportunity after the Russian Federation submitted a less-redacted version of the Investigation Report as an exhibit in this dispute;

c. the Russian Federation has been in full possession of all the evidence at issue since the beginning of the case; and

d. the Russian Federation has had ample opportunity to respond to the arguments of the European Union, and has done so in considerable detail.

[463] European Union's response to Panel question No. 88, paras. 70 and 71.
[464] European Union's comments on Russian Federation's response to Panel question No. 88, para. 43.
[465] European Union's panel request, para. 8.
[466] *Russia – Commercial Vehicles*, preliminary ruling of the panel, para. 4.1. (Annex D-1)

Accordingly, we do not consider these additional allegations of undisclosed essential facts to constitute "new claims", and will address them in our findings.

7.262. The Russian Federation further argues that **[***]** "were not central to the conclusion of injury and did not weigh significantly"[467] and therefore did not constitute essential facts. The Russian Federation argues that **[***]** does not constitute an essential fact because, in part, "the named factors do not constitute relevant factors listed in Article 3.4 of the Anti-Dumping Agreement".[468] As to whether the facts at issue constituted "essential facts", the European Union argues that:

> The body of essential facts to be disclosed under Article 6.9 concerns the facts "under consideration" by the investigating authority in determining whether (or not) to apply measures, including those that are "salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome". This surely covers the facts underlying the assessment of mandatory injury factors which an investigating authority is required to undertake under Article 3.4 of the AD Agreement.[469]

The European Union further argues that in addition to the mandatory injury factors, Article 3.4 requires analysis of "relevant economic factor having a bearing on the state of the industry". Accordingly, information related to non-listed factors such as **[***]** is nevertheless "salient for the DIMD's decision to apply definitive measures" and thus an essential fact subject to the disclosure requirements of Article 6.9.[470]

7.263. A fact is essential if it is "significant, important or salient" or "indispensable" in the process of reaching a decision as to whether or not to apply definitive measures. That "process" has three principal constituent elements: dumping, material injury and causation. Each of these constituent elements has, in turn, specific analytical and evidentiary requirements. A fact is essential where it is "significant, important or salient" in respect of a requirement under any of the three elements. Accordingly, even if we were to agree with the Russian Federation that the facts at issue were not "central to the conclusion of injury", that does not end the analysis as to whether they are "essential facts" within the meaning of Article 6.9. In this instance, the Russian Federation does not dispute that **[***]** are required elements in evaluating the injury factors under Article 3.4.[471] Facts that are "significant, important or salient" in conducting required analyses are "essential facts" whether or not they are "central" to the final injury determination. For this reason, we find that the facts at issue, that is, the figures related to investments, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments are essential facts subject to the disclosure requirements of Article 6.9.

7.264. Finally, we agree with the Russian Federation that some of the **[***]** does not relate directly to the specific factors listed in Article 3.4. However, we recall that Article 3.4 requires an analysis of "all relevant economic factors and indices" including the listed fifteen specific factors. The information at issue is in our view salient to the analysis of relevant economic factors and therefore constitutes essential facts subject to the disclosure requirement of Article 6.9.

7.265. The parties do not disagree as to whether the other facts at issue are "essential facts under consideration" within the meaning of Article 6.9. As well, the parties do not disagree that the essential facts in question were not disclosed in their entirety to the two interested parties named. Rather, the Russian Federation considers that the information allegedly not disclosed was

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[467] Russian Federation's response to Panel question No. 89, para. 61.
[468] Russian Federation's opening statement at the second meeting of the Panel, para. 79.
[469] European Union's response to Panel question No. 89, para. 72. (fn omitted, emphasis added)
[470] European Union's second written submission, paras. 303 and 304.
[471] Article 3.4 provides that:

> The examination of the impact of the 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, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance. (emphasis added)

subject to confidentiality requirements. The European Union initially argued that the failure to disclose certain actual figures (whether or not confidential) amounted to acting inconsistently with Article 6.9.[472] In later submissions, the European Union appears to argue that to the extent that information was confidential, it was not properly disclosed.[473] We now turn to the question of disclosure under Article 6.9 of information properly treated as confidential under Article 6.5.

7.8.2.2.2 Confidential information

7.266. The Russian Federation argues that:

a. in respect of information treated as confidential[474], the European Union did not "demonstrate that the DIMD had an opportunity to disclose the actual figures …"[475]; and

b. certain "essential facts" in this case constituted information subject to the confidentiality requirements of Article 6.5.[476]

7.267. The European Union considers that:

> [T]he central objective of Article 6.9 is to enable interested parties to defend their interests. With respect to confidential information, whether they are summarized in a meaningful way will similarly often depend on whether the summary allows interested parties to defend their interests.[477]

In this instance, then, "what is at issue is the omission of essential facts, without providing a meaningful non-confidential summary".[478]

7.268. Nothing in Article 6.9 requires a complaining party to demonstrate that an investigating authority had "an opportunity" to make the required disclosure. Under Article 6.9, a complaining party presents a *prima facie* case where it demonstrates that essential facts have not been disclosed to the interested parties as required. Article 6.9 does not require the disclosure of essential facts that benefit from confidential treatment under Article 6.5. Indeed, the Russian Federation also argues that a Member is under "dual obligations"[479] in respect of essential facts that are treated as confidential by an investigating authority. But Article 6.5 is not a carve-out to Article 6.9; confidentiality of information is neither an absolute bar to disclosure nor a defence to the failure to disclose as required under Article 6.9. Rather, a harmonious interpretation of the "dual obligation" is that where essential facts are properly treated as confidential, "the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the 'essential' but confidential facts".[480]

7.269. We have found above that none of the information set out in Table 11 that was treated as confidential by the DIMD met the requirements of Article 6.5 for such treatment. This includes the essential facts contained in that information. We stress that this finding does not mean that the information at issue was not confidential, or could not have been properly treated as confidential. Rather, we found that the condition precedent for treatment as confidential of such information by

[472] European Union's first written submission, para. 438. Both the actual figures that show the domestic consumption, production and sales volumes, and the evolution of the profits and profitability of the domestic industry in 2011, are essential facts that form the basis of the injury analysis.

[473] European Union's response to Panel question No. 71, para. 26.

[474] Specifically, the actual volumes of imports of subject products to the CU effected by Daimler AG and Volkswagen AG that were used for the purpose of calculation of the normal value and of the export price; the actual value of imports of subject products to the CU effected by Daimler AG and Volkswagen AG that were used for the purpose of calculation of the export price; the actual figures that show the domestic consumption, production and sales volumes, and the evolution of the profits and profitability rate of Sollers in 2011; the profit/loss of Sollers from the sale of LCVs in the CT CU in 2011; the profitability rate of Sollers from the sale of LCVs in the CT CU; and the production volumes, consumption volumes and sales volumes *in aggregate form*.

[475] Russian Federation's second written submission, para. 313. (emphasis added)

[476] Russian Federation's first written submission, para. 722.

[477] European Union's response to Panel question No. 82, para. 55.

[478] European Union's response to Russian Federation question No. 5, para. 12.

[479] The obligation to disclose under Article 6.9 and the obligation to protect confidential information under Article 6.5. Both provisions apply in respect of confidential information.

[480] Panel Report, *China – GOES*, para. 7.410.

the investigating authority, a showing of good cause, was not met and therefore that information, including the essential facts at issue, was not properly treated as confidential in the investigation. Because confidential treatment of the essential facts in question by the DIMD was not consistent with the Russian Federation's obligations under Article 6.5, it was not properly treated as confidential; to the extent that the DIMD failed to disclose information that was not properly treated as confidential constitutes, it acted inconsistently with Article 6.9.

7.270. In respect of information originating from electronic customs database of national customs authorities of the CU, the Russian Federation argues that this information was submitted on a confidential basis to the DIMD and, accordingly, was treated as confidential by the DIMD. We note that there is no showing of good cause on the record in respect of such information. This does not mean that the information at issue was not confidential, or could not have been properly treated as confidential. Rather, the condition precedent for treatment as confidential of such information by the investigating authority, a showing of good cause, is nowhere on the record. For this reason, consistent with our finding in paragraph 7.269, this information, including the essential facts at issue, was not properly treated as confidential in the investigation. To the extent that the DIMD failed to disclose information that was not properly treated as confidential, it acted inconsistently with Article 6.9.

7.8.2.3 "All" interested parties

7.271. The Russian Federation argues that the two interested parties at issue were non-cooperating and that a Member has limited disclosure obligations in respect of such interested parties.

7.272. Article 6.9 requires the authorities to "inform all interested parties of the essential facts". The European Union and the Russian Federation do not disagree that the two interested parties in question are, in fact, "interested parties" within the meaning of Article 6.9. The question at issue is whether "all interested parties" in Article 6.9 includes non-cooperating interested parties.

7.273. Unless otherwise defined or indicated, "all" means everyone. Nothing in Article 6.9 provides a different definition of "all" or otherwise suggests that "all" should be interpreted as anything other than all. It is true that Article 6.9 does not set out the precise manner in which an investigating authority must disclose the essential facts.[481] The disclosure, in whatever "manner" it is undertaken, must be made to all interested parties:

a. before a final determination is made;

b. with a view to enabling interested parties to defend their interests; and

c. "in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures."[482]

7.274. The broader context supports the view that "all" means all. Where the drafters intended to make a distinction between various interested parties in a disclosure context, they did so expressly, as in Article 6.7. Furthermore, Article 6.9 follows Article 6.8, which refers to "non-cooperating" parties: it would therefore have been easy, had it been the intent of the drafters, to exclude such parties from the scope of disclosure in Article 6.9, which is not the case. And nothing in the object and purpose of Article 6.9 detracts from the textual understanding that "all" means all. Article 6.9 is not about disclosure in the abstract or transparency for its own sake. The second sentence of Article 6.9 provides: "[s]uch disclosure should take place in sufficient time for the parties to defend their interests."[483] This sentence, combined with the opening sub-clause

[481] Panel Report, *China – Broiler Products*, para. 7.95:
Article 6.9 does not prescribe a particular format for the disclosure of the essential facts under consideration. The standard by which to assess whether a disclosure satisfies the requirements of Article 6.9 is not whether it was provided in the respondent's preferred format, but whether it provided sufficient disclosure of the essential facts such that the respondent could defend its interests.

[482] Appellate Body Report, *China – GOES*, para. 240.
[483] Emphasis added.

of Article 6.9 ("before a final determination is made"), makes clear the purpose of disclosure under Article 6.9:

> [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.[484]

This purpose will not be served by reading "all" as not meaning all. An interested party's failure to fully cooperate in the investigation does not necessarily lessen the interest or concerns of that interested party with the conduct and outcome of an investigation; the purpose of Article 6.9 will not be served by not including non-cooperating interested parties in its scope. Indeed, in this instance, we note that the two "non-cooperating" interested parties in question were involved in the investigation from the beginning and made numerous representations to the DIMD.[485]

7.275. In respect of its obligations under Article 6.9, an investigating authority may not make a distinction between cooperating and non-cooperating interested parties. All interested parties have the right to be informed of the essential facts under consideration.

7.8.2.4 "Inform"

7.276. The Russian Federation argues that "in cases where the relevant essential facts are already in the possession of the respondents, a narrative description of the data used cannot *ipso facto* be considered insufficient disclosure". In respect of certain specific essential facts[486] the Russian Federation argues that it has met its obligation to "inform" interested parties because:

> [T]he Draft Report allows any interested parties to determine the weighted average price for LCVs produced by German exporting producers on EXW basis and the weighted average price for LCVs produced by German exporting producers on CIF basis … .[487]

7.277. Article 6.9 requires an investigating authority to disclose the essential 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 measures".[488] What other information is in the possession of the interested parties does not determine the obligation of an investigating authority to "inform" the interested parties of the essential facts. As well, the requirement to "inform" interested parties of essential facts "in a coherent way" is not met where interested parties are expected to deduce the essential facts themselves from information they have otherwise received.

7.8.2.5 Conclusion

7.278. In the light of the above, in respect of the "essential facts" at issue we make the following specific findings:

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[484] Panel Report, *EC – Salmon (Norway)*, para. 7.805.

[485] Both Volkswagen AG and Daimler AG were registered as investigation participants. They both participated in investigation meetings, held on 28 February 2012 and 17 May 2012 with each respectively. Volkswagen AG presented non-confidential materials on 17 and 27 March 2012, and both companies participated in the public hearing of 22 March 2012, presenting information in writing. (Investigation Report, section 1.2).

[486] Specifically, "[e]xport volumes and weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG respectively."

[487] Russian Federation's first written submission, para. 813. (fn omitted)

[488] Appellate Body Report, *China – GOES*, para. 240.

Table 12: Findings concerning the disclosure of essential facts

"Essential fact" at issue	Finding
a. the source of the information concerning import volumes and values used by the DIMD[489] b. the source of the data used to compile tables 4.1.1.3 (import volume and volume of dumped imports)[490] c. market share held by GAZ in 2011[491]	Not an essential fact under consideration. Accordingly, the European Union has not established that the DIMD acted inconsistently with Article 6.9 by failing to inform all interested parties of these items of information.
d. the actual volumes of imports of subject products to the CU effected by Daimler AG and Volkswagen AG that were used for the purpose of calculation of the normal value and of the export price[492] e. the weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG respectively [493] f. the actual figures that show the domestic consumption, production and sales volumes, and the evolution of the profits and profitability rate of Sollers in 2011[494] g. the profit/loss of Sollers from the sale of LCVs in the CT CU in 2011[495] h. the profitability rate of Sollers from the sale of LCVs in the CT CU[496] i. the production volumes, consumption volumes and sales volumes *in aggregate form*[497] j. the weighted average export price for subject products exported by each of the abovementioned companies into the CU[498] k. return on investments, actual and potential negative effects on cash flow and ability to raise capital or investments[499] l. information on the relation of the volume of export to the total volume of production[500] m. the figures for the production capacity of the domestic industry[501] n. the figures for the structure of the costs of production of the domestic industry[502] o. the figures for the numbers and salaries of staff[503]	Not properly treated as confidential.[504] Accordingly, the DIMD's failure to inform all interested parties of these items of information was not consistent with Article 6.9.

[489] European Union's first written submission, paras. 430-433; second written submission, para. 278.
[490] European Union's first written submission, paras. 448-450; second written submission, para. 278.
[491] European Union's first written submission, para. 443; second written submission, para. 278.
[492] European Union's first written submission, paras. 426 and 429; second written submission, para. 278.
[493] European Union's second written submission, para. 278.
[494] European Union's first written submission, paras. 436-438; second written submission, para. 278.
[495] European Union's first written submission, paras. 219, 437, and 438; second written submission, para. 278.
[496] European Union's first written submission, paras. 437 and 438; second written submission, para. 278.
[497] European Union's first written submission, paras. 210, 355, and 356; second written submission, para. 296.
[498] European Union's first written submission, paras. 428 and 429; second written submission, para. 278.
[499] European Union's first written submission, para. 236; second written submission, para. 301.
[500] Investigation Report, section 4.1.2; Draft Report, (Exhibits EU-16 and RUS-10) (exhibited twice), section 4.1.2; and European Union's second written submission, para. 302.
[501] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), table in section 4.2.3; Draft Report, (Exhibits EU-16 and RUS-10) (exhibited twice), table in section 4.2.3; and European Union's second written submission, para. 302.
[502] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 4.2.4 and table 4.2.4.2; Draft Report, (Exhibits EU-16 and RUS-10) (exhibited twice), section 4.2.4 (table 4.2.4.2 was not included); and European Union's second written submission, para. 302.
[503] Confidential version of the Investigation Report, (Exhibit RUS-14) (BCI), section 4.2.6 and table 4.2.6; Draft Report, (Exhibits EU-16 and RUS-10) (exhibited twice), section 4.2.6 (table 4.2.6 was not included); and European Union's second written submission, para. 302.
[504] See paragraph 7.247 for our findings concerning the European Union's claims under Article 6.5.

7.9 Consequential claims

7.279. The European Union claims that the DIMD acted inconsistently with Articles 1 and 18.4 of the Anti-Dumping Agreement and Article VI of the GATT 1994, as a consequence of the alleged breaches of the Anti-Dumping Agreement.

7.280. We note that the European Union's claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 are purely consequential, in the sense that they depend on the outcome of other claims brought by the European Union under other provisions of the Anti-Dumping Agreement. As a consequence of the inconsistencies we have found to exist with the Anti-Dumping Agreement, we find that the Russian Federation acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

7.281. With respect to the European Union's claim under Article 18.4 of the Anti-Dumping Agreement, we note that the European Union has not brought any claims concerning the conformity of any laws, regulations or administrative procedures with the provisions of the Anti-Dumping Agreement as they may apply to the Russian Federation. Accordingly, we find that the European Union has not established its consequential claim under Article 18.4 of the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, we conclude as follows:

a. the DIMD acted inconsistently with Article 4.1 in its definition of "domestic industry";

b. the DIMD acted inconsistently with Article 3.1 because it undertook its injury and causation analyses on the basis of information related to an improperly defined domestic industry;

c. the European Union has failed to establish that the DIMD acted inconsistently with Article 3.1 by purportedly using "non-equal and non-consecutive" periods in the examination of developments in injury indicators for the domestic industry. Having reached this conclusion, we also reject the European Union's consequential claims of inconsistency under Articles 3.2, 3.4, and 3.5;

d. With respect to claims related to price suppression;

   i. the DIMD acted inconsistently with Articles 3.1 and 3.2 by failing to taken into account the impact of the financial crisis in its price suppression analysis;

   ii. the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.2 because the DIMD "mixed up" data expressed in USD and RUB without any explanation in its price suppression analysis;

   iii. the European Union has not established that the DIMD's consideration of whether the subject imports have "explanatory force" for the occurrence of significant suppression of domestic prices was inconsistent with Articles 3.1 and 3.2;

   iv. the European Union has not established that the DIMD did not demonstrate that the alleged price suppression was "to a significant degree" because the DIMD did not compare the estimated prices and the actual prices for the domestic like product.

e. With respect to claims related to the state of the domestic industry,

   i. the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 in its consideration of profit/profitability data in the Investigation Report;

ii. the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 in its consideration of inventories data in the Investigation Report;

iii. the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to systematically compare data for 2011 with data for 2008 for all economic indicators in the present case;

iv. the European Union has not established that the DIMD failed to objectively examine the domestic industry's profit/profitability during the POI, the 1st half of 2011 and the full year of 2011;

v. the European Union has not established that the DIMD assumed that the exceptional positive developments in the domestic industry during 2009 could continue during 2010-2011 without more explanation, and "base[d] its conclusions on a comparison between these two time periods";

vi. the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to consider whether the market would accept further price increases;

vii. the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to specifically address the interested parties' argument on the comparison of the domestic industry's market share in 2010 and 2008;

viii. the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 in failing to evaluate the inventories of independent dealers and the reason for the increase in inventories;

ix. the DIMD acted inconsistently with Article 3.4 by failing to evaluate the magnitude of the margin of dumping;

x. the European Union has not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 by failing to evaluate the domestic industry's return on investments, actual and potential effects on cash flow and the ability to raise capital or investments.

f. With respect to claims related to causation and non-attribution,

i. the DIMD acted inconsistently with Articles 3.1 and 3.5, insofar as it relied on its price suppression analysis in its causation determination;

ii. the European Union failed to establish that the DIMD's determination that the increased volume of dumped imports caused material injury to the domestic industry was inconsistent with Articles 3.1 and 3.5;

iii. the European Union failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.5 by failing to conduct a proper non-attribution analysis of the termination of the Fiat licence agreement;

iv. the European Union failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.5 in its non-attribution analysis of the competition from GAZ;

v. the European Union failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.5 by failing to consider the alleged financing difficulties as an "other factor" causing injury;

vi. the European Union failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.5 by failing to consider the alleged discontinuation of the government support programmes as an "other factor" causing injury;

vii. the DIMD acted inconsistently with Articles 3.1 and 3.5 by failing to (a) examine, whether the alleged overly ambitious business plan of Sollers, in particular the level of capacity, was causing injury to the domestic industry at the same time as dumped imports, and if so, (b) separate and distinguish the injurious effects of that factor from the injurious effects of the dumped imports.

g. With respect to claims concerning confidential treatment,

   i. the DIMD acted inconsistently with Article 6.5 by treating all information as set out in table 11 as confidential in the absence of any showing of good cause;

   ii. the European Union failed to establish that the DIMD treated the Sollers letter of 25 December 2012 and the letter of the Association of Russian Automakers of 11 February 2013 as confidential.

h. With respect to claims concerning the disclosure of essential facts,

   i. the European Union failed to establish that the DIMD acted inconsistently with Article 6.9 by not informing all interested parties of the information listed in items (a) to (c) of table 12;

   ii. the DIMD acted inconsistently with Article 6.9 by failing to inform all interested parties of the information listed in items (d) to (o) of table 12.

8.2. We do not consider it necessary to address the European Union's claims under Article 6.5.1.

8.3. With respect to the European Union's consequential claims, we find that

a. the Russian Federation acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994;

b. the European Union has not established its consequential claim under Article 18.4 of the Anti-Dumping Agreement.

8.4. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue have been found to be inconsistent with the Anti-Dumping Agreement and the GATT 1994, they have nullified or impaired benefits accruing to the European Union under these agreements.

8.5. Pursuant to Article 19.1 of the DSU, we recommend that the Russian Federation bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994.

WORLD TRADE ORGANIZATION

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REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS479/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 1 December 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the European Union requests such a ruling, Russia shall submit its response to the request in its first written submission. If Russia requests such a ruling, the European Union shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following

the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party be aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the European Union could be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

10. Each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1, to the extent that it is practical to do so.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite Russia to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Russia if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Russia to present its opening statement, followed by the European Union. If Russia chooses not to avail itself of that right, the Panel shall invite

the European Union to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 2 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx.xxxxx@wto.org and xxxxx.xxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 14 January 2016

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS479.

1. For the purposes of these Panel proceedings, BCI includes

   a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

   b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute may not be designated as BCI if the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.

3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.

5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE EUROPEAN UNION

1 INTRODUCTION

1. In this integrated executive summary, the European Union ("EU") summarizes the facts and arguments presented to the Panel in its first written submission, its opening and closing oral statements at the first substantive meeting and its responses to the Panel's and Russia's questions.

2 FACTUAL BACKGROUND AND THE MEASURES AT ISSUE

2. On 3 October 2011 Sollers-Elabuga LLC ("Sollers") filed an Application requesting the imposition of anti-dumping duties on imports of light commercial vehicles ("LCVs") from Germany, Italy and Turkey on the territory of the Customs Union of Belarus, Kazakhstan and Russia.

3. The product concerned is LCVs of gross vehicle weight from 2.8 tonnes to 3.5 tonnes, van-type bodies and diesel engines with cylinder capacity not exceeding 3.000 cc, designed for the transport of cargo of up to two tonnes (cargo all-metal van version) or for the combined transport of cargo and passengers (combi cargo and passenger van version) falling under HS code 8704 21 3100 and HS code 8704 21 9100 and imported in the Customs Union from Germany, Italy and Turkey.

4. The applicant argued that its output during the first half of 2011 amounted to 85.2% of the total production of the like product, and identified another producer of the like product, Gorkovsky Avtomobilny Zavod ("GAZ") for the period concerned.

5. The anti-dumping investigation was initiated on 16 November 2011. The dumping investigation period ("DIP") is from 1 July 2010 until 30 June 2011. The injury investigation period ("IIP") is from 1 January 2008 until 31 December 2011. By Notice of 16 November 2012 the Department of Internal Market Defence ("DIMD") of the Eurasian Economic Commission ("EAEC") extended the duration of the investigation for 6 months, until 16 May 2013.

6. On 14 May 2013 the DIMD introduced anti-dumping duties on imports of LCVs from Germany, Italy and Turkey on the territory of the Customs Union. The Decision entered into force on 15 June 2013. The anti-dumping duties are 29.6% for imports from Germany, 23% for imports from Italy and 11.1% for imports from Turkey. The Decision is based on the Report "Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union' of the Domestic Market Protection Department of the Eurasian Economic Commission" ("the Report").

3 LEGAL ARGUMENT

3.1 Claim under Articles 3.1 and 4.1 of the AD Agreement: failure to properly determine the domestic industry

7. Pursuant to Articles 3.1 and 4.1 of the AD Agreement, provisions which are inextricably linked, the "domestic industry" should be defined as referring to the domestic producers as a whole of the like products, or as those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. Domestic producers may be left out from the definition of "domestic industry" on the basis of the two limitative reasons provided for in subparagraphs (i) and (ii) of Article 4.1 of the AD Agreement. The possibility to define the domestic industry as producers producing a major proportion of the total domestic production is not unfettered. The Appellate Body has specified that these limits are of a quantitative and qualitative nature. The proportion relied upon by the investigating authority should be representative of the domestic industry as a whole and be unbiased, without favouring the interest of any interested party, or group thereof. The investigating authority must ensure that the way in

which the domestic industry is defined does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry.

8. By excluding GAZ from the definition of "domestic industry", the DIMD acted in a biased manner, potentially leading to a risk of materially distorting the injury analysis and, thus, violating the obligations under Articles 3.1 and 4.1 of the AD Agreement.

9. First, without providing any reasons for it, the DIMD defined the product concerned by this investigation very narrowly: LCVs with diesel engine. This definition was designed to conform precisely to the type of products that Sollers was assembling in the Special Economic Zone when the application was filed (in particular, Fiat Ducato with diesel engines). LCVs with diesel engine were also the product being made and sold by GAZ during the investigation period. Sollers already noted that GAZ was producing two models of LCVs which fell under the product concerned during the IIP and DIP.

10. Second, DIMD was well aware that GAZ, the leader in the overall LCVs market in Russia, was a producer engaged in the full production cycle ("producer") manufacturing the product concerned (in particular, LCVs with diesel engine) in Russia and directly competing with Sollers. GAZ's production amounted, on average, to 12.1% of the total production during the period of investigation (i.e. the remaining production not accounted for by Sollers). Evidence on the record showed that GAZ, with its petrol and diesel models, was the undisputed leader in the overall LCV market in Russia in 2010, with 51.4% share in that market, thanks to its main models Gazelle and Sobol, whereas Fiat was the third with a share of 9.6%. In fact, evidence on the record showed that the overall market share of GAZ increased by 13% between the second half of 2010 and the first half of 2011 (i.e. the DIP), while Sollers' market share decreased by 11% during the same period, as a consequence of the fact that the price of the Gazelle Diesel was even lower than Sollers' Fiat Ducato Diesel. Being such a market leader of LCVs in Russia, it could be expected that, in principle, GAZ's economic data could have shown a somehow different picture from that portrayed by Sollers in its Application. Thus, an undistorted injury analysis would have to take data pertaining to GAZ, the overall market leader, into account.

11. Third, the DIMD failed to take into account important qualitative differences between GAZ and Sollers which could have consequences for the injury analysis. Indeed, GAZ manufactures LCVs from the beginning of the production cycle, whereas Sollers assembled Fiat Ducato from semi-knocked down sets imported from Italy. In this sense, GAZ may be regarded as a domestic "producer" of the product concerned, whereas Sollers would rather be an "assembler", bringing the LCV into existence in Russia from mainly imported parts. This in an important distinction that may have a bearing on the injury analysis. While the truly domestic producer may be more stable in its production cycle by adjusting its production costs and prices to market demand, an assembler of LCVs is more at the mercy of the value of the imported parts and other exogenous commercial considerations, without being able to quickly adapt its assembly operations to the evolution of the market. This may put "assemblers" in a more delicate situation than "producers".

12. Another relevant factor distinguishing the situation between GAZ and Sollers is that, while the former is based in Russia and is subject to the regular economic conditions in Russia, Sollers is based in the Special Economic Zone of Elabuga ("SEZ"). Despite the benefits it enjoyed in the SEZ, Sollers was still losing market share against a very efficient producers and GAZ remained in a very strong position as a market leader for the overall LCV market.

13. As a consequence of such an incorrect definition of the domestic industry, the DIMD's injury determination was also based on an incorrect data set, in violation of Article 3.1 of the AD Agreement.

3.2 Claim under Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement: selection of non-consecutive periods of non-equal duration in the injury and causation analyses

14. By selecting non-consecutive periods of non-equal duration for the examination of the trends for the whole domestic industry, the DIMD's injury determination was not based on an objective examination of positive evidence, contrary to the obligations under Article 3.1 of the AD Agreement.

15. According to the panel in *Mexico – Olive Oil* an examination can only be "objective" if it is based on data which provide an accurate and unbiased picture of what it is that one is examining. An investigating authority must ensure that in examining the evidence in the context of its injury determination an accurate and unbiased picture is provided (See also Panel Report, *China – X-Ray Scanners*). The use of non-equal, non-consecutive periods by an investigating authority, absent any justification to do so, fails to provide such an accurate and unbiased picture.

16. The use of non-equal, non-consecutive periods interrupts the logical and temporal progression of the analysis which is done for a period of one year. Moreover, it changes the logical temporal sequence of the analysed half-year periods without any explanation for the necessity to do so. The DIMD failed to provide an explanation as to why the use of non-equal, non-consecutive periods was necessary in this case.

17. The information in question should have been provided on an equal and consecutive basis, so that meaningful trends can be observed on the basis of which the investigating authority could come to the conclusion in its injury determination. Indeed, in order to present such an accurate and objective picture of the information, the DIMD should have examined the information on the basis of a sequence of measurements of the same variable collected over time (i.e. a trend). For instance, the DIMD could have provided trends on the basis of consistent annual comparisons (e.g. by comparing 2009, 2010 and 2011 with 2008, and also comparing the DIP on an annual basis with 2008). However, the EAEC further distorted its injury and causation analyses by predominantly examining information on the basis of the data of the respective preceding period, i.e. without comparing the data of each year, including the year 2011, with 2008 on a consecutive annual basis.

18. Since the DIMD relied on an examination of non-equal, non-consecutive periods for the purpose of gauging the effects of the dumped imports on the domestic industry and assessing whether the injury found to exist is caused by the dumped imports, the DIMD's injury determination is further inconsistent with Articles 3.2, 3.4 and 3.5 of the AD Agreement.

3.3 Claim under Articles 3.1 and 3.2 of the AD Agreement: failure to make an objective examination based on positive evidence of whether the effect of the allegedly dumped imports was to prevent domestic price increases, which otherwise would have occurred, to a significant degree

19. According to the AD Agreement, an investigating authority's inquiry regarding the last price effect listed in Article 3.2 (i.e. price suppression) must provide it with a meaningful understanding of whether subject imports have explanatory force for the significant depression or suppression of domestic prices that may be occurring in the domestic market, without disregarding any evidence that may call into question such explanatory force. Such analysis under Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the investigation period and needs to consider whether the price effects, including price suppression, is "significant". This understanding, in turn, provides a building block for the authority to determine whether subject imports, through their price effects, are causing injury to the domestic industry within the meaning of Article 3.5 (Appellate Body Report in *China – GOES* and *China – HP-SSST (EU)*). Indeed, the analysis under Article 3.2 concerns the relationship between subject imports and domestic prices, whereas the analysis under Article 3.5 concerns the causal relationship between the subject imports and the material injury to the domestic industry.

20. The DIMD failed to make an objective analysis based on positive evidence when considering whether the effect of the dumped imports was to prevent domestic price increases, which otherwise would have occurred, to a significant degree (i.e. price suppression). It failed to examine whether the subject imports had explanatory force for the occurrence of significant suppression of domestic prices.

21. DIMD incorrectly based its analysis on the year 2009 to show price suppression, while this year cannot – according to the DIMD's own description – be considered to be a "normal year". Second, the DIMD relied on data expressed in USD to suggest there was price suppression, ignoring the developments in the exchange rate. Third, the DIMD did not show that the dumped imports have "explanatory force" for the alleged price effects, failing to examine whether the

market would be ready to absorb further price increases. Fourth, the DIMD did not explain and demonstrate why the alleged price suppression would be "to a significant degree".

22. Because the DIMD failed to make an objective analysis based on positive evidence when considering whether the effects of the dumped imports was to prevent domestic price increases, Russia violated Articles 3.1 and 3.2 of the AD Agreement.

3.4 Claim under Articles 3.1 and 3.4 of the AD Agreement: state of the domestic industry

23. The DIMD failed to make a proper evaluation of all injury factors in context and thus failed to reach a reasoned and adequate conclusion with respect to the impact of dumped imports on the domestic industry. As a result, the EAEC failed to make a determination of injury on the basis of an "objective examination" of the disclosed factual basis (Panel Report, Argentina – *Poultry*). Therefore, the DIMD's determination of injury is inconsistent with Russia's obligations under Articles 3.1 and 3.4 AD Agreement.

24. WTO panels and the Appellate Body have consistently held that, according to Articles 3.1 and 3.4, investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to each potentially relevant factor having a bearing on the state of the industry and the weight to be attached to it (Appellate Body Report, *US – Hot-Rolled Steel*). In assessing the state of the domestic industry, investigating authorities must evaluate all factors listed in Article 3.4 and any other relevant factors having a bearing on the state of the domestic industry in the case at hand. This analysis cannot be limited to a mere identification of the "relevance or irrelevance" of each factor, but rather must be based on a thorough evaluation of the state of the industry. The analysis must explain in a satisfactory way why the evaluation of the injury factors set out under Article 3.4 leads to the determination of material injury, including an explanation of why factors which would seem to lead in the other direction do not undermine the conclusion of material injury (Panel Report, *Korea – Paper AD Duties*).

25. When examining the state of the domestic industry in the Customs Union, the DIMD acted inconsistently with Articles 3.1 and 3.4 of the AD Agreement. First, the DIMD did not base its examination of various injury factors on positive evidence, as demonstrated by the contradictions between the DIMD's findings and the evidence put forward by Sollers.

26. Second, the DIMD failed to make a proper evaluation of all injury factors in context and thus failed to reach a reasoned and adequate conclusion with respect to the impact of dumped imports on the domestic industry. It made contradictory observations and failed to consider a number of facts on the record relating to the state of the domestic industry that contradict the alleged negative trends in the domestic industry during the dumping investigation period.

27. The evidence on the record, if considered in an objective and even-handed manner, as well as evidence regarding factors that the DIMD failed to examine, demonstrate that Sollers performed extraordinarily well at the beginning of the analysed period (2008-2009), with abnormal profit levels that were due to consumers' preferences of purchasing cheaper domestic products. When the effects of the financial crisis started to fade out (in 2010 and 2011), Sollers returned to normal profitability levels, in view of the competition in the market. Returning to normality is not a state of material injury. When the trends of production and sales of each year are compared to the base year of 2008, it becomes apparent that those factors showed positive trends, even in 2011. In addition, the DIMD found material injury at a time and in a situation where a company was materially dissolving, i.e. leaving the production operations of the Fiat Ducato to move to another cooperation. This may be a challenging moment in business. However, this is not a state of material injury in an anti-dumping context.

28. Finally, the DIMD also failed to examine several injury factors, listed in Article 3.4 of the AD Agreement, i.e. the magnitude of the margin of dumping, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments.

3.5 Claim under Articles 3.1 and 3.5 of the AD Agreement: causation

29. Pursuant to Articles 3.1 and 3.5 of the AD Agreement, investigating authorities are called upon to make a determination that the material injury found was caused by the dumped imports. Moreover, investigating authorities have to 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. Investigating the authorities' establishment of the facts has to be proper and their evaluation of those facts unbiased and objective so that the investigating authority's explanations are reasonable and supported by the evidence cited.

30. The DIMD found that dumped imports displaced similar goods produced by the domestic industry. The DIMD stated that, while volumes of dumped imports decreased during 2009 compared to 2008, "in 2010, during the investigated period, and in 2011, the share of imports in total consumption in the territory of the Customs Union was rising steadily, in the context of the proportional reduction of the share of the like product manufactured in the territory of the Customs Union".[1]

31. Three main facts challenge the DIMD's conclusion of a causal link between the dumped import volume and the material injury. First, facts on the record reveal that imports recovered from the financial crisis and merely reached the pre-crisis level in 2011. Second, the domestic market share of Sollers and GAZ combined remained very high (at 57% in 2011). Third, the reduction in domestic share between 2009 and 2011 was less than half of the increase of the market share of dumped imports. All this evidence on the record demonstrates that the DIMD failed to properly examine the causal relationship between dumped import volume and injury.

32. Evidence on the record even showed that domestic prices were below import prices during the DIP. This further contradicts the DIMD's finding that the "dumped imports significantly prevented the growth of prices for the same Products produced by the domestic industry in the Customs Union". The DIMD failed to address how higher import prices could be the cause of suppressing an increase in domestic prices. Given that these domestic prices were below the import prices, Sollers had still a margin to further increase its domestic prices. The fact that import prices were higher than domestic prices during the DIP strongly suggests that the subject imports were not responsible for the alleged price suppression (Panel Report, *China – GOES*). This point was repeatedly raised by interested parties, but was not elaborated on by the DIMD.

33. In addition, the DIMD strongly relied on the fact that the domestic producer's costs increased by 42.7% between 2009 and 2011 whereas its prices merely rose by 6.4%. Leaving aside the issue that this finding was not based on an objective assessment of the evidence, the DIMD failed to address whether Sollers could pass on such a cost increase to its prices. The EU already stressed that the DIMD could not assume that producers can continuously increase their prices and that the domestic market would be willing to absorb these increases.

34. The DIMD failed to examine the relevance of other known factors. Sollers' own misguided business decisions that created self-inflicted harm; the termination of Sollers' cooperation with Fiat in early 2010; the domestic competition between Sollers and GAZ in the domestic market of LCVs; the difficulties in accessing finance; and the discontinuation of the government programme supporting sales of cars at the end of 2010, are known factors, other than the dumped imports, that the DIMD failed to properly examine and that caused the injury that Sollers suffered during the DIP. These factors were "known" to the investigating authority since they were raised by the participants in the investigation. They are factors "other than dumped imports" since they were not related at all to the imports. These factors were injuring the domestic industry at the same time as the dumped imports (Appellate Body Report, *EC – Pipe Fittings*). As consequence, Russia violated its obligation under Article 3.5 of the AD Agreement by failing to examine the relevance of such factors.

35. For the reasons explained above, the DIMD's causality analysis is inconsistent with Russia's obligations in Articles 3.1 and 3.5 of the AD Agreement.

[1] Report (Exhibit EU-22), Section 5.1.

3.6 Claim under Articles 6.5 and 6.5.1 of the AD Agreement: Treatment of Information as Confidential without Showing Good Cause and without Providing a Meaningful Summary

36. The Appellate Body in *EC – Fasteners (China)* considered that Articles 6.5 and 6.5.1 of the AD Agreement "set[s] out specific rules governing an investigating authority's acceptance and treatment of confidential information". Article 6.5 imposes two conditions in order for the investigating authority to be obliged to treat information submitted by the parties to an investigation as "confidential". The first condition is split up in two alternatives. Authorities must treat information as confidential (i) if it is "by nature" confidential *or* if it is "provided on a confidential basis" *and* (ii) "upon good cause shown".

37. Article 6.5.1 establishes an "alternative method" for communicating the content of confidential information "so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests". Under Article 6.5.1, an investigating authority is under an obligation to require that (i) a non-confidential summary of the information is furnished, and (ii) to ensure that the summary contains sufficient detail to permit a reasonable understanding of the information submitted in confidence. Whether the summary contains "sufficient detail" depends on the confidential nature of the information at issue, but "it must permit a *reasonable understanding* of the substance of the information withheld to allow the other parties to the investigation an opportunity to respond and defend their interests" (Appellate Body Report, *EC – Fasteners (China)*).

38. Only in "exceptional circumstances", the information may be "not susceptible of summary". In such "exceptional circumstances", the reasons why summarization is impossible must be provided in a statement. The investigating authority must scrutinize such statement. The Appellate Body has stressed that it is not enough for a party simply to claim that providing a summary "would be burdensome or costly". Rather, it must be shown that "no alternative method of presenting that information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence". Without such scrutiny by the investigating authority of the non-confidential summary, or of the statement explaining why "exceptional circumstances" make summarisation not possible, the "due process rights of other parties to the investigation are not fully respected" (Appellate Body Report, *EC – Fasteners (China)*). The jurisprudence also explains that the obligations to perform an objective assessment of good cause and require meaningful non-confidential summaries do not depend on "whether or not the underlying issue was contested in the investigation", and that a "lack of contestation is not an excuse for the absence of any assessment."[2]

39. Throughout the anti-dumping investigation, the DIMD treated a wide range of information as confidential. However, no good cause was required to be shown for such confidential treatment, nor did the DIMD properly assess whether there was good cause. There is no evidence in the Report or in any related documents of any objective assessment of whether good cause was shown for confidential treatment, or even that the DIMD at any point required the parties seeking confidential treatment to explain and provide reasons as to why the information at issue should be treated as confidential (Appellate Body Report, *China — HP-SSST (Japan)*).

40. Regarding the **claims related to Sollers' Application**, its non-confidential version that was made available to interested parties contains a wide range of information that is treated as confidential. The DIMD's treatment of that confidential treatment violates the AD Agreement in several ways.

41. First, Sollers did not show any "good cause" for the confidential treatment of this information, and the DIMD did not require Sollers to provide such good cause, or properly assess an alleged "good cause". The Appellate Body has stressed that the requirement to show "good cause" applies to *both* information that is "by nature" confidential *and* that which is provided to the authority "on a confidential basis" (Appellate Body Report, *EC – Fasteners (China)*). For this reason, Russia violated Article 6.5 of the AD Agreement.

[2] Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.61; Panel Report, *EC – Fasteners (China)*, para. 7.46.

42. Second, no meaningful summary of this information, and no explanation of why such a summary would not be possible, was provided by Sollers or required by the EAEC. For this reason, Russia violated Article 6.5.1 of the AD Agreement.

43. In addition, some of the information that is treated as confidential, notably in the non-confidential version of Sollers' questionnaire responses, seems not to be confidential by nature. This is an additional violation of the obligations under Article 6.5 of the AD Agreement. It should be stressed, however, that the other violations just described (no good cause shown, required or properly assessed, and an absence of either a meaningful summary or an explanation of why a summary would not be possible) apply to those points as well.

44. Regarding the **claims related to Sollers' questionnaire responses**, their non-confidential version[3] of 3 March 2012, as updated on 31 January 2013, contains a wide range of information that is treated as confidential. Sollers did not show any "good cause" for this confidential treatment and the DIMD did not require Sollers to provide nor did it properly assess whether Sollers had shown such "good cause". For this reason, Russia violated Article 6.5 of the AD Agreement.

45. Furthermore, Sollers did not provide, and the DIMD failed to require Sollers to provide, a meaningful summary of this information, and no explanation was provided or required on why a summary would not be possible. There is nothing more than a mere indication that the information is "[CONFIDENTIAL]". For this reason, Russia violated its obligation in Article 6.5.1 of the AD Agreement.

46. The EU also makes equivalent claims of violations of Articles 6.5 and 6.5.1 of the AD Agreement, *mutatis mutandis*, regarding the confidential treatment of information in the non-confidential versions **of Turin-Auto's questionnaires responses**, along with their update of 31 January 2013 and amendment of 13 February 2013, as well as in Sollers' written comments after the hearing of 6 April 2012. The EU also challenges under Articles 6.5 and 6.5.1 the confidential treatment of the questionnaire response of GAZ, Sollers' letter of 25 December 2012, the letter of the 'Association of Russian Automakers' of 11 February 2013 and GAZ's letter of 6 March 2013.

47. In light of the foregoing, the EU submits that the DIMD's treatment of confidential information violated the obligations under Article 6.5 of the AD Agreement, by treating as confidential certain information that is neither confidential by nature nor provided on a confidential basis and by treating information as confidential without requiring a good cause to be shown and without properly assessing whether such good cause was shown, and under Article 6.5.1 of the AD Agreement, by failing to require interested parties providing confidential information to either provide non-confidential summaries thereof that would permit a reasonable understanding of the information submitted in confidence, or to indicate and state the reasons why that information is not susceptible of summary.

3.7 Claim under Article 6.9 of the AD Agreement: Failure to disclose all essential facts under consideration that formed the basis for the decision by the EAEC

48. The Appellate Body has noted that at the heart of Article 6.9 is the "requirement to disclose, before a final determination is made, the essential facts under consideration which form the basis for the decision whether or not to apply definitive measures". A timely and complete disclosure is essential for preserving the ability of interested parties to defend their interests, in particular by enabling them to challenge omissions or the use of incorrect facts (Appellate Body Report, *China – GOES*).

49. The "essential facts" are those facts that are significant in the process of reaching a decision as to whether or not to apply definitive anti-dumping measures. The facts may be those "salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome" (Appellate Body Report, *China – GOES*). The body of essential facts to be disclosed under Article 6.9 concerns the facts "under consideration" by the investigating authority in determining whether (or not) to apply measures, including but not limited to the facts that support

[3] If not otherwise indicated, the European Union's references to Sollers' "questionnaire responses" relate to both the Questionnaire Response of 3 March 2012 and the Update of 31 January 2013.

the final determination to apply measures (Panel Report, *China - HP-SSST (EU)*). Essentially, in order to apply such definitive measures, an investigating authority must find dumping (including, depending upon the authority's findings, the determination of normal value, export price and the fair comparison between normal value and export price, the home market and export sales being used and the calculation methodology used to determine the dumping margin), injury and a causal link between the dumping and the injury to the domestic industry. Therefore, what constitutes an "essential fact" must be understood "in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement, as well as the factual circumstances of each case" (Appellate Body Report, *China – GOES*). When confidential information constitutes "essential facts" within the meaning of Article 6.9, the disclosure obligations under that provision should be met by disclosing non-confidential summaries of those facts.[4] If an essential fact is treated as confidential, and either Article 6.5 or Article 6.5.1 is not complied with, the investigating authority infringes Article 6.9 by wrongly treating this information as confidential.

50. First, the DIMD failed to inform Volkswagen and Daimler of the essential facts under consideration underlying the determinations of the existence of dumping.

51. Volkswagen and Daimler did not receive an individual confidential dumping disclosure. They could only examine the non-confidential version of the Draft Report by the DIMD. The opportunity of these interested parties to inspect the facts that formed the basis of the calculation of the normal value by the EAEC was therefore limited to the EAEC Draft Report of 28 March 2013. The EU understands that the DIMD attempted to justify this on the basis of an alleged lack of cooperation in the investigation.

52. Partial non-cooperation in the context of an anti-dumping investigation can have legal consequences, including the use of facts available (Article 6.8 of the AD Agreement) and even adversely affect the outcome of the investigation for the non-cooperating party (Article 7 of Annex II to the AD Agreement). It does not, however, remove the rights of any interested party under Article 6.9 of the AD Agreement. Even if Volkswagen and Daimler failed to provide certain information to the DIMD, they should nevertheless have been informed of the essential facts under consideration.

53. The DIMD failed to disclose to Volkswagen and Daimler the essential facts under consideration that formed the basis for the calculation of the normal value of LCVs for Volkswagen and Daimler, those that formed the basis for the calculation of the export price, as well as the source of the information concerning import volumes and values.

54. Second, in the sections of the Draft Report dealing with DIMD's analysis of injury and of the existence of a causal link, the DIMD failed to disclose the essential facts under consideration to the interested parties.

55. In the section of the Draft Report dealing with DIMD's injury analysis, a wide range of essential facts is entirely omitted. In the absence of any additional individual confidential disclosure, it was therefore impossible for the interested parties to be adequately informed of the essential facts under consideration which form the basis of DIMD's determination of injury.

56. The section of the Draft Report concerning the causal link between dumping and injury similarly omits a wide range of essential facts. In the absence of any additional individual disclosure, it was therefore impossible for the interested parties to be adequately informed under the standard set by Article 6.9 of the AD Agreement. The Draft Report also does not provide a source for the information on the volume and value of imports of LCVs which formed the basis for DIMD's decision whether to apply definitive measures, in respect of the existence of injury (Section 4 of the Draft Report). The Draft Report thus failed to disclose the "essential facts under consideration which form the basis for the decision whether to apply definitive measures". Therefore, the Russia violated the obligation under Article 6.9 of the AD Agreement.

[4] Appellate Body Report, *China – GOES*, para. 247; Panel Report, *China – Broiler Products*, para. 7.321.

3.8 Russia's anti-dumping measures on LCVs from the Germany and Italy further are inconsistent with Articles 1 and 18.4 of the AD Agreement and Article VI of the GATT 1994

57. In light of the abovementioned violations of the AD Agreement, the measures at issue are also inconsistent with Articles 1 and 18.4 of the AD Agreement, as well as with Article VI of the GATT 1994.

ANNEX B-2

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1 BURDEN OF PROOF

1. The Russian Federation maintains that the European Union failed to meet its burden of proof to establish *prima facie* case of violation. In this respect, we recall that *prima facie* case must be based on evidence and legal argument. The Appellate Body made it clear that "[a] complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."[1]

2. We recall the findings of the Appellate Body in *US-Hot-Rolled Steel* that "an objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".[2] This interpretation provides a standard for objective examination requirement.

3. Specifically, in this dispute the European Union claims that the DIMD acted in a biased manner. At the same time the European Union failed to prove the existence of bias. In our view, bias implies an intent that results in a situation that is more favourable to any interested party or group of interested parties. Therefore, in order to prove the existence of a bias, the existence of a reference standard which is unbiased has to be clearly demonstrated.

2 DEFINITION OF THE DOMESTIC INDUSTRY

4. The European Union asserts that "[t]he EAEC therefore deliberately excluded GAZ from the definition of "domestic industry", despite the fact that GAZ was a known producer of the like products which participated throughout the investigation".[3] The European Union also argues that "the EAEC acted in a biased manner, favouring the interests of Sollers, and thus introducing a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry".[4]

5. With respect to alleged failure of the DIMD to provide "a satisfactory explanation as to why it was not necessary to include GAZ within the definition of "domestic industry" and thus examining directly or specifically its economic data", we maintain that the issue of explanation is clearly outside the scope of obligations under Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

2.1 The DIMD did not "exclude" GAZ from the definition of the domestic industry

6. The European Union's arguments are based upon the presumption that GAZ was actively participating in the investigation.[5] This presumption is flawed because it does not take into account the fact that GAZ's questionnaire reply contained multiple deficiencies, which was the reason why the data pertaining to GAZ could not be used in the injury analysis.

7. In this respect, the Russian Federation recalls that the following approach to defining the domestic industry was used in the anti-dumping investigation at issue. The domestic industry, as referring to domestic producers of the like product, was defined, when the investigating authority defined the like product. Two domestic producers of the like product, namely GAZ and Sollers, were known to the investigating authority in the course of the anti-dumping investigation. From the outset, both producers could be included into the definition of the domestic industry for the

[1] Appellate Body Report, *US – Gambling*, para. 140.
[2] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[3] First Written Submission by the European Union, para. 44.
[4] Ibid, para. 46.
[5] First Written Submission by the European Union, paras. 44-45.

purpose of the injury analysis. The MIT sent questionnaires for domestic producers of the like product in the territory of the Customs Union to both of them, i.e. sought information from both of them. However, both the MIT and the DIMD were unable to rely on the data submitted by GAZ given the multiple deficiencies and inconsistencies in the questionnaire reply.

8. Specifically, the questionnaire reply did not contain information on total costs per unit of production of the like product for the first half of 2010, capacity utilization, investments. The questionnaire reply contained substantial errors and inaccurate data (namely, with regard to total costs per unit, volume of production). Moreover, the analysis of the questionnaire reply raised serious doubts whether some of the information did relate only to the product concerned.

9. The Russian Federation maintains that the situation when the deficient data from one of the domestic producers of the like product cannot be used in the injury analysis is not the same as the "exclusion" of the domestic producer from the definition of the domestic industry in the meaning of Article 4.1 of the Anti-Dumping Agreement.

2.2 The DIMD did not introduce the material risk of skewing the economic data and, consequently, distorting the analysis of the state of the domestic industry

10. Further, the European Union made a number of incorrect assertions with respect to "bias of the DIMD, favouring the interests of Sollers", and alleged "introduction of the material risk of skewing the economic data and, consequently, distorting analysis of the state of the industry".[6] The Russian Federation is of the view that bias implies an intent that results in a situation that is more favourable to any interested party or group of interested parties. We maintain that the European Union has not presented sufficient and accurate evidence to make a *prima facie* case of bias and alleged material risk of distortion.

11. First, the European Union incorrectly asserts that GAZ was the "undisputed leader" in the overall LCV market. The European Union operated with mixed figures that include the data on LCVs with gasoline engines which fall outside the scope of the like product, as defined in the anti-dumping investigation at issue.

12. Second, the European Union alleges that there are important differences between the domestic producers "which could have consequences for the injury analysis".[7] Specifically, the European Union alleges that Sollers is rather an "assembler" than a "producer"[8] in contrast to GAZ that may be regarded as a domestic "producer". The European Union also alleges that "Sollers' activities in Elabuga were not of sufficient economic importance"[9] due to the rules of origin requirements. Finally, the European Union considers favourable conditions in Special Economic Zone of Elabuga to be "another relevant factor distinguishing the situation between GAZ and Sollers".[10] At the same time the European Union does not provide sufficient evidence as to how these alleged distinctions could have affected the injury analysis.[11]

13. The Russian Federation maintains that there is no obligation in the Anti-Dumping Agreement to consider these allegedly "important" distinctions when defining the domestic industry. If that were the case, it would create uncertainty and significant impediments in the course of the anti-dumping investigation.[12]

2.3 The DIMD's injury determination is not distorted, as it is based on a very high proportion that substantially reflects the total domestic production

14. The DIMD's injury determination was based on 87.9% of total domestic production of the like product. We recall that the Appellate Body in *EC-Fasteners (China)* emphasised that "a very high

[6] First Written Submission by the European Union, para. 46.
[7] First Written Submission by the European Union, para. 50.
[8] Ibid.
[9] Ibid, para. 55.
[10] Ibid, para. 56.
[11] See First Written Submission by the Russian Federation, paras. 53-58.
[12] Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras.15-16.

proportion that "substantially reflects the total domestic production" will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1".[13]

15. We maintain that 87.9% of total domestic production qualifies for "a major proportion" of total domestic production and is a very high proportion that substantially reflects the total domestic production in the meaning of Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

3 SELECTION OF PERIODS FOR THE INJURY AND CAUSATION ANALYSES

3.1 The DIMD did not select non-consecutive periods of non-equal duration

16. First, contrary to what the European Union alleges, the DIMD did not select non-consecutive periods of non-equal duration. The DIMD has analysed the data for the period from 1 January 2008 to 31 December 2011 for the purposes of the injury and causation analysis. The DIMD has consequently considered the data for the entire period from 1 January 2008 to 31 December 2011 in relation to respective calendar years, namely 2008, 2009, 2010 and 2011. In addition to year-to-year comparison, the DIMD analysed the change of the data for the half-year sub-periods (the periods from 1 July 2010 to 31 December 2010 and 1 January 2011 to 30 June 2011) as compared to the data for the comparable periods of the respective previous year. The analysis of the data for the half-year sub-periods was supplementary to the analysis of the data for the entire period of investigation from 2008 to 2011. This method was uniformly used with regard to all injury factors.

3.2 The European Union failed to demonstrate that the DIMD's injury and causation analysis does not involve the objective determination based on positive evidence

17. Second, there is nothing in the European Union's argument capable of supporting its assertion that the investigating authority in this case made a determination that does not involve an objective examination based on positive evidence. The European Union failed to demonstrate how the alleged selection of the periods can lead to a result that would be more favourable to any interested party or how the DIMD has favoured the interests of any party to the investigation.

18. To support its claim under Article 3.1 of the Anti-Dumping Agreement, the European Union criticizes the analysis conducted by the DIMD. The European Union suggests an alternative methodology for the DIMD that "could give an accurate and objective picture". However, the proposed method offers overlaps in the periods that distort the overall picture over the entire period in its progression. In our view, such method simply cannot be used.

4 PRICE SUPPRESSION

19. The European Union submits that the DIMD failed to make objective analysis based on positive evidence when considering price suppression due to a number of reasons. First, the European Union states that the DIMD incorrectly based its analysis on the year 2009. It is convinced that "the 2009 profit level was abnormally high i.e. it represents a significant increase of 233% from the level of the profit in 2008". The Russian Federation completely disagrees with this assertion and emphasizes that the European Union mistakenly based its conclusion on relative indicators. In fact, profit increased substantially in relation to 2008 to reach its normal level in 2009. The rate of return used in the analysis was based on the year when the influence of dumped imports on the market was minimal and the domestic industry could reasonably expect to achieve such profitability taking into account macroeconomic indicators and economic performance of the relevant sector.[14] The European Union insists that the DIMD "should have based itself on the year 2008 rather than the abnormal year 2009"[15] without providing any evidence as to why the analysis based on 2009 was biased while the analysis based on 2008 would not have been.

20. Second, the European Union claims that the DIMD "mixed up data expressed in USD and RUB without any explanation in its price suppression analysis".[16] The European Union does not show

[13] Appellate Body Report, *EC – Fasteners (Article 21.5 - China)*, para. 5.303.

[14] Responses by the Russian Federation to the Questions from the Panel after the First Substantive Meeting with the Parties, question 31, para.79-80.

[15] Opening Oral Statement by the European Union, para. 39.

[16] First Written Submission by the European Union, para.136.

where alleged mixing up took place in price effects analysis and how it deteriorated the results of that analysis. The Russian Federation is convinced that the evaluation of price data in the same currency provides for the objectivity of the analysis and it cannot be regarded as biased approach.

21. Third, the European Union claims that the DIMD "failed to explain and demonstrate why it was dumped imports that had brought about the alleged price suppression".[17] It erroneously argues that "import and domestic prices were moving in the "contrary directions"[18] while, in fact, gap between imports and domestic prices was tightening. The European Union based its conclusion on erroneous and inconsistent analysis.[19] Moreover, the European Union insists that the DIMD should have analysed import prices excluding customs duties. The Russian Federation is of the view that exclusion of customs duties would undermine price comparability and lead to the breach of obligation under Article 3.1 of Anti-Dumping Agreement.

22. The European Union claims that the DIMD failed to examine "whether the market could take further increases" of domestic prices.[20] It believes that price suppression analysis involves such assessment.[21] The Russian Federation supposes that Article 3.2 of Anti-Dumping Agreement does not establish the obligation to determine whether market could absorb price increases. Taking into account the fact that the DIMD did not have any evidence which could call into question the ability of the market to absorb prices (especially when import prices were higher than domestic prices) the Russian Federation maintains that the DIMD did not violate the obligations in terms of price suppression analysis.

23. Finally, the European Union claims that the DIMD "failed to explain and demonstrate why the alleged price suppression would be "to a significant degree".[22] Furthermore the European Union insists that the investigating authority must determine the significance of price suppression on the basis of the list of factors.[23] The Russian Federation believes that Anti-Dumping Agreement does not oblige the investigating authority to make such inquiry. Neither such interpretation of Article 3.2 has been confirmed by the WTO case law.[24] The Russian Federation is convinced that the DIMD fulfilled the obligations under Article 3.2 in terms of *consideration* of significant price suppression.

5 STATE OF THE DOMESTIC INDUSTRY

5.1 The DIMD based its evaluation of injury factors on positive evidence

24. The DIMD evaluated the factors "profits" and "inventories" on the basis of positive evidence. The Report contains aggregated profit and profitability figures for the Sollers group which were calculated on the basis of data provided by Sollers and its related trading house Turin Auto, and the inventories reflected in the Report are the inventories held by Sollers.

25. The European Union claims that the DIMD failed to base its evaluation of profits and inventories on positive evidence. The evidence which the European Union adduced to support its claim is flawed. The European Union made incorrect comparisons of data from the Report with data from the Sollers' Application and/or its Questionnaire Reply, and then pointed to discrepancies, which otherwise would not have occurred. Accordingly, the European Union failed to make a *prima facie* case.

[17] First Written Submission by the European Union, para. 136.
[18] Ibid. para.150.
[19] First Written Submission by the Russian Federation, para.181, Opening Oral Statement by the Russian Federation, para.35.
[20] First Written Submission by the European Union, para.154.
[21] Opening Oral Statement by the European Union, para.44.
[22] First Written Submission by the European Union, para.136.
[23] Ibid. para.157.
[24] Opening Oral Statement by the Russian Federation, para. 40-43, Responses by the Russian Federation to the Questions from the Panel after the First Substantive Meeting with the Parties, question 26, para. 71.

5.2 The European Union's claim that the DIMD failed to make an objective evaluation of factors and indices having a bearing on the domestic industry is not substantiated

26. The European Union claims that the DIMD failed to make a proper evaluation of factors because the Report does not always include comparisons of data for the year of 2011 to 2008. The European Union, first, overlooked the relevant parts of the Report in which the DIMD compared the evolution of production and sales from 2008 to 2011, and, second, made additional derivations of figures to complete the tables in the Report, which did not add any objectivity to the picture of the evolution of the factors over time.

27. The European Union's claim that the objectivity of the DIMD's analysis is hindered by the split of periods lacks factual basis. The DIMD did not "split" its analysis into two periods, which explains why the European Union failed to adduce any evidence from the text of the Report to substantiate its claim.

28. As to the European Union's claims regarding disclosure of the figures for profits and regarding the ability of the market to absorb a price increase, these claims are outside the scope of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

5.3 The DIMD properly took into account all facts and arguments on the record relating to the state of the domestic industry

29. The European Union claims that the DIMD should have analysed certain evidence from statements made by interested parties in the context of market shares. These statements do not contain any positive evidence relating to the overall evolution of market shares that should have been objectively examined by the DIMD under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. At the same time, the DIMD thoroughly considered in the Report the overall evolution of market shares, and examined and dismissed in the context of the causation analysis the alternative explanation of what caused the drop in production and, consequently, market shares of the domestic industry in 2011 which was referred to by an interested party.

30. The European Union believes that the DIMD should have analysed the evolution of stocks of independent dealers. Article 3.4 of the Anti-Dumping Agreement requires that an investigating authority analyse inventories without prescribing how inventories should be treated in this analysis. The DIMD analysed stocks held by the producer and the analysis was based on positive evidence. Unlike the data relating to independent dealers, the data used by the DIMD were verifiable, as required by Article 3.1 of the Anti-Dumping Agreement.

5.4 The DIMD examined all factors listed in Article 3.4 of the Anti-Dumping Agreement

31. The European Union claims that the DIMD failed to evaluate the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments. The Russian Federation submits that the DIMD evaluated the above factors. The results of the DIMD's evaluation were set forth in the confidential version of the Report.

32. The European Union could have understood from the evidence on the record that the DIMD evaluated the factors at issue but the results of such evaluation were not set forth in the public version of the Report for confidentiality reasons. The record shows that the DIMD requested the information which it needed for the evaluation of the said injury factors and that this information was submitted in confidential form.

33. Setting forth the results of the examination of some of the factors listed in Article 3.4 only in the confidential version of the final report does not amount to a violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. As the Appellate Body has observed, "Articles 3.1 and 3.4 of the Anti-Dumping Agreement do not regulate the *manner* in which the results of the "evaluation" of each injury factor are to be set out in the published documents". Article 3.4 contains an *obligation* to evaluate all fifteen factors, which is, according to the Appellate Body, "distinct from the *manner* in which the evaluation is to be set out in the published documents". Hence, Article 3.4 of the Anti-Dumping Agreement does not require that the results of the evaluation of each injury factor be set forth in the non-confidential version of the final report. The Appellate Body has also held that "the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve

an "objective" examination of the required elements of injury does not imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation".

34. The European Union also claims that the DIMD did not evaluate the factor ''the magnitude of the margin of dumping''. The European Union's claim is unsubstantiated. The DIMD apparently evaluated the magnitude of the margin of dumping in the context of the analysis of whether a cumulative assessment of the effects of imports under Article 3.3 of the Anti-Dumping Agreement is appropriate.

35. The evaluation of the injury factor ''the magnitude of the margin of dumping'' differs from the evaluation of the other listed injury factors, which are *factual indicators* of an industry's condition. What distinguishes the magnitude of the margin of dumping from the other listed factors is that it is a potential *cause* of the domestic industry's condition. The requirement of substantive compliance contained in Article 3.4 of the Anti-Dumping Agreement does not preclude the investigating authority from making an *apparent* evaluation of the factor ''the magnitude of the margin of dumping'' at its initial stage in the context of the analysis of whether a cumulative assessment of the effects of imports under Article 3.3 of the Anti-Dumping Agreement is appropriate. The magnitude of the margin of dumping is further *implicitly* analysed in the context of the analysis of domestic prices.

6 CAUSATION

6.1 Volume Effects

36. The European Union claims that the DIMD failed to properly examine the causal relationship between the volume of dumped imports and the injury. The European Union did not provide an alternative explanation of facts as a whole with relation to a causal link in the light of which the DIMD's explanation would not seem adequate. The reasoning in the Report is coherent and internally consistent. The DIMD provided adequate and reasonable explanation that the dumped imports, through the effects of dumping and by reason of a substantial increase in their volumes in 2010 and 2011, have captured a share of the growing market which would not have happened in the absence of dumping. The European Union's explanations, in turn, are placed outside of the context of market developments, such as trends in consumption, evolution of market shares and profitability of the domestic industry, and evolution of the share of dumped imports in the total volume of imports.

6.2 Import prices

37. The European Union claims that with respect to import prices the EAEC wrongly attributed the observed effects on the domestic industry to the dumped imports. It supports the claim by strongly relying on the arguments against the objectivity of the price suppression analysis conducted by the DIMD.[25]

38. The Russian Federation emphasizes that the DIMD properly analysed the trends of imports prices including customs duties and domestic prices and objectively used 2009 as a benchmark for price suppression analysis. Therefore, it provided for the unbiased consideration of the effect of dumped imports on domestic prices which is the part of the causation determination.[26]

6.3 Non-Attribution

39. The European Union argues that the findings of the DIMD with respect to termination of the license agreement between Sollers and Fiat and competition from GAZ are inconsistent with the investigation record. In fact, both factors were adequately considered by the DIMD and specifically addressed in the Report.

[25] First Written Submission by the European Union, paras.274-290.
[26] First Written Submission by the Russian Federation, paras. 301-308.

40. The European Union also claims that certain allegedly "known" factors were not examined at all.[27] The Russian Federation maintains that such factors were not *clearly raised* before the investigating authority. Moreover, the factors, referred to by the European Union, are unfounded because they are not supported by accurate evidence. [28]

7 CONFIDENTIALITY

41. The European Union makes a number of claims related to confidentiality of information under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

42. Specifically, the European Union claims that a wide range of information was treated by the DIMD as confidential despite any "good cause" shown by Sollers and Turin-Auto or required to be shown by the DIMD and that there is no evidence that the DIMD properly assessed whether there was "good cause". The Russian Federation states that the DIMD required Sollers and Turin-Auto to provide "good cause" for information submitted in confidence. The requirement to provide justification for confidential treatment was established under the CU law and special instructions of the investigating authority. As nothing in the Anti-Dumping Agreement specifies how (in what form or manner) an investigating authority shall require the party submitting confidential information to show "good cause" for confidential treatment, the Russian Federation considers that the way how the DIMD required the good cause to be shown is consistent with Article 6.5 of the Anti-Dumping Agreement.

43. The European Union also argues that the DIMD treated as confidential certain information that is not confidential by nature because it cannot be considered as such or because it is expected to be reasonably available, if not public. In the view of the Russian Federation, the European Union failed to make a *prima facie* case in this respect because it bases its claim on allegations unsupported by evidence or tries to substantiate its claim on irrelevant references to some websites.

44. In respect of Article 6.5.1 of the Anti-Dumping Agreement, the European Union claims that for a wide range of information no meaningful summaries were provided by submitting party or required by the DIMD, nor any explanation of why such summaries were provided. The Russian Federation considers that the European Union's claim under Article 6.5.1 of the Anti-Dumping Agreement is unsubstantiated. The European Union in developing its arguments focused on the text, while the tables (which the text refers to) on the same page of the document actually contain information that permits a reasonable understanding of the substance of confidential information. At the same time, the text provides a description of data contained in the tables and could not be considered separately. Apparently, the European Union failed to look at the documents in their entirety and simply took the pieces of information out of context. The Russian Federation sees no violation of Article 6.5.1 of the Anti-Dumping Agreement because non-confidential summaries of confidential information were provided (except for the cases where summarization of confidential information was not possible) and such summaries permit a reasonable understanding of the confidential information.

45. In addition, the European Union claims that the DIMD omitted from the non-confidential file certain documents that were provided to the DIMD during the investigation and were relied upon by the DIMD and referred to in the Report. With respect to GAZ's Questionnaire Reply, we recall that the investigating authority could not rely upon this document due to its deficiencies and inconsistencies. The Russian Federation states that the European Union failed to substantiate the claim by accurate evidence, because the other documents mentioned by the European Union were in the public record.[29]

46. In sum, the Russian Federation considers that the DIMD acted consistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

[27] First Written Submission by the European Union, paras.305-307.

[28] See Responses by the Russian Federation to the Questions from the Panel after the First Substantive Meeting with the Parties, paras. 91-103.

[29] First Written Submission by the Russian Federation, paras. 676-681.

8 ESSENTIAL FACTS

47. The issue of proper and fair disclosure demonstrates the clear relationship between Article 6.9 and Article 6.5 of the Anti-Dumping Agreement. This relationship is due to the mechanism for protection of confidential information, as set forth in the Anti-Dumping Agreement with respect to confidential data.[30] In this respect, the Russian Federation agrees with the findings in *China-Broilers* and *China-GOES* that "when confidential information constitutes "essential facts" within the meaning of Articles 6.9 and 12.8, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts."[31]

8.1 Determination of Dumping

48. The Russian Federation would like to pay attention to the fact that for the purpose of the determination of margin of dumping for the German exporting producers the DIMD used the volume and the value of imports of LCVs produced by Daimler AG and Volkswagen AG because only those companies exported LCVs from Germany during the period of the investigation at issue.[32]

49. The Russian Federation states that Daimler AG and Volkswagen AG were non-cooperating parties who failed to provide information requested in the questionnaire or even to respond to the questionnaire.[33] Pursuant to Article 6.9 of the Anti-Dumping Agreement the investigating authority is not obliged to provide a non-cooperating party, whose dumping rate was based on confidential data of the third parties, with confidential individual dumping disclosure.[34] Since the calculation of the margin of dumping for the German exporting producers was based on confidential facts available, which were not submitted by Daimler AG and Volkswagen AG, those companies could defend their interests on the basis of non-confidential summary of confidential determination of dumping[35] and information in their possession.[36]

50. The DIMD explained to Daimler AG and Volkswagen AG the reasons of impossibility of individual disclosure of the volume and the value of imports of LCVs produced by these companies in its additional disclosure letter.[37] Moreover, the Russian Federation is of the view that aggregated data, which were calculated on the basis of confidential information pertaining to two interested parties, shall be always treated as confidential under Article 6.5 of the Anti-Dumping Agreement.[38] Hence, such aggregated data could not be disclosed to all interested parties in the non-confidential version of the Draft Report.

51. The non-confidential version of the Draft Report adequately and fully disclosed all the essential facts in connection with the data underlying the determination of dumping concerning the German exporting producers (e.g. the methodology and the source of data used to determine normal value and export price; the weighted average normal value and export price for LCVs

[30] First Written Submission by the Russian Federation, paras 722-724, 737-738, 799-800, 941-942; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 21-22.

[31] Appellate Body Report, *China – GOES*, para. 247. Panel Report, *China – GOES*, para. 7.410. See also Panel Report, *China – Broiler Products*, para. 7.321.

[32] First Written Submission by the Russian Federation, paras. 765, 832.

[33] First Written Submission by the Russian Federation, paras. 703-704, 707, 726, 742, 754, 809, 820, 877, 878; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 77; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 24.

[34] First Written Submission by the Russian Federation, paras. 710, 741, 766, 803, 833; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 79, 81; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 23.

[35] First Written Submission by the Russian Federation, paras. 710, 741, 760, 766, 803, 827, 833; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 79-80; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 23.

[36] First Written Submission by the Russian Federation, paras. 747-750, 771-772, 777-778, 787, 808-811, 814-816, 838-839, 853-854, 872, 877-915; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 82, 84.

[37] First Written Submission by the Russian Federation, paras. 786-787, 871-872; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 82.

[38] First Written Submission by the Russian Federation, paras. 767-782; 834-867.

produced by the German exporting producers; the formula for calculation of dumping margin, etc.).[39]

8.2 Determination of Injury

52. Regarding the essential facts related to the determination of injury the Russian Federation outlines that the DIMD did not disclose in the Draft Report aggregate data pertaining to one or two domestic companies.[40] The Russian Federation is of the view that disclosing a confidential data in the Draft Report could lead to unauthorized disclosure of confidential information which was submitted by one of the two domestic producers.[41] The types of information excluded from the Draft Report are generally those that might be treated as confidential relating *inter alia* to profitability, costs, production and sales data.[42]

53. The non-confidential version of the Draft Report contained sufficiently-detailed disclosure of the essential facts under consideration that formed the basis for the determination of injury.[43] The Russian Federation outlines that each summary of redacted confidential data contains at least one of the following: (i) the year-on-year percentage changes; (ii) year-on-year percentage point changes; (iii) the mix of the year-on-year percentage changes or year-on-year percentage point changes and textual explanation of changes; (iv) textual description of trends with respect to the injury factor.[44] Moreover, the non-confidential summaries of some of the confidential information can be ascertained in terms of the relationships with other data in non-confidential version of the Draft Report.[45]

9 THE ANTI-DUMPING MEASURE ON LCVS FROM GERMANY AND ITALY IS CONSISTENT WITH ARTICLES 1 AND 18.4 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF THE GATT 1994

54. The European Union claims that in light of the abovementioned alleged violations of the Anti-Dumping Agreement the anti-dumping measures on light commercial vehicles from Germany and Italy are also inconsistent with Articles 1 and 18.4 of the Anti-Dumping Agreement, as well as with Article VI of the GATT 1994.[46]

55. Thus, the European Union's claim of inconsistency of the Russian anti-dumping measure on LCV from Germany and Italy with Articles 1 and 18.4 of the Anti-Dumping Agreement and Article VI of the GATT 1994 is clearly consequential and in this respect dependent on all other claims.

56. Since all other claims made by the European Union are to be rejected, the Russian Federation respectfully asks the Panel to reject the European Union's claim under consideration.

[39] First Written Submission by the Russian Federation, paras. 709-710, 726-730, 746-751, 770, 777, 786-787, 808-817, 838, 842, 845, 848, 853, 857, 859, 862, 892, 894, 898, 901, 922-925; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 82-83.

[40] First Written Submission by the Russian Federation, paras. 947-948, 959, 975, 988, 1002, 1016; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 87-88.

[41] First Written Submission by the Russian Federation, paras. 947-948; 959-963, 973-978, 987-992, 1002-1003, 1016- 1017; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 87-88.

[42] First Written Submission by the Russian Federation, paras. 946, 954, 961, 976, 989, 1002, 1016; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 87.

[43] First Written Submission by the Russian Federation, paras. 945, 953, 956-957, 964-970, 979-984, 992-998, 1004-1012, 1018-1014; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 89-90.

[44] First Written Submission by the Russian Federation, paras. 89, 94, 96, 103, 104, 106, 109, 956, 968, 983, 996, 1006, 1007, 1018, 1019; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 90.

[45] Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 90.

[46] First Written Submission by the European Union, para. 452.

10 CONCLUSION

57. The Russian Federation respectfully requests the Panel to reject all of the European Union's claims and arguments in their entirety, finding instead that, the Russian Federation acted consistently with all its obligations under the Anti-Dumping Agreement and the GATT 1994.

ANNEX B-3

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1 INTRODUCTION

1. In this integrated executive summary, the European Union ("EU") summarizes the facts and arguments presented to the Panel in its second written submission, its opening and closing oral statements at the second substantive meeting and its responses to the Panel's and Russia's questions.

2 RUSSIA'S REQUEST FOR A PRELIMINARY RULING

2. Russia requests the Panel to rule that the EU's claims under Article 6.9 of the Anti-Dumping Agreement ("AD Agreement") are outside the Panel's terms of reference insofar as they concern the issue of causal link between dumping and injury.

3. This request should be rejected. The EU's panel request, paragraph 8, clearly covers the disclosure of essential facts related to the causal link between dumping and injury. Moreover, the EU's panel request, paragraph 8, just like Article 6.9 of the AD Agreement, refers generally to all essential facts which formed the basis of the anti-dumping measure with the word "including". Therefore, the language of the panel request was not limited to dumping and injury. Thus, even if the issue of causal link was somehow said to fall outside the scope of the determination of injury, despite the clear language of the AD Agreement, it would still be covered by the language of the panel request.

3 CLAIMS RELATING TO THE DIMD'S INJURY DETERMINATION

3.1 Claim under Articles 3.1 and 4.1 of the AD Agreement: failure to properly determine the domestic industry

3.1.1 The definition of the domestic industry as Sollers only violates Articles 4.1 and 3.1 of the AD Agreement

4. According to Article 4.1 of the AD Agreement, the domestic industry is defined for the purpose of the AD Agreement *either* as the domestic producers as a whole, *or* those of them whose collective output represents a major proportion of total domestic production. Hence, Article 4.1 provides two options for defining the domestic industry. Further, Article 4.1 specifies two exceptions that permit an investigating authority to exclude certain domestic producers that would otherwise fall within the definition, from the domestic industry. No other options for excluding producers from the domestic industry exist and thus no other exclusions are permissible under Article 4.1.

5. Russia confirms that the Department of Internal Market Defence ("DIMD") considered that both Sollers-Elabuga LLC ("Sollers") and Gorkovsky Avtomobilny Zavod ("GAZ") were "producers of the like product". Russia also confirms that GAZ produced the product concerned during the period under investigation. Nonetheless, according to Russia's clarifications, the DIMD excluded GAZ from the definition of the domestic industry, since "the domestic industry was eventually defined as not including GAZ".

6. This directly violates the obligation under Article 4.1 of the AD Agreement. Indeed, GAZ was not excluded under one of the two exceptions listed in paragraphs (i) and (ii) of Article 4.1. Rather, Russia claims that the reason for limiting the domestic industry to Sollers only, and excluding GAZ, was the "absence of correct and verifiable data" for GAZ. A WTO Member breaches Article 4.1 of the AD Agreement if it excludes a known producer from the definition of domestic industry in view of any other reasons not specified in Article 4.1, or if it excludes consciously a known producer of the product considered to be like, for instance, in *EC – Salmon (Norway)*.

3.1.2 Alleged deficiency of GAZ's questionnaire response

7. Russia considers that the DIMD was justified in excluding this known producer from the domestic industry definition on the basis of a number of factual arguments. Russia alleges that GAZ's questionnaire response was deficient.

8. Yet, the Report "Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union' of the Domestic Market Protection Department of the Eurasian Economic Commission" ("the Report") does not contain any information that GAZ failed to provide the requested information. Russia acknowledges this explicitly. In fact, the questionnaire reply that Russia provided as an exhibit in these proceedings contains data on *all* injury factors. It is apparent from the Report that GAZ participated throughout the investigation.

9. The EU considers that, if the DIDM has defined domestic industry on the basis of Sollers only, relying on data outside such definition is contrary to Article 3.1 of the AD Agreement. Indeed, as stated in Panel Report in *EC – Bed Linen*, once the domestic industry is defined, it is not possible to use information in the injury analysis that does not belong to the defined domestic industry.

3.1.3 If the DIMD relied on a "major proportion" option in Article 4.1, the DIMD ignored the qualitative elements of the domestic industry

10. In its responses to the Panel's questions, Russia now argues that GAZ does not belong to the defined domestic industry in the first place. However, even if the DIMD defined the domestic industry as a "major proportion of the total domestic production", under the second option of Article 4.1 of the AD Agreement, it still violated Articles 4.1 and 3.1 of the AD Agreement because it ignored the qualitative components of the domestic industry definition.

11. The EU has explained in its responses to the Panel's questions that the obligations in Articles 3.1 and 4.1 must be read together, since the former provides relevant context for the latter. Indeed, reading the obligations in Articles 3.1 and 4.1 together, the Appellate Body in *EC – Fasteners (Article 21.5)* "read the requirement in Article 4.1 that domestic producers' output constitute a 'major proportion' as having both quantitative and qualitative connotations". Therefore, the authority may not leave out from the definition of the domestic industry producers that have relevant qualitative characteristics by relying on the "major proportion" option.

12. Thus, the DIMD could not limit its injury analysis to the domestic industry by focusing on Sollers only, on the basis that it constitutes a "major proportion of the total domestic production". Even if the proportion chosen to define the domestic industry is high, this does not mean that the qualitative aspects can automatically be disregarded by the investigating authority.

3.1.4 Distinctions between Sollers and GAZ show that GAZ was genuinely a domestic producer with relevant qualitative characteristics distinct from Sollers

13. Russia takes issue with the EU argument that Sollers is more adequately described as an "assembler", whereas GAZ is a true "producer" of light commercial vehicles ("LCVs"). Russia suggests that the EU did "not provide any evidence with respect to the consequences of including GAZ into the injury analysis".

14. The EU has explained that an investigating authority has the obligation to ensure that the definition is "representative of the domestic industry as a whole and be unbiased". As a producer, GAZ has relevant qualitative characteristics that are different from Sollers, as an assembler. Sollers assembled the Fiat Ducato from semi-knocked down sets imported from Italy. In contrast, GAZ produces LCVs from the very beginning of the production cycle. This is an important qualitative difference.

15. Whilst an investigating authority may not be required to examine the composition of the domestic industry as "assemblers" or "full producers" in all cases in order to avoid a violation of Article 3.1 of the AD Agreement, in the present case where there were only two domestic producers of the product concerned (one, a full producer, and the other an assembler), the EU considers that the DIMD should have included GAZ in its definition of domestic industry.

3.1.5 GAZ was the undisputed leader in the LCV market

16. Russia further suggests that the EU arguments that GAZ was the undisputed leader in the overall LCV market is flawed because the "alleged leadership does not relate to the market of LCVs with diesel engines that were identified as the product under consideration and the like product".

17. However, the evidence that is now before the Panel, as well as Russia's response to the EU's questions, shows that GAZ was producing the like product from the beginning of the injury investigation period (starting in 2008).

3.2 Claim under Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement: Selection of non-consecutive periods of non-equal duration in the injury and causation analysis

3.2.1 The DIMD's selective use of time periods is inconsistent with the legal obligations in Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement

18. The EU disagrees with Russia that the AD Agreement does not provide any guidance as to how the periods for the injury and causation analysis must be defined. Article 3.1 of the AD Agreement does impose limits on the manner in which an investigating authority selects time periods. An investigating authority must not depict the state of the domestic industry in a manner that lacks accuracy and involves bias. If the investigating authority deviates from the usual collection of data by year, it must explain the reasons for doing so, to take away any reasonable doubts with regard to its selection of time periods.

19. The Appellate Body in *Mexico – Beef and Rice* has stressed that when an investigating authority selects certain time periods for its injury determination such that the most negative side of the state of the industry is shown, it did not provide an "accurate and unbiased picture" of the domestic industry, and thus failed to make an "objective examination" as required by Article 3.1 of the AD Agreement.

20. Thus, the DIMD had to be particularly cautious, given that the presentation of the evidence by half-years in 2010 and 2011 was done by the petitioner (Sollers) itself in its application, and also without providing any valid reason to do so.

3.2.2 The DIMD relied on non-consecutive periods of non-equal duration to support its conclusions on injury

21. Russia ignores major parts of the Report when it suggests that the injury conclusions were principally based on year-by-year comparisons, and not on the consideration of non-consecutive, non-equal time periods. The DIMD has split up the injury investigation period in its evaluation of each injury factor, contrasting the developments in the time period 2008-2010 and the time period second half 2010-first half 2011 (in which the DIMD did not compare consecutive time periods, but "jumped" six months). Russia suggests that the reason for relying on non-consecutive time periods for its injury analysis, is the "need to eliminate the possible time lag in the injury suffered by the domestic industry of the CU as a result of dumped imports of Products in the 2nd half of 2010".

22. While the EU considers that in abstract terms there may be reasons for such an approach, such as the seasonality of the product at issue, nowhere in its Report did the EAEC explain whether or why there was, in fact, a time lag between the allegedly dumped imports and injury, or why precisely a *six* month time lag was expected. The EU wonders what the reason was to split the POI as the DIMD did, other than to show artificially negative trends, *inter alia*, that Sollers incurred losses already towards the end of the POI. Indeed, if the DIMD had considered the POI as a full year, rather than to split it up in two halves, it would have found that for the full POI, no losses were made.

3.2.3 The DIMD failed to make an end-point to end-point analysis of all factors it examined

23. The EU has explained that, in order to make an objective evaluation based on positive evidence, the DIMD had to assess the trends in the injury analysis by making both an analysis of the trend during the period of data collection by means of an end-point to end-point comparison

(2008-2011), and year-by-year (or half year-by-half year) comparison of equal time periods. This is necessary to provide an accurate and unbiased picture of the state of the domestic industry, and thus an objective examination.

24. Russia does not identify any other instances where the DIMD made a longer term trend analysis for the entire injury investigation period (2008-2011). The other examples that Russia provides in its responses only focus on *2009*-2011. The EU reconstructed based on the public version of the Final Report the 2008-2011 trends which were omitted by the DIMD. The EAEC could have well provided those trends but consciously decided to omit them in the tables, presumably in an attempt to disguise the lack of objectivity in the presentation of the data.

3.2.4 The selection of non-consecutive periods of non-equal duration by the DIMD leads to a picture that is biased and lacks objectivity

25. The EU disagrees with Russia's allegation that the EU has not demonstrated why the DIMD's selection of non-successive periods of non-equal duration failed to provide an objective examination of the positive evidence. Although the EU considers that there is no obligation for the complainant to positively demonstrate that an investigating authority was biased, it has shown in detail the contrast between the DIMD's selective use of time periods, on the one hand, and what an objective picture of the developments in the domestic industry would look like.

26. Whereas, under the DIMD's approach, there was a suggestion that during the POI, i.e. from the second half of 2010 to the first half of 2011, the domestic industry underwent negative developments, placing the POI in the context of the longer-term developments from 2008 to 2010 shows quite a different, positive, picture. The figures presented by the EU show how domestic sales volumes, domestic production volume, domestic prices and domestic market shares, all showed a positive trend from 2008 to 2011, in that year reaching a level significantly above that of 2008.

27. The EU further disagrees with Russia that, in the present case, any deficiency caused by the consideration of non-equal and non-consecutive periods in the POI does not undermine the injury and causation analysis because the data for the period from 1 January 2008 to 31 December 2011 was analysed on an annual basis, which allegedly sufficed to establish the existence of the material injury and the causal link in an objective manner. Precisely in a situation where the POI includes two calendar years the investigating authority should contextualise the data shown in the POI with the other trends observed for the injury period. Otherwise, it is not possible to show attribution.

3.3 Claim under Articles 3.1 and 3.2 of the AD Agreement: The DIMD did not make an objective examination based on positive evidence when considering alleged price suppression to a significant degree

3.3.1 2009 was not a "normal year" and could not be used by the DIMD without any adjustment as the basis for calculating prices that would otherwise have occurred

28. The DIMD failed to make an objective assessment, based on positive evidence, of the price suppression because it took as "reasonable rate of return" the profit level during a year (2009) that was, according to the DIMD itself, marked by the financial and economic crisis and consumer preference for domestic LCVs. Russia ignores that fact that the DIMD itself considered 2009 to be exceptional.

29. The EU noted the enormous profit increase from 2008 to 2009 with 233.8%. Likewise, the EU showed on the basis of the actual data provided in the confidential version of the Final Report how the 2009 profit levels were extremely high when compared to the quasi-similar levels reached by Sollers in 2008 and 2010 respectively. Moreover, a number of injury indicators such as the production and sales volume, the capacity utilisation, the employment, the investment went down, and the cost of production clearly shows that 2009 was not an ordinary year in which the domestic industry was healthy.

3.3.2 The DIMD relied on data expressed in USD to suggest there was price suppression, while ignoring the impact of the exchange rate developments

30. The DIMD relied on data expressed in USD to suggest there was price suppression, while ignoring the impact of the exchange rate developments. The DIMD calculated only the domestic and the import prices in USD while other data related with the cost of production, the profit and loss analysis and the injury analysis are shown in RUB. Russia alleges that the conversion of domestic prices in USD was needed because it enabled the comparison of prices of imports and domestic sales in the same currency.

31. However, in the absence of any explanation for the reasons for this approach taken by the DIMD, the EU raised concerns with regard to the objectivity of this analysis. As can be seen from the figures provided by the EU, the trend expressed in RUB shows a constant and relatively moderate increase in the domestic prices throughout the period considered. In contrast, the same trend expressed in USD showed a decline of domestic prices at the beginning of the period considered (which was caused by the exchange rates) and higher change in the increase of domestic prices. This ultimately served to support the DIMD's allegation that Sollers could not increase domestic prices to pass on its costs of production, i.e. by showing how domestic prices had constantly increased throughout the period.

3.3.3 The DIMD did not show that the dumped imports have "explanatory force" for the alleged price effects

32. The EU questions that the dumped imports could have "explanatory force" for evolution of domestic prices. First, import prices remained above domestic prices during the entire POI. The fact that import prices were higher than domestic prices (regardless of the currency used to express those prices) during the POI suggest that other factors, unrelated to subject imports, were responsible for the alleged price suppression.

33. Second, the considerable increase in domestic prices between 2008 and 2009, and again between 2010 and 2011, in combination with quality problems experienced by the Fiat Ducato LCVs assembled by Sollers and the significant raise in costs of production (due to the raising costs of raw materials), should have lead the DIMD to examine whether consumers would be willing to absorb further price increases. When making its price suppression analysis, an investigating authority must examine elements that may explain the significant price suppression, such as market circumstances that indicate that consumers would, in any event, not be willing to accept further price increases.

34. Third, further questioning the explanatory force of the dumped imports for the domestic price effects is the presence of GAZ as a strong competitor in the market for LCVs. Russia has confirmed that the DIMD was aware of the fact that GAZ produced the product concerned during the period under investigation. By failing to examine and engage with this evidence in its analysis, which challenges the "explanatory force" of dumped imports for the price effects, the DIMD acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement.

3.3.4 The DIMD did not explain and demonstrate why the alleged price suppression would be "to a significant degree"

35. The DIMD did not explain and demonstrate why the alleged price suppression would be "to a significant degree". Russia considers that under Article 3.2 of the AD Agreement "the investigating authority is not obliged […] to conduct the thorough analysis in order to determine whether price suppression is significant".

36. However, if the consideration of the impact of the dumped imports on the prices involves a finding of price suppression − as in this case − that finding must involve a consideration of the "significance" of the price suppression, *i.e.* important, notable, or consequential. This is demonstrated by the very words of Article 3.2, which requires price suppression to be "to a significant degree".

37. In response to the Panel's question where in the EAEC's report, the DIMD would have analysed or make conclusions regarding the significance of price suppression, Russia does nothing

more than refer to Section 5.2 of the Report. However, this Section, dealing with the "impact of dumped imports on the prices of the like product in the customs union market", does not contain any consideration of whether the degree of price suppression was "important, notable, or consequential". Merely stating that it was "significant" does not meet the required rigour of the inquiry under Article 3.2.

3.4 Claim under Articles 3.1 and 3.4 of the AD Agreement: State of the Domestic Industry

3.4.1 The DIMD's assessment of the state of Sollers is not based on positive evidence

38. The EU has pointed to inconsistencies between the evidence that Sollers provided and the evidence that the DIMD relied upon for its conclusions regarding the state of Sollers. First, with regard to profits, the EU has shown that profit figures in Table 4.2.5 of the EAEC's report different significantly from the figures in Table 6.2.1 of Sollers' questionnaire responses. In response, Russia provides a formula purporting to explain how the figures were calculated. However, this formula does not clarify the significant differences between the data in the Report and in Sollers' Application and Questionnaire Response.

39. Second, in respect of stocks, the EU has argued in its first written submission that the figures on inventories in Table 11.4.3 of Sollers' application did not match the figures on stocks in Table 4.2.2 of the EAEC Report. Russia responds by claiming that Table 11.4.3 of Sollers' application "contains data on stocks of the Applicant *and* independent dealers". According to Russia, the DIMD must not include data from independent dealers and this would explain the differences in Table 4.2.2 of the EAEC Report, which would be based on Table 4.4 of Sollers' updated questionnaire response. However, the EU still fails to understand how Table 4.4 of Sollers' updated questionnaire response relates to Table 4.2.2 of the Report. Table 4.4 provides information on Sollers' stocks in the form of indexes, splitting up the information in half-years starting from 2009 and setting the first and second half of 2009 as 100.

3.4.2 The DIMD made contradictory observations in its examination of the evidence and ignored certain facts and arguments on the record relating to the state of the domestic industry

40. The EU has also demonstrated how the DIMD's observations that the domestic industry was suffering injury are contradicted by the evidence on the record that shows how the domestic industry's situation showed improvements when comparing the 2008 and 2011 data. While Russia does not dispute that domestic product, volume and prices indeed developed positively, it seeks to contrast the growth rate of production and sales with the slower growth rate of domestic consumption. However, Russia failed to explain and neither did the DIMD consider why it should be expected that consumption of the domestic product would follow the growth in production and prices.

41. The EU has also pointed out that the evidence on profits and losses contradicts the DIMD's findings that the domestic industry was suffering injury because of dumped imports during the POI. Russia responds by noting "the DIMD based its conclusion of material injury on the *fact* of losses and negative profitability rather than on the *amount* of losses". However, the mere suggestion that some undisclosed amount of "losses" would have happened during a small part of the POI is not sufficient to support a conclusion of material injury.

3.4.3 The DIMD failed to examine all factors listed in Article 3.4 of the AD Agreement

42. Article 3.4 of the AD Agreement contains a mandatory list of fifteen factors that an investigating authority must always evaluate in every investigation. The DIMD failed to examine in the EAEC's Report the magnitude of the margin of dumping, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments.

43. With respect to the margin of dumping, Russia admits that this was "not explicitly explained". Russia argues that it suffices that the margin of dumping was discussed in the section of the report where it was determined whether the margin of each country was more than 2% − and thus the conditions for assessing the cumulative impact of the dumping were met.

44. The EU disagrees. The panel in *China – X-Ray Equipment* made clear that a "simple listing of the margins" in other sections of the determination "is not sufficient evidence that the magnitude of the margin of dumping was evaluated in the context of examining the state of the domestic industry". Those issues would not normally be addressed under the analysis referred to by Article 3.3 of the AD Agreement, and were certainly not addressed by the DIMD's simple statement that "the dumping margin for each country exceeds 2%". This statement does not constitute or show evidence of any evaluation or assessment.

45. Further, with respect to the EU's argument that the DIMD failed to examine the domestic industry's return on investments, actual and potential effects on cash flow and the ability to raise capital or investments, Russia alleges that it is sufficient to meet the requirement of Article 3.4 that financial accounts were requested by the DIMD and submitted by Sollers in confidential form. According to Russia, the fact that data was requested and received from the domestic industry can be indicative that the relevant information has been evaluated, although the results of such evaluation were not set forth in the published document".

46. The EU disagrees. First, the Panel should not base its assessment under Articles 3.1 and 3.4 of the AD Agreement on the confidential version of the Report that was submitted by Russia as Exhibit RUS-14 only during WTO proceedings, to the extent that the same information was not apparent from the non-confidential version of the Report on which the EU based its claims. In the alternative, even if the Panel were to consider the confidential Report as part of the evidence, the EU still considers that the analysis laid down in the confidential Report is inconsistent with Articles 3.4 and 3.1.

47. Article 3.4 of the AD Agreement requires investigating authorities to examine the role, relevance and relative weight of each factor mentioned in that provision. This obligation cannot be fulfilled by simply requesting or even obtaining information concerning a given factor. Rather, this information must be analysed and interpreted by the authority.

3.5 Claim under Articles 3.1 and 3.5 of the AD Agreement: The DIMD did not properly establish a causal link between the dumped imports and the material injury to the domestic industry

3.5.1 The DIMD failed to properly examine the causal relationship between dumped imports and injury

48. The EU has demonstrated that the DIMD failed to demonstrate a causal link between the dumped imports and the material injury to the domestic industry. In respect of import volume, the EU explained that the evidence on the record indicated that the increase in the volume of imports was not significant when seen in the context of domestic consumption, domestic sales volume and the market share held by the domestic industry. In response, Russia argues that "[i]t does not seem less plausible […] that these decreases in domestic market share happened because of the effects of dumping". However, merely stating that it is "plausible" does demonstrate a causal link between the import volumes and the injury to the domestic production. Under Article 3.5 of the AD Agreement, it must be demonstrated that the subject imports have caused the injury to the domestic industry.

49. With respect to import prices, the EU explained that the DIMD failed to demonstrate the necessary "linkage" between decreasing import prices and the alleged price suppression. The DIMD makes statements on the difference between the import prices and domestic prices, but does not explain how higher import prices show that the import prices caused price suppression. Russia does not address this point. It merely states that the DIMD made an objective and unbiased conclusion that there was no price undercutting and no price depression. Russia's argument does not respond to the fact that the DIMD did not demonstrate any causal link between the evolution of the import prices and the domestic prices.

3.5.2 The DIMD failed to properly examine the relevance of other known factors

50. Pursuant to Article 3.5, the DIMD's establishment of the facts had to be proper and the evaluation of the facts had to be unbiased and objective such that the explanations are reasonable and supported by the evidence. The EU has listed several known factors that explained the state of

Sollers during the POI and that the DIMD either failed to properly examine, or did not examine at all. A first factor that the DIMD did not properly examine was the termination of the licensing agreement between Fiat and Sollers. A second non-attribution factor that the DIMD did not properly examine was the competition by GAZ during the POI.

51. The EU has also identified three other factors that explain the state of Sollers. First, the EU pointed to the arguments by the interested parties that the difficulties by Sollers were, to a great extent, self-inflicted because of the quality problems with respect to the Fiat Ducatos assembled by Sollers. Another factor that the DIMD failed to examine is the difficulty encountered by Sollers in obtaining financing for its joint venture with Fiat. Finally, the DIMD also failed to examine the discontinuation of the local car manufacturers programmes.

4 PROCEDURAL CLAIMS

4.1 Claim under Articles 6.5 and 6.5.1 of the AD Agreement: Treatment of Information as Confidential without Showing Good Cause and without Providing a Meaningful Summary

52. The DIMD failed to require a showing of good cause or to assess whether such good cause is shown, and to require or provide a meaningful summary or an explanation of why a summary would not be possible. In some instances, the EU is also challenging the confidential treatment of certain information that does not appear to be confidential.

53. The DIMD took no specific action to require good cause in this investigation. Russia also considers that no action to assess whether good cause is shown needs to be taken when confidential treatment is accepted. This is contrary to the jurisprudence. If the published report and its supporting documents do not show that an assessment took place, there is no legal basis to for confidential treatment. With respect to meaningful summaries, interested parties should not be required to examine "documents in their entirety." It must be clear what constitutes the summary of which omitted information. Any subsequent explanations and calculations by Russia cannot compensate for the DIMD's failings.

4.1.1 The meaning of the terms "significant" and "significantly" in Article 6.5 of the AD Agreement

54. The EU agrees with Russia in general terms that disclosing a piece of information would not necessarily "be of significant competitive advantage to a competitor" or "have a significantly adverse effect", and that a document should normally be treated as confidential by nature only when its disclosure would risk causing a great harm. Whether any of this is the case must be objectively assessed by the investigating authority. This assessment should be apparent from the documents provided to interested parties. Simply marking certain pieces of information as "CONFIDENTIAL" or omitting them does not show such an assessment.

4.1.2 The nature of the investigating authority's obligation to require and assess good cause

55. As the EU has explained, the documents provided by the DIMD do not show that the interested parties concerned provided any good cause for confidential treatment, that the DIMD ever required them to do so or objectively assessed whether good cause exists. At a minimum, Article 6.5 requires investigating authorities to objectively assess whether a party has shown good cause for the confidential treatment, and to require the parties to provide the good cause if they failed to do so. It may not always be necessary for the investigating authority to issue a separate document detailing its good cause assessment, or separately determining good cause for each piece of confidential information. In this case, however, there is simply no evidence anywhere on the record that good cause was shown, required or assessed.

4.1.3 The relevance of the alleged absence of objections to confidential treatment or the adequacy of summaries by interested parties

56. In any investigation, due process requires that the interested parties are able to participate, that their views are taken into account, and that any summaries of information provided are clear

and understandable. Yet, this cannot mean that interested parties waive their due process rights if they do not immediately object to a particular document (which in this case they did, as the record demonstrates). If WTO proceedings are brought on the basis of Article 6.5 or Article 6.5.1, it must be possible for a panel to examine whether the confidential treatment and the summaries provided were proper, as Russia concedes.

4.2 Claim under Article 6.9 of the AD Agreement: Failure to disclose all essential facts under consideration that formed the basis for the decision by the EAEC

57. The EU claims that the EAEC Draft Report failed to disclose or meaningfully summarize a number of essential facts underlying the determinations of dumping (import volumes of LCVs produced by Volkswagen AG and Daimler AG respectively; export volumes and weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG respectively; source for the information on the volume and value of imports of LCVs), material injury (consumption, production and sales volumes of LCVs in the Customs Union; information on Sollers' profits and profitability; source for the information on the volume and value of imports of LCVs) and causation (consumption and production volumes of LCVs in the Customs Union; numerical data on the ratio of dumped imports versus consumption and production, prices, rate of return, profits and other issues; rate of return on sales of goods which would have occurred in the absence of dumped imports; market share held by GAZ in 2011). Moreover, the exhibits to Russia's first written submission, in particular the alleged confidential version of the EAEC Report, reveal additional violations of Article 6.9 of the AD Agreement, relevant for the assessment of mandatory injury factors.

58. Whether a fact is essential is an objective question, depending on the role of the fact in the determinations that must be made by the authority. It is not for the authority to list which facts it subjectively considers essential. All such facts must be disclosed, or at least meaningfully summarized. This is equally true when "facts available" are used. The due process rights of interested parties will be infringed by definition if essential facts are not disclosed, and there is no need to additionally show whether or not interested parties can defend their interests.

4.2.1 The relationship between Articles 6.5, 6.5.1 and 6.9 of the AD Agreement

59. The EU disagrees with Russia's statement that "in order to establish a consequential violation of Article 6.9 of the AD Agreement with regard to confidential essential facts, it is necessary to carry out two separate analyses of Article 6.5 and Article 6.9." There is no need for a separate claim, or finding of violation, under Article 6.5. It is only where a separate Article 6.5 or Article 6.5.1 claim has been made, and a panel found a violation of those provisions, that one could truly speak of a "consequential" violation (in practical terms, rather than because Article 6.9 necessarily depends on the correct treatment of information as confidential or not).

4.2.2 The treatment of so-called "non-cooperating producers" under Article 6.9 of the AD Agreement

60. Article 6.9 requires investigating authorities to disclose essential facts to all interested parties. No distinction is made in that respect between parties that the authority considers as "cooperating" and "non-cooperating". Any disclosure, whether general or specific, and whether it contains information on confidential matters or not, must be sufficiently detailed to enable the interested party concerned to defend its interests. All this is equally true when essential facts were not obtained from an interested party but from another public authority, such as a customs authority. Just because an individual dumping margin is not calculated for a so-called "non-cooperating" party based on its own data, it does not follow that such a party does not have an interest in essential facts pertaining to it.

4.2.3 Russia's treatment of Daimler's and Volkswagen's letter requesting additional disclosure of information on the calculation of dumping margins

61. Russia notes that the joint letter of Volkswagen Group Rus and Mercedes-Benz requested disclosure of data derived from customs statistics that was treated as confidential. Nevertheless, the DIMD failed to disclose such information, even as regards the sales to Volkswagen Group Rus

and Mercedes-Benz Rus. Russia seems to acknowledge that no summary of these essential facts was provided.

4.2.4 Russia's arguments regarding the non-disclosure of essential facts related to the determination of dumping and injury

62. With respect to the determination of dumping, Russia's first written submission discusses various calculation methodologies that *could* be used by interested parties to enhance their understanding of the information that was not disclosed. The EU does not consider that this approach is sufficient to provide a meaningful summary that would disclose essential facts.

63. First, there are numerous points in which Russia's explanations depart from what is apparent in the Draft Report, or merely reinforce the EU's conclusion that essential facts were not disclosed. Second, merely disclosing the "methodology" of a calculation does not necessarily constitute a meaningful summary, since it does not enable a reasonable understanding of the substance of the information. In the case at hand, no meaningful methodology was provided. Third, the disclosure requirement under Article 6.9 cannot be met by requiring interested parties to piece together information from various documents submitted by other interested parties and combine them with what is disclosed by the investigating authority.

64. Similar considerations hold true for the DIMD's failure to disclose facts related to the determination of injury. On several issues, the DIMD failed to disclose essential facts, replacing them with entirely uninformative summaries.

4.2.5 Additional undisclosed essential facts

65. The EU has argued that the Panel should not consider the confidential Report that was submitted by Russia as Exhibit RUS-14 (BCI). In the alternative, the EU claims that the confidential Report still fails to comply with Articles 3.4 and 3.1 of the AD Agreement.

66. In addition, were the Panel to consider the confidential Report, the EU submits the following. When compared to the Draft Report, the confidential version of the Report reveals that additional facts which formed the basis for the finding of material injury were determined and assessed by the DIMD, but were not disclosed to the interested parties. No attempt was made to provide a meaningful summary of this information; in fact, much of it was omitted without even being marked as confidential. With respect to these essential facts, Russia has therefore violated Article 6.9 of the AD Agreement, for the reasons already explored by the EU.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

I. INTRODUCTION

1. The European Union still has failed to establish that the Russian Federation has violated any provision of the Anti-Dumping Agreement and the GATT 1994. The European Union continues to propose that the DIMD should have used approaches and methodologies in the anti-dumping investigation at issue that have no legal basis in the WTO law and jurisprudence.

II. STANDARD OF REVIEW

2. The Russian Federation maintains that it is well-established in the WTO jurisprudence that the Anti-Dumping Agreement *requires* taking into account all information upon which the investigating authority relied in order to reach its final determination, whether or not this information forms part of the non-confidential or disclosed record of the investigation.[1] As confirmed by the Appellate Body in *Thailand – H-Beams*, "Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination".[2] In addition, the panel in *EC – Salmon (Norway)* acknowledged that the standard of review specified in Article 17.5(ii) does not mean that a panel is limited to "the information actually set forth or specifically referenced in the determination at issue".[3]

3. Therefore, the European Union cannot reasonably claim that the Panel should base its judgement on "the facts expressed in the non-confidential EAEC's report and supporting documents for which the Report shows a sign of existence".[4]

III. DEFINITION OF THE DOMESTIC INDUSTRY

4. The European Union's untenable interpretations of Articles 4.1 and 3.1 of the Anti-Dumping Agreement completely ignore the existence of objective reasons for defining the domestic industry as a "major proportion" of total domestic production. In addition, the European Union's approach to definition of the domestic industry that implies that such a definition shall remain fixed throughout an anti-dumping investigation undermines the "objective examination" standard that is required by Article 3.1 of the Anti-Dumping Agreement.

A. The European Union's arguments fail to address the objective reasons behind the DIMD's definition of the domestic industry for the purposes of injury determination

5. The Russian Federation believes that practical constraints of obtaining necessary information may prevent the investigating authority from defining the domestic industry for the purposes of injury analysis as all known domestic producers of the like product. The role of the investigating authority in seeking information from known domestic producers may be limited due to the factual circumstances of the anti-dumping investigation.

6. To recall, the reason why the data pertaining to GAZ could not have been used in the injury analysis is related to deficiencies and inconsistencies in the data submitted by GAZ. The investigating authority expressed its willingness to include GAZ into the domestic industry for the purposes of the injury analysis (sent a questionnaire for the producer of the like product in the

[1] *See* Panel Report, *EC – Tube or Pipe Fittings*, para. 7.45, Appellate Body Report, *Thailand – H-Beams,* paras. 115-118.

[2] Appellate Body Report, *Thailand – H-Beams*, para. 118.

[3] Panel Report, *EC – Salmon (Norway)*, para. 7.837. *See* also Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 161-165.

[4] Opening Oral Statement by the European Union at the Second Substantive Meeting of the Panel with the Parties, para. 5.

CU[5], sought clarifications regarding the Questionnaire Reply and informed GAZ on inconsistencies in the data[6]). However, neither clarifications, nor corrected data were received by the investigating authority.

7. Given the inability to use the data pertaining to GAZ in the injury analysis, the domestic industry for the purposes of the injury determination was defined as Sollers that accounted for 87.9% of total domestic production of the like product. Such definition of the domestic industry is based upon a "major proportion" option and is in conformity with Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

8. The Russian Federation maintains that a "major proportion" of total domestic production is a legitimate way for defining the domestic industry for the purpose of the injury analysis.

B. The European Union erred in its interpretation of Article 4.1 of the Anti-Dumping Agreement

9. The European Union suggests that "allowing investigating authorities to define "domestic industry" on the basis of the questionnaire responses as "deficiency" or any other reason not foreseen in Article 4.1 of the AD Agreement risks materially distorting the injury determination".[7]

10. This interpretation proposed by the European Union renders useless a "major proportion" option provided in Article 4.1 of the Anti-Dumping Agreement and leaves the issue of known producers that do not respond to the questionnaire or provide deficient data that cannot be used in the injury analysis unresolved. In addition, Article 3.1 of the Anti-Dumping Agreement contains the requirement of objective examination based on "positive evidence". Appellate Body has clarified that "[t]he word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible".[8] In this respect, the investigating authority shall not base its injury determination on evidence that is not verifiable and not credible.

C. The WTO law does not require that the definition of the domestic industry shall remain fixed throughout the anti-dumping proceedings

11. The European Union further notes that "the domestic industry should be defined as soon as possible in the course of the investigation"[9] and "once the domestic industry is defined, relying on one of the two options in Article 4.1, the investigating authority must not adjust this definition as the injury analysis proceeds on the basis of difficulties in collecting data".[10] In this respect, the Russian Federation notes that the WTO law and jurisprudence do not prescribe to follow an approach suggested by the European Union.

12. In the general context, at the outset of an anti-dumping investigation the domestic industry is identified when the like product is defined. Panel in *EC - Salmon (Norway)* stated that "Article 4.1 makes clear that the starting point for the identification of the domestic industry is the "like product".[11] Hence, the scope of domestic producers that form part of the domestic industry is limited to the domestic producers of the *like product*. Hence, at the outset all known domestic producers of the *like product* constitute the domestic industry.

13. At the same time if the definition of the domestic industry had to be fixed at a particular point in time at the outset of an anti-dumping investigation and could not be changed, as the investigation proceeds, this would contradict the requirements of Article 3.1 of the Anti-Dumping Agreement. In this regard, the Russian Federation maintains that the definition of the domestic industry is an evolving concept. The definition of the domestic industry can be changed in the course of the proceedings, as the investigating authority may be faced with new factual evidence that may trigger a redefinition of the domestic industry (e.g. existence of the domestic producers

[5] See Report, Exhibit RUS-12. Section 1.2.
[6] Exhibit RUS-30 (BCI).
[7] Responses to the 2nd Set of Questions by the European Union, para. 3.
[8] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[9] Responses to the 2nd Set of Questions by the European Union, para. 1.
[10] Ibid., para.4.
[11] Panel Report, *EC – Salmon (Norway)*, para. 7.64.

that were not known to the investigating authority, absence of full and credible questionnaire response from known domestic producers, etc.).

14. Therefore, the European Union's interpretation that implies impossibility to redefine the domestic industry for the purposes of injury analysis should be rejected.

IV. SELECTION OF PERIODS FOR THE INJURY AND CAUSATION ANALYSES

15. The Russian Federation maintains that the European Union has misinterpreted the DIMD's injury and causation analysis and, therefore, presented incorrect and incomplete picture of the injury and causation analysis conducted by the DIMD in the course of the investigation. In fact, the DIMD has analysed the data for the period from 1 January 2008 to 31 December 2011. Such analysis has been conducted on a year-to-year basis, i.e. by comparing particular indicators as of 2008, 2009, 2010, 2011. The data for the period from 1 January 2008 to 31 December 2011 has been analysed consistently in relation to each indicator throughout the entire Report.[12]

16. Further, relevant WTO jurisprudence[13] shows that in order to make a *prima facie* case of violation of Article 3.1 of the Anti-Dumping Agreement a complaining party should correctly identify the reference standard which excludes the possibility (risk) of favouring the interests of any interested party, or group of interested parties, in any investigation and specify how exactly the injury analysis at issue does not meet the above reference standard and thus may favour those interests.[14]

17. As far as the European Union's claim is concerned, the European Union bears the burden to identify how an investigating authority should select the periods for the analysis in general (reference standard) and specify in which way the DIMD's selection of periods for analysis could have favoured the interests of any interested party, or group of interested parties, in the investigation.[15]

18. The standard suggested by the European Union (comparison the data for 2009, 2010 and 2011 and also the period from 1 July 2010 to 30 June 2011 on an annual basis with 2008) cannot be considered as the appropriate reference standard as such standard involves the overlap between the periods analysed.[16]

19. The Russian Federation further submits that there is no logical connection between the European Union's argument regarding the failure by the DIMD to systematically make an end-point to end-point analysis of all of the economic indicators and the European Union's claim. The above argument does not deal with the selection of periods at the initial stage of the process of injury determination. Rather, it touches upon the analysis of economic indicators for the periods already selected.[17]

20. Based on the above, the European Union has failed to make a *prima facie* case of violation by the DIMD of Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. Therefore, the European Union's claim shall be dismissed.

V. PRICE SUPPRESSION

21. The European Union submits that the DIMD failed to make objective analysis based on positive evidence when considering price suppression. The European Union gives up its claim that the DIMD "should have based itself on the year 2008 rather than the abnormal year 2009".[18] The European Union is now convinced that rate of return of 2009 should have been adjusted downwards by the DIMD. The Russian Federation stresses out that the DIMD accessed the

[12] Second Written Submission by the Russian Federation, paras. 56-58.
[13] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196, 204.
[14] Second Written Submission by the Russian Federation, para. 76.
[15] Second Written Submission by the Russian Federation, para. 77.
[16] Second Written Submission by the Russian Federation, para. 80.
[17] Responses to the 2nd Set of Questions by the European Union, para. 23.
[18] Second Written Submission by the European Union, para. 97, Opening Oral Statement by the European Union, para. 39.

conditions of the Russian economy. These conditions clearly show that the rate of return in 2009 could be considered reasonable.[19]

22. The European Union insists that 2009 was not a "normal year" and could not be used by the DIMD for the price suppression analysis because, according to the European Union, 2009 was an exceptional year. In order to support this standing the European Union simply refers to the market situation in 2009 without providing any clear explanations as to how it could make for the "abnormality" of the rate of return in 2009. The Russian Federation emphasizes that the DIMD took the economic crisis as well as the recovery after the crisis into account in its analysis[20], therefore, this factor could not in any way undermine the objectivity of the price suppression analysis.[21]

23. The European Union tries to show that there was some biased approach in the analysis of prices in USD.[22] The Russian Federation is convinced that the claim of the European Union is unfounded as the European Union failed to demonstrate the ground on which it could be concluded that use of USD undermined the objectivity of price suppression analysis. The DIMD actually took the factor of currency fluctuations into account while conducting the analysis.[23] There was no significant difference between price trends expressed in RUB and USD that could distort the analysis.[24]

24. European Union also challenges the explanatory force of dumped imports for the occurrence of price suppression.[25] The Russian Federation recalls that the DIMD demonstrated the explanatory force of dumped imports for the occurrence of price suppression in the Report.[26]

25. The European Union's misunderstanding of the explanatory force stems from its conviction that there was significant gap between import and domestic prices and that price suppression implies that import prices should be higher than domestic prices.[27] The Russian Federation reminds that difference between import and domestic prices decreased during the entire analysed period.[28] Therefore, the European Union makes unfounded allegation and, at that, tries to substantiate it by referring to the comments of the interested parties[29] taken from the context and not related to the issues raised by the European Union in connection with the explanatory force of dumped imports for price suppression.[30]

26. On the basis of foregoing, the Russian Federation concludes that the European Union failed to provide evidence that the DIMD failed to make an objective analysis based on positive evidence when considering whether the effects of the dumped imports was to prevent domestic price increases, which otherwise would have occurred, to a significant degree and its claim should be rejected.

VI. STATE OF THE DOMESTIC INDUSTRY

A. The DIMD based its evaluation of injury factors on positive evidence

27. With regard to profits, the European Union argues that the formula provided by the Russian Federation, which explains how the profit figures set out in the Report were calculated, does not clarify the significant differences between the data in the Report and in Sollers' Application and Questionnaire Response. This formula contains six elements, namely the volume of sales, the price and the cost for Sollers and its trading house separately. The European Union, for some reason,

[19] Second Written Submission by the Russian Federation, paras. 102-103.
[20] Second Written Submission by the Russian Federation, para.109.
[21] Second Written Submission by the Russian Federation, para.111.
[22] Second Written Submission by the European Union, paras. 100-110.
[23] Second Written Submission by the Russian Federation, para. 93.
[24] Ibid., paras. 94-96.
[25] First Written Submission by the European Union, para.156.
[26] Second Written Submission by the Russian Federation, paras. 113-118.
[27] Responses to the 2nd Set of Questions by the European Union, question 67, para. 18.
[28] Second Written Submission by the Russian Federation, para.117.
[29] Second Written Submission by the European Union, para.116,117, Opening Oral Statement by the European Union at the Second Substantive Meeting of the Panel with the Parties,para.39, Responses to the 2nd Set of Questions by the European Union, question 67, para.19.
[30] Second Written Submission by the Russian Federation, paras. 121,123.

fails to take into account that the aggregated profit figure depends not only on Sollers' volume of sales, price and cost but also on the corresponding figures of its trading house.

28. With regard to stocks, the European Union claims that the DIMD failed to conduct an objective examination because the DIMD, when determining the stocks of the domestic industry in the Report, used the data on stocks of the producer and did not rely on stocks of the trading house. This claim is unsubstantiated since the European Union has not even attempted to demonstrate that the DIMD's examination was thereby not conducted in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.

29. The Russian Federation emphasises that Article 3.4 of the Anti−Dumping Agreement does not prescribe the methodology to be used by an investigating authority in its evaluation of the injury factors. The Russian Federation underlines that Article 3.4 of the Anti−Dumping Agreement requires that there be an analysis of inventories and the DIMD included such an analysis in its evaluation of the state of the industry.

30. The European Union also alleges that the DIMD did not rely on positive evidence in its analysis of stocks held by Sollers because the figures in the Report do not correspond to the relevant non-confidential data provided by Sollers. The European Union's allegation lacks any factual basis since the European Union simply failed to extract the required information from the relevant non-confidential data.

B. The DIMD made a proper evaluation of the overall development and interaction among injury factors taken together

31. The European Union has not provided plausible alternative explanations of the evidence on the record in the light of which the explanations given by the DIMD are not reasoned or adequate. The European Union highlights upward trends in the internal evolution of certain injury factors, whereas discounting the factor "profits", which runs contrary to the picture of "normality" in the state of the industry portrayed by the European Union. The highlighted trends, including production and sales levels, are depicted by the European Union in isolation from other market developments, such as trends in the levels of dumped imports and consumption. As a result, any relative changes are disregarded by the European Union.

32. With reference to the European Union's allegation that the selection of the non-equal, non-consecutive periods in the injury and causation analysis tainted the EAEC's analysis since it failed to provide an accurate and unbiased picture of the relevant information, we have shown that when the data are provided for consecutive half-year periods, the injury to the domestic industry and the explanatory force of the subject imports for the state of the domestic industry are pronounced, and the observations made on the basis of these data are in line with the conclusions made in the Report.

C. The DIMD examined all the injury factors listed in Article 3.4 of the Anti-Dumping Agreement

1. The magnitude of the margin of dumping

33. The European Union claims that the DIMD failed to examine the magnitude of the margin of dumping in its injury analysis.

34. Contrary to the European Union, the magnitude of the margin of dumping was apparently examined by the DIMD in the context of establishing that the conditions for cumulative assessment of the effects of the dumped imports of a product from more than one country were fulfilled. This initial stage of the evaluation of the magnitude of the margin of dumping at the least implicitly indicates that the evaluation of the factor occurred.

35. The contribution of the magnitude of the margin of dumping to the impact of the dumped imports on the domestic industry was further implicitly examined in the context of the analysis of domestic prices. The DIMD implicitly evaluated the magnitude of the margin of dumping in the context of the analysis of the effect of the prices of dumped imports on the domestic prices. The determination of "a significant adverse effect", which the prices of the dumped imports had on the

domestic prices and profits, reflects the results of the evaluation of the magnitude of the margin of dumping.

2. Return on investments, actual and potential negative effects on cash flow and ability to raise capital or investments

36. The European Union alleges that the DIMD failed to examine return on investments, actual and potential negative effects on cash flow and ability to raise capital or investments. Contrary to the European Union's allegation, the DIMD analysed these injury factors, which is reflected in the confidential version of the Report. Setting out the results of evaluation of the injury factors at issue only in the confidential version of the Report does not amount to a violation of Articles 3.1 and 3.4 of the Anti–Dumping Agreement since Article 3.4 of the Anti-Dumping Agreement contains an *obligation* to evaluate the listed injury factors, and Article 3.1 of the Anti-Dumping Agreement does not preclude the investigating authority from using confidential reasoning or facts in the analysis.

VII. NON-ATTRIBUTION

37. With regard to non-attribution analysis, the European Union asserts that the Russian Federation provided *ex post* argumentation that "is of no relevance since it does not explain how the DIMD examined this known factor".[31]

38. The Russian Federation maintains that when the allegation on the "known factor other than the dumped imports" in the meaning of Article 3.5 of the Anti-Dumping Agreement contains factual errors that undermine its relevance in the non-attribution analysis, this factor proves to be unfounded and there is no point in its further consideration in the non-attribution analysis. This is the case with alleged "known factor other than the dumped imports" mentioned by the European Union, namely the so-called "local car manufactures programme" that allegedly expired in 2010.

39. The European Union also stated that "Russia ignores that the quality problems and their impact on the state of Sollers were not only raised by PCA, but also by Daimler, who submitted, as part of its comments, detailed test reports of the Fiat Ducato showing significant quality problems".[32] However, the DIMD did not ignore these comments but concluded that the information on testing described in Auto Review falls short of being credible and does not meet the requirement of being "positive evidence".

VIII. CONFIDENTIALITY

40. With regard to confidentiality claim of the European Union, the Russian Federation believes that any document on the investigation record should be read consequentially and in its entirety. In contrast, the European Union's allegations on confidential treatment of information submitted in confidence have shown another approach. Mostly, the contested pieces of information are simply taken by the European Union out of context.

A. The DIMD properly assessed the "good cause"

41. In the investigation at issue the DIMD assessed the reasons for withholding the information from the public file and was satisfied with the "good cause" shown. Hence, no further clarifications or explanations were required.

42. We maintain that the Anti-Dumping Agreement could not be understood as to require an investigating authority to explain why an investigating authority accepted any piece of information submitted by the interested parties in the course of the anti-dumping investigation. Such explanations would go beyond the requirements of the Anti-Dumping Agreement. While the good cause alleged is to be reviewed by an investigating authority on a case-by-case basis, i.e. for each request for the confidential treatment, that does not mean that a separate or detailed explanation

[31] Second Written Submission by the European Union, para. 170.
[32] Second Written Submission by the European Union, para. 168.

of an investigation authority's decision whether to accept a particular request, or not, must be furnished in each case.

B. The EU failed to make a *prima facie* case with regard to customs statistics

43. To recall, the reason for treating customs statistics as confidential was to avoid disclosing the sales volumes used to calculate the volumes of imports of the product under investigation. The European Union, assuming that customs statistics in principle is publicly available and cannot, or even must not, be confidential, failed to make a *prima facie* case because it based its claim on allegations unsupported by evidence or tried to substantiate its claim on irrelevant references to some websites.

44. Specifically, to support its claim the European Union provides simply the following allegations: "[t]o a significant extent, this information is publicly available. It does not appear to be confidential by nature, and it was not indicated that it was provided on a confidential basis".[33] In its First Written Submission the European Union also refers to some web-sites where "a wide range of customs statistics" or "comprehensive customs statistics" "is made available".[34] With respect to the annexes to the Sollers' Application, the European Union did not even attempt to prove the publicity or "non-confidentiality" of the documents and information contained in the annexes.

45. The assertions of the European Union fall short of being substantiated enough and, therefore, must not be accepted.

IX. ESSENTIAL FACTS

46. The European Union's claim at issue touches upon sensitive systemic issues of Article 6.9 of the Anti-Dumping Agreement.[35] The explanations of obligations under Article 6.9 of the Anti-Dumping Agreement, proposed by the European Union[36], contradict the existing WTO jurisprudence. Such interpretations would lead to reduction in the level of cooperation by interested parties who would be against the disclosure of their sensitive confidential information, which is not susceptible of summary, in the different form of summary.

47. Pursuant to Article 6.9 of the Anti-Dumping Agreement the investigating authority is not obliged to disclose of data which (i) were not provided by parties to the investigation[37]; (ii) were in the possession of the investigating authority[38]; (iii) would permit to calculate specific confidential information pertaining to another interested party[39]; (iv) not permitted to be disclosed under Article 6.5 of the Anti-Dumping Agreement[40]. Therefore, before the assessing the adequacy of disclosure of "essential facts" it is necessary to understand the circumstances in which particular disclosure took place.[41]

A. Determination of Dumping

48. The Russian Federation states that the European Union still has not met its burden to establish that disclosure provided in the non-confidential version of the Draft Report and in the additional disclosure letter were inadequate.[42] The DIMD in its Draft Report disclosed the necessary information for the interested parties (including Daimler AG, Volkswagen AG and the European Union) to scrutinise the calculation of the export price and normal value for the German

[33] Opening Oral Statement of the European Union, para. 79.
[34] First Written Submission by the European Union, para. 341, footnote 316.
[35] Second Written Submission by the Russian Federation, paras. 323-372; Closing Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 11.
[36] Second Written Submission by the European Union, paras. 289, 292, 295-296.
[37] Second Written Submission by the Russian Federation, paras. 367-372; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 73.
[38] Ibid.
[39] Second Written Submission by the Russian Federation, paras. 359-366; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, paras. 71, 75.
[40] Second Written Submission by the Russian Federation, paras. 338-340, 363; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, paras. 72, 75.
[41] Second Written Submission by the Russian Federation, para. 323.
[42] Second Written Submission by the Russian Federation, paras. 310-318.

exporting producers and assess the suitability and accuracy of the data concerning import volumes and values.[43]

49. In spite of the fact that the individual volumes of imports and individual weighted average export price of LCVs produced by Daimler AG and Volkswagen AG are not susceptible of summary in the form of range[44], the Draft Report contains meaningful and detailed non-confidential version of the dumping margin calculation for the German exporting producers.[45] Moreover, the interested parties could defend their interests by submitting information on the actual volume of imports and customs value of LCVs produced by them and imported into the Customs Union and using linear relationship between the individual volumes of imports of LCVs for Daimler AG and the individual volumes of imports of LCVs for Volkswagen AG and between the individual weighted export price for Daimler AG and the individual weighted average price for Volkswagen AG.[46]

B. Determination of Injury and Causality

50. Turning to the issue of essential facts related to the determination of injury and causality the Russian Federation notes that the European Union did not make a *prima facie* case because it did not reinforce its claim with demonstration of clear violation of Article 6.9 of the Anti-Dumping Agreement caused by action or inaction of the DIMD.[47] In particular, the Russian Federation sees no European Union's attempts to understand the substance of non-confidential version of the determination on injury and causality. All the Russian Federation can see is that the European Union is trying to justify its claim without substantive analysis of disclosure of each essential fact.[48]

51. The Draft Report contains sufficiently-detailed disclosure of the essential facts under consideration that formed the basis for the determination of injury and causality.[49] Each summary of redacted confidential data contains at least one of the following: (i) the year-on-year percentage changes; (ii) year-on-year percentage point changes; (iii) the mix of the year-on-year percentage changes or year-on-year percentage point changes and textual explanation of changes; (iv) textual description of trends with respect to the injury factor.[50] Moreover, in order to get a full picture of the determination of injury and causality the interested parties should read the Draft Report in its entirety. [51]

52. Besides, the Russian Federation is of the view that if some facts are not central to the determination of injury, such facts do not constitute essential facts within the meaning of Article 6.9 of the Anti-Dumping Agreement.[52]

X. CONCLUSION

53. For these reasons, along with those that were set forth in the Russian Federation's written submissions, oral statements, responses to questions and comments, the Russian Federation respectfully requests the Panel to reject all of the European Union's claims and arguments in their entirety.

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[43] Second Written Submission by the Russian Federation, paras. 384-385; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 73.

[44] Second Written Submission by the Russian Federation, paras. 421-448,455-467; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, paras. 71, 75.

[45] Second Written Submission by the Russian Federation, paras. 391-420, 449-454; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 73.

[46] Second Written Submission by the Russian Federation, paras. 421-448, 455-465; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 71.

[47] Second Written Submission by the Russian Federation, paras. 319-322.

[48] Second Written Submission by the Russian Federation, para. 321.

[49] Second Written Submission by the Russian Federation, paras. 476, 479-623.

[50] Second Written Submission by the Russian Federation, para. 470.

[51] Closing Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 11.

[52] Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 78; Responses by the Russian Federation to the Questions from the Panel after the Second Substantive Meeting with the Parties, paras. 61-63.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1 Brazil focused its participation in these panel proceedings on five main aspects considered in its Third Party Submission, in its participation in the Third Party Session and in the answers to the Panel's questions.

2 The first problem addressed by Brazil is the definition of the domestic industry under Articles 3.1 and 4.1 of the "Anti-Dumping Agreement"[1].

3 Brazil commented in its TPS and in the answers to the Panel that the use of the term excluded by the EU was not in conformity with its strict technical meaning. For Brazil, whenever the investigating authority excludes certain producer from the concept of domestic industry, it is doing so as authorized by Article 4.1 (i) of the ADA, which allows the investigating authority to exclude certain producers from the concept of domestic industry whenever the producers are "related to the exporters or importers or are themselves importers of the allegedly dumped product"[2].

4 In the present case, if GAZ had been excluded from the definition of "domestic industry", for not qualifying specifically as a domestic producer, this company would not be included in the calculation of the collective output of the like product. In this scenario, Sollers would, thus, have held one hundred per cent of market share of the product at analysis.

5 Considering this view, Brazil believes that what happened in the investigation was not an exclusion as foreseen in Article 4.1 (i) of the ADA, but rather a possible disregard to the data that was sent by GAZ to the EAEC.

6 Brazil did not contest that a proper definition of domestic industry under Article 4.1 of the ADA is of paramount importance in order to ensure the accuracy of an injury determination. However, in order to assess whether the investigating authority acted so as to give rise to a material risk of distortion in defining the domestic industry one should not read in Article 4.1 of the ADA obligations that are not there, namely obligations that would result from a combined interpretation of Articles 4.1 and 3.1, as proposed by the EU.

7 Taking into account that the imposition of anti-dumping duties on the importation of dumped imports would benefit the domestic industry as a whole, it is certainly preferable that the "domestic industry" defined by an investigating authority encompasses every single producer, as set forth in the first sentence of Article 4.1. However, this provision clearly establishes that, in face of difficulties in obtaining reliable data from the producers as a whole, it is possible for the investigating authority to rely solely on a major proportion of the domestic producers. As Brazil stressed in the answers to the Panel, it is important that the investigating authority acts in a way to gather a complete set of data related to every producer, but that is not possible sometimes and an investigation based on a major proportion is apt.

8 Brazil does not dispute that data from the domestic producer(s) eventually left out of the "domestic industry" definition may also be relevant for the purposes of the injury analysis as they may (partially or totally) reflect the state of the industry. In the same line, Brazil does not contest that the more producers are included in the "domestic industry", the more ample the economic data set is and, therefore, the injury analysis is potentially more accurate.

9 In Brazil's understanding, however, there is no obligation in the text of Article 4.1 of the ADA that would invalidate *prima facie* an investigation based on a less ample set of data that represent, notwithstanding, a major proportion of the market share, as suggested by the EU. Under Article 4.1 of the ADA, the statistical determination of a "major proportion" by itself provides the amount of data required to ensure an accurate injury analysis. Therefore, there is no obligation to carry out a "qualitative" investigation, which, as argued by the EU, would result from a combined interpretation of Articles 3.1 and 4.1 of the ADA.

[1] EU's First Written Submission, para. 33.
[2] Article 4.1(i) of the Anti-Dumping Agreement.

10 Brazil reaffirms its understanding that a market share of 87.9% could certainly qualify as a major proportion in the sense of Article 4.1.

11 Brazil took issue as well with the EU's contention that in defining the "domestic industry" for the purposes of the injury analysis, the investigating authority should take into consideration differences in production process mainly in terms of the value added along the process and whether the domestic producer benefits or not from preferential regime. Once the like product is defined, producers engaged in its production are by definition the domestic industry.

12 Once again, it seems that the EU is conflating the standards under Article 3.1 and 4.1 of the ADA trying to evaluate the consistency of the definition of "domestic industry" adopted by the investigating authority with the lens of Article 3.1. It is Brazil's view that nothing in Article 4.1 of the ADA requires this type of qualitative assessment. For the purposes of defining the "domestic industry" it is irrelevant whether or not the producer benefits from a preferential treatment or is a manufacturer or an assembler of the like product.

13 This particular distinction has no grounds in the text of the ADA and would represent a major challenge for investigating authorities worldwide. It would be necessary, for instance, to create different categories of companies producing a specific product inside the territory of a member, divided by levels of local content and value added in the local chain of production. That would definitely render impracticable every investigation and the results of the margin of dumping would be even more biased. The same reasoning is true is respect to rules of origin[3]. Nowhere in the ADA there is an obligation to assess the origin of the product. Likewise, the fact that a producer may benefit from preferential regime is irrelevant for the purposes of Article 3.1 of the ADA as this kind of consideration does not have a bearing on the defining of the "domestic industry" in Article 4.1 of the ADA.

14 Brazil agreed with Russia that the ADA "does not provide any guidance as to how the periods for the injury and causation analysis [should be defined] nor does it require the investigating authorities to divide the period into sub-periods of a particular length"[4]. However, it was also recognized that the discretion of the investigation authority is not unlimited. As indicated in Brazil's answers to the Panel, the important is that the periods are chosen by the investigating authority as to permit verifying whether the dumping found was causing injury to the domestic industry.

15 Brazil understands that once the investigating authority has made a decision about the dumping and injury periods, and once it has determined the length of the time periods that it wishes to compare, every injury factor to be taken into account must be assessed in the chosen timeframe. The key aspect in assessing the trends in the injury analysis is to ensure that the investigating authority is comparing periods of the same duration, it does not matter whether it is a period of two years, a full calendar year or half-year/half-year, and all the concurring factors must be analyzed in the same period.

16 In Brazil's view, the kind of incoherence identified by the EU in the analysis made by the EAEC, if clearly demonstrated, would be inconsistent with Art. 3.1 of the ADA and, by consequence, with Articles 3.2, 3.4 and 3.5, and would jeopardize the objectiveness of EAEC's determination.

17 The use of different timeframes to assess the evolution of injury factors could only amount to an objective assessment if the investigating authority provided a proper justification for the practice adopted. In Brazil's view, the absence of explanation to justify the practice and the use of different approaches during the injury analysis, depending on the factual situation at hand, do not seem to be in accordance with the obligation to make an objective examination as required by Article 3.1 of the ADA.

18 Brazil considers that each of the aspects listed in Article 3.4 of the ADA must be considered during the investigation of injury. If the investigating authority does not have sufficient data or information regarding a specific issue, the report must indicate what was the reason that conducted to the absence of one of the aspects listed.

[3] EU's First Written Submission, para. 55.
[4] Russia's First Written Submission, para. 124.

19 Brazil supported that relevant factors raised by interested parties must be accompanied by a reasonable amount of evidence that minimally supports the "relevance" of the claim. Mere unfounded allegations are not sufficient to prove the presence of other factors that were injuring the domestic industry.

20 Furthermore, Brazil also upheld that an investigating authority should make this statement. Otherwise, a doubt would arise of whether the investigating authority really found that the party did not present relevant evidence or whether it deliberately avoided addressing the issue. If the latter is the case, and the authority deliberately excluded the analysis of a relevant known factor that might be causing injury, the investigating authority did not objectively examine the positive evidence before it and violated Art. 3.1 of the ADA.

21 In this particular it is also imperative to stress that the approach of the investigating authority in respect to the level of information it demands to analyze a relevant factor must be uniform. If an interested party presents two relevant factors accompanied by the same overall level of information, Brazil demonstrated its opinion that the investigating authority could not consider only one of those factors. The absence of comments by the investigating authority justifying the exclusion would result in a breach of the obligation set forth in Article 3.5 of the ADA.

22 According to the case-law[5], in Article 6.5 of the ADA, an investigating authority is entitled to treat information received as confidential under two circumstances: (a) information which is by nature confidential; and (b) information which is provided on a confidential basis. It has already been clarified that the "good cause" requirement applies to both circumstances[6] and that "the requisite 'good cause' must be shown by the interested party submitting the confidential information at issue"[7].

23 For Brazil, if an interested party presents confidential information without a justification and if the investigating authority accepts treating this information as confidential without requiring any justification to be placed into the files, there would be a clear violation of Article 6.5 of the ADA.

24 If the confidential information is submitted with a justification − the "good cause" −, then two situations might be possible: (i) the investigating authority rejects the justification. In this case, the provisions of Article 6.5.2 apply, including footnote 18; or (ii) the investigating authority accepts the justification. The "good cause" requirement is not met simply by a request from the interested party, since the very nature of the "good cause" requires analysis by the investigating authority and its agreement that a "good cause" has been effectively presented. The fact that the investigating authority accepted to treat the information as confidential implies that the investigating authority agrees with the justification. In other words, it means that the investigating authority is convinced that the justification presented meets the good cause requirement.

25 It must be pointed out, however, that there is nothing in the ADA establishing that the investigating authority has to issue a special document or to place in any report an "objective assessment [...] of whether good cause was shown for confidential treatment". The requirement of Article 6.5 is that a "good cause" is presented by the interested party. For confidentiality to be granted, the investigating authority must be satisfied that the justification presented fulfill the "good cause" requirement.

26 Another issue raised by the EU is the treatment of information that is not confidential by nature as confidential information. Although there seems to be nothing in Article 6.5 of the ADA preventing a "good cause" from being presented by any interested party − and accepted by the investigating authority − for "information that is publicly available", it seems awkward to have situations in which being an interested party in an antidumping investigation entails access to less information that if the interested party was not part of the investigation. The fact that the publicly available information is not fully reflected into the files would unduly limit transparency, due process and the ability of interested parties to defend themselves.

27 It is the Brazil's view that aggregate information or information that refers to the market as a whole − like exports, imports, production, sales and inventories − should not be treated, as a rule,

[5] Panel Report, Guatemala — Cement II, para. 8.219.
[6] Panel Report, EC — Fasteners (China), para. 7.452.
[7] Panel Report, Guatemala — Cement II, para. 8.220.

as confidential information. If, by any reason, an interested party believes that confidentiality is needed for publicly available information, the standard of the "good cause" requirement should be very high and very careful consideration should be given by the investigating authority. There must be a balance between requests for confidentiality by an interested party and the necessity of ensuring transparency for all interested parties. Confidentiality should not be used as a tool to diminish transparency.

28 If information is treated as confidential − because the investigating authority is convinced that a "good cause" has been shown −, then it falls upon the investigating authority to require the party submitting the confidential information to provide a non-confidential summary in such a level of detail that would not prevent other interested parties from understanding the substance of the information submitted in confidence. It falls also upon the investigating authority to demonstrate that its obligation of requesting the non-confidential summary has been dully fulfilled.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

A. Price Effect Analysis under Articles 3.1 and 3.2 of the AD Agreement

1 First, Articles 3.1 and 3.2 of the Anti-Dumping Agreement require an investigating authority to examine "the volume of the dumped imports" (the "volume effect") and "the effect of the dumped imports on prices in the domestic market for like products" (the "price effect") as the initial step of analyses in its injury and causation determination under Article 3. With regard to the price effect inquiry, Article 3.2 specifies three paths through which dumped imports may give rise to a price effect, i.e., (i) price undercutting; (ii) price depression; and (iii) price suppression.

2 While Article 3.2 does not prescribe any particular methodologies to assess such price effects[1], the Appellate Body in *China – GOES* clarified, with respect to price depression and suppression under the second sentence of Article 3.2, that an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices.[2]

3 In considering whether subject imports provide explanatory force for the occurrence of price suppression or depression, an investigating authority typically begins its analysis with an examination of price developments or trends of subject imports and domestic like products over the period of investigation (the "POI") and compares them to see whether the observed price trends of subject imports and domestic like products moved in the same or similar direction over the POI. However, the mere coincidence in direction and/or extent of price development or trend hardly establishes price depression or suppression. As the Appellate Body pointed out in *China – GOES*:

> [I]t would not be sufficient to identify a downward trend in the price of like domestic products over the period of investigation when considering significant price depression, or to note that prices have not risen, even though they would normally be expected to have risen, when analyzing significant price suppression. Rather, an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices.[3]

Thus, the investigating authority must further consider relevant factors and, in particular look into the cause of the coincidence in direction and/or extent of price development or trend and, specifically, the dynamic interaction between subject imports and domestic products through the market competition between them. The investigating authority must analyze and explain, based on the positive evidence on the record, that subject imports have explanatory force for the occurrence of significant depression or suppression of the domestic like products including evidence of the above dynamic interaction. Were it not for any parallel, however, such difference in price development or trend between subject imports and domestic like products would likely suggest the lack of relationship between them, let alone the lack of dynamic interaction. Faced with such contrary evidence, the investigating authority would be required to make further inquiry with positive evidence to conclude nevertheless that subject imports have explanatory force for the occurrence of suppression of domestic prices.

4 The text of Article 3 and the Appellate Body's prior findings support this view. The assessment of price suppression under Article 3.2 appears to require a counterfactual analysis, as it provides "which otherwise would have occurred". Japan notes here that, in a counterfactual analysis, the investigating authority should compare the observed actual prices with counterfactual prices, which would have occurred if the subject imports were introduced into the domestic market at

[1] *See* Panel Report, *EC –Tube or Pipe Fittings*, para. 7.278; *EC – Fasteners (China)*, para. 7.328; and *China – GOES*, para. 7.546. *See also* Russia's First Written Submission, para. 157.
[2] Appellate Body Report, *China – GOES,* para. 154.
[3] Ibid. para. 138.

normal value. To complete this analysis, the investigating authority must objectively examine various factors including a reasonable rate of return and actual costs of production. Also, it may examine, depending on the case and method used in the comparison, whether the market could have absorbed the price increase.

5 Second, in the examination of whether the subject imports have explanatory force for the occurrence of significant price suppression, the investigating authority must analyze the development or trend of price of subject imports and domestic like products, based on the assessment of price data and other information during the entire POI. This is because the price development or trend between subject imports and domestic like products and the interaction between them can only be ascertained by assessing all the relevant price data and other relevant information.

6 Findings based on the authority's picking and choosing of certain data in non-consecutive periods, while ignoring data in other periods, would be contrary to the requirement under Article 3.1. As the panel in *Mexico – Anti-Dumping Measures on Ric*e found, "such an examination on the basis of an incomplete set of data cannot be objective, nor does the selective use of certain data for the injury analysis constitute a proper establishment of the facts on which to base the determination".[4] The statement of the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* is instructive in this regard, although the case was in the context of price undercutting: "Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products *over the duration of the POI*".[5]

7 Finally, all the analysis of the investigating authority must be based on positive evidence as required by Article 3.1. The investigating authority then must provide a reasoned and adequate explanation in a published report on how it analyzed the factual situation of the present case based on the positive evidence on the record.[6] Further, as the Appellate Body explained, where the authority is faced with elements other than subject imports that may explain the significant depression or suppression of domestic prices, the authority is also required to consider relevant evidence pertaining to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices.[7] For example, when a price development or trend in subject imports and domestic prices diverges in its direction at a certain point in time during the POI, this would imply that elements other than subject imports affect the domestic prices. The investigating authority must then assess the implication of this fact carefully and explain why and how, notwithstanding such evidence, there still exists positive evidence that would outweigh such negative evidence and warrant the finding of depressive or suppressive effect on domestic prices for the entire POI.

B Definition of the "Domestic Industry" under Article 4.1 of the AD Agreement

8 Japan is of the view that the basis of the definition of the domestic industry must be all domestic producers of the like product, and not a part thereof, as explained in detail below.

[4] Panel Report, *Mexico – Anti-Dumping Measures on Ric*e, para. 7.81.

[5] Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU),* para. 5.160 (emphasis added).

[6] Appellate Body Report, *China – GOES*, para. 131.

[7] Ibid. para. 152. Japan agrees that an investigating authority must consider "elements other than subject imports that may explain the significant price suppression" in the context of the price effects analysis, separate from and independent of the non-attribution analysis mandated by Article 3.5. On the one hand, in the context of the price depression and suppression inquiry, an investigating authority must analyze "what brings about such price phenomena" and examine whether such phenomena are an effect of subject imports. As such, the analysis conducted by the investigating authority includes "element{s} other than subject import{s} that may explain the significant price suppression." On the other hand, Article 3.5 analysis concerns the causal relationship between subject imports and injury to the domestic industry and, by virtue of the phrase "through the effects of dumping, as set forth in paragraph 2 and 4", the examination of the causal relationship under Article 3.5 encompasses "all relevant evidence" before the authority, including the volume of subject imports and their price effects listed under Article 3.2, as well as all relevant economic factors concerning the state of the domestic industry listed in Article 3.4. As such, the examination under Article 3.5 covers a broader scope than the scope of the elements considered in relation to price depression and suppression under Article 3.2.

9 Article 3.1 provides that injury determinations must be based on the objective examination of both (a) the volume effect and the price effect, and (b) the consequent impact of dumped imports on "domestic producers" of the like product. The obligation to conduct objective assessment set forth in Article 3.1 requires an investigating authority to assess the significance, if any, of information it is made aware of during the process of defining the domestic industry for its assessment of injury.[8] In this sense, Articles 3.1 and 4.1 "are inextricably linked".[9]

10 Accordingly, the definition of the domestic industry must be such that it enables the authority to make an objective examination of the impact of the dumped imports on all domestic producers. Should an investigating authority act in a biased manner in defining the domestic industry, thereby distorting the injury analysis, the determination of the domestic industry would be in violation of the obligations under Articles 3.1 and 4.1.

11 Article 4.1 defines the domestic industry in two ways, either as "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".[10] In either case, the definition in a given investigation must allow the authority to make an objective examination of the injury of all domestic producers under Article 3, so as not to introduce a material risk of distortion to the injury determination.[11] The volume of production during the POI is an important factor to define the domestic industry, but the volume alone will not be decisive. As the Appellate Body pointed out, "when the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that 'substantially reflects the total domestic production' will very likely satisfy *both the quantitative and qualitative aspect of the requirements of Articles 4.1 and 3.1*".[12] The Appellate Body continued "if the proportion of the domestic producers' collective output included in the domestic industry definition is not sufficiently high that it can be considered as substantially reflecting the totality of the domestic production, then the *qualitative element becomes crucial* in establishing whether the definition of the domestic industry is consistent with Articles 4.1 and 3.1".[13] As such, the investigating authority must define the domestic industry quantitatively as well as qualitatively to reflect accurately the total domestic production.

12 With regard to the qualitative aspect of the requirement of Articles 4.1 and 3.1, the investigating authority must consider various factors. Japan recognizes that the qualitative reflection of the total domestic production requires the investigating authority to ensure that the economic situation of the defined domestic industry represents the economic situation of domestic producers as a whole. To this end, the investigating authority must assess, for example, whether the particular method to select domestic producers to be included in the domestic industry is neutral and unbiased so as not to give rise to a material risk of distortion, or whether and to what extent the products made by the domestic producers within the scope of the domestic industry interact with the products made by domestic producers not included in the domestic industry in the market at issue.

C Transparency and Due Process Rights of Interested Parties under Article 6 of the AD Agreement

13 The AD Agreement ensures the due process rights of interested parties in investigations.[14] The due process rights of adequate and sufficient opportunities of interested parties to defend their interest stand on the transparency of information during the investigation. Without adequate disclosure of information, interested parties would not be able to understand the substantive issues in a given investigation, and thus would not be able to make an effective defense. Unless interested parties provide relevant information throughout the defense process, the authority would not be able to make an appropriate determination based on enough information. In particular, an insufficient or inappropriate disclosure of essential facts would prevent the interested parties from understanding the substantive issues in the investigation, which would be the basis

[8] *See* Panel Report, *China – Broiler Products,* para. 7.413.
[9] Panel Report, *China – Broiler Products,* para. 7.408.
[10] *See* Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.322; *China – Broiler Products*, para. 7.416; and *China – Autos (US)*, para. 7.206.
[11] Appellate Body Report, *EC – Fasteners (China),* para. 414.
[12] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.303 (emphasis added).
[13] Ibid. (emphasis added).
[14] *See* Article 6 of the AD Agreement.

for the authority's assessment and from making comments on the authority's determination. This precludes the authority from making analysis properly. Thus, the transparency is important from the perspective not only of protecting the right of interested parties but also of ensuring the appropriateness of the authority's determination.

14 Article 6.9 concerns "the disclosure of 'facts' in the course of such investigations 'before a final determination is made'".[15] Facts that must be disclosed as essential facts are those that "form the basis for the decision whether to apply definitive measure." The Appellate Body clarified on this point:

> 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 measures. In our view, disclosing the essential facts under consideration pursuant to Article[] 6.9 [] is paramount for ensuring the ability of the parties concerned to defend their interests.[16]

As such, the disclosure of essential facts is a critical process to secure the transparency and due process rights of the interested parties, and must be made in such depth that interested parties are able to comment on the factual basis of the determination.

15 The essential facts include the factual elements of dumping margin calculation, such as normal value, export price and comparisons to reach the dumping margins. The panel in *China – Broiler Products* confirmed that the disclose of such must include:

> the underlying data for particular elements that ultimately comprise normal value (including the price in the ordinary course of trade of individual sales of the like product in the home market or, in the case of constructed normal value, the components that make up the total cost of production, selling and general expenses, and profit); export price (including any information used to construct export price under Article 2.3); the sales that were used in the comparisons between normal value and export price; and any adjustments for differences which affect price comparability.[17]

Indeed, no interested parties would be able to comment on the dumping determination without knowing the authority's factual basis for dumping determination.

16 Japan also notes that Article 6.9 does not permit a Member to make a distinction between "cooperating" and "non-cooperating" interested parties regarding the disclosure of the essential facts.

17 Where a fact contains confidential information, "the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the 'essential' but confidential facts."[18] Accordingly, the adequacy of the disclosure of essential facts in such case would be in fact questions of the confidential nature of the information covered under Articles 6.5 and 6.5.1.

18 The treatment of confidential information under Article 6.5 and 6.5.1, however, would not apply to a party from which the relevant information originates. That treatment would be required only with respect to the parties other than the party which submitted the information. As the panel in *Korea – Certain Paper* found, "[t]he notion of confidentiality, as elaborated upon in Article 6.5 . . . is about preserving confidentiality of information that concerns one interested party *vis-à-vis* the other interested parties".[19] Therefore, "confidentiality cannot be used as the basis for denying access to information against the company which submitted the information".[20] The actual facts, not a non-confidential summary, therefore, are required to be disclosed to the party who submitted the information on which such facts are based.

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[15] Appellate Body Report, *China – GOES,* para. 240.
[16] Appellate Body Report, *China – GOES,* para. 240.
[17] Panel Report, *China – Broiler Products*, para. 7.91. *See also* Panel Report, *China – Autos (US),* paras. 7.72-7.73.
[18] Panel Report, *China – GOES,* para. 7.410.
[19] Panel Report, *Korea – Certain Paper,* para. 7.201.
[20] Ibid.

19 In connection with the injury determination, Article 6.9 requires the authority to disclose facts, not the authority's assessment of facts. As the panel in *China – GOES* found, "it is insufficient merely to state a general finding and conclusion regarding non-subject imports, namely that as a proportion of total imports into China, non-subject imports 'continued to drop' and therefore were not a cause of injury to the domestic industry." [21] Confirming such findings, the Appellate Body stated "the essential facts that MOFCOM should have disclosed in respect of the 'low price' of subject imports include the price comparisons between subject imports and the like domestic products. … because they were required for an understanding of the occurrence of price undercutting, which served as a basis for MOFCOM's price effects finding".[22]

[21] Panel Report, *China – GOES,* para. 7.658.
[22] Appellate Body Report, *China – GOES,* para. 247.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

1 INTRODUCTION

Mr. Chairperson, Distinguished Members of the Panel.

1. The Republic of Turkey (hereinafter referred to as "Turkey") would like to thank the Panel for the opportunity to present this Oral Statement as a Third Party in the current proceedings.

2. As stated in our third party written submission, Turkey exercises its third party rights under Article 10 of the DSU in this case not only because of its systemic interest in the correct interpretation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "Anti-Dumping Agreement"), but also its substantial trade interests that is negatively affected by the measures at issue in this dispute. Turkey provided a written submission to the Panel on 29 January 2016. In this Oral Statement, Turkey does not wish to reiterate the arguments stated in its written submission but Turkey would like to briefly elaborate some important parts of its written submission.

2 CLAIMS UNDER ARTICLES 3.1 AND 4.1 OF THE ANTI-DUMPING AGREEMENT

3. In its written submission Turkey argued that the accurate definition of the "product under consideration" and "like product" constitutes the very foundation of a coherent and unbiased determination of the "domestic industry". Indeed, it is indispensable to conduct an objective injury analysis in line with the overarching principles stipulated in Article 3.1 of the Anti-Dumping Agreement.[1]

4. Since, Article 4.1 of the Anti-Dumping Agreement defines the "domestic industry" as either the domestic producers as a whole or those domestic producers whose output constitutes a major proportion of the product under consideration, Turkey considers that the investigating authority is under the obligation to identify the domestic producers of the like product as precisely as possible.

5. In a dumping investigation, however, the issue whether the investigating authority has put "reasonable" effort to identify all domestic producers is a question that must be addressed on a case-by-case basis. Accordingly, assessing whether "reasonable effort" was shown depends, on different factors; *inter alia*, the structure of the market, number of the market players, the percentage of registered production facilities and willingness of the domestic producers to declare their output data.

6. Finally, the risk of distortion of the injury analysis can be mitigated if the universe of all domestic producers is defined as entirely and accurately as possible and the "domestic industry" is defined with a view of reaching an objective picture of the injury based on positive evidence.[2]

3 CLAIMS UNDER ARTICLES 3.1, 3.2, 3.4 AND 3.5 OF THE ANTIDUMPING AGREEMENT

7. Considering the claims and arguments on the period of investigation Turkey reiterates its position that maintaining symmetry between the "period of dumping determination" and "period of injury determination" is imperative to ensure an objective and even-handed analysis on injury and

[1] Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China,* WT/DS405/R, adopted 22 February 2012, para. 7.315; Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States,* WT/DS440/R, adopted 18 June 2014, para. 7.211.

[2] Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron and Steel Fasteners from China,* WT/DS397/AB/R, adopted 28 July 2011, para. 414; Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States,* WT/DS427/R, adopted 25 September 2013, para. 7.413.

causation. As underlined in its written submission[3], Turkey is of the view that the rules set in the Recommendation of the Committee on Anti-Dumping Practices reflect this rationale clearly.

8. Turkey understands that the "price effect" analysis is one of the fundamental components of a coherent injury and causation assessment. As confirmed by the case law, the concepts of "explanatory force" and "dynamic price assessment" are significant instruments to strengthen the legal discipline of Article 3.2 and drive the investigating authority to inquire further the link between the state of the domestic industry and the price impact of the dumped imports. Turkey, however, opines that examinations to satisfy the requirements of these concepts may not be always straight forward or easily handled. Turkey acknowledges that investigating authority is under the obligation to achieve this complicated work with a view of acting in line with the principles of Article 3.1 of the Anti-Dumping Agreement.[4]

9. As regards the legal discipline stipulated in Article 3.4 of the Anti-Dumping Agreement, Turkey underlines that the investigating authority is expected not only to analyze the trend of individual factors but also to establish the cross-connections between factors that will depict a more complete and precise picture of the domestic industry's state. Furthermore, Turkey understands that the Article 3.1 of the Anti-Dumping Agreement implicitly directs the investigating authority to evaluate economic indicators of the domestic industry in a holistic manner without singling out or giving less emphasis to those indicators that display affirmative outcomes on the viability of the domestic industry.

10. Finally, as underscored in case law[5] Article 3.5 of the Anti-Dumping Agreement stipulates two separate paths of evaluation to reach the conclusion that causality is present between the dumped imports under consideration and injury of the domestic industry. From a practitioner's point of view, Turkey acknowledges that "causality" analysis is one of the most challenging parts of an investigation. In that context, Turkey opines that while the investigating authority is expected to show the link between the dumped imports and injury, it is equally responsible to examine whether the "other known factors" are in such a magnitude that they render the link between dumped imports and injury irrelevant.

4 CONCLUSION

11. Mr. Chairperson, distinguished Members of the Panel, with these comments, Turkey would like to contribute to the legal debate of the parties in this case, and express again its appreciation for this opportunity to share its views on this relevant debate, regarding the interpretation of Anti-Dumping Agreement.

12. We thank you for your kind attention and remain at your disposal for any question you may have.

[3] Turkey's Third Party Written Submission, para. 29.
[4] Ibid, paras. 34, 35.
[5] Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, para. 151.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

1. In its written submission and oral statement Ukraine provided comments on certain legal issues involving the consistency of the anti-dumping measures applied by Eurasian Economic Commission ("EAEC") with Articles 3.1, 3.2, 3.4, 3.5, 4.1, 6.5, 6.5.1, 6.9, and 12.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-dumping Agreement") and Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

2. Ukraine considers that the fact that EAEC excluded "Gorkovsky Avtomobilny Zavod" from the definition of the domestic industry on the grounds that it provided lacking or deficient information violates provisions of Articles 3.1, 4.1, and 6.6 of Anti-dumping Agreement.

3. First, Article 6.6 places "the burden of satisfying oneself of the accuracy of the information on the investigating authority"[1] with a sole exception of circumstances provided in Article 6.8 and Annex II to Anti-dumping Agreement following the extensive procedures provided therein. Moreover, Panel in *US – Hot-Rolled Steel* explicitly stated that "where information is actually submitted in time to be verified, and actually could be verified, we consider that it should generally be accepted".[2] Therefore, declaring a producer non-cooperating and disregarding its information after finding it deficient shall not be done without making an extensive effort to verify the provided information.

4. Second, Ukraine considers that deviation from specific definition of the domestic industry may result in a violation of Article 4.1. Specifically, the Panel in *Argentina – Poultry Anti-Dumping Duties* states" if a Member were to interpret the term differently in the context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1".[3] As Article 4.1 sets out explicably only two specific circumstances that permit an investigating authority to deliberately exclude producers from the domestic industry (one for related producers and one for definition of separate competitive markets), the investigating authority shall include every producer into domestic industry unless it has very strong reasons for the opposite.

5. Third, the Appellate Body in *EC – Fasteners (China)* provided plainly that "excluding a whole category of producers of the like product" is an example of behaviour that creates a risk of "distortion in defining the domestic industry"[4] and results in a lack of objective examination contrary to provisions of Article 3.1. Ukraine fails to understand how EAEC could have conducted objective examination by intentionally ignoring a producer as non-cooperating and limiting its definition of the domestic industry with applicant only even though the other producer fully participated in the investigation.

6. In connection to the fact that the Russian Federation excluded examination of certain factors (namely, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments) Ukraine notes that it was not consistent with several provisions of Anti-Dumping Agreement.

7. Ukraine finds it important to understand the precise scope of explanations of the Appellate Body in *Thailand – H-Beams.* While the Appellate Body explained that there is "no justification for reading these obligations *[of Article 12]* into the substantive provisions of Article 3.1"[5] and that the determination made by the investigating authority under Article 3.1 must not be "based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation"[6], Ukraine considers that these conclusions applied only to the factual basis and reasoning that is the basis for investigating authority's conclusions: nothing in Article 3.1 or 3.4

[1] Panel Report, Argentina – Ceramic Tiles, para. 6.57.
[2] Panel Report, US – Hot-Rolled Steel, para. 7.55.
[3] Panel report, Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil, para. 7.338
[4] Appellate Body Report, EC – Fasteners, para. 414.
[5] Appellate Body Report, Thailand – H-Beams, para. 110.
[6] Appellate Body Report, Thailand – H-Beams, para. 111.

could justify making the whole examination of the required elements of injury confidential and excluding it from the public report.

8. Moreover, such exclusion should also violate requirements of Article 12.2 Anti-dumping Agreement that reasons which have led to the imposition of final measures should be included into public notice with "due regard being paid to the requirement for the protection of confidential information". The findings of the investigating authority are not such information.

9. Therefore, Ukraine considers that excluding findings of the investigating authorities on obligatory factors from the public record violates both Article 3.4 and 12.2 of Anti-dumping Agreement.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

1 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.

2 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.

3 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

4 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.

5 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.

ANNEX D

PRELIMINARY RULING

ANNEX D-1

PRELIMINARY RULING ON THE PANEL'S JURISDICTION UNDER ARTICLE 6.2 OF THE DSU

20 April 2016

1 INTRODUCTION AND ARGUMENTS OF THE PARTIES

1.1. The Russian Federation requests a preliminary ruling on whether certain claims addressed by the European Union in its first written submission are within the scope of the request for the establishment of a panel in this dispute and therefore within the jurisdiction of this Panel.

1.2. According to the **Russian Federation**, in its Request for Consultations of 26 May 2014[1] and Request for the Establishment of a Panel of 16 September 2014[2], the European Union claimed that, inconsistently with Article 6.9 of the Anti-Dumping Agreement, the Russian Federation failed to inform the interested parties of the essential facts under consideration which form the basis of the decision to impose anti-dumping measures, including facts underlying the determinations of the existence of dumping, the calculation of the margins of dumping and "the determination of injury".[3] In its first written submission, the European Union argued that the Russian Federation had violated its obligations under Article 6.9 of the Anti-Dumping Agreement by failing to disclose to the interested parties the essential facts under consideration that formed the basis for the determination of "a causal link between the dumping and the injury".[4] In the Russian Federation's view, this is a "new claim" that was not included in either the consultations request or the panel request. As such, it impermissibly expanded the scope of the dispute and changed "the essence of the complaint".[5] The test established by the Appellate Body in respect of Article 6.2 of the DSU is "the ability of the respondent to defend itself".[6] The panel request does not meet this test in relation to the claim regarding the determination of causality. Therefore, the Russian Federation requests a preliminary ruling that this claim is not within the jurisdiction of the Panel.[7]

1.3. The **European Union** responds that the "phrase 'determination of injury' in the EU's consultation and panel requests should be read in light of Article 3 of the Anti-Dumping Agreement … [which] is entitled 'Determination of injury'."[8] Paragraph 5 of Article 3 deals with causation and non-attribution, and thus, for the European Union, the phrase "determination of injury" includes these elements. The European Union considers that paragraph 1 of the panel request refers to "injury determination" in the same sense − that is, as including causation and non-attribution.[9] Finally, paragraph 8 of the panel request is drafted in a non-exhaustive manner.[10]

2 THE GOVERNING LAW

2.1. Articles 7 and 6.2 of the DSU set out the jurisdiction of the Panel. Article 7 of the DSU provides that, unless the parties agree otherwise, the terms of reference of a panel are set out in the DSB document establishing that panel. These terms of reference are, in turn, based on the request for the establishment of the panel under Article 6.2 of the DSU, which states in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a

[1] WT/DS479/1; G/L/1070; G/ADP/D103/1; 26 May 2014 (hereinafter consultations request).
[2] WT/DS479/2; 16 September 2014 (hereinafter panel request).
[3] Russian Federation's response to Panel question No. 2, para. 6. (emphasis added)
[4] Russian Federation's first written submission, para. 684. (emphasis added)
[5] Russian Federation's first written submission, para. 685.
[6] Appellate Body Report, *Korea − Dairy*, para. 127.
[7] Russian Federation's first written submission, para. 688; See also Russian Federation's second written submission, paras. 306-309.
[8] European Union's response to Panel question No. 2, para. 2; second written submission, paras. 7-14.
[9] *Ibid.,* para. 4.
[10] *Ibid.,* para. 5.

brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2.2. Previous panel and Appellate Body reports have clarified these provisions, and it is now well understood that:

a. A panel has the inherent jurisdiction to determine whether a matter falls within its terms of reference.[11]

b. Where a matter or a claim does not satisfy the requirements of Article 6.2, it is not within the jurisdiction of the panel.[12]

c. A defect in the panel request may not be "cured" in later submissions.[13]

d. To determine whether a matter or a claim falls within the terms of reference of the panel, the panel request should be read in its entirety.[14]

e. The use of terminology such as "including" "cannot operate to include any and all other claims not specifically included in the request".[15]

f. Article 6.2 protects a Member's due process interests in the course of litigation.[16] At the same time, the procedural rules of the WTO should not be used as litigation techniques.[17]

3 ANALYSIS

3.1. The Russian Federation argues that the European Union referred only to "injury determination" but not to "causation" or "non-attribution" in the context of its claims under Article 6.9 of the Anti-Dumping Agreement (Article 6.9 claims) as set out in the consultation request and panel request. For this reason, the Russian Federation considers that the aspect of the European Union's Article 6.9 claims related to causation and non-attribution falls outside the Panel's jurisdiction.

3.2. In its panel request the European Union set out the following claims:

> 1. Articles 3.1, 3.2, 3.4 and **3.5** of the AD Agreement, because, by selecting non-consecutive periods of non-equal duration for the examination of the trends for the whole domestic industry, Russia's **injury determination** was not based on an objective examination of positive evidence. …
>
> 4. Articles 3.1 and **3.5** of the AD Agreement, because Russia failed to conduct an objective examination, based on positive evidence, **of the causal relationship** between the imports under investigation and the alleged injury to the domestic industry. Russia also failed to conduct an objective examination, based on positive evidence, of **factors other than the imports** under investigation which have been injuring the domestic industry, and therefore improperly attributed the injuries caused by these other factors to the imports under investigation. …
>
> 8. Article 6.9 of the AD Agreement, because Russia failed to inform the interested parties of the essential facts under consideration which form the basis of **the decision to impose antidumping measures**, including the essential facts underlying the

[11] Appellate Body Report, *Mexico – Taxes on Soft Drinks,* para. 45.
[12] Panel Report, *Brazil – Desiccated Coconut*, para. 288; Appellate Body Report, *US – Carbon Steel*, para. 126.
[13] Appellate Body Report, *EC – Bananas III*, para. 143.
[14] Appellate Body Report, *US – Carbon Steel,* para. 127.
[15] Appellate Body Reports, *India – Patents (US)*, para. 90; and *EC – Fasteners* (China), para. 597.
[16] Appellate Body Report, *US – Carbon Steel, para.* 126.
[17] Appellate Body Report, *US – FSC*, para. 166.

> determinations of the existence of dumping and the calculation of the margins of dumping and **the determination of injury**.[18]

The European Union specifically identified both causation and non-attribution in the claim related to Article 3.5 of the Anti-Dumping Agreement set out in paragraph 4 of its panel request. While no specific reference is made to either causation or non-attribution in paragraph 8, which sets out the Article 6.9 claims, the reference to the determination of injury is introduced by the word "including". The European Union argues that in paragraph 1 of the panel request mention is made of Article 3.5 of the Anti-Dumping Agreement in respect of the "injury determination". For this reason, both here and in paragraph 8, the term "injury determination" should be read to include causation and non-attribution.

3.3. The Russian Federation's argument raises a concern that the absence of any specific reference to causation and non-attribution in paragraph 8 of the panel request risks a measure of imprecision in the scope of the European Union's Article 6.9 claims. In this regard, we recall the findings of the panel in *Canada – Wheat Exports and Grain Imports*:

> Due process requires that the complaining party fully assume the burden of identifying the specific measures under challenge.
>
> ...
>
> In our view, it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request.[19]

At the same time, however, we recall that to determine whether a claim meets the due process requirements of Article 6.2 of the DSU, it must be viewed in the context of the panel request as a whole. As well, in any claim the measure at issue and the legal basis of the complaint impart meaning to one another.

3.4. In this context, we make the following two observations. First, the use of the same term in different places in the same document implies, absent indications to the contrary, that it should be understood to have the same scope throughout the document, and there is nothing in the panel request to suggest that this should not be the case here: following on from paragraph 1 of the panel request, subsequent references to the "injury determination" in the context of a claim referring to Articles 3.1, 3.2, 3.4, or 3.5 of the Anti-Dumping Agreement suggest to us that the term may properly be understood to include all the relevant elements of an injury determination set out in those provisions, including causation and non-attribution. Accordingly, "injury determination" when used in paragraph 8 should be understood to have the same scope as when used in paragraph 1 – that is, to also include the causation and non-attribution aspects of Article 3.5 of the Anti-Dumping Agreement. Second, paragraph 8 closely tracks the text of Article 6.9 of the Anti-Dumping Agreement in referring to "essential facts under consideration which form the basis of the decision to impose antidumping measures". The decision to impose anti-dumping measures rests on consideration of all the relevant elements of the determination of injury set out in Article 3 of the Anti-Dumping Agreement.

3.5. In our view, it is clear that Article 6.9 of the Anti-Dumping Agreement covers all elements of a decision to impose an anti-dumping measure, and that this also includes causation and non-attribution.[20] Moreover, we note that in setting out the scope of its obligation under Article 6.9 of

[18] Emphases added. These are substantially similar to the corresponding paragraphs of the consultation request.

[19] Panel Report, *Canada – Wheat Exports and Grain Imports*, paras. 24-25. (emphasis added)

[20] Appellate Body Report, *China – HP-SST*, para. 5.130: "In order to apply a definitive measure, an investigating authority must find dumping, injury to the domestic industry, and a causal link between the dumping and the injury." See also Appellate Body Report, *China – GOES*, para. 241: "We agree with the Panel that, '[i]n order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link'". And panel Report, *China – Autos (US)*, para 7.71:

> In order to apply definitive measures at the conclusion of AD investigations, an IA must find three key elements: (i) dumping; (ii) injury; and (iii) a causal link. Therefore, the "essential

the Anti-Dumping Agreement in its first written submission, the Russian Federation referred to the panel's findings in *China – Broiler Products*:

> In this regard the panel in *China – Broiler Products* has noted that the investigating authority must find three key elements in order to apply definitive measures: (i) dumping, (ii) injury **and (iii) causal link**. Therefore, **the "essential facts" underlying the findings and conclusion relating to these elements form the basis of the decision to apply definitive measures** and must be disclosed.[21]

This demonstrates that the Russian Federation was or should have been aware that in the panel request in this case, the term "determination of injury" in paragraph 8 was to be understood to encompass the elements of causation and non-attribution. The use of the term "determination of injury" without specifying the elements of causal link or non-attribution does not detract from the clear Article 6.9 legal requirement.

4 CONCLUSION

4.1. The Russian Federation has failed to establish that the claim of the European Union under Article 6.9 of the Anti-Dumping Agreement in relation to alleged failure to disclose essential facts concerning causation and non-attribution is a "new claim" that falls outside the jurisdiction of the Panel.

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facts" underlying the findings and conclusions relating to these elements form the basis for the decision to apply definitive measures, and must be disclosed.

[21] Russian Federation's first written submission, para. 718. (emphasis added) See also Russian Federation's second written submission, at para. 327 (in the section dealing with the interpretation of Article 6.9): "It is a clear that a definitive measure is applied if dumping and injury **caused by dumping** are found." (emphasis added)

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REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS479/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 1 December 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the European Union requests such a ruling, Russia shall submit its response to the request in its first written submission. If Russia requests such a ruling, the European Union shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following

the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party be aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the European Union could be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

10. Each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1, to the extent that it is practical to do so.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite Russia to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Russia if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Russia to present its opening statement, followed by the European Union. If Russia chooses not to avail itself of that right, the Panel shall invite

the European Union to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 2 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx.xxxxx@wto.org and xxxxx.xxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 14 January 2016

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS479.

1. For the purposes of these Panel proceedings, BCI includes

   a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

   b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute may not be designated as BCI if the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.

3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.

5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE EUROPEAN UNION

1 INTRODUCTION

1. In this integrated executive summary, the European Union ("EU") summarizes the facts and arguments presented to the Panel in its first written submission, its opening and closing oral statements at the first substantive meeting and its responses to the Panel's and Russia's questions.

2 FACTUAL BACKGROUND AND THE MEASURES AT ISSUE

2. On 3 October 2011 Sollers-Elabuga LLC ("Sollers") filed an Application requesting the imposition of anti-dumping duties on imports of light commercial vehicles ("LCVs") from Germany, Italy and Turkey on the territory of the Customs Union of Belarus, Kazakhstan and Russia.

3. The product concerned is LCVs of gross vehicle weight from 2.8 tonnes to 3.5 tonnes, van-type bodies and diesel engines with cylinder capacity not exceeding 3.000 cc, designed for the transport of cargo of up to two tonnes (cargo all-metal van version) or for the combined transport of cargo and passengers (combi cargo and passenger van version) falling under HS code 8704 21 3100 and HS code 8704 21 9100 and imported in the Customs Union from Germany, Italy and Turkey.

4. The applicant argued that its output during the first half of 2011 amounted to 85.2% of the total production of the like product, and identified another producer of the like product, Gorkovsky Avtomobilny Zavod ("GAZ") for the period concerned.

5. The anti-dumping investigation was initiated on 16 November 2011. The dumping investigation period ("DIP") is from 1 July 2010 until 30 June 2011. The injury investigation period ("IIP") is from 1 January 2008 until 31 December 2011. By Notice of 16 November 2012 the Department of Internal Market Defence ("DIMD") of the Eurasian Economic Commission ("EAEC") extended the duration of the investigation for 6 months, until 16 May 2013.

6. On 14 May 2013 the DIMD introduced anti-dumping duties on imports of LCVs from Germany, Italy and Turkey on the territory of the Customs Union. The Decision entered into force on 15 June 2013. The anti-dumping duties are 29.6% for imports from Germany, 23% for imports from Italy and 11.1% for imports from Turkey. The Decision is based on the Report "Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union' of the Domestic Market Protection Department of the Eurasian Economic Commission" ("the Report").

3 LEGAL ARGUMENT

3.1 Claim under Articles 3.1 and 4.1 of the AD Agreement: failure to properly determine the domestic industry

7. Pursuant to Articles 3.1 and 4.1 of the AD Agreement, provisions which are inextricably linked, the "domestic industry" should be defined as referring to the domestic producers as a whole of the like products, or as those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. Domestic producers may be left out from the definition of "domestic industry" on the basis of the two limitative reasons provided for in subparagraphs (i) and (ii) of Article 4.1 of the AD Agreement. The possibility to define the domestic industry as producers producing a major proportion of the total domestic production is not unfettered. The Appellate Body has specified that these limits are of a quantitative and qualitative nature. The proportion relied upon by the investigating authority should be representative of the domestic industry as a whole and be unbiased, without favouring the interest of any interested party, or group thereof. The investigating authority must ensure that the way in

which the domestic industry is defined does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry.

8. By excluding GAZ from the definition of "domestic industry", the DIMD acted in a biased manner, potentially leading to a risk of materially distorting the injury analysis and, thus, violating the obligations under Articles 3.1 and 4.1 of the AD Agreement.

9. First, without providing any reasons for it, the DIMD defined the product concerned by this investigation very narrowly: LCVs with diesel engine. This definition was designed to conform precisely to the type of products that Sollers was assembling in the Special Economic Zone when the application was filed (in particular, Fiat Ducato with diesel engines). LCVs with diesel engine were also the product being made and sold by GAZ during the investigation period. Sollers already noted that GAZ was producing two models of LCVs which fell under the product concerned during the IIP and DIP.

10. Second, DIMD was well aware that GAZ, the leader in the overall LCVs market in Russia, was a producer engaged in the full production cycle ("producer") manufacturing the product concerned (in particular, LCVs with diesel engine) in Russia and directly competing with Sollers. GAZ's production amounted, on average, to 12.1% of the total production during the period of investigation (i.e. the remaining production not accounted for by Sollers). Evidence on the record showed that GAZ, with its petrol and diesel models, was the undisputed leader in the overall LCV market in Russia in 2010, with 51.4% share in that market, thanks to its main models Gazelle and Sobol, whereas Fiat was the third with a share of 9.6%. In fact, evidence on the record showed that the overall market share of GAZ increased by 13% between the second half of 2010 and the first half of 2011 (i.e. the DIP), while Sollers' market share decreased by 11% during the same period, as a consequence of the fact that the price of the Gazelle Diesel was even lower than Sollers' Fiat Ducato Diesel. Being such a market leader of LCVs in Russia, it could be expected that, in principle, GAZ's economic data could have shown a somehow different picture from that portrayed by Sollers in its Application. Thus, an undistorted injury analysis would have to take data pertaining to GAZ, the overall market leader, into account.

11. Third, the DIMD failed to take into account important qualitative differences between GAZ and Sollers which could have consequences for the injury analysis. Indeed, GAZ manufactures LCVs from the beginning of the production cycle, whereas Sollers assembled Fiat Ducato from semi-knocked down sets imported from Italy. In this sense, GAZ may be regarded as a domestic "producer" of the product concerned, whereas Sollers would rather be an "assembler", bringing the LCV into existence in Russia from mainly imported parts. This in an important distinction that may have a bearing on the injury analysis. While the truly domestic producer may be more stable in its production cycle by adjusting its production costs and prices to market demand, an assembler of LCVs is more at the mercy of the value of the imported parts and other exogenous commercial considerations, without being able to quickly adapt its assembly operations to the evolution of the market. This may put "assemblers" in a more delicate situation than "producers".

12. Another relevant factor distinguishing the situation between GAZ and Sollers is that, while the former is based in Russia and is subject to the regular economic conditions in Russia, Sollers is based in the Special Economic Zone of Elabuga ("SEZ"). Despite the benefits it enjoyed in the SEZ, Sollers was still losing market share against a very efficient producers and GAZ remained in a very strong position as a market leader for the overall LCV market.

13. As a consequence of such an incorrect definition of the domestic industry, the DIMD's injury determination was also based on an incorrect data set, in violation of Article 3.1 of the AD Agreement.

3.2 Claim under Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement: selection of non-consecutive periods of non-equal duration in the injury and causation analyses

14. By selecting non-consecutive periods of non-equal duration for the examination of the trends for the whole domestic industry, the DIMD's injury determination was not based on an objective examination of positive evidence, contrary to the obligations under Article 3.1 of the AD Agreement.

15. According to the panel in *Mexico – Olive Oil* an examination can only be "objective" if it is based on data which provide an accurate and unbiased picture of what it is that one is examining. An investigating authority must ensure that in examining the evidence in the context of its injury determination an accurate and unbiased picture is provided (See also Panel Report, *China – X-Ray Scanners*). The use of non-equal, non-consecutive periods by an investigating authority, absent any justification to do so, fails to provide such an accurate and unbiased picture.

16. The use of non-equal, non-consecutive periods interrupts the logical and temporal progression of the analysis which is done for a period of one year. Moreover, it changes the logical temporal sequence of the analysed half-year periods without any explanation for the necessity to do so. The DIMD failed to provide an explanation as to why the use of non-equal, non-consecutive periods was necessary in this case.

17. The information in question should have been provided on an equal and consecutive basis, so that meaningful trends can be observed on the basis of which the investigating authority could come to the conclusion in its injury determination. Indeed, in order to present such an accurate and objective picture of the information, the DIMD should have examined the information on the basis of a sequence of measurements of the same variable collected over time (i.e. a trend). For instance, the DIMD could have provided trends on the basis of consistent annual comparisons (e.g. by comparing 2009, 2010 and 2011 with 2008, and also comparing the DIP on an annual basis with 2008). However, the EAEC further distorted its injury and causation analyses by predominantly examining information on the basis of the data of the respective preceding period, i.e. without comparing the data of each year, including the year 2011, with 2008 on a consecutive annual basis.

18. Since the DIMD relied on an examination of non-equal, non-consecutive periods for the purpose of gauging the effects of the dumped imports on the domestic industry and assessing whether the injury found to exist is caused by the dumped imports, the DIMD's injury determination is further inconsistent with Articles 3.2, 3.4 and 3.5 of the AD Agreement.

3.3 Claim under Articles 3.1 and 3.2 of the AD Agreement: failure to make an objective examination based on positive evidence of whether the effect of the allegedly dumped imports was to prevent domestic price increases, which otherwise would have occurred, to a significant degree

19. According to the AD Agreement, an investigating authority's inquiry regarding the last price effect listed in Article 3.2 (i.e. price suppression) must provide it with a meaningful understanding of whether subject imports have explanatory force for the significant depression or suppression of domestic prices that may be occurring in the domestic market, without disregarding any evidence that may call into question such explanatory force. Such analysis under Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the investigation period and needs to consider whether the price effects, including price suppression, is "significant". This understanding, in turn, provides a building block for the authority to determine whether subject imports, through their price effects, are causing injury to the domestic industry within the meaning of Article 3.5 (Appellate Body Report in *China – GOES* and *China – HP-SSST (EU)*). Indeed, the analysis under Article 3.2 concerns the relationship between subject imports and domestic prices, whereas the analysis under Article 3.5 concerns the causal relationship between the subject imports and the material injury to the domestic industry.

20. The DIMD failed to make an objective analysis based on positive evidence when considering whether the effect of the dumped imports was to prevent domestic price increases, which otherwise would have occurred, to a significant degree (i.e. price suppression). It failed to examine whether the subject imports had explanatory force for the occurrence of significant suppression of domestic prices.

21. DIMD incorrectly based its analysis on the year 2009 to show price suppression, while this year cannot – according to the DIMD's own description – be considered to be a "normal year". Second, the DIMD relied on data expressed in USD to suggest there was price suppression, ignoring the developments in the exchange rate. Third, the DIMD did not show that the dumped imports have "explanatory force" for the alleged price effects, failing to examine whether the

market would be ready to absorb further price increases. Fourth, the DIMD did not explain and demonstrate why the alleged price suppression would be "to a significant degree".

22. Because the DIMD failed to make an objective analysis based on positive evidence when considering whether the effects of the dumped imports was to prevent domestic price increases, Russia violated Articles 3.1 and 3.2 of the AD Agreement.

3.4 Claim under Articles 3.1 and 3.4 of the AD Agreement: state of the domestic industry

23. The DIMD failed to make a proper evaluation of all injury factors in context and thus failed to reach a reasoned and adequate conclusion with respect to the impact of dumped imports on the domestic industry. As a result, the EAEC failed to make a determination of injury on the basis of an "objective examination" of the disclosed factual basis (Panel Report, Argentina – *Poultry*). Therefore, the DIMD's determination of injury is inconsistent with Russia's obligations under Articles 3.1 and 3.4 AD Agreement.

24. WTO panels and the Appellate Body have consistently held that, according to Articles 3.1 and 3.4, investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to each potentially relevant factor having a bearing on the state of the industry and the weight to be attached to it (Appellate Body Report, *US – Hot-Rolled Steel*). In assessing the state of the domestic industry, investigating authorities must evaluate all factors listed in Article 3.4 and any other relevant factors having a bearing on the state of the domestic industry in the case at hand. This analysis cannot be limited to a mere identification of the "relevance or irrelevance" of each factor, but rather must be based on a thorough evaluation of the state of the industry. The analysis must explain in a satisfactory way why the evaluation of the injury factors set out under Article 3.4 leads to the determination of material injury, including an explanation of why factors which would seem to lead in the other direction do not undermine the conclusion of material injury (Panel Report, *Korea – Paper AD Duties*).

25. When examining the state of the domestic industry in the Customs Union, the DIMD acted inconsistently with Articles 3.1 and 3.4 of the AD Agreement. First, the DIMD did not base its examination of various injury factors on positive evidence, as demonstrated by the contradictions between the DIMD's findings and the evidence put forward by Sollers.

26. Second, the DIMD failed to make a proper evaluation of all injury factors in context and thus failed to reach a reasoned and adequate conclusion with respect to the impact of dumped imports on the domestic industry. It made contradictory observations and failed to consider a number of facts on the record relating to the state of the domestic industry that contradict the alleged negative trends in the domestic industry during the dumping investigation period.

27. The evidence on the record, if considered in an objective and even-handed manner, as well as evidence regarding factors that the DIMD failed to examine, demonstrate that Sollers performed extraordinarily well at the beginning of the analysed period (2008-2009), with abnormal profit levels that were due to consumers' preferences of purchasing cheaper domestic products. When the effects of the financial crisis started to fade out (in 2010 and 2011), Sollers returned to normal profitability levels, in view of the competition in the market. Returning to normality is not a state of material injury. When the trends of production and sales of each year are compared to the base year of 2008, it becomes apparent that those factors showed positive trends, even in 2011. In addition, the DIMD found material injury at a time and in a situation where a company was materially dissolving, i.e. leaving the production operations of the Fiat Ducato to move to another cooperation. This may be a challenging moment in business. However, this is not a state of material injury in an anti-dumping context.

28. Finally, the DIMD also failed to examine several injury factors, listed in Article 3.4 of the AD Agreement, i.e. the magnitude of the margin of dumping, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments.

3.5 Claim under Articles 3.1 and 3.5 of the AD Agreement: causation

29. Pursuant to Articles 3.1 and 3.5 of the AD Agreement, investigating authorities are called upon to make a determination that the material injury found was caused by the dumped imports. Moreover, investigating authorities have to 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. Investigating the authorities' establishment of the facts has to be proper and their evaluation of those facts unbiased and objective so that the investigating authority's explanations are reasonable and supported by the evidence cited.

30. The DIMD found that dumped imports displaced similar goods produced by the domestic industry. The DIMD stated that, while volumes of dumped imports decreased during 2009 compared to 2008, "in 2010, during the investigated period, and in 2011, the share of imports in total consumption in the territory of the Customs Union was rising steadily, in the context of the proportional reduction of the share of the like product manufactured in the territory of the Customs Union".[1]

31. Three main facts challenge the DIMD's conclusion of a causal link between the dumped import volume and the material injury. First, facts on the record reveal that imports recovered from the financial crisis and merely reached the pre-crisis level in 2011. Second, the domestic market share of Sollers and GAZ combined remained very high (at 57% in 2011). Third, the reduction in domestic share between 2009 and 2011 was less than half of the increase of the market share of dumped imports. All this evidence on the record demonstrates that the DIMD failed to properly examine the causal relationship between dumped import volume and injury.

32. Evidence on the record even showed that domestic prices were below import prices during the DIP. This further contradicts the DIMD's finding that the "dumped imports significantly prevented the growth of prices for the same Products produced by the domestic industry in the Customs Union". The DIMD failed to address how higher import prices could be the cause of suppressing an increase in domestic prices. Given that these domestic prices were below the import prices, Sollers had still a margin to further increase its domestic prices. The fact that import prices were higher than domestic prices during the DIP strongly suggests that the subject imports were not responsible for the alleged price suppression (Panel Report, *China – GOES*). This point was repeatedly raised by interested parties, but was not elaborated on by the DIMD.

33. In addition, the DIMD strongly relied on the fact that the domestic producer's costs increased by 42.7% between 2009 and 2011 whereas its prices merely rose by 6.4%. Leaving aside the issue that this finding was not based on an objective assessment of the evidence, the DIMD failed to address whether Sollers could pass on such a cost increase to its prices. The EU already stressed that the DIMD could not assume that producers can continuously increase their prices and that the domestic market would be willing to absorb these increases.

34. The DIMD failed to examine the relevance of other known factors. Sollers' own misguided business decisions that created self-inflicted harm; the termination of Sollers' cooperation with Fiat in early 2010; the domestic competition between Sollers and GAZ in the domestic market of LCVs; the difficulties in accessing finance; and the discontinuation of the government programme supporting sales of cars at the end of 2010, are known factors, other than the dumped imports, that the DIMD failed to properly examine and that caused the injury that Sollers suffered during the DIP. These factors were "known" to the investigating authority since they were raised by the participants in the investigation. They are factors "other than dumped imports" since they were not related at all to the imports. These factors were injuring the domestic industry at the same time as the dumped imports (Appellate Body Report, *EC – Pipe Fittings*). As consequence, Russia violated its obligation under Article 3.5 of the AD Agreement by failing to examine the relevance of such factors.

35. For the reasons explained above, the DIMD's causality analysis is inconsistent with Russia's obligations in Articles 3.1 and 3.5 of the AD Agreement.

[1] Report (Exhibit EU-22), Section 5.1.

3.6 Claim under Articles 6.5 and 6.5.1 of the AD Agreement: Treatment of Information as Confidential without Showing Good Cause and without Providing a Meaningful Summary

36. The Appellate Body in *EC – Fasteners (China)* considered that Articles 6.5 and 6.5.1 of the AD Agreement "set[s] out specific rules governing an investigating authority's acceptance and treatment of confidential information". Article 6.5 imposes two conditions in order for the investigating authority to be obliged to treat information submitted by the parties to an investigation as "confidential". The first condition is split up in two alternatives. Authorities must treat information as confidential (i) if it is "by nature" confidential *or* if it is "provided on a confidential basis" *and* (ii) "upon good cause shown".

37. Article 6.5.1 establishes an "alternative method" for communicating the content of confidential information "so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests". Under Article 6.5.1, an investigating authority is under an obligation to require that (i) a non-confidential summary of the information is furnished, and (ii) to ensure that the summary contains sufficient detail to permit a reasonable understanding of the information submitted in confidence. Whether the summary contains "sufficient detail" depends on the confidential nature of the information at issue, but "it must permit a *reasonable understanding* of the substance of the information withheld to allow the other parties to the investigation an opportunity to respond and defend their interests" (Appellate Body Report, *EC – Fasteners (China)*).

38. Only in "exceptional circumstances", the information may be "not susceptible of summary". In such "exceptional circumstances", the reasons why summarization is impossible must be provided in a statement. The investigating authority must scrutinize such statement. The Appellate Body has stressed that it is not enough for a party simply to claim that providing a summary "would be burdensome or costly". Rather, it must be shown that "no alternative method of presenting that information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence". Without such scrutiny by the investigating authority of the non-confidential summary, or of the statement explaining why "exceptional circumstances" make summarisation not possible, the "due process rights of other parties to the investigation are not fully respected" (Appellate Body Report, *EC – Fasteners (China)*). The jurisprudence also explains that the obligations to perform an objective assessment of good cause and require meaningful non-confidential summaries do not depend on "whether or not the underlying issue was contested in the investigation", and that a "lack of contestation is not an excuse for the absence of any assessment."[2]

39. Throughout the anti-dumping investigation, the DIMD treated a wide range of information as confidential. However, no good cause was required to be shown for such confidential treatment, nor did the DIMD properly assess whether there was good cause. There is no evidence in the Report or in any related documents of any objective assessment of whether good cause was shown for confidential treatment, or even that the DIMD at any point required the parties seeking confidential treatment to explain and provide reasons as to why the information at issue should be treated as confidential (Appellate Body Report, *China — HP-SSST (Japan)*).

40. Regarding the **claims related to Sollers' Application**, its non-confidential version that was made available to interested parties contains a wide range of information that is treated as confidential. The DIMD's treatment of that confidential treatment violates the AD Agreement in several ways.

41. First, Sollers did not show any "good cause" for the confidential treatment of this information, and the DIMD did not require Sollers to provide such good cause, or properly assess an alleged "good cause". The Appellate Body has stressed that the requirement to show "good cause" applies to *both* information that is "by nature" confidential *and* that which is provided to the authority "on a confidential basis" (Appellate Body Report, *EC – Fasteners (China)*). For this reason, Russia violated Article 6.5 of the AD Agreement.

[2] Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.61; Panel Report, *EC – Fasteners (China)*, para. 7.46.

42. Second, no meaningful summary of this information, and no explanation of why such a summary would not be possible, was provided by Sollers or required by the EAEC. For this reason, Russia violated Article 6.5.1 of the AD Agreement.

43. In addition, some of the information that is treated as confidential, notably in the non-confidential version of Sollers' questionnaire responses, seems not to be confidential by nature. This is an additional violation of the obligations under Article 6.5 of the AD Agreement. It should be stressed, however, that the other violations just described (no good cause shown, required or properly assessed, and an absence of either a meaningful summary or an explanation of why a summary would not be possible) apply to those points as well.

44. Regarding the **claims related to Sollers' questionnaire responses**, their non-confidential version[3] of 3 March 2012, as updated on 31 January 2013, contains a wide range of information that is treated as confidential. Sollers did not show any "good cause" for this confidential treatment and the DIMD did not require Sollers to provide nor did it properly assess whether Sollers had shown such "good cause". For this reason, Russia violated Article 6.5 of the AD Agreement.

45. Furthermore, Sollers did not provide, and the DIMD failed to require Sollers to provide, a meaningful summary of this information, and no explanation was provided or required on why a summary would not be possible. There is nothing more than a mere indication that the information is "[CONFIDENTIAL]". For this reason, Russia violated its obligation in Article 6.5.1 of the AD Agreement.

46. The EU also makes equivalent claims of violations of Articles 6.5 and 6.5.1 of the AD Agreement, *mutatis mutandis*, regarding the confidential treatment of information in the non-confidential versions **of Turin-Auto's questionnaires responses**, along with their update of 31 January 2013 and amendment of 13 February 2013, as well as in Sollers' written comments after the hearing of 6 April 2012. The EU also challenges under Articles 6.5 and 6.5.1 the confidential treatment of the questionnaire response of GAZ, Sollers' letter of 25 December 2012, the letter of the 'Association of Russian Automakers' of 11 February 2013 and GAZ's letter of 6 March 2013.

47. In light of the foregoing, the EU submits that the DIMD's treatment of confidential information violated the obligations under Article 6.5 of the AD Agreement, by treating as confidential certain information that is neither confidential by nature nor provided on a confidential basis and by treating information as confidential without requiring a good cause to be shown and without properly assessing whether such good cause was shown, and under Article 6.5.1 of the AD Agreement, by failing to require interested parties providing confidential information to either provide non-confidential summaries thereof that would permit a reasonable understanding of the information submitted in confidence, or to indicate and state the reasons why that information is not susceptible of summary.

3.7 Claim under Article 6.9 of the AD Agreement: Failure to disclose all essential facts under consideration that formed the basis for the decision by the EAEC

48. The Appellate Body has noted that at the heart of Article 6.9 is the "requirement to disclose, before a final determination is made, the essential facts under consideration which form the basis for the decision whether or not to apply definitive measures". A timely and complete disclosure is essential for preserving the ability of interested parties to defend their interests, in particular by enabling them to challenge omissions or the use of incorrect facts (Appellate Body Report, *China – GOES*).

49. The "essential facts" are those facts that are significant in the process of reaching a decision as to whether or not to apply definitive anti-dumping measures. The facts may be those "salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome" (Appellate Body Report, *China – GOES*). The body of essential facts to be disclosed under Article 6.9 concerns the facts "under consideration" by the investigating authority in determining whether (or not) to apply measures, including but not limited to the facts that support

[3] If not otherwise indicated, the European Union's references to Sollers' "questionnaire responses" relate to both the Questionnaire Response of 3 March 2012 and the Update of 31 January 2013.

the final determination to apply measures (Panel Report, *China - HP-SSST (EU)*). Essentially, in order to apply such definitive measures, an investigating authority must find dumping (including, depending upon the authority's findings, the determination of normal value, export price and the fair comparison between normal value and export price, the home market and export sales being used and the calculation methodology used to determine the dumping margin), injury and a causal link between the dumping and the injury to the domestic industry. Therefore, what constitutes an "essential fact" must be understood "in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement, as well as the factual circumstances of each case" (Appellate Body Report, *China – GOES*). When confidential information constitutes "essential facts" within the meaning of Article 6.9, the disclosure obligations under that provision should be met by disclosing non-confidential summaries of those facts.[4] If an essential fact is treated as confidential, and either Article 6.5 or Article 6.5.1 is not complied with, the investigating authority infringes Article 6.9 by wrongly treating this information as confidential.

50. First, the DIMD failed to inform Volkswagen and Daimler of the essential facts under consideration underlying the determinations of the existence of dumping.

51. Volkswagen and Daimler did not receive an individual confidential dumping disclosure. They could only examine the non-confidential version of the Draft Report by the DIMD. The opportunity of these interested parties to inspect the facts that formed the basis of the calculation of the normal value by the EAEC was therefore limited to the EAEC Draft Report of 28 March 2013. The EU understands that the DIMD attempted to justify this on the basis of an alleged lack of cooperation in the investigation.

52. Partial non-cooperation in the context of an anti-dumping investigation can have legal consequences, including the use of facts available (Article 6.8 of the AD Agreement) and even adversely affect the outcome of the investigation for the non-cooperating party (Article 7 of Annex II to the AD Agreement). It does not, however, remove the rights of any interested party under Article 6.9 of the AD Agreement. Even if Volkswagen and Daimler failed to provide certain information to the DIMD, they should nevertheless have been informed of the essential facts under consideration.

53. The DIMD failed to disclose to Volkswagen and Daimler the essential facts under consideration that formed the basis for the calculation of the normal value of LCVs for Volkswagen and Daimler, those that formed the basis for the calculation of the export price, as well as the source of the information concerning import volumes and values.

54. Second, in the sections of the Draft Report dealing with DIMD's analysis of injury and of the existence of a causal link, the DIMD failed to disclose the essential facts under consideration to the interested parties.

55. In the section of the Draft Report dealing with DIMD's injury analysis, a wide range of essential facts is entirely omitted. In the absence of any additional individual confidential disclosure, it was therefore impossible for the interested parties to be adequately informed of the essential facts under consideration which form the basis of DIMD's determination of injury.

56. The section of the Draft Report concerning the causal link between dumping and injury similarly omits a wide range of essential facts. In the absence of any additional individual disclosure, it was therefore impossible for the interested parties to be adequately informed under the standard set by Article 6.9 of the AD Agreement. The Draft Report also does not provide a source for the information on the volume and value of imports of LCVs which formed the basis for DIMD's decision whether to apply definitive measures, in respect of the existence of injury (Section 4 of the Draft Report). The Draft Report thus failed to disclose the "essential facts under consideration which form the basis for the decision whether to apply definitive measures". Therefore, the Russia violated the obligation under Article 6.9 of the AD Agreement.

[4] Appellate Body Report, *China – GOES*, para. 247; Panel Report, *China – Broiler Products*, para. 7.321.

3.8 Russia's anti-dumping measures on LCVs from the Germany and Italy further are inconsistent with Articles 1 and 18.4 of the AD Agreement and Article VI of the GATT 1994

57. In light of the abovementioned violations of the AD Agreement, the measures at issue are also inconsistent with Articles 1 and 18.4 of the AD Agreement, as well as with Article VI of the GATT 1994.

ANNEX B-2

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1 BURDEN OF PROOF

1. The Russian Federation maintains that the European Union failed to meet its burden of proof to establish *prima facie* case of violation. In this respect, we recall that *prima facie* case must be based on evidence and legal argument. The Appellate Body made it clear that "[a] complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."[1]

2. We recall the findings of the Appellate Body in *US-Hot-Rolled Steel* that "an objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".[2] This interpretation provides a standard for objective examination requirement.

3. Specifically, in this dispute the European Union claims that the DIMD acted in a biased manner. At the same time the European Union failed to prove the existence of bias. In our view, bias implies an intent that results in a situation that is more favourable to any interested party or group of interested parties. Therefore, in order to prove the existence of a bias, the existence of a reference standard which is unbiased has to be clearly demonstrated.

2 DEFINITION OF THE DOMESTIC INDUSTRY

4. The European Union asserts that "[t]he EAEC therefore deliberately excluded GAZ from the definition of "domestic industry", despite the fact that GAZ was a known producer of the like products which participated throughout the investigation".[3] The European Union also argues that "the EAEC acted in a biased manner, favouring the interests of Sollers, and thus introducing a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry".[4]

5. With respect to alleged failure of the DIMD to provide "a satisfactory explanation as to why it was not necessary to include GAZ within the definition of "domestic industry" and thus examining directly or specifically its economic data", we maintain that the issue of explanation is clearly outside the scope of obligations under Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

2.1 The DIMD did not "exclude" GAZ from the definition of the domestic industry

6. The European Union's arguments are based upon the presumption that GAZ was actively participating in the investigation.[5] This presumption is flawed because it does not take into account the fact that GAZ's questionnaire reply contained multiple deficiencies, which was the reason why the data pertaining to GAZ could not be used in the injury analysis.

7. In this respect, the Russian Federation recalls that the following approach to defining the domestic industry was used in the anti-dumping investigation at issue. The domestic industry, as referring to domestic producers of the like product, was defined, when the investigating authority defined the like product. Two domestic producers of the like product, namely GAZ and Sollers, were known to the investigating authority in the course of the anti-dumping investigation. From the outset, both producers could be included into the definition of the domestic industry for the

[1] Appellate Body Report, *US – Gambling*, para. 140.
[2] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[3] First Written Submission by the European Union, para. 44.
[4] Ibid, para. 46.
[5] First Written Submission by the European Union, paras. 44-45.

purpose of the injury analysis. The MIT sent questionnaires for domestic producers of the like product in the territory of the Customs Union to both of them, i.e. sought information from both of them. However, both the MIT and the DIMD were unable to rely on the data submitted by GAZ given the multiple deficiencies and inconsistencies in the questionnaire reply.

8. Specifically, the questionnaire reply did not contain information on total costs per unit of production of the like product for the first half of 2010, capacity utilization, investments. The questionnaire reply contained substantial errors and inaccurate data (namely, with regard to total costs per unit, volume of production). Moreover, the analysis of the questionnaire reply raised serious doubts whether some of the information did relate only to the product concerned.

9. The Russian Federation maintains that the situation when the deficient data from one of the domestic producers of the like product cannot be used in the injury analysis is not the same as the "exclusion" of the domestic producer from the definition of the domestic industry in the meaning of Article 4.1 of the Anti-Dumping Agreement.

2.2 The DIMD did not introduce the material risk of skewing the economic data and, consequently, distorting the analysis of the state of the domestic industry

10. Further, the European Union made a number of incorrect assertions with respect to "bias of the DIMD, favouring the interests of Sollers", and alleged "introduction of the material risk of skewing the economic data and, consequently, distorting analysis of the state of the industry".[6] The Russian Federation is of the view that bias implies an intent that results in a situation that is more favourable to any interested party or group of interested parties. We maintain that the European Union has not presented sufficient and accurate evidence to make a *prima facie* case of bias and alleged material risk of distortion.

11. First, the European Union incorrectly asserts that GAZ was the "undisputed leader" in the overall LCV market. The European Union operated with mixed figures that include the data on LCVs with gasoline engines which fall outside the scope of the like product, as defined in the anti-dumping investigation at issue.

12. Second, the European Union alleges that there are important differences between the domestic producers "which could have consequences for the injury analysis".[7] Specifically, the European Union alleges that Sollers is rather an "assembler" than a "producer"[8] in contrast to GAZ that may be regarded as a domestic "producer". The European Union also alleges that "Sollers' activities in Elabuga were not of sufficient economic importance"[9] due to the rules of origin requirements. Finally, the European Union considers favourable conditions in Special Economic Zone of Elabuga to be "another relevant factor distinguishing the situation between GAZ and Sollers".[10] At the same time the European Union does not provide sufficient evidence as to how these alleged distinctions could have affected the injury analysis.[11]

13. The Russian Federation maintains that there is no obligation in the Anti-Dumping Agreement to consider these allegedly "important" distinctions when defining the domestic industry. If that were the case, it would create uncertainty and significant impediments in the course of the anti-dumping investigation.[12]

2.3 The DIMD's injury determination is not distorted, as it is based on a very high proportion that substantially reflects the total domestic production

14. The DIMD's injury determination was based on 87.9% of total domestic production of the like product. We recall that the Appellate Body in *EC-Fasteners (China)* emphasised that "a very high

[6] First Written Submission by the European Union, para. 46.
[7] First Written Submission by the European Union, para. 50.
[8] Ibid.
[9] Ibid, para. 55.
[10] Ibid, para. 56.
[11] See First Written Submission by the Russian Federation, paras. 53-58.
[12] Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras.15-16.

proportion that "substantially reflects the total domestic production" will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1".[13]

15. We maintain that 87.9% of total domestic production qualifies for "a major proportion" of total domestic production and is a very high proportion that substantially reflects the total domestic production in the meaning of Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

3 SELECTION OF PERIODS FOR THE INJURY AND CAUSATION ANALYSES

3.1 The DIMD did not select non-consecutive periods of non-equal duration

16. First, contrary to what the European Union alleges, the DIMD did not select non-consecutive periods of non-equal duration. The DIMD has analysed the data for the period from 1 January 2008 to 31 December 2011 for the purposes of the injury and causation analysis. The DIMD has consequently considered the data for the entire period from 1 January 2008 to 31 December 2011 in relation to respective calendar years, namely 2008, 2009, 2010 and 2011. In addition to year-to-year comparison, the DIMD analysed the change of the data for the half-year sub-periods (the periods from 1 July 2010 to 31 December 2010 and 1 January 2011 to 30 June 2011) as compared to the data for the comparable periods of the respective previous year. The analysis of the data for the half-year sub-periods was supplementary to the analysis of the data for the entire period of investigation from 2008 to 2011. This method was uniformly used with regard to all injury factors.

3.2 The European Union failed to demonstrate that the DIMD's injury and causation analysis does not involve the objective determination based on positive evidence

17. Second, there is nothing in the European Union's argument capable of supporting its assertion that the investigating authority in this case made a determination that does not involve an objective examination based on positive evidence. The European Union failed to demonstrate how the alleged selection of the periods can lead to a result that would be more favourable to any interested party or how the DIMD has favoured the interests of any party to the investigation.

18. To support its claim under Article 3.1 of the Anti-Dumping Agreement, the European Union criticizes the analysis conducted by the DIMD. The European Union suggests an alternative methodology for the DIMD that "could give an accurate and objective picture". However, the proposed method offers overlaps in the periods that distort the overall picture over the entire period in its progression. In our view, such method simply cannot be used.

4 PRICE SUPPRESSION

19. The European Union submits that the DIMD failed to make objective analysis based on positive evidence when considering price suppression due to a number of reasons. First, the European Union states that the DIMD incorrectly based its analysis on the year 2009. It is convinced that "the 2009 profit level was abnormally high i.e. it represents a significant increase of 233% from the level of the profit in 2008". The Russian Federation completely disagrees with this assertion and emphasizes that the European Union mistakenly based its conclusion on relative indicators. In fact, profit increased substantially in relation to 2008 to reach its normal level in 2009. The rate of return used in the analysis was based on the year when the influence of dumped imports on the market was minimal and the domestic industry could reasonably expect to achieve such profitability taking into account macroeconomic indicators and economic performance of the relevant sector.[14] The European Union insists that the DIMD "should have based itself on the year 2008 rather than the abnormal year 2009"[15] without providing any evidence as to why the analysis based on 2009 was biased while the analysis based on 2008 would not have been.

20. Second, the European Union claims that the DIMD "mixed up data expressed in USD and RUB without any explanation in its price suppression analysis".[16] The European Union does not show

[13] Appellate Body Report, *EC – Fasteners (Article 21.5 - China)*, para. 5.303.

[14] Responses by the Russian Federation to the Questions from the Panel after the First Substantive Meeting with the Parties, question 31, para.79-80.

[15] Opening Oral Statement by the European Union, para. 39.

[16] First Written Submission by the European Union, para.136.

where alleged mixing up took place in price effects analysis and how it deteriorated the results of that analysis. The Russian Federation is convinced that the evaluation of price data in the same currency provides for the objectivity of the analysis and it cannot be regarded as biased approach.

21. Third, the European Union claims that the DIMD "failed to explain and demonstrate why it was dumped imports that had brought about the alleged price suppression".[17] It erroneously argues that "import and domestic prices were moving in the "contrary directions"[18] while, in fact, gap between imports and domestic prices was tightening. The European Union based its conclusion on erroneous and inconsistent analysis.[19] Moreover, the European Union insists that the DIMD should have analysed import prices excluding customs duties. The Russian Federation is of the view that exclusion of customs duties would undermine price comparability and lead to the breach of obligation under Article 3.1 of Anti-Dumping Agreement.

22. The European Union claims that the DIMD failed to examine "whether the market could take further increases" of domestic prices.[20] It believes that price suppression analysis involves such assessment.[21] The Russian Federation supposes that Article 3.2 of Anti-Dumping Agreement does not establish the obligation to determine whether market could absorb price increases. Taking into account the fact that the DIMD did not have any evidence which could call into question the ability of the market to absorb prices (especially when import prices were higher than domestic prices) the Russian Federation maintains that the DIMD did not violate the obligations in terms of price suppression analysis.

23. Finally, the European Union claims that the DIMD "failed to explain and demonstrate why the alleged price suppression would be "to a significant degree".[22] Furthermore the European Union insists that the investigating authority must determine the significance of price suppression on the basis of the list of factors.[23] The Russian Federation believes that Anti-Dumping Agreement does not oblige the investigating authority to make such inquiry. Neither such interpretation of Article 3.2 has been confirmed by the WTO case law.[24] The Russian Federation is convinced that the DIMD fulfilled the obligations under Article 3.2 in terms of *consideration* of significant price suppression.

5 STATE OF THE DOMESTIC INDUSTRY

5.1 The DIMD based its evaluation of injury factors on positive evidence

24. The DIMD evaluated the factors "profits" and "inventories" on the basis of positive evidence. The Report contains aggregated profit and profitability figures for the Sollers group which were calculated on the basis of data provided by Sollers and its related trading house Turin Auto, and the inventories reflected in the Report are the inventories held by Sollers.

25. The European Union claims that the DIMD failed to base its evaluation of profits and inventories on positive evidence. The evidence which the European Union adduced to support its claim is flawed. The European Union made incorrect comparisons of data from the Report with data from the Sollers' Application and/or its Questionnaire Reply, and then pointed to discrepancies, which otherwise would not have occurred. Accordingly, the European Union failed to make a *prima facie* case.

[17] First Written Submission by the European Union, para. 136.
[18] Ibid. para.150.
[19] First Written Submission by the Russian Federation, para.181, Opening Oral Statement by the Russian Federation, para.35.
[20] First Written Submission by the European Union, para.154.
[21] Opening Oral Statement by the European Union, para.44.
[22] First Written Submission by the European Union, para.136.
[23] Ibid. para.157.
[24] Opening Oral Statement by the Russian Federation, para. 40-43, Responses by the Russian Federation to the Questions from the Panel after the First Substantive Meeting with the Parties, question 26, para. 71.

5.2 The European Union's claim that the DIMD failed to make an objective evaluation of factors and indices having a bearing on the domestic industry is not substantiated

26. The European Union claims that the DIMD failed to make a proper evaluation of factors because the Report does not always include comparisons of data for the year of 2011 to 2008. The European Union, first, overlooked the relevant parts of the Report in which the DIMD compared the evolution of production and sales from 2008 to 2011, and, second, made additional derivations of figures to complete the tables in the Report, which did not add any objectivity to the picture of the evolution of the factors over time.

27. The European Union's claim that the objectivity of the DIMD's analysis is hindered by the split of periods lacks factual basis. The DIMD did not "split" its analysis into two periods, which explains why the European Union failed to adduce any evidence from the text of the Report to substantiate its claim.

28. As to the European Union's claims regarding disclosure of the figures for profits and regarding the ability of the market to absorb a price increase, these claims are outside the scope of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

5.3 The DIMD properly took into account all facts and arguments on the record relating to the state of the domestic industry

29. The European Union claims that the DIMD should have analysed certain evidence from statements made by interested parties in the context of market shares. These statements do not contain any positive evidence relating to the overall evolution of market shares that should have been objectively examined by the DIMD under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. At the same time, the DIMD thoroughly considered in the Report the overall evolution of market shares, and examined and dismissed in the context of the causation analysis the alternative explanation of what caused the drop in production and, consequently, market shares of the domestic industry in 2011 which was referred to by an interested party.

30. The European Union believes that the DIMD should have analysed the evolution of stocks of independent dealers. Article 3.4 of the Anti-Dumping Agreement requires that an investigating authority analyse inventories without prescribing how inventories should be treated in this analysis. The DIMD analysed stocks held by the producer and the analysis was based on positive evidence. Unlike the data relating to independent dealers, the data used by the DIMD were verifiable, as required by Article 3.1 of the Anti-Dumping Agreement.

5.4 The DIMD examined all factors listed in Article 3.4 of the Anti-Dumping Agreement

31. The European Union claims that the DIMD failed to evaluate the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments. The Russian Federation submits that the DIMD evaluated the above factors. The results of the DIMD's evaluation were set forth in the confidential version of the Report.

32. The European Union could have understood from the evidence on the record that the DIMD evaluated the factors at issue but the results of such evaluation were not set forth in the public version of the Report for confidentiality reasons. The record shows that the DIMD requested the information which it needed for the evaluation of the said injury factors and that this information was submitted in confidential form.

33. Setting forth the results of the examination of some of the factors listed in Article 3.4 only in the confidential version of the final report does not amount to a violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. As the Appellate Body has observed, "Articles 3.1 and 3.4 of the Anti-Dumping Agreement do not regulate the *manner* in which the results of the "evaluation" of each injury factor are to be set out in the published documents". Article 3.4 contains an *obligation* to evaluate all fifteen factors, which is, according to the Appellate Body, "distinct from the *manner* in which the evaluation is to be set out in the published documents". Hence, Article 3.4 of the Anti-Dumping Agreement does not require that the results of the evaluation of each injury factor be set forth in the non-confidential version of the final report. The Appellate Body has also held that "the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve

an "objective" examination of the required elements of injury does not imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation".

34. The European Union also claims that the DIMD did not evaluate the factor ''the magnitude of the margin of dumping''. The European Union's claim is unsubstantiated. The DIMD apparently evaluated the magnitude of the margin of dumping in the context of the analysis of whether a cumulative assessment of the effects of imports under Article 3.3 of the Anti-Dumping Agreement is appropriate.

35. The evaluation of the injury factor ''the magnitude of the margin of dumping'' differs from the evaluation of the other listed injury factors, which are *factual indicators* of an industry's condition. What distinguishes the magnitude of the margin of dumping from the other listed factors is that it is a potential *cause* of the domestic industry's condition. The requirement of substantive compliance contained in Article 3.4 of the Anti-Dumping Agreement does not preclude the investigating authority from making an *apparent* evaluation of the factor ''the magnitude of the margin of dumping'' at its initial stage in the context of the analysis of whether a cumulative assessment of the effects of imports under Article 3.3 of the Anti-Dumping Agreement is appropriate. The magnitude of the margin of dumping is further *implicitly* analysed in the context of the analysis of domestic prices.

6 CAUSATION

6.1 Volume Effects

36. The European Union claims that the DIMD failed to properly examine the causal relationship between the volume of dumped imports and the injury. The European Union did not provide an alternative explanation of facts as a whole with relation to a causal link in the light of which the DIMD's explanation would not seem adequate. The reasoning in the Report is coherent and internally consistent. The DIMD provided adequate and reasonable explanation that the dumped imports, through the effects of dumping and by reason of a substantial increase in their volumes in 2010 and 2011, have captured a share of the growing market which would not have happened in the absence of dumping. The European Union's explanations, in turn, are placed outside of the context of market developments, such as trends in consumption, evolution of market shares and profitability of the domestic industry, and evolution of the share of dumped imports in the total volume of imports.

6.2 Import prices

37. The European Union claims that with respect to import prices the EAEC wrongly attributed the observed effects on the domestic industry to the dumped imports. It supports the claim by strongly relying on the arguments against the objectivity of the price suppression analysis conducted by the DIMD.[25]

38. The Russian Federation emphasizes that the DIMD properly analysed the trends of imports prices including customs duties and domestic prices and objectively used 2009 as a benchmark for price suppression analysis. Therefore, it provided for the unbiased consideration of the effect of dumped imports on domestic prices which is the part of the causation determination.[26]

6.3 Non-Attribution

39. The European Union argues that the findings of the DIMD with respect to termination of the license agreement between Sollers and Fiat and competition from GAZ are inconsistent with the investigation record. In fact, both factors were adequately considered by the DIMD and specifically addressed in the Report.

[25] First Written Submission by the European Union, paras.274-290.
[26] First Written Submission by the Russian Federation, paras. 301-308.

40. The European Union also claims that certain allegedly "known" factors were not examined at all.[27] The Russian Federation maintains that such factors were not *clearly raised* before the investigating authority. Moreover, the factors, referred to by the European Union, are unfounded because they are not supported by accurate evidence. [28]

7 CONFIDENTIALITY

41. The European Union makes a number of claims related to confidentiality of information under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

42. Specifically, the European Union claims that a wide range of information was treated by the DIMD as confidential despite any "good cause" shown by Sollers and Turin-Auto or required to be shown by the DIMD and that there is no evidence that the DIMD properly assessed whether there was "good cause". The Russian Federation states that the DIMD required Sollers and Turin-Auto to provide "good cause" for information submitted in confidence. The requirement to provide justification for confidential treatment was established under the CU law and special instructions of the investigating authority. As nothing in the Anti-Dumping Agreement specifies how (in what form or manner) an investigating authority shall require the party submitting confidential information to show "good cause" for confidential treatment, the Russian Federation considers that the way how the DIMD required the good cause to be shown is consistent with Article 6.5 of the Anti-Dumping Agreement.

43. The European Union also argues that the DIMD treated as confidential certain information that is not confidential by nature because it cannot be considered as such or because it is expected to be reasonably available, if not public. In the view of the Russian Federation, the European Union failed to make a *prima facie* case in this respect because it bases its claim on allegations unsupported by evidence or tries to substantiate its claim on irrelevant references to some websites.

44. In respect of Article 6.5.1 of the Anti-Dumping Agreement, the European Union claims that for a wide range of information no meaningful summaries were provided by submitting party or required by the DIMD, nor any explanation of why such summaries were provided. The Russian Federation considers that the European Union's claim under Article 6.5.1 of the Anti-Dumping Agreement is unsubstantiated. The European Union in developing its arguments focused on the text, while the tables (which the text refers to) on the same page of the document actually contain information that permits a reasonable understanding of the substance of confidential information. At the same time, the text provides a description of data contained in the tables and could not be considered separately. Apparently, the European Union failed to look at the documents in their entirety and simply took the pieces of information out of context. The Russian Federation sees no violation of Article 6.5.1 of the Anti-Dumping Agreement because non-confidential summaries of confidential information were provided (except for the cases where summarization of confidential information was not possible) and such summaries permit a reasonable understanding of the confidential information.

45. In addition, the European Union claims that the DIMD omitted from the non-confidential file certain documents that were provided to the DIMD during the investigation and were relied upon by the DIMD and referred to in the Report. With respect to GAZ's Questionnaire Reply, we recall that the investigating authority could not rely upon this document due to its deficiencies and inconsistencies. The Russian Federation states that the European Union failed to substantiate the claim by accurate evidence, because the other documents mentioned by the European Union were in the public record.[29]

46. In sum, the Russian Federation considers that the DIMD acted consistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

[27] First Written Submission by the European Union, paras.305-307.

[28] See Responses by the Russian Federation to the Questions from the Panel after the First Substantive Meeting with the Parties, paras. 91-103.

[29] First Written Submission by the Russian Federation, paras. 676-681.

8 ESSENTIAL FACTS

47. The issue of proper and fair disclosure demonstrates the clear relationship between Article 6.9 and Article 6.5 of the Anti-Dumping Agreement. This relationship is due to the mechanism for protection of confidential information, as set forth in the Anti-Dumping Agreement with respect to confidential data.[30] In this respect, the Russian Federation agrees with the findings in *China-Broilers* and *China-GOES* that "when confidential information constitutes "essential facts" within the meaning of Articles 6.9 and 12.8, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts."[31]

8.1 Determination of Dumping

48. The Russian Federation would like to pay attention to the fact that for the purpose of the determination of margin of dumping for the German exporting producers the DIMD used the volume and the value of imports of LCVs produced by Daimler AG and Volkswagen AG because only those companies exported LCVs from Germany during the period of the investigation at issue.[32]

49. The Russian Federation states that Daimler AG and Volkswagen AG were non-cooperating parties who failed to provide information requested in the questionnaire or even to respond to the questionnaire.[33] Pursuant to Article 6.9 of the Anti-Dumping Agreement the investigating authority is not obliged to provide a non-cooperating party, whose dumping rate was based on confidential data of the third parties, with confidential individual dumping disclosure.[34] Since the calculation of the margin of dumping for the German exporting producers was based on confidential facts available, which were not submitted by Daimler AG and Volkswagen AG, those companies could defend their interests on the basis of non-confidential summary of confidential determination of dumping[35] and information in their possession.[36]

50. The DIMD explained to Daimler AG and Volkswagen AG the reasons of impossibility of individual disclosure of the volume and the value of imports of LCVs produced by these companies in its additional disclosure letter.[37] Moreover, the Russian Federation is of the view that aggregated data, which were calculated on the basis of confidential information pertaining to two interested parties, shall be always treated as confidential under Article 6.5 of the Anti-Dumping Agreement.[38] Hence, such aggregated data could not be disclosed to all interested parties in the non-confidential version of the Draft Report.

51. The non-confidential version of the Draft Report adequately and fully disclosed all the essential facts in connection with the data underlying the determination of dumping concerning the German exporting producers (e.g. the methodology and the source of data used to determine normal value and export price; the weighted average normal value and export price for LCVs

[30] First Written Submission by the Russian Federation, paras 722-724, 737-738, 799-800, 941-942; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 21-22.

[31] Appellate Body Report, *China – GOES*, para. 247. Panel Report, *China – GOES*, para. 7.410. See also Panel Report, *China – Broiler Products*, para. 7.321.

[32] First Written Submission by the Russian Federation, paras. 765, 832.

[33] First Written Submission by the Russian Federation, paras. 703-704, 707, 726, 742, 754, 809, 820, 877, 878; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 77; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 24.

[34] First Written Submission by the Russian Federation, paras. 710, 741, 766, 803, 833; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 79, 81; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 23.

[35] First Written Submission by the Russian Federation, paras. 710, 741, 760, 766, 803, 827, 833; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 79-80; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 23.

[36] First Written Submission by the Russian Federation, paras. 747-750, 771-772, 777-778, 787, 808-811, 814-816, 838-839, 853-854, 872, 877-915; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 82, 84.

[37] First Written Submission by the Russian Federation, paras. 786-787, 871-872; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 82.

[38] First Written Submission by the Russian Federation, paras. 767-782; 834-867.

produced by the German exporting producers; the formula for calculation of dumping margin, etc.).[39]

8.2 Determination of Injury

52. Regarding the essential facts related to the determination of injury the Russian Federation outlines that the DIMD did not disclose in the Draft Report aggregate data pertaining to one or two domestic companies.[40] The Russian Federation is of the view that disclosing a confidential data in the Draft Report could lead to unauthorized disclosure of confidential information which was submitted by one of the two domestic producers.[41] The types of information excluded from the Draft Report are generally those that might be treated as confidential relating *inter alia* to profitability, costs, production and sales data.[42]

53. The non-confidential version of the Draft Report contained sufficiently-detailed disclosure of the essential facts under consideration that formed the basis for the determination of injury.[43] The Russian Federation outlines that each summary of redacted confidential data contains at least one of the following: (i) the year-on-year percentage changes; (ii) year-on-year percentage point changes; (iii) the mix of the year-on-year percentage changes or year-on-year percentage point changes and textual explanation of changes; (iv) textual description of trends with respect to the injury factor.[44] Moreover, the non-confidential summaries of some of the confidential information can be ascertained in terms of the relationships with other data in non-confidential version of the Draft Report.[45]

9 THE ANTI-DUMPING MEASURE ON LCVS FROM GERMANY AND ITALY IS CONSISTENT WITH ARTICLES 1 AND 18.4 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF THE GATT 1994

54. The European Union claims that in light of the abovementioned alleged violations of the Anti-Dumping Agreement the anti-dumping measures on light commercial vehicles from Germany and Italy are also inconsistent with Articles 1 and 18.4 of the Anti-Dumping Agreement, as well as with Article VI of the GATT 1994.[46]

55. Thus, the European Union's claim of inconsistency of the Russian anti-dumping measure on LCV from Germany and Italy with Articles 1 and 18.4 of the Anti-Dumping Agreement and Article VI of the GATT 1994 is clearly consequential and in this respect dependent on all other claims.

56. Since all other claims made by the European Union are to be rejected, the Russian Federation respectfully asks the Panel to reject the European Union's claim under consideration.

[39] First Written Submission by the Russian Federation, paras. 709-710, 726-730, 746-751, 770, 777, 786-787, 808-817, 838, 842, 845, 848, 853, 857, 859, 862, 892, 894, 898, 901, 922-925; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 82-83.

[40] First Written Submission by the Russian Federation, paras. 947-948, 959, 975, 988, 1002, 1016; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 87-88.

[41] First Written Submission by the Russian Federation, paras. 947-948; 959-963, 973-978, 987-992, 1002-1003, 1016- 1017; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 87-88.

[42] First Written Submission by the Russian Federation, paras. 946, 954, 961, 976, 989, 1002, 1016; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 87.

[43] First Written Submission by the Russian Federation, paras. 945, 953, 956-957, 964-970, 979-984, 992-998, 1004-1012, 1018-1014; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 89-90.

[44] First Written Submission by the Russian Federation, paras. 89, 94, 96, 103, 104, 106, 109, 956, 968, 983, 996, 1006, 1007, 1018, 1019; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 90.

[45] Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 90.

[46] First Written Submission by the European Union, para. 452.

10 CONCLUSION

57. The Russian Federation respectfully requests the Panel to reject all of the European Union's claims and arguments in their entirety, finding instead that, the Russian Federation acted consistently with all its obligations under the Anti-Dumping Agreement and the GATT 1994.

ANNEX B-3

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1 INTRODUCTION

1. In this integrated executive summary, the European Union ("EU") summarizes the facts and arguments presented to the Panel in its second written submission, its opening and closing oral statements at the second substantive meeting and its responses to the Panel's and Russia's questions.

2 RUSSIA'S REQUEST FOR A PRELIMINARY RULING

2. Russia requests the Panel to rule that the EU's claims under Article 6.9 of the Anti-Dumping Agreement ("AD Agreement") are outside the Panel's terms of reference insofar as they concern the issue of causal link between dumping and injury.

3. This request should be rejected. The EU's panel request, paragraph 8, clearly covers the disclosure of essential facts related to the causal link between dumping and injury. Moreover, the EU's panel request, paragraph 8, just like Article 6.9 of the AD Agreement, refers generally to all essential facts which formed the basis of the anti-dumping measure with the word "including". Therefore, the language of the panel request was not limited to dumping and injury. Thus, even if the issue of causal link was somehow said to fall outside the scope of the determination of injury, despite the clear language of the AD Agreement, it would still be covered by the language of the panel request.

3 CLAIMS RELATING TO THE DIMD'S INJURY DETERMINATION

3.1 Claim under Articles 3.1 and 4.1 of the AD Agreement: failure to properly determine the domestic industry

3.1.1 The definition of the domestic industry as Sollers only violates Articles 4.1 and 3.1 of the AD Agreement

4. According to Article 4.1 of the AD Agreement, the domestic industry is defined for the purpose of the AD Agreement *either* as the domestic producers as a whole, *or* those of them whose collective output represents a major proportion of total domestic production. Hence, Article 4.1 provides two options for defining the domestic industry. Further, Article 4.1 specifies two exceptions that permit an investigating authority to exclude certain domestic producers that would otherwise fall within the definition, from the domestic industry. No other options for excluding producers from the domestic industry exist and thus no other exclusions are permissible under Article 4.1.

5. Russia confirms that the Department of Internal Market Defence ("DIMD") considered that both Sollers-Elabuga LLC ("Sollers") and Gorkovsky Avtomobilny Zavod ("GAZ") were "producers of the like product". Russia also confirms that GAZ produced the product concerned during the period under investigation. Nonetheless, according to Russia's clarifications, the DIMD excluded GAZ from the definition of the domestic industry, since "the domestic industry was eventually defined as not including GAZ".

6. This directly violates the obligation under Article 4.1 of the AD Agreement. Indeed, GAZ was not excluded under one of the two exceptions listed in paragraphs (i) and (ii) of Article 4.1. Rather, Russia claims that the reason for limiting the domestic industry to Sollers only, and excluding GAZ, was the "absence of correct and verifiable data" for GAZ. A WTO Member breaches Article 4.1 of the AD Agreement if it excludes a known producer from the definition of domestic industry in view of any other reasons not specified in Article 4.1, or if it excludes consciously a known producer of the product considered to be like, for instance, in *EC – Salmon (Norway)*.

3.1.2 Alleged deficiency of GAZ's questionnaire response

7. Russia considers that the DIMD was justified in excluding this known producer from the domestic industry definition on the basis of a number of factual arguments. Russia alleges that GAZ's questionnaire response was deficient.

8. Yet, the Report "Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union' of the Domestic Market Protection Department of the Eurasian Economic Commission" ("the Report") does not contain any information that GAZ failed to provide the requested information. Russia acknowledges this explicitly. In fact, the questionnaire reply that Russia provided as an exhibit in these proceedings contains data on *all* injury factors. It is apparent from the Report that GAZ participated throughout the investigation.

9. The EU considers that, if the DIDM has defined domestic industry on the basis of Sollers only, relying on data outside such definition is contrary to Article 3.1 of the AD Agreement. Indeed, as stated in Panel Report in *EC – Bed Linen*, once the domestic industry is defined, it is not possible to use information in the injury analysis that does not belong to the defined domestic industry.

3.1.3 If the DIMD relied on a "major proportion" option in Article 4.1, the DIMD ignored the qualitative elements of the domestic industry

10. In its responses to the Panel's questions, Russia now argues that GAZ does not belong to the defined domestic industry in the first place. However, even if the DIMD defined the domestic industry as a "major proportion of the total domestic production", under the second option of Article 4.1 of the AD Agreement, it still violated Articles 4.1 and 3.1 of the AD Agreement because it ignored the qualitative components of the domestic industry definition.

11. The EU has explained in its responses to the Panel's questions that the obligations in Articles 3.1 and 4.1 must be read together, since the former provides relevant context for the latter. Indeed, reading the obligations in Articles 3.1 and 4.1 together, the Appellate Body in *EC – Fasteners (Article 21.5)* "read the requirement in Article 4.1 that domestic producers' output constitute a 'major proportion' as having both quantitative and qualitative connotations". Therefore, the authority may not leave out from the definition of the domestic industry producers that have relevant qualitative characteristics by relying on the "major proportion" option.

12. Thus, the DIMD could not limit its injury analysis to the domestic industry by focusing on Sollers only, on the basis that it constitutes a "major proportion of the total domestic production". Even if the proportion chosen to define the domestic industry is high, this does not mean that the qualitative aspects can automatically be disregarded by the investigating authority.

3.1.4 Distinctions between Sollers and GAZ show that GAZ was genuinely a domestic producer with relevant qualitative characteristics distinct from Sollers

13. Russia takes issue with the EU argument that Sollers is more adequately described as an "assembler", whereas GAZ is a true "producer" of light commercial vehicles ("LCVs"). Russia suggests that the EU did "not provide any evidence with respect to the consequences of including GAZ into the injury analysis".

14. The EU has explained that an investigating authority has the obligation to ensure that the definition is "representative of the domestic industry as a whole and be unbiased". As a producer, GAZ has relevant qualitative characteristics that are different from Sollers, as an assembler. Sollers assembled the Fiat Ducato from semi-knocked down sets imported from Italy. In contrast, GAZ produces LCVs from the very beginning of the production cycle. This is an important qualitative difference.

15. Whilst an investigating authority may not be required to examine the composition of the domestic industry as "assemblers" or "full producers" in all cases in order to avoid a violation of Article 3.1 of the AD Agreement, in the present case where there were only two domestic producers of the product concerned (one, a full producer, and the other an assembler), the EU considers that the DIMD should have included GAZ in its definition of domestic industry.

3.1.5 GAZ was the undisputed leader in the LCV market

16. Russia further suggests that the EU arguments that GAZ was the undisputed leader in the overall LCV market is flawed because the "alleged leadership does not relate to the market of LCVs with diesel engines that were identified as the product under consideration and the like product".

17. However, the evidence that is now before the Panel, as well as Russia's response to the EU's questions, shows that GAZ was producing the like product from the beginning of the injury investigation period (starting in 2008).

3.2 Claim under Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement: Selection of non-consecutive periods of non-equal duration in the injury and causation analysis

3.2.1 The DIMD's selective use of time periods is inconsistent with the legal obligations in Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement

18. The EU disagrees with Russia that the AD Agreement does not provide any guidance as to how the periods for the injury and causation analysis must be defined. Article 3.1 of the AD Agreement does impose limits on the manner in which an investigating authority selects time periods. An investigating authority must not depict the state of the domestic industry in a manner that lacks accuracy and involves bias. If the investigating authority deviates from the usual collection of data by year, it must explain the reasons for doing so, to take away any reasonable doubts with regard to its selection of time periods.

19. The Appellate Body in *Mexico – Beef and Rice* has stressed that when an investigating authority selects certain time periods for its injury determination such that the most negative side of the state of the industry is shown, it did not provide an "accurate and unbiased picture" of the domestic industry, and thus failed to make an "objective examination" as required by Article 3.1 of the AD Agreement.

20. Thus, the DIMD had to be particularly cautious, given that the presentation of the evidence by half-years in 2010 and 2011 was done by the petitioner (Sollers) itself in its application, and also without providing any valid reason to do so.

3.2.2 The DIMD relied on non-consecutive periods of non-equal duration to support its conclusions on injury

21. Russia ignores major parts of the Report when it suggests that the injury conclusions were principally based on year-by-year comparisons, and not on the consideration of non-consecutive, non-equal time periods. The DIMD has split up the injury investigation period in its evaluation of each injury factor, contrasting the developments in the time period 2008-2010 and the time period second half 2010-first half 2011 (in which the DIMD did not compare consecutive time periods, but "jumped" six months). Russia suggests that the reason for relying on non-consecutive time periods for its injury analysis, is the "need to eliminate the possible time lag in the injury suffered by the domestic industry of the CU as a result of dumped imports of Products in the 2nd half of 2010".

22. While the EU considers that in abstract terms there may be reasons for such an approach, such as the seasonality of the product at issue, nowhere in its Report did the EAEC explain whether or why there was, in fact, a time lag between the allegedly dumped imports and injury, or why precisely a *six* month time lag was expected. The EU wonders what the reason was to split the POI as the DIMD did, other than to show artificially negative trends, *inter alia*, that Sollers incurred losses already towards the end of the POI. Indeed, if the DIMD had considered the POI as a full year, rather than to split it up in two halves, it would have found that for the full POI, no losses were made.

3.2.3 The DIMD failed to make an end-point to end-point analysis of all factors it examined

23. The EU has explained that, in order to make an objective evaluation based on positive evidence, the DIMD had to assess the trends in the injury analysis by making both an analysis of the trend during the period of data collection by means of an end-point to end-point comparison

(2008-2011), and year-by-year (or half year-by-half year) comparison of equal time periods. This is necessary to provide an accurate and unbiased picture of the state of the domestic industry, and thus an objective examination.

24. Russia does not identify any other instances where the DIMD made a longer term trend analysis for the entire injury investigation period (2008-2011). The other examples that Russia provides in its responses only focus on *2009*-2011. The EU reconstructed based on the public version of the Final Report the 2008-2011 trends which were omitted by the DIMD. The EAEC could have well provided those trends but consciously decided to omit them in the tables, presumably in an attempt to disguise the lack of objectivity in the presentation of the data.

3.2.4 The selection of non-consecutive periods of non-equal duration by the DIMD leads to a picture that is biased and lacks objectivity

25. The EU disagrees with Russia's allegation that the EU has not demonstrated why the DIMD's selection of non-successive periods of non-equal duration failed to provide an objective examination of the positive evidence. Although the EU considers that there is no obligation for the complainant to positively demonstrate that an investigating authority was biased, it has shown in detail the contrast between the DIMD's selective use of time periods, on the one hand, and what an objective picture of the developments in the domestic industry would look like.

26. Whereas, under the DIMD's approach, there was a suggestion that during the POI, i.e. from the second half of 2010 to the first half of 2011, the domestic industry underwent negative developments, placing the POI in the context of the longer-term developments from 2008 to 2010 shows quite a different, positive, picture. The figures presented by the EU show how domestic sales volumes, domestic production volume, domestic prices and domestic market shares, all showed a positive trend from 2008 to 2011, in that year reaching a level significantly above that of 2008.

27. The EU further disagrees with Russia that, in the present case, any deficiency caused by the consideration of non-equal and non-consecutive periods in the POI does not undermine the injury and causation analysis because the data for the period from 1 January 2008 to 31 December 2011 was analysed on an annual basis, which allegedly sufficed to establish the existence of the material injury and the causal link in an objective manner. Precisely in a situation where the POI includes two calendar years the investigating authority should contextualise the data shown in the POI with the other trends observed for the injury period. Otherwise, it is not possible to show attribution.

3.3 Claim under Articles 3.1 and 3.2 of the AD Agreement: The DIMD did not make an objective examination based on positive evidence when considering alleged price suppression to a significant degree

3.3.1 2009 was not a "normal year" and could not be used by the DIMD without any adjustment as the basis for calculating prices that would otherwise have occurred

28. The DIMD failed to make an objective assessment, based on positive evidence, of the price suppression because it took as "reasonable rate of return" the profit level during a year (2009) that was, according to the DIMD itself, marked by the financial and economic crisis and consumer preference for domestic LCVs. Russia ignores that fact that the DIMD itself considered 2009 to be exceptional.

29. The EU noted the enormous profit increase from 2008 to 2009 with 233.8%. Likewise, the EU showed on the basis of the actual data provided in the confidential version of the Final Report how the 2009 profit levels were extremely high when compared to the quasi-similar levels reached by Sollers in 2008 and 2010 respectively. Moreover, a number of injury indicators such as the production and sales volume, the capacity utilisation, the employment, the investment went down, and the cost of production clearly shows that 2009 was not an ordinary year in which the domestic industry was healthy.

3.3.2 The DIMD relied on data expressed in USD to suggest there was price suppression, while ignoring the impact of the exchange rate developments

30. The DIMD relied on data expressed in USD to suggest there was price suppression, while ignoring the impact of the exchange rate developments. The DIMD calculated only the domestic and the import prices in USD while other data related with the cost of production, the profit and loss analysis and the injury analysis are shown in RUB. Russia alleges that the conversion of domestic prices in USD was needed because it enabled the comparison of prices of imports and domestic sales in the same currency.

31. However, in the absence of any explanation for the reasons for this approach taken by the DIMD, the EU raised concerns with regard to the objectivity of this analysis. As can be seen from the figures provided by the EU, the trend expressed in RUB shows a constant and relatively moderate increase in the domestic prices throughout the period considered. In contrast, the same trend expressed in USD showed a decline of domestic prices at the beginning of the period considered (which was caused by the exchange rates) and higher change in the increase of domestic prices. This ultimately served to support the DIMD's allegation that Sollers could not increase domestic prices to pass on its costs of production, i.e. by showing how domestic prices had constantly increased throughout the period.

3.3.3 The DIMD did not show that the dumped imports have "explanatory force" for the alleged price effects

32. The EU questions that the dumped imports could have "explanatory force" for evolution of domestic prices. First, import prices remained above domestic prices during the entire POI. The fact that import prices were higher than domestic prices (regardless of the currency used to express those prices) during the POI suggest that other factors, unrelated to subject imports, were responsible for the alleged price suppression.

33. Second, the considerable increase in domestic prices between 2008 and 2009, and again between 2010 and 2011, in combination with quality problems experienced by the Fiat Ducato LCVs assembled by Sollers and the significant raise in costs of production (due to the raising costs of raw materials), should have lead the DIMD to examine whether consumers would be willing to absorb further price increases. When making its price suppression analysis, an investigating authority must examine elements that may explain the significant price suppression, such as market circumstances that indicate that consumers would, in any event, not be willing to accept further price increases.

34. Third, further questioning the explanatory force of the dumped imports for the domestic price effects is the presence of GAZ as a strong competitor in the market for LCVs. Russia has confirmed that the DIMD was aware of the fact that GAZ produced the product concerned during the period under investigation. By failing to examine and engage with this evidence in its analysis, which challenges the "explanatory force" of dumped imports for the price effects, the DIMD acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement.

3.3.4 The DIMD did not explain and demonstrate why the alleged price suppression would be "to a significant degree"

35. The DIMD did not explain and demonstrate why the alleged price suppression would be "to a significant degree". Russia considers that under Article 3.2 of the AD Agreement "the investigating authority is not obliged […] to conduct the thorough analysis in order to determine whether price suppression is significant".

36. However, if the consideration of the impact of the dumped imports on the prices involves a finding of price suppression − as in this case − that finding must involve a consideration of the "significance" of the price suppression, *i.e.* important, notable, or consequential. This is demonstrated by the very words of Article 3.2, which requires price suppression to be "to a significant degree".

37. In response to the Panel's question where in the EAEC's report, the DIMD would have analysed or make conclusions regarding the significance of price suppression, Russia does nothing

more than refer to Section 5.2 of the Report. However, this Section, dealing with the "impact of dumped imports on the prices of the like product in the customs union market", does not contain any consideration of whether the degree of price suppression was "important, notable, or consequential". Merely stating that it was "significant" does not meet the required rigour of the inquiry under Article 3.2.

3.4 Claim under Articles 3.1 and 3.4 of the AD Agreement: State of the Domestic Industry

3.4.1 The DIMD's assessment of the state of Sollers is not based on positive evidence

38. The EU has pointed to inconsistencies between the evidence that Sollers provided and the evidence that the DIMD relied upon for its conclusions regarding the state of Sollers. First, with regard to profits, the EU has shown that profit figures in Table 4.2.5 of the EAEC's report different significantly from the figures in Table 6.2.1 of Sollers' questionnaire responses. In response, Russia provides a formula purporting to explain how the figures were calculated. However, this formula does not clarify the significant differences between the data in the Report and in Sollers' Application and Questionnaire Response.

39. Second, in respect of stocks, the EU has argued in its first written submission that the figures on inventories in Table 11.4.3 of Sollers' application did not match the figures on stocks in Table 4.2.2 of the EAEC Report. Russia responds by claiming that Table 11.4.3 of Sollers' application "contains data on stocks of the Applicant *and* independent dealers". According to Russia, the DIMD must not include data from independent dealers and this would explain the differences in Table 4.2.2 of the EAEC Report, which would be based on Table 4.4 of Sollers' updated questionnaire response. However, the EU still fails to understand how Table 4.4 of Sollers' updated questionnaire response relates to Table 4.2.2 of the Report. Table 4.4 provides information on Sollers' stocks in the form of indexes, splitting up the information in half-years starting from 2009 and setting the first and second half of 2009 as 100.

3.4.2 The DIMD made contradictory observations in its examination of the evidence and ignored certain facts and arguments on the record relating to the state of the domestic industry

40. The EU has also demonstrated how the DIMD's observations that the domestic industry was suffering injury are contradicted by the evidence on the record that shows how the domestic industry's situation showed improvements when comparing the 2008 and 2011 data. While Russia does not dispute that domestic product, volume and prices indeed developed positively, it seeks to contrast the growth rate of production and sales with the slower growth rate of domestic consumption. However, Russia failed to explain and neither did the DIMD consider why it should be expected that consumption of the domestic product would follow the growth in production and prices.

41. The EU has also pointed out that the evidence on profits and losses contradicts the DIMD's findings that the domestic industry was suffering injury because of dumped imports during the POI. Russia responds by noting "the DIMD based its conclusion of material injury on the *fact* of losses and negative profitability rather than on the *amount* of losses". However, the mere suggestion that some undisclosed amount of "losses" would have happened during a small part of the POI is not sufficient to support a conclusion of material injury.

3.4.3 The DIMD failed to examine all factors listed in Article 3.4 of the AD Agreement

42. Article 3.4 of the AD Agreement contains a mandatory list of fifteen factors that an investigating authority must always evaluate in every investigation. The DIMD failed to examine in the EAEC's Report the magnitude of the margin of dumping, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments.

43. With respect to the margin of dumping, Russia admits that this was "not explicitly explained". Russia argues that it suffices that the margin of dumping was discussed in the section of the report where it was determined whether the margin of each country was more than 2% − and thus the conditions for assessing the cumulative impact of the dumping were met.

44. The EU disagrees. The panel in *China – X-Ray Equipment* made clear that a "simple listing of the margins" in other sections of the determination "is not sufficient evidence that the magnitude of the margin of dumping was evaluated in the context of examining the state of the domestic industry". Those issues would not normally be addressed under the analysis referred to by Article 3.3 of the AD Agreement, and were certainly not addressed by the DIMD's simple statement that "the dumping margin for each country exceeds 2%". This statement does not constitute or show evidence of any evaluation or assessment.

45. Further, with respect to the EU's argument that the DIMD failed to examine the domestic industry's return on investments, actual and potential effects on cash flow and the ability to raise capital or investments, Russia alleges that it is sufficient to meet the requirement of Article 3.4 that financial accounts were requested by the DIMD and submitted by Sollers in confidential form. According to Russia, the fact that data was requested and received from the domestic industry can be indicative that the relevant information has been evaluated, although the results of such evaluation were not set forth in the published document".

46. The EU disagrees. First, the Panel should not base its assessment under Articles 3.1 and 3.4 of the AD Agreement on the confidential version of the Report that was submitted by Russia as Exhibit RUS-14 only during WTO proceedings, to the extent that the same information was not apparent from the non-confidential version of the Report on which the EU based its claims. In the alternative, even if the Panel were to consider the confidential Report as part of the evidence, the EU still considers that the analysis laid down in the confidential Report is inconsistent with Articles 3.4 and 3.1.

47. Article 3.4 of the AD Agreement requires investigating authorities to examine the role, relevance and relative weight of each factor mentioned in that provision. This obligation cannot be fulfilled by simply requesting or even obtaining information concerning a given factor. Rather, this information must be analysed and interpreted by the authority.

3.5 Claim under Articles 3.1 and 3.5 of the AD Agreement: The DIMD did not properly establish a causal link between the dumped imports and the material injury to the domestic industry

3.5.1 The DIMD failed to properly examine the causal relationship between dumped imports and injury

48. The EU has demonstrated that the DIMD failed to demonstrate a causal link between the dumped imports and the material injury to the domestic industry. In respect of import volume, the EU explained that the evidence on the record indicated that the increase in the volume of imports was not significant when seen in the context of domestic consumption, domestic sales volume and the market share held by the domestic industry. In response, Russia argues that "[i]t does not seem less plausible […] that these decreases in domestic market share happened because of the effects of dumping". However, merely stating that it is "plausible" does demonstrate a causal link between the import volumes and the injury to the domestic production. Under Article 3.5 of the AD Agreement, it must be demonstrated that the subject imports have caused the injury to the domestic industry.

49. With respect to import prices, the EU explained that the DIMD failed to demonstrate the necessary "linkage" between decreasing import prices and the alleged price suppression. The DIMD makes statements on the difference between the import prices and domestic prices, but does not explain how higher import prices show that the import prices caused price suppression. Russia does not address this point. It merely states that the DIMD made an objective and unbiased conclusion that there was no price undercutting and no price depression. Russia's argument does not respond to the fact that the DIMD did not demonstrate any causal link between the evolution of the import prices and the domestic prices.

3.5.2 The DIMD failed to properly examine the relevance of other known factors

50. Pursuant to Article 3.5, the DIMD's establishment of the facts had to be proper and the evaluation of the facts had to be unbiased and objective such that the explanations are reasonable and supported by the evidence. The EU has listed several known factors that explained the state of

Sollers during the POI and that the DIMD either failed to properly examine, or did not examine at all. A first factor that the DIMD did not properly examine was the termination of the licensing agreement between Fiat and Sollers. A second non-attribution factor that the DIMD did not properly examine was the competition by GAZ during the POI.

51. The EU has also identified three other factors that explain the state of Sollers. First, the EU pointed to the arguments by the interested parties that the difficulties by Sollers were, to a great extent, self-inflicted because of the quality problems with respect to the Fiat Ducatos assembled by Sollers. Another factor that the DIMD failed to examine is the difficulty encountered by Sollers in obtaining financing for its joint venture with Fiat. Finally, the DIMD also failed to examine the discontinuation of the local car manufacturers programmes.

4 PROCEDURAL CLAIMS

4.1 Claim under Articles 6.5 and 6.5.1 of the AD Agreement: Treatment of Information as Confidential without Showing Good Cause and without Providing a Meaningful Summary

52. The DIMD failed to require a showing of good cause or to assess whether such good cause is shown, and to require or provide a meaningful summary or an explanation of why a summary would not be possible. In some instances, the EU is also challenging the confidential treatment of certain information that does not appear to be confidential.

53. The DIMD took no specific action to require good cause in this investigation. Russia also considers that no action to assess whether good cause is shown needs to be taken when confidential treatment is accepted. This is contrary to the jurisprudence. If the published report and its supporting documents do not show that an assessment took place, there is no legal basis to for confidential treatment. With respect to meaningful summaries, interested parties should not be required to examine "documents in their entirety." It must be clear what constitutes the summary of which omitted information. Any subsequent explanations and calculations by Russia cannot compensate for the DIMD's failings.

4.1.1 The meaning of the terms "significant" and "significantly" in Article 6.5 of the AD Agreement

54. The EU agrees with Russia in general terms that disclosing a piece of information would not necessarily "be of significant competitive advantage to a competitor" or "have a significantly adverse effect", and that a document should normally be treated as confidential by nature only when its disclosure would risk causing a great harm. Whether any of this is the case must be objectively assessed by the investigating authority. This assessment should be apparent from the documents provided to interested parties. Simply marking certain pieces of information as "CONFIDENTIAL" or omitting them does not show such an assessment.

4.1.2 The nature of the investigating authority's obligation to require and assess good cause

55. As the EU has explained, the documents provided by the DIMD do not show that the interested parties concerned provided any good cause for confidential treatment, that the DIMD ever required them to do so or objectively assessed whether good cause exists. At a minimum, Article 6.5 requires investigating authorities to objectively assess whether a party has shown good cause for the confidential treatment, and to require the parties to provide the good cause if they failed to do so. It may not always be necessary for the investigating authority to issue a separate document detailing its good cause assessment, or separately determining good cause for each piece of confidential information. In this case, however, there is simply no evidence anywhere on the record that good cause was shown, required or assessed.

4.1.3 The relevance of the alleged absence of objections to confidential treatment or the adequacy of summaries by interested parties

56. In any investigation, due process requires that the interested parties are able to participate, that their views are taken into account, and that any summaries of information provided are clear

and understandable. Yet, this cannot mean that interested parties waive their due process rights if they do not immediately object to a particular document (which in this case they did, as the record demonstrates). If WTO proceedings are brought on the basis of Article 6.5 or Article 6.5.1, it must be possible for a panel to examine whether the confidential treatment and the summaries provided were proper, as Russia concedes.

4.2 Claim under Article 6.9 of the AD Agreement: Failure to disclose all essential facts under consideration that formed the basis for the decision by the EAEC

57. The EU claims that the EAEC Draft Report failed to disclose or meaningfully summarize a number of essential facts underlying the determinations of dumping (import volumes of LCVs produced by Volkswagen AG and Daimler AG respectively; export volumes and weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG respectively; source for the information on the volume and value of imports of LCVs), material injury (consumption, production and sales volumes of LCVs in the Customs Union; information on Sollers' profits and profitability; source for the information on the volume and value of imports of LCVs) and causation (consumption and production volumes of LCVs in the Customs Union; numerical data on the ratio of dumped imports versus consumption and production, prices, rate of return, profits and other issues; rate of return on sales of goods which would have occurred in the absence of dumped imports; market share held by GAZ in 2011). Moreover, the exhibits to Russia's first written submission, in particular the alleged confidential version of the EAEC Report, reveal additional violations of Article 6.9 of the AD Agreement, relevant for the assessment of mandatory injury factors.

58. Whether a fact is essential is an objective question, depending on the role of the fact in the determinations that must be made by the authority. It is not for the authority to list which facts it subjectively considers essential. All such facts must be disclosed, or at least meaningfully summarized. This is equally true when "facts available" are used. The due process rights of interested parties will be infringed by definition if essential facts are not disclosed, and there is no need to additionally show whether or not interested parties can defend their interests.

4.2.1 The relationship between Articles 6.5, 6.5.1 and 6.9 of the AD Agreement

59. The EU disagrees with Russia's statement that "in order to establish a consequential violation of Article 6.9 of the AD Agreement with regard to confidential essential facts, it is necessary to carry out two separate analyses of Article 6.5 and Article 6.9." There is no need for a separate claim, or finding of violation, under Article 6.5. It is only where a separate Article 6.5 or Article 6.5.1 claim has been made, and a panel found a violation of those provisions, that one could truly speak of a "consequential" violation (in practical terms, rather than because Article 6.9 necessarily depends on the correct treatment of information as confidential or not).

4.2.2 The treatment of so-called "non-cooperating producers" under Article 6.9 of the AD Agreement

60. Article 6.9 requires investigating authorities to disclose essential facts to all interested parties. No distinction is made in that respect between parties that the authority considers as "cooperating" and "non-cooperating". Any disclosure, whether general or specific, and whether it contains information on confidential matters or not, must be sufficiently detailed to enable the interested party concerned to defend its interests. All this is equally true when essential facts were not obtained from an interested party but from another public authority, such as a customs authority. Just because an individual dumping margin is not calculated for a so-called "non-cooperating" party based on its own data, it does not follow that such a party does not have an interest in essential facts pertaining to it.

4.2.3 Russia's treatment of Daimler's and Volkswagen's letter requesting additional disclosure of information on the calculation of dumping margins

61. Russia notes that the joint letter of Volkswagen Group Rus and Mercedes-Benz requested disclosure of data derived from customs statistics that was treated as confidential. Nevertheless, the DIMD failed to disclose such information, even as regards the sales to Volkswagen Group Rus

and Mercedes-Benz Rus. Russia seems to acknowledge that no summary of these essential facts was provided.

4.2.4 Russia's arguments regarding the non-disclosure of essential facts related to the determination of dumping and injury

62. With respect to the determination of dumping, Russia's first written submission discusses various calculation methodologies that *could* be used by interested parties to enhance their understanding of the information that was not disclosed. The EU does not consider that this approach is sufficient to provide a meaningful summary that would disclose essential facts.

63. First, there are numerous points in which Russia's explanations depart from what is apparent in the Draft Report, or merely reinforce the EU's conclusion that essential facts were not disclosed. Second, merely disclosing the "methodology" of a calculation does not necessarily constitute a meaningful summary, since it does not enable a reasonable understanding of the substance of the information. In the case at hand, no meaningful methodology was provided. Third, the disclosure requirement under Article 6.9 cannot be met by requiring interested parties to piece together information from various documents submitted by other interested parties and combine them with what is disclosed by the investigating authority.

64. Similar considerations hold true for the DIMD's failure to disclose facts related to the determination of injury. On several issues, the DIMD failed to disclose essential facts, replacing them with entirely uninformative summaries.

4.2.5 Additional undisclosed essential facts

65. The EU has argued that the Panel should not consider the confidential Report that was submitted by Russia as Exhibit RUS-14 (BCI). In the alternative, the EU claims that the confidential Report still fails to comply with Articles 3.4 and 3.1 of the AD Agreement.

66. In addition, were the Panel to consider the confidential Report, the EU submits the following. When compared to the Draft Report, the confidential version of the Report reveals that additional facts which formed the basis for the finding of material injury were determined and assessed by the DIMD, but were not disclosed to the interested parties. No attempt was made to provide a meaningful summary of this information; in fact, much of it was omitted without even being marked as confidential. With respect to these essential facts, Russia has therefore violated Article 6.9 of the AD Agreement, for the reasons already explored by the EU.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

I. INTRODUCTION

1. The European Union still has failed to establish that the Russian Federation has violated any provision of the Anti-Dumping Agreement and the GATT 1994. The European Union continues to propose that the DIMD should have used approaches and methodologies in the anti-dumping investigation at issue that have no legal basis in the WTO law and jurisprudence.

II. STANDARD OF REVIEW

2. The Russian Federation maintains that it is well-established in the WTO jurisprudence that the Anti-Dumping Agreement *requires* taking into account all information upon which the investigating authority relied in order to reach its final determination, whether or not this information forms part of the non-confidential or disclosed record of the investigation.[1] As confirmed by the Appellate Body in *Thailand – H-Beams*, "Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination".[2] In addition, the panel in *EC – Salmon (Norway)* acknowledged that the standard of review specified in Article 17.5(ii) does not mean that a panel is limited to "the information actually set forth or specifically referenced in the determination at issue".[3]

3. Therefore, the European Union cannot reasonably claim that the Panel should base its judgement on "the facts expressed in the non-confidential EAEC's report and supporting documents for which the Report shows a sign of existence".[4]

III. DEFINITION OF THE DOMESTIC INDUSTRY

4. The European Union's untenable interpretations of Articles 4.1 and 3.1 of the Anti-Dumping Agreement completely ignore the existence of objective reasons for defining the domestic industry as a "major proportion" of total domestic production. In addition, the European Union's approach to definition of the domestic industry that implies that such a definition shall remain fixed throughout an anti-dumping investigation undermines the "objective examination" standard that is required by Article 3.1 of the Anti-Dumping Agreement.

A. The European Union's arguments fail to address the objective reasons behind the DIMD's definition of the domestic industry for the purposes of injury determination

5. The Russian Federation believes that practical constraints of obtaining necessary information may prevent the investigating authority from defining the domestic industry for the purposes of injury analysis as all known domestic producers of the like product. The role of the investigating authority in seeking information from known domestic producers may be limited due to the factual circumstances of the anti-dumping investigation.

6. To recall, the reason why the data pertaining to GAZ could not have been used in the injury analysis is related to deficiencies and inconsistencies in the data submitted by GAZ. The investigating authority expressed its willingness to include GAZ into the domestic industry for the purposes of the injury analysis (sent a questionnaire for the producer of the like product in the

[1] *See* Panel Report, *EC – Tube or Pipe Fittings*, para. 7.45, Appellate Body Report, *Thailand – H-Beams,* paras. 115-118.

[2] Appellate Body Report, *Thailand – H-Beams*, para. 118.

[3] Panel Report, *EC – Salmon (Norway)*, para. 7.837. *See* also Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 161-165.

[4] Opening Oral Statement by the European Union at the Second Substantive Meeting of the Panel with the Parties, para. 5.

CU[5], sought clarifications regarding the Questionnaire Reply and informed GAZ on inconsistencies in the data[6]). However, neither clarifications, nor corrected data were received by the investigating authority.

7. Given the inability to use the data pertaining to GAZ in the injury analysis, the domestic industry for the purposes of the injury determination was defined as Sollers that accounted for 87.9% of total domestic production of the like product. Such definition of the domestic industry is based upon a "major proportion" option and is in conformity with Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

8. The Russian Federation maintains that a "major proportion" of total domestic production is a legitimate way for defining the domestic industry for the purpose of the injury analysis.

B. The European Union erred in its interpretation of Article 4.1 of the Anti-Dumping Agreement

9. The European Union suggests that "allowing investigating authorities to define "domestic industry" on the basis of the questionnaire responses as "deficiency" or any other reason not foreseen in Article 4.1 of the AD Agreement risks materially distorting the injury determination".[7]

10. This interpretation proposed by the European Union renders useless a "major proportion" option provided in Article 4.1 of the Anti-Dumping Agreement and leaves the issue of known producers that do not respond to the questionnaire or provide deficient data that cannot be used in the injury analysis unresolved. In addition, Article 3.1 of the Anti-Dumping Agreement contains the requirement of objective examination based on "positive evidence". Appellate Body has clarified that "[t]he word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible".[8] In this respect, the investigating authority shall not base its injury determination on evidence that is not verifiable and not credible.

C. The WTO law does not require that the definition of the domestic industry shall remain fixed throughout the anti-dumping proceedings

11. The European Union further notes that "the domestic industry should be defined as soon as possible in the course of the investigation"[9] and "once the domestic industry is defined, relying on one of the two options in Article 4.1, the investigating authority must not adjust this definition as the injury analysis proceeds on the basis of difficulties in collecting data".[10] In this respect, the Russian Federation notes that the WTO law and jurisprudence do not prescribe to follow an approach suggested by the European Union.

12. In the general context, at the outset of an anti-dumping investigation the domestic industry is identified when the like product is defined. Panel in *EC - Salmon (Norway)* stated that "Article 4.1 makes clear that the starting point for the identification of the domestic industry is the "like product".[11] Hence, the scope of domestic producers that form part of the domestic industry is limited to the domestic producers of the *like product*. Hence, at the outset all known domestic producers of the *like product* constitute the domestic industry.

13. At the same time if the definition of the domestic industry had to be fixed at a particular point in time at the outset of an anti-dumping investigation and could not be changed, as the investigation proceeds, this would contradict the requirements of Article 3.1 of the Anti-Dumping Agreement. In this regard, the Russian Federation maintains that the definition of the domestic industry is an evolving concept. The definition of the domestic industry can be changed in the course of the proceedings, as the investigating authority may be faced with new factual evidence that may trigger a redefinition of the domestic industry (e.g. existence of the domestic producers

[5] See Report, Exhibit RUS-12. Section 1.2.
[6] Exhibit RUS-30 (BCI).
[7] Responses to the 2nd Set of Questions by the European Union, para. 3.
[8] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[9] Responses to the 2nd Set of Questions by the European Union, para. 1.
[10] Ibid., para.4.
[11] Panel Report, *EC – Salmon (Norway)*, para. 7.64.

that were not known to the investigating authority, absence of full and credible questionnaire response from known domestic producers, etc.).

14. Therefore, the European Union's interpretation that implies impossibility to redefine the domestic industry for the purposes of injury analysis should be rejected.

IV. SELECTION OF PERIODS FOR THE INJURY AND CAUSATION ANALYSES

15. The Russian Federation maintains that the European Union has misinterpreted the DIMD's injury and causation analysis and, therefore, presented incorrect and incomplete picture of the injury and causation analysis conducted by the DIMD in the course of the investigation. In fact, the DIMD has analysed the data for the period from 1 January 2008 to 31 December 2011. Such analysis has been conducted on a year-to-year basis, i.e. by comparing particular indicators as of 2008, 2009, 2010, 2011. The data for the period from 1 January 2008 to 31 December 2011 has been analysed consistently in relation to each indicator throughout the entire Report.[12]

16. Further, relevant WTO jurisprudence[13] shows that in order to make a *prima facie* case of violation of Article 3.1 of the Anti-Dumping Agreement a complaining party should correctly identify the reference standard which excludes the possibility (risk) of favouring the interests of any interested party, or group of interested parties, in any investigation and specify how exactly the injury analysis at issue does not meet the above reference standard and thus may favour those interests.[14]

17. As far as the European Union's claim is concerned, the European Union bears the burden to identify how an investigating authority should select the periods for the analysis in general (reference standard) and specify in which way the DIMD's selection of periods for analysis could have favoured the interests of any interested party, or group of interested parties, in the investigation.[15]

18. The standard suggested by the European Union (comparison the data for 2009, 2010 and 2011 and also the period from 1 July 2010 to 30 June 2011 on an annual basis with 2008) cannot be considered as the appropriate reference standard as such standard involves the overlap between the periods analysed.[16]

19. The Russian Federation further submits that there is no logical connection between the European Union's argument regarding the failure by the DIMD to systematically make an end-point to end-point analysis of all of the economic indicators and the European Union's claim. The above argument does not deal with the selection of periods at the initial stage of the process of injury determination. Rather, it touches upon the analysis of economic indicators for the periods already selected.[17]

20. Based on the above, the European Union has failed to make a *prima facie* case of violation by the DIMD of Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. Therefore, the European Union's claim shall be dismissed.

V. PRICE SUPPRESSION

21. The European Union submits that the DIMD failed to make objective analysis based on positive evidence when considering price suppression. The European Union gives up its claim that the DIMD "should have based itself on the year 2008 rather than the abnormal year 2009".[18] The European Union is now convinced that rate of return of 2009 should have been adjusted downwards by the DIMD. The Russian Federation stresses out that the DIMD accessed the

[12] Second Written Submission by the Russian Federation, paras. 56-58.
[13] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196, 204.
[14] Second Written Submission by the Russian Federation, para. 76.
[15] Second Written Submission by the Russian Federation, para. 77.
[16] Second Written Submission by the Russian Federation, para. 80.
[17] Responses to the 2nd Set of Questions by the European Union, para. 23.
[18] Second Written Submission by the European Union, para. 97, Opening Oral Statement by the European Union, para. 39.

conditions of the Russian economy. These conditions clearly show that the rate of return in 2009 could be considered reasonable.[19]

22. The European Union insists that 2009 was not a "normal year" and could not be used by the DIMD for the price suppression analysis because, according to the European Union, 2009 was an exceptional year. In order to support this standing the European Union simply refers to the market situation in 2009 without providing any clear explanations as to how it could make for the "abnormality" of the rate of return in 2009. The Russian Federation emphasizes that the DIMD took the economic crisis as well as the recovery after the crisis into account in its analysis[20], therefore, this factor could not in any way undermine the objectivity of the price suppression analysis.[21]

23. The European Union tries to show that there was some biased approach in the analysis of prices in USD.[22] The Russian Federation is convinced that the claim of the European Union is unfounded as the European Union failed to demonstrate the ground on which it could be concluded that use of USD undermined the objectivity of price suppression analysis. The DIMD actually took the factor of currency fluctuations into account while conducting the analysis.[23] There was no significant difference between price trends expressed in RUB and USD that could distort the analysis.[24]

24. European Union also challenges the explanatory force of dumped imports for the occurrence of price suppression.[25] The Russian Federation recalls that the DIMD demonstrated the explanatory force of dumped imports for the occurrence of price suppression in the Report.[26]

25. The European Union's misunderstanding of the explanatory force stems from its conviction that there was significant gap between import and domestic prices and that price suppression implies that import prices should be higher than domestic prices.[27] The Russian Federation reminds that difference between import and domestic prices decreased during the entire analysed period.[28] Therefore, the European Union makes unfounded allegation and, at that, tries to substantiate it by referring to the comments of the interested parties[29] taken from the context and not related to the issues raised by the European Union in connection with the explanatory force of dumped imports for price suppression.[30]

26. On the basis of foregoing, the Russian Federation concludes that the European Union failed to provide evidence that the DIMD failed to make an objective analysis based on positive evidence when considering whether the effects of the dumped imports was to prevent domestic price increases, which otherwise would have occurred, to a significant degree and its claim should be rejected.

VI. STATE OF THE DOMESTIC INDUSTRY

A. The DIMD based its evaluation of injury factors on positive evidence

27. With regard to profits, the European Union argues that the formula provided by the Russian Federation, which explains how the profit figures set out in the Report were calculated, does not clarify the significant differences between the data in the Report and in Sollers' Application and Questionnaire Response. This formula contains six elements, namely the volume of sales, the price and the cost for Sollers and its trading house separately. The European Union, for some reason,

[19] Second Written Submission by the Russian Federation, paras. 102-103.
[20] Second Written Submission by the Russian Federation, para.109.
[21] Second Written Submission by the Russian Federation, para.111.
[22] Second Written Submission by the European Union, paras. 100-110.
[23] Second Written Submission by the Russian Federation, para. 93.
[24] Ibid., paras. 94-96.
[25] First Written Submission by the European Union, para.156.
[26] Second Written Submission by the Russian Federation, paras. 113-118.
[27] Responses to the 2nd Set of Questions by the European Union, question 67, para. 18.
[28] Second Written Submission by the Russian Federation, para.117.
[29] Second Written Submission by the European Union, para.116,117, Opening Oral Statement by the European Union at the Second Substantive Meeting of the Panel with the Parties,para.39, Responses to the 2nd Set of Questions by the European Union, question 67, para.19.
[30] Second Written Submission by the Russian Federation, paras. 121,123.

fails to take into account that the aggregated profit figure depends not only on Sollers' volume of sales, price and cost but also on the corresponding figures of its trading house.

28. With regard to stocks, the European Union claims that the DIMD failed to conduct an objective examination because the DIMD, when determining the stocks of the domestic industry in the Report, used the data on stocks of the producer and did not rely on stocks of the trading house. This claim is unsubstantiated since the European Union has not even attempted to demonstrate that the DIMD's examination was thereby not conducted in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.

29. The Russian Federation emphasises that Article 3.4 of the Anti−Dumping Agreement does not prescribe the methodology to be used by an investigating authority in its evaluation of the injury factors. The Russian Federation underlines that Article 3.4 of the Anti−Dumping Agreement requires that there be an analysis of inventories and the DIMD included such an analysis in its evaluation of the state of the industry.

30. The European Union also alleges that the DIMD did not rely on positive evidence in its analysis of stocks held by Sollers because the figures in the Report do not correspond to the relevant non-confidential data provided by Sollers. The European Union's allegation lacks any factual basis since the European Union simply failed to extract the required information from the relevant non-confidential data.

B. The DIMD made a proper evaluation of the overall development and interaction among injury factors taken together

31. The European Union has not provided plausible alternative explanations of the evidence on the record in the light of which the explanations given by the DIMD are not reasoned or adequate. The European Union highlights upward trends in the internal evolution of certain injury factors, whereas discounting the factor "profits", which runs contrary to the picture of "normality" in the state of the industry portrayed by the European Union. The highlighted trends, including production and sales levels, are depicted by the European Union in isolation from other market developments, such as trends in the levels of dumped imports and consumption. As a result, any relative changes are disregarded by the European Union.

32. With reference to the European Union's allegation that the selection of the non-equal, non-consecutive periods in the injury and causation analysis tainted the EAEC's analysis since it failed to provide an accurate and unbiased picture of the relevant information, we have shown that when the data are provided for consecutive half-year periods, the injury to the domestic industry and the explanatory force of the subject imports for the state of the domestic industry are pronounced, and the observations made on the basis of these data are in line with the conclusions made in the Report.

C. The DIMD examined all the injury factors listed in Article 3.4 of the Anti-Dumping Agreement

1. The magnitude of the margin of dumping

33. The European Union claims that the DIMD failed to examine the magnitude of the margin of dumping in its injury analysis.

34. Contrary to the European Union, the magnitude of the margin of dumping was apparently examined by the DIMD in the context of establishing that the conditions for cumulative assessment of the effects of the dumped imports of a product from more than one country were fulfilled. This initial stage of the evaluation of the magnitude of the margin of dumping at the least implicitly indicates that the evaluation of the factor occurred.

35. The contribution of the magnitude of the margin of dumping to the impact of the dumped imports on the domestic industry was further implicitly examined in the context of the analysis of domestic prices. The DIMD implicitly evaluated the magnitude of the margin of dumping in the context of the analysis of the effect of the prices of dumped imports on the domestic prices. The determination of "a significant adverse effect", which the prices of the dumped imports had on the

domestic prices and profits, reflects the results of the evaluation of the magnitude of the margin of dumping.

2. Return on investments, actual and potential negative effects on cash flow and ability to raise capital or investments

36. The European Union alleges that the DIMD failed to examine return on investments, actual and potential negative effects on cash flow and ability to raise capital or investments. Contrary to the European Union's allegation, the DIMD analysed these injury factors, which is reflected in the confidential version of the Report. Setting out the results of evaluation of the injury factors at issue only in the confidential version of the Report does not amount to a violation of Articles 3.1 and 3.4 of the Anti–Dumping Agreement since Article 3.4 of the Anti-Dumping Agreement contains an *obligation* to evaluate the listed injury factors, and Article 3.1 of the Anti-Dumping Agreement does not preclude the investigating authority from using confidential reasoning or facts in the analysis.

VII. NON-ATTRIBUTION

37. With regard to non-attribution analysis, the European Union asserts that the Russian Federation provided *ex post* argumentation that "is of no relevance since it does not explain how the DIMD examined this known factor".[31]

38. The Russian Federation maintains that when the allegation on the "known factor other than the dumped imports" in the meaning of Article 3.5 of the Anti-Dumping Agreement contains factual errors that undermine its relevance in the non-attribution analysis, this factor proves to be unfounded and there is no point in its further consideration in the non-attribution analysis. This is the case with alleged "known factor other than the dumped imports" mentioned by the European Union, namely the so-called "local car manufactures programme" that allegedly expired in 2010.

39. The European Union also stated that "Russia ignores that the quality problems and their impact on the state of Sollers were not only raised by PCA, but also by Daimler, who submitted, as part of its comments, detailed test reports of the Fiat Ducato showing significant quality problems".[32] However, the DIMD did not ignore these comments but concluded that the information on testing described in Auto Review falls short of being credible and does not meet the requirement of being "positive evidence".

VIII. CONFIDENTIALITY

40. With regard to confidentiality claim of the European Union, the Russian Federation believes that any document on the investigation record should be read consequentially and in its entirety. In contrast, the European Union's allegations on confidential treatment of information submitted in confidence have shown another approach. Mostly, the contested pieces of information are simply taken by the European Union out of context.

A. The DIMD properly assessed the "good cause"

41. In the investigation at issue the DIMD assessed the reasons for withholding the information from the public file and was satisfied with the "good cause" shown. Hence, no further clarifications or explanations were required.

42. We maintain that the Anti-Dumping Agreement could not be understood as to require an investigating authority to explain why an investigating authority accepted any piece of information submitted by the interested parties in the course of the anti-dumping investigation. Such explanations would go beyond the requirements of the Anti-Dumping Agreement. While the good cause alleged is to be reviewed by an investigating authority on a case-by-case basis, i.e. for each request for the confidential treatment, that does not mean that a separate or detailed explanation

[31] Second Written Submission by the European Union, para. 170.
[32] Second Written Submission by the European Union, para. 168.

of an investigation authority's decision whether to accept a particular request, or not, must be furnished in each case.

B. The EU failed to make a *prima facie* case with regard to customs statistics

43. To recall, the reason for treating customs statistics as confidential was to avoid disclosing the sales volumes used to calculate the volumes of imports of the product under investigation. The European Union, assuming that customs statistics in principle is publicly available and cannot, or even must not, be confidential, failed to make a *prima facie* case because it based its claim on allegations unsupported by evidence or tried to substantiate its claim on irrelevant references to some websites.

44. Specifically, to support its claim the European Union provides simply the following allegations: "[t]o a significant extent, this information is publicly available. It does not appear to be confidential by nature, and it was not indicated that it was provided on a confidential basis".[33] In its First Written Submission the European Union also refers to some web-sites where "a wide range of customs statistics" or "comprehensive customs statistics" "is made available".[34] With respect to the annexes to the Sollers' Application, the European Union did not even attempt to prove the publicity or "non-confidentiality" of the documents and information contained in the annexes.

45. The assertions of the European Union fall short of being substantiated enough and, therefore, must not be accepted.

IX. ESSENTIAL FACTS

46. The European Union's claim at issue touches upon sensitive systemic issues of Article 6.9 of the Anti-Dumping Agreement.[35] The explanations of obligations under Article 6.9 of the Anti-Dumping Agreement, proposed by the European Union[36], contradict the existing WTO jurisprudence. Such interpretations would lead to reduction in the level of cooperation by interested parties who would be against the disclosure of their sensitive confidential information, which is not susceptible of summary, in the different form of summary.

47. Pursuant to Article 6.9 of the Anti-Dumping Agreement the investigating authority is not obliged to disclose of data which (i) were not provided by parties to the investigation[37]; (ii) were in the possession of the investigating authority[38]; (iii) would permit to calculate specific confidential information pertaining to another interested party[39]; (iv) not permitted to be disclosed under Article 6.5 of the Anti-Dumping Agreement[40]. Therefore, before the assessing the adequacy of disclosure of "essential facts" it is necessary to understand the circumstances in which particular disclosure took place.[41]

A. Determination of Dumping

48. The Russian Federation states that the European Union still has not met its burden to establish that disclosure provided in the non-confidential version of the Draft Report and in the additional disclosure letter were inadequate.[42] The DIMD in its Draft Report disclosed the necessary information for the interested parties (including Daimler AG, Volkswagen AG and the European Union) to scrutinise the calculation of the export price and normal value for the German

[33] Opening Oral Statement of the European Union, para. 79.
[34] First Written Submission by the European Union, para. 341, footnote 316.
[35] Second Written Submission by the Russian Federation, paras. 323-372; Closing Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 11.
[36] Second Written Submission by the European Union, paras. 289, 292, 295-296.
[37] Second Written Submission by the Russian Federation, paras. 367-372; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 73.
[38] Ibid.
[39] Second Written Submission by the Russian Federation, paras. 359-366; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, paras. 71, 75.
[40] Second Written Submission by the Russian Federation, paras. 338-340, 363; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, paras. 72, 75.
[41] Second Written Submission by the Russian Federation, para. 323.
[42] Second Written Submission by the Russian Federation, paras. 310-318.

exporting producers and assess the suitability and accuracy of the data concerning import volumes and values.[43]

49. In spite of the fact that the individual volumes of imports and individual weighted average export price of LCVs produced by Daimler AG and Volkswagen AG are not susceptible of summary in the form of range[44], the Draft Report contains meaningful and detailed non-confidential version of the dumping margin calculation for the German exporting producers.[45] Moreover, the interested parties could defend their interests by submitting information on the actual volume of imports and customs value of LCVs produced by them and imported into the Customs Union and using linear relationship between the individual volumes of imports of LCVs for Daimler AG and the individual volumes of imports of LCVs for Volkswagen AG and between the individual weighted export price for Daimler AG and the individual weighted average price for Volkswagen AG.[46]

B. Determination of Injury and Causality

50. Turning to the issue of essential facts related to the determination of injury and causality the Russian Federation notes that the European Union did not make a *prima facie* case because it did not reinforce its claim with demonstration of clear violation of Article 6.9 of the Anti-Dumping Agreement caused by action or inaction of the DIMD.[47] In particular, the Russian Federation sees no European Union's attempts to understand the substance of non-confidential version of the determination on injury and causality. All the Russian Federation can see is that the European Union is trying to justify its claim without substantive analysis of disclosure of each essential fact.[48]

51. The Draft Report contains sufficiently-detailed disclosure of the essential facts under consideration that formed the basis for the determination of injury and causality.[49] Each summary of redacted confidential data contains at least one of the following: (i) the year-on-year percentage changes; (ii) year-on-year percentage point changes; (iii) the mix of the year-on-year percentage changes or year-on-year percentage point changes and textual explanation of changes; (iv) textual description of trends with respect to the injury factor.[50] Moreover, in order to get a full picture of the determination of injury and causality the interested parties should read the Draft Report in its entirety. [51]

52. Besides, the Russian Federation is of the view that if some facts are not central to the determination of injury, such facts do not constitute essential facts within the meaning of Article 6.9 of the Anti-Dumping Agreement.[52]

X. CONCLUSION

53. For these reasons, along with those that were set forth in the Russian Federation's written submissions, oral statements, responses to questions and comments, the Russian Federation respectfully requests the Panel to reject all of the European Union's claims and arguments in their entirety.

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[43] Second Written Submission by the Russian Federation, paras. 384-385; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 73.

[44] Second Written Submission by the Russian Federation, paras. 421-448,455-467; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, paras. 71, 75.

[45] Second Written Submission by the Russian Federation, paras. 391-420, 449-454; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 73.

[46] Second Written Submission by the Russian Federation, paras. 421-448, 455-465; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 71.

[47] Second Written Submission by the Russian Federation, paras. 319-322.

[48] Second Written Submission by the Russian Federation, para. 321.

[49] Second Written Submission by the Russian Federation, paras. 476, 479-623.

[50] Second Written Submission by the Russian Federation, para. 470.

[51] Closing Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 11.

[52] Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 78; Responses by the Russian Federation to the Questions from the Panel after the Second Substantive Meeting with the Parties, paras. 61-63.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1 Brazil focused its participation in these panel proceedings on five main aspects considered in its Third Party Submission, in its participation in the Third Party Session and in the answers to the Panel's questions.

2 The first problem addressed by Brazil is the definition of the domestic industry under Articles 3.1 and 4.1 of the "Anti-Dumping Agreement"[1].

3 Brazil commented in its TPS and in the answers to the Panel that the use of the term excluded by the EU was not in conformity with its strict technical meaning. For Brazil, whenever the investigating authority excludes certain producer from the concept of domestic industry, it is doing so as authorized by Article 4.1 (i) of the ADA, which allows the investigating authority to exclude certain producers from the concept of domestic industry whenever the producers are "related to the exporters or importers or are themselves importers of the allegedly dumped product"[2].

4 In the present case, if GAZ had been excluded from the definition of "domestic industry", for not qualifying specifically as a domestic producer, this company would not be included in the calculation of the collective output of the like product. In this scenario, Sollers would, thus, have held one hundred per cent of market share of the product at analysis.

5 Considering this view, Brazil believes that what happened in the investigation was not an exclusion as foreseen in Article 4.1 (i) of the ADA, but rather a possible disregard to the data that was sent by GAZ to the EAEC.

6 Brazil did not contest that a proper definition of domestic industry under Article 4.1 of the ADA is of paramount importance in order to ensure the accuracy of an injury determination. However, in order to assess whether the investigating authority acted so as to give rise to a material risk of distortion in defining the domestic industry one should not read in Article 4.1 of the ADA obligations that are not there, namely obligations that would result from a combined interpretation of Articles 4.1 and 3.1, as proposed by the EU.

7 Taking into account that the imposition of anti-dumping duties on the importation of dumped imports would benefit the domestic industry as a whole, it is certainly preferable that the "domestic industry" defined by an investigating authority encompasses every single producer, as set forth in the first sentence of Article 4.1. However, this provision clearly establishes that, in face of difficulties in obtaining reliable data from the producers as a whole, it is possible for the investigating authority to rely solely on a major proportion of the domestic producers. As Brazil stressed in the answers to the Panel, it is important that the investigating authority acts in a way to gather a complete set of data related to every producer, but that is not possible sometimes and an investigation based on a major proportion is apt.

8 Brazil does not dispute that data from the domestic producer(s) eventually left out of the "domestic industry" definition may also be relevant for the purposes of the injury analysis as they may (partially or totally) reflect the state of the industry. In the same line, Brazil does not contest that the more producers are included in the "domestic industry", the more ample the economic data set is and, therefore, the injury analysis is potentially more accurate.

9 In Brazil's understanding, however, there is no obligation in the text of Article 4.1 of the ADA that would invalidate *prima facie* an investigation based on a less ample set of data that represent, notwithstanding, a major proportion of the market share, as suggested by the EU. Under Article 4.1 of the ADA, the statistical determination of a "major proportion" by itself provides the amount of data required to ensure an accurate injury analysis. Therefore, there is no obligation to carry out a "qualitative" investigation, which, as argued by the EU, would result from a combined interpretation of Articles 3.1 and 4.1 of the ADA.

[1] EU's First Written Submission, para. 33.
[2] Article 4.1(i) of the Anti-Dumping Agreement.

10 Brazil reaffirms its understanding that a market share of 87.9% could certainly qualify as a major proportion in the sense of Article 4.1.

11 Brazil took issue as well with the EU's contention that in defining the "domestic industry" for the purposes of the injury analysis, the investigating authority should take into consideration differences in production process mainly in terms of the value added along the process and whether the domestic producer benefits or not from preferential regime. Once the like product is defined, producers engaged in its production are by definition the domestic industry.

12 Once again, it seems that the EU is conflating the standards under Article 3.1 and 4.1 of the ADA trying to evaluate the consistency of the definition of "domestic industry" adopted by the investigating authority with the lens of Article 3.1. It is Brazil's view that nothing in Article 4.1 of the ADA requires this type of qualitative assessment. For the purposes of defining the "domestic industry" it is irrelevant whether or not the producer benefits from a preferential treatment or is a manufacturer or an assembler of the like product.

13 This particular distinction has no grounds in the text of the ADA and would represent a major challenge for investigating authorities worldwide. It would be necessary, for instance, to create different categories of companies producing a specific product inside the territory of a member, divided by levels of local content and value added in the local chain of production. That would definitely render impracticable every investigation and the results of the margin of dumping would be even more biased. The same reasoning is true is respect to rules of origin[3]. Nowhere in the ADA there is an obligation to assess the origin of the product. Likewise, the fact that a producer may benefit from preferential regime is irrelevant for the purposes of Article 3.1 of the ADA as this kind of consideration does not have a bearing on the defining of the "domestic industry" in Article 4.1 of the ADA.

14 Brazil agreed with Russia that the ADA "does not provide any guidance as to how the periods for the injury and causation analysis [should be defined] nor does it require the investigating authorities to divide the period into sub-periods of a particular length"[4]. However, it was also recognized that the discretion of the investigation authority is not unlimited. As indicated in Brazil's answers to the Panel, the important is that the periods are chosen by the investigating authority as to permit verifying whether the dumping found was causing injury to the domestic industry.

15 Brazil understands that once the investigating authority has made a decision about the dumping and injury periods, and once it has determined the length of the time periods that it wishes to compare, every injury factor to be taken into account must be assessed in the chosen timeframe. The key aspect in assessing the trends in the injury analysis is to ensure that the investigating authority is comparing periods of the same duration, it does not matter whether it is a period of two years, a full calendar year or half-year/half-year, and all the concurring factors must be analyzed in the same period.

16 In Brazil's view, the kind of incoherence identified by the EU in the analysis made by the EAEC, if clearly demonstrated, would be inconsistent with Art. 3.1 of the ADA and, by consequence, with Articles 3.2, 3.4 and 3.5, and would jeopardize the objectiveness of EAEC's determination.

17 The use of different timeframes to assess the evolution of injury factors could only amount to an objective assessment if the investigating authority provided a proper justification for the practice adopted. In Brazil's view, the absence of explanation to justify the practice and the use of different approaches during the injury analysis, depending on the factual situation at hand, do not seem to be in accordance with the obligation to make an objective examination as required by Article 3.1 of the ADA.

18 Brazil considers that each of the aspects listed in Article 3.4 of the ADA must be considered during the investigation of injury. If the investigating authority does not have sufficient data or information regarding a specific issue, the report must indicate what was the reason that conducted to the absence of one of the aspects listed.

[3] EU's First Written Submission, para. 55.
[4] Russia's First Written Submission, para. 124.

19 Brazil supported that relevant factors raised by interested parties must be accompanied by a reasonable amount of evidence that minimally supports the "relevance" of the claim. Mere unfounded allegations are not sufficient to prove the presence of other factors that were injuring the domestic industry.

20 Furthermore, Brazil also upheld that an investigating authority should make this statement. Otherwise, a doubt would arise of whether the investigating authority really found that the party did not present relevant evidence or whether it deliberately avoided addressing the issue. If the latter is the case, and the authority deliberately excluded the analysis of a relevant known factor that might be causing injury, the investigating authority did not objectively examine the positive evidence before it and violated Art. 3.1 of the ADA.

21 In this particular it is also imperative to stress that the approach of the investigating authority in respect to the level of information it demands to analyze a relevant factor must be uniform. If an interested party presents two relevant factors accompanied by the same overall level of information, Brazil demonstrated its opinion that the investigating authority could not consider only one of those factors. The absence of comments by the investigating authority justifying the exclusion would result in a breach of the obligation set forth in Article 3.5 of the ADA.

22 According to the case-law[5], in Article 6.5 of the ADA, an investigating authority is entitled to treat information received as confidential under two circumstances: (a) information which is by nature confidential; and (b) information which is provided on a confidential basis. It has already been clarified that the "good cause" requirement applies to both circumstances[6] and that "the requisite 'good cause' must be shown by the interested party submitting the confidential information at issue"[7].

23 For Brazil, if an interested party presents confidential information without a justification and if the investigating authority accepts treating this information as confidential without requiring any justification to be placed into the files, there would be a clear violation of Article 6.5 of the ADA.

24 If the confidential information is submitted with a justification − the "good cause" −, then two situations might be possible: (i) the investigating authority rejects the justification. In this case, the provisions of Article 6.5.2 apply, including footnote 18; or (ii) the investigating authority accepts the justification. The "good cause" requirement is not met simply by a request from the interested party, since the very nature of the "good cause" requires analysis by the investigating authority and its agreement that a "good cause" has been effectively presented. The fact that the investigating authority accepted to treat the information as confidential implies that the investigating authority agrees with the justification. In other words, it means that the investigating authority is convinced that the justification presented meets the good cause requirement.

25 It must be pointed out, however, that there is nothing in the ADA establishing that the investigating authority has to issue a special document or to place in any report an "objective assessment [...] of whether good cause was shown for confidential treatment". The requirement of Article 6.5 is that a "good cause" is presented by the interested party. For confidentiality to be granted, the investigating authority must be satisfied that the justification presented fulfill the "good cause" requirement.

26 Another issue raised by the EU is the treatment of information that is not confidential by nature as confidential information. Although there seems to be nothing in Article 6.5 of the ADA preventing a "good cause" from being presented by any interested party − and accepted by the investigating authority − for "information that is publicly available", it seems awkward to have situations in which being an interested party in an antidumping investigation entails access to less information that if the interested party was not part of the investigation. The fact that the publicly available information is not fully reflected into the files would unduly limit transparency, due process and the ability of interested parties to defend themselves.

27 It is the Brazil's view that aggregate information or information that refers to the market as a whole − like exports, imports, production, sales and inventories − should not be treated, as a rule,

[5] Panel Report, Guatemala — Cement II, para. 8.219.
[6] Panel Report, EC — Fasteners (China), para. 7.452.
[7] Panel Report, Guatemala — Cement II, para. 8.220.

as confidential information. If, by any reason, an interested party believes that confidentiality is needed for publicly available information, the standard of the "good cause" requirement should be very high and very careful consideration should be given by the investigating authority. There must be a balance between requests for confidentiality by an interested party and the necessity of ensuring transparency for all interested parties. Confidentiality should not be used as a tool to diminish transparency.

28 If information is treated as confidential − because the investigating authority is convinced that a "good cause" has been shown −, then it falls upon the investigating authority to require the party submitting the confidential information to provide a non-confidential summary in such a level of detail that would not prevent other interested parties from understanding the substance of the information submitted in confidence. It falls also upon the investigating authority to demonstrate that its obligation of requesting the non-confidential summary has been dully fulfilled.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

A. Price Effect Analysis under Articles 3.1 and 3.2 of the AD Agreement

1 First, Articles 3.1 and 3.2 of the Anti-Dumping Agreement require an investigating authority to examine "the volume of the dumped imports" (the "volume effect") and "the effect of the dumped imports on prices in the domestic market for like products" (the "price effect") as the initial step of analyses in its injury and causation determination under Article 3. With regard to the price effect inquiry, Article 3.2 specifies three paths through which dumped imports may give rise to a price effect, i.e., (i) price undercutting; (ii) price depression; and (iii) price suppression.

2 While Article 3.2 does not prescribe any particular methodologies to assess such price effects[1], the Appellate Body in *China – GOES* clarified, with respect to price depression and suppression under the second sentence of Article 3.2, that an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices.[2]

3 In considering whether subject imports provide explanatory force for the occurrence of price suppression or depression, an investigating authority typically begins its analysis with an examination of price developments or trends of subject imports and domestic like products over the period of investigation (the "POI") and compares them to see whether the observed price trends of subject imports and domestic like products moved in the same or similar direction over the POI. However, the mere coincidence in direction and/or extent of price development or trend hardly establishes price depression or suppression. As the Appellate Body pointed out in *China – GOES*:

> [I]t would not be sufficient to identify a downward trend in the price of like domestic products over the period of investigation when considering significant price depression, or to note that prices have not risen, even though they would normally be expected to have risen, when analyzing significant price suppression. Rather, an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices.[3]

Thus, the investigating authority must further consider relevant factors and, in particular look into the cause of the coincidence in direction and/or extent of price development or trend and, specifically, the dynamic interaction between subject imports and domestic products through the market competition between them. The investigating authority must analyze and explain, based on the positive evidence on the record, that subject imports have explanatory force for the occurrence of significant depression or suppression of the domestic like products including evidence of the above dynamic interaction. Were it not for any parallel, however, such difference in price development or trend between subject imports and domestic like products would likely suggest the lack of relationship between them, let alone the lack of dynamic interaction. Faced with such contrary evidence, the investigating authority would be required to make further inquiry with positive evidence to conclude nevertheless that subject imports have explanatory force for the occurrence of suppression of domestic prices.

4 The text of Article 3 and the Appellate Body's prior findings support this view. The assessment of price suppression under Article 3.2 appears to require a counterfactual analysis, as it provides "which otherwise would have occurred". Japan notes here that, in a counterfactual analysis, the investigating authority should compare the observed actual prices with counterfactual prices, which would have occurred if the subject imports were introduced into the domestic market at

[1] *See* Panel Report, *EC –Tube or Pipe Fittings*, para. 7.278; *EC – Fasteners (China)*, para. 7.328; and *China – GOES*, para. 7.546. *See also* Russia's First Written Submission, para. 157.
[2] Appellate Body Report, *China – GOES,* para. 154.
[3] Ibid. para. 138.

normal value. To complete this analysis, the investigating authority must objectively examine various factors including a reasonable rate of return and actual costs of production. Also, it may examine, depending on the case and method used in the comparison, whether the market could have absorbed the price increase.

5 Second, in the examination of whether the subject imports have explanatory force for the occurrence of significant price suppression, the investigating authority must analyze the development or trend of price of subject imports and domestic like products, based on the assessment of price data and other information during the entire POI. This is because the price development or trend between subject imports and domestic like products and the interaction between them can only be ascertained by assessing all the relevant price data and other relevant information.

6 Findings based on the authority's picking and choosing of certain data in non-consecutive periods, while ignoring data in other periods, would be contrary to the requirement under Article 3.1. As the panel in *Mexico – Anti-Dumping Measures on Ric*e found, "such an examination on the basis of an incomplete set of data cannot be objective, nor does the selective use of certain data for the injury analysis constitute a proper establishment of the facts on which to base the determination".[4] The statement of the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* is instructive in this regard, although the case was in the context of price undercutting: "Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products *over the duration of the POI*".[5]

7 Finally, all the analysis of the investigating authority must be based on positive evidence as required by Article 3.1. The investigating authority then must provide a reasoned and adequate explanation in a published report on how it analyzed the factual situation of the present case based on the positive evidence on the record.[6] Further, as the Appellate Body explained, where the authority is faced with elements other than subject imports that may explain the significant depression or suppression of domestic prices, the authority is also required to consider relevant evidence pertaining to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices.[7] For example, when a price development or trend in subject imports and domestic prices diverges in its direction at a certain point in time during the POI, this would imply that elements other than subject imports affect the domestic prices. The investigating authority must then assess the implication of this fact carefully and explain why and how, notwithstanding such evidence, there still exists positive evidence that would outweigh such negative evidence and warrant the finding of depressive or suppressive effect on domestic prices for the entire POI.

B Definition of the "Domestic Industry" under Article 4.1 of the AD Agreement

8 Japan is of the view that the basis of the definition of the domestic industry must be all domestic producers of the like product, and not a part thereof, as explained in detail below.

[4] Panel Report, *Mexico – Anti-Dumping Measures on Ric*e, para. 7.81.

[5] Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU),* para. 5.160 (emphasis added).

[6] Appellate Body Report, *China – GOES*, para. 131.

[7] Ibid. para. 152. Japan agrees that an investigating authority must consider "elements other than subject imports that may explain the significant price suppression" in the context of the price effects analysis, separate from and independent of the non-attribution analysis mandated by Article 3.5. On the one hand, in the context of the price depression and suppression inquiry, an investigating authority must analyze "what brings about such price phenomena" and examine whether such phenomena are an effect of subject imports. As such, the analysis conducted by the investigating authority includes "element{s} other than subject import{s} that may explain the significant price suppression." On the other hand, Article 3.5 analysis concerns the causal relationship between subject imports and injury to the domestic industry and, by virtue of the phrase "through the effects of dumping, as set forth in paragraph 2 and 4", the examination of the causal relationship under Article 3.5 encompasses "all relevant evidence" before the authority, including the volume of subject imports and their price effects listed under Article 3.2, as well as all relevant economic factors concerning the state of the domestic industry listed in Article 3.4. As such, the examination under Article 3.5 covers a broader scope than the scope of the elements considered in relation to price depression and suppression under Article 3.2.

9 Article 3.1 provides that injury determinations must be based on the objective examination of both (a) the volume effect and the price effect, and (b) the consequent impact of dumped imports on "domestic producers" of the like product. The obligation to conduct objective assessment set forth in Article 3.1 requires an investigating authority to assess the significance, if any, of information it is made aware of during the process of defining the domestic industry for its assessment of injury.[8] In this sense, Articles 3.1 and 4.1 "are inextricably linked".[9]

10 Accordingly, the definition of the domestic industry must be such that it enables the authority to make an objective examination of the impact of the dumped imports on all domestic producers. Should an investigating authority act in a biased manner in defining the domestic industry, thereby distorting the injury analysis, the determination of the domestic industry would be in violation of the obligations under Articles 3.1 and 4.1.

11 Article 4.1 defines the domestic industry in two ways, either as "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".[10] In either case, the definition in a given investigation must allow the authority to make an objective examination of the injury of all domestic producers under Article 3, so as not to introduce a material risk of distortion to the injury determination.[11] The volume of production during the POI is an important factor to define the domestic industry, but the volume alone will not be decisive. As the Appellate Body pointed out, "when the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that 'substantially reflects the total domestic production' will very likely satisfy *both the quantitative and qualitative aspect of the requirements of Articles 4.1 and 3.1*".[12] The Appellate Body continued "if the proportion of the domestic producers' collective output included in the domestic industry definition is not sufficiently high that it can be considered as substantially reflecting the totality of the domestic production, then the *qualitative element becomes crucial* in establishing whether the definition of the domestic industry is consistent with Articles 4.1 and 3.1".[13] As such, the investigating authority must define the domestic industry quantitatively as well as qualitatively to reflect accurately the total domestic production.

12 With regard to the qualitative aspect of the requirement of Articles 4.1 and 3.1, the investigating authority must consider various factors. Japan recognizes that the qualitative reflection of the total domestic production requires the investigating authority to ensure that the economic situation of the defined domestic industry represents the economic situation of domestic producers as a whole. To this end, the investigating authority must assess, for example, whether the particular method to select domestic producers to be included in the domestic industry is neutral and unbiased so as not to give rise to a material risk of distortion, or whether and to what extent the products made by the domestic producers within the scope of the domestic industry interact with the products made by domestic producers not included in the domestic industry in the market at issue.

C Transparency and Due Process Rights of Interested Parties under Article 6 of the AD Agreement

13 The AD Agreement ensures the due process rights of interested parties in investigations.[14] The due process rights of adequate and sufficient opportunities of interested parties to defend their interest stand on the transparency of information during the investigation. Without adequate disclosure of information, interested parties would not be able to understand the substantive issues in a given investigation, and thus would not be able to make an effective defense. Unless interested parties provide relevant information throughout the defense process, the authority would not be able to make an appropriate determination based on enough information. In particular, an insufficient or inappropriate disclosure of essential facts would prevent the interested parties from understanding the substantive issues in the investigation, which would be the basis

[8] *See* Panel Report, *China – Broiler Products,* para. 7.413.
[9] Panel Report, *China – Broiler Products,* para. 7.408.
[10] *See* Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.322; *China – Broiler Products*, para. 7.416; and *China – Autos (US)*, para. 7.206.
[11] Appellate Body Report, *EC – Fasteners (China),* para. 414.
[12] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.303 (emphasis added).
[13] Ibid. (emphasis added).
[14] *See* Article 6 of the AD Agreement.

for the authority's assessment and from making comments on the authority's determination. This precludes the authority from making analysis properly. Thus, the transparency is important from the perspective not only of protecting the right of interested parties but also of ensuring the appropriateness of the authority's determination.

14 Article 6.9 concerns "the disclosure of 'facts' in the course of such investigations 'before a final determination is made'".[15] Facts that must be disclosed as essential facts are those that "form the basis for the decision whether to apply definitive measure." The Appellate Body clarified on this point:

> 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 measures. In our view, disclosing the essential facts under consideration pursuant to Article[] 6.9 [] is paramount for ensuring the ability of the parties concerned to defend their interests.[16]

As such, the disclosure of essential facts is a critical process to secure the transparency and due process rights of the interested parties, and must be made in such depth that interested parties are able to comment on the factual basis of the determination.

15 The essential facts include the factual elements of dumping margin calculation, such as normal value, export price and comparisons to reach the dumping margins. The panel in *China – Broiler Products* confirmed that the disclose of such must include:

> the underlying data for particular elements that ultimately comprise normal value (including the price in the ordinary course of trade of individual sales of the like product in the home market or, in the case of constructed normal value, the components that make up the total cost of production, selling and general expenses, and profit); export price (including any information used to construct export price under Article 2.3); the sales that were used in the comparisons between normal value and export price; and any adjustments for differences which affect price comparability.[17]

Indeed, no interested parties would be able to comment on the dumping determination without knowing the authority's factual basis for dumping determination.

16 Japan also notes that Article 6.9 does not permit a Member to make a distinction between "cooperating" and "non-cooperating" interested parties regarding the disclosure of the essential facts.

17 Where a fact contains confidential information, "the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the 'essential' but confidential facts."[18] Accordingly, the adequacy of the disclosure of essential facts in such case would be in fact questions of the confidential nature of the information covered under Articles 6.5 and 6.5.1.

18 The treatment of confidential information under Article 6.5 and 6.5.1, however, would not apply to a party from which the relevant information originates. That treatment would be required only with respect to the parties other than the party which submitted the information. As the panel in *Korea – Certain Paper* found, "[t]he notion of confidentiality, as elaborated upon in Article 6.5 . . . is about preserving confidentiality of information that concerns one interested party *vis-à-vis* the other interested parties".[19] Therefore, "confidentiality cannot be used as the basis for denying access to information against the company which submitted the information".[20] The actual facts, not a non-confidential summary, therefore, are required to be disclosed to the party who submitted the information on which such facts are based.

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[15] Appellate Body Report, *China – GOES,* para. 240.
[16] Appellate Body Report, *China – GOES,* para. 240.
[17] Panel Report, *China – Broiler Products*, para. 7.91. *See also* Panel Report, *China – Autos (US),* paras. 7.72-7.73.
[18] Panel Report, *China – GOES,* para. 7.410.
[19] Panel Report, *Korea – Certain Paper,* para. 7.201.
[20] Ibid.

19 In connection with the injury determination, Article 6.9 requires the authority to disclose facts, not the authority's assessment of facts. As the panel in *China – GOES* found, "it is insufficient merely to state a general finding and conclusion regarding non-subject imports, namely that as a proportion of total imports into China, non-subject imports 'continued to drop' and therefore were not a cause of injury to the domestic industry." [21] Confirming such findings, the Appellate Body stated "the essential facts that MOFCOM should have disclosed in respect of the 'low price' of subject imports include the price comparisons between subject imports and the like domestic products. … because they were required for an understanding of the occurrence of price undercutting, which served as a basis for MOFCOM's price effects finding".[22]

[21] Panel Report, *China – GOES,* para. 7.658.
[22] Appellate Body Report, *China – GOES,* para. 247.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

1 INTRODUCTION

Mr. Chairperson, Distinguished Members of the Panel.

1. The Republic of Turkey (hereinafter referred to as "Turkey") would like to thank the Panel for the opportunity to present this Oral Statement as a Third Party in the current proceedings.

2. As stated in our third party written submission, Turkey exercises its third party rights under Article 10 of the DSU in this case not only because of its systemic interest in the correct interpretation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "Anti-Dumping Agreement"), but also its substantial trade interests that is negatively affected by the measures at issue in this dispute. Turkey provided a written submission to the Panel on 29 January 2016. In this Oral Statement, Turkey does not wish to reiterate the arguments stated in its written submission but Turkey would like to briefly elaborate some important parts of its written submission.

2 CLAIMS UNDER ARTICLES 3.1 AND 4.1 OF THE ANTI-DUMPING AGREEMENT

3. In its written submission Turkey argued that the accurate definition of the "product under consideration" and "like product" constitutes the very foundation of a coherent and unbiased determination of the "domestic industry". Indeed, it is indispensable to conduct an objective injury analysis in line with the overarching principles stipulated in Article 3.1 of the Anti-Dumping Agreement.[1]

4. Since, Article 4.1 of the Anti-Dumping Agreement defines the "domestic industry" as either the domestic producers as a whole or those domestic producers whose output constitutes a major proportion of the product under consideration, Turkey considers that the investigating authority is under the obligation to identify the domestic producers of the like product as precisely as possible.

5. In a dumping investigation, however, the issue whether the investigating authority has put "reasonable" effort to identify all domestic producers is a question that must be addressed on a case-by-case basis. Accordingly, assessing whether "reasonable effort" was shown depends, on different factors; *inter alia*, the structure of the market, number of the market players, the percentage of registered production facilities and willingness of the domestic producers to declare their output data.

6. Finally, the risk of distortion of the injury analysis can be mitigated if the universe of all domestic producers is defined as entirely and accurately as possible and the "domestic industry" is defined with a view of reaching an objective picture of the injury based on positive evidence.[2]

3 CLAIMS UNDER ARTICLES 3.1, 3.2, 3.4 AND 3.5 OF THE ANTIDUMPING AGREEMENT

7. Considering the claims and arguments on the period of investigation Turkey reiterates its position that maintaining symmetry between the "period of dumping determination" and "period of injury determination" is imperative to ensure an objective and even-handed analysis on injury and

[1] Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China,* WT/DS405/R, adopted 22 February 2012, para. 7.315; Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States,* WT/DS440/R, adopted 18 June 2014, para. 7.211.

[2] Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron and Steel Fasteners from China,* WT/DS397/AB/R, adopted 28 July 2011, para. 414; Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States,* WT/DS427/R, adopted 25 September 2013, para. 7.413.

causation. As underlined in its written submission[3], Turkey is of the view that the rules set in the Recommendation of the Committee on Anti-Dumping Practices reflect this rationale clearly.

8. Turkey understands that the "price effect" analysis is one of the fundamental components of a coherent injury and causation assessment. As confirmed by the case law, the concepts of "explanatory force" and "dynamic price assessment" are significant instruments to strengthen the legal discipline of Article 3.2 and drive the investigating authority to inquire further the link between the state of the domestic industry and the price impact of the dumped imports. Turkey, however, opines that examinations to satisfy the requirements of these concepts may not be always straight forward or easily handled. Turkey acknowledges that investigating authority is under the obligation to achieve this complicated work with a view of acting in line with the principles of Article 3.1 of the Anti-Dumping Agreement.[4]

9. As regards the legal discipline stipulated in Article 3.4 of the Anti-Dumping Agreement, Turkey underlines that the investigating authority is expected not only to analyze the trend of individual factors but also to establish the cross-connections between factors that will depict a more complete and precise picture of the domestic industry's state. Furthermore, Turkey understands that the Article 3.1 of the Anti-Dumping Agreement implicitly directs the investigating authority to evaluate economic indicators of the domestic industry in a holistic manner without singling out or giving less emphasis to those indicators that display affirmative outcomes on the viability of the domestic industry.

10. Finally, as underscored in case law[5] Article 3.5 of the Anti-Dumping Agreement stipulates two separate paths of evaluation to reach the conclusion that causality is present between the dumped imports under consideration and injury of the domestic industry. From a practitioner's point of view, Turkey acknowledges that "causality" analysis is one of the most challenging parts of an investigation. In that context, Turkey opines that while the investigating authority is expected to show the link between the dumped imports and injury, it is equally responsible to examine whether the "other known factors" are in such a magnitude that they render the link between dumped imports and injury irrelevant.

4 CONCLUSION

11. Mr. Chairperson, distinguished Members of the Panel, with these comments, Turkey would like to contribute to the legal debate of the parties in this case, and express again its appreciation for this opportunity to share its views on this relevant debate, regarding the interpretation of Anti-Dumping Agreement.

12. We thank you for your kind attention and remain at your disposal for any question you may have.

[3] Turkey's Third Party Written Submission, para. 29.
[4] Ibid, paras. 34, 35.
[5] Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, para. 151.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

1. In its written submission and oral statement Ukraine provided comments on certain legal issues involving the consistency of the anti-dumping measures applied by Eurasian Economic Commission ("EAEC") with Articles 3.1, 3.2, 3.4, 3.5, 4.1, 6.5, 6.5.1, 6.9, and 12.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-dumping Agreement") and Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

2. Ukraine considers that the fact that EAEC excluded "Gorkovsky Avtomobilny Zavod" from the definition of the domestic industry on the grounds that it provided lacking or deficient information violates provisions of Articles 3.1, 4.1, and 6.6 of Anti-dumping Agreement.

3. First, Article 6.6 places "the burden of satisfying oneself of the accuracy of the information on the investigating authority"[1] with a sole exception of circumstances provided in Article 6.8 and Annex II to Anti-dumping Agreement following the extensive procedures provided therein. Moreover, Panel in *US – Hot-Rolled Steel* explicitly stated that "where information is actually submitted in time to be verified, and actually could be verified, we consider that it should generally be accepted".[2] Therefore, declaring a producer non-cooperating and disregarding its information after finding it deficient shall not be done without making an extensive effort to verify the provided information.

4. Second, Ukraine considers that deviation from specific definition of the domestic industry may result in a violation of Article 4.1. Specifically, the Panel in *Argentina – Poultry Anti-Dumping Duties* states" if a Member were to interpret the term differently in the context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1".[3] As Article 4.1 sets out explicably only two specific circumstances that permit an investigating authority to deliberately exclude producers from the domestic industry (one for related producers and one for definition of separate competitive markets), the investigating authority shall include every producer into domestic industry unless it has very strong reasons for the opposite.

5. Third, the Appellate Body in *EC – Fasteners (China)* provided plainly that "excluding a whole category of producers of the like product" is an example of behaviour that creates a risk of "distortion in defining the domestic industry"[4] and results in a lack of objective examination contrary to provisions of Article 3.1. Ukraine fails to understand how EAEC could have conducted objective examination by intentionally ignoring a producer as non-cooperating and limiting its definition of the domestic industry with applicant only even though the other producer fully participated in the investigation.

6. In connection to the fact that the Russian Federation excluded examination of certain factors (namely, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments) Ukraine notes that it was not consistent with several provisions of Anti-Dumping Agreement.

7. Ukraine finds it important to understand the precise scope of explanations of the Appellate Body in *Thailand – H-Beams.* While the Appellate Body explained that there is "no justification for reading these obligations *[of Article 12]* into the substantive provisions of Article 3.1"[5] and that the determination made by the investigating authority under Article 3.1 must not be "based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation"[6], Ukraine considers that these conclusions applied only to the factual basis and reasoning that is the basis for investigating authority's conclusions: nothing in Article 3.1 or 3.4

[1] Panel Report, Argentina – Ceramic Tiles, para. 6.57.
[2] Panel Report, US – Hot-Rolled Steel, para. 7.55.
[3] Panel report, Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil, para. 7.338
[4] Appellate Body Report, EC – Fasteners, para. 414.
[5] Appellate Body Report, Thailand – H-Beams, para. 110.
[6] Appellate Body Report, Thailand – H-Beams, para. 111.

could justify making the whole examination of the required elements of injury confidential and excluding it from the public report.

8. Moreover, such exclusion should also violate requirements of Article 12.2 Anti-dumping Agreement that reasons which have led to the imposition of final measures should be included into public notice with "due regard being paid to the requirement for the protection of confidential information". The findings of the investigating authority are not such information.

9. Therefore, Ukraine considers that excluding findings of the investigating authorities on obligatory factors from the public record violates both Article 3.4 and 12.2 of Anti-dumping Agreement.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

1 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.

2 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.

3 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

4 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.

5 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.

ANNEX D

PRELIMINARY RULING

ANNEX D-1

PRELIMINARY RULING ON THE PANEL'S JURISDICTION UNDER ARTICLE 6.2 OF THE DSU

20 April 2016

1 INTRODUCTION AND ARGUMENTS OF THE PARTIES

1.1. The Russian Federation requests a preliminary ruling on whether certain claims addressed by the European Union in its first written submission are within the scope of the request for the establishment of a panel in this dispute and therefore within the jurisdiction of this Panel.

1.2. According to the **Russian Federation**, in its Request for Consultations of 26 May 2014[1] and Request for the Establishment of a Panel of 16 September 2014[2], the European Union claimed that, inconsistently with Article 6.9 of the Anti-Dumping Agreement, the Russian Federation failed to inform the interested parties of the essential facts under consideration which form the basis of the decision to impose anti-dumping measures, including facts underlying the determinations of the existence of dumping, the calculation of the margins of dumping and "the determination of injury".[3] In its first written submission, the European Union argued that the Russian Federation had violated its obligations under Article 6.9 of the Anti-Dumping Agreement by failing to disclose to the interested parties the essential facts under consideration that formed the basis for the determination of "a causal link between the dumping and the injury".[4] In the Russian Federation's view, this is a "new claim" that was not included in either the consultations request or the panel request. As such, it impermissibly expanded the scope of the dispute and changed "the essence of the complaint".[5] The test established by the Appellate Body in respect of Article 6.2 of the DSU is "the ability of the respondent to defend itself".[6] The panel request does not meet this test in relation to the claim regarding the determination of causality. Therefore, the Russian Federation requests a preliminary ruling that this claim is not within the jurisdiction of the Panel.[7]

1.3. The **European Union** responds that the "phrase 'determination of injury' in the EU's consultation and panel requests should be read in light of Article 3 of the Anti-Dumping Agreement … [which] is entitled 'Determination of injury'."[8] Paragraph 5 of Article 3 deals with causation and non-attribution, and thus, for the European Union, the phrase "determination of injury" includes these elements. The European Union considers that paragraph 1 of the panel request refers to "injury determination" in the same sense − that is, as including causation and non-attribution.[9] Finally, paragraph 8 of the panel request is drafted in a non-exhaustive manner.[10]

2 THE GOVERNING LAW

2.1. Articles 7 and 6.2 of the DSU set out the jurisdiction of the Panel. Article 7 of the DSU provides that, unless the parties agree otherwise, the terms of reference of a panel are set out in the DSB document establishing that panel. These terms of reference are, in turn, based on the request for the establishment of the panel under Article 6.2 of the DSU, which states in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a

[1] WT/DS479/1; G/L/1070; G/ADP/D103/1; 26 May 2014 (hereinafter consultations request).
[2] WT/DS479/2; 16 September 2014 (hereinafter panel request).
[3] Russian Federation's response to Panel question No. 2, para. 6. (emphasis added)
[4] Russian Federation's first written submission, para. 684. (emphasis added)
[5] Russian Federation's first written submission, para. 685.
[6] Appellate Body Report, *Korea − Dairy*, para. 127.
[7] Russian Federation's first written submission, para. 688; See also Russian Federation's second written submission, paras. 306-309.
[8] European Union's response to Panel question No. 2, para. 2; second written submission, paras. 7-14.
[9] *Ibid.,* para. 4.
[10] *Ibid.,* para. 5.

brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2.2. Previous panel and Appellate Body reports have clarified these provisions, and it is now well understood that:

a. A panel has the inherent jurisdiction to determine whether a matter falls within its terms of reference.[11]

b. Where a matter or a claim does not satisfy the requirements of Article 6.2, it is not within the jurisdiction of the panel.[12]

c. A defect in the panel request may not be "cured" in later submissions.[13]

d. To determine whether a matter or a claim falls within the terms of reference of the panel, the panel request should be read in its entirety.[14]

e. The use of terminology such as "including" "cannot operate to include any and all other claims not specifically included in the request".[15]

f. Article 6.2 protects a Member's due process interests in the course of litigation.[16] At the same time, the procedural rules of the WTO should not be used as litigation techniques.[17]

3 ANALYSIS

3.1. The Russian Federation argues that the European Union referred only to "injury determination" but not to "causation" or "non-attribution" in the context of its claims under Article 6.9 of the Anti-Dumping Agreement (Article 6.9 claims) as set out in the consultation request and panel request. For this reason, the Russian Federation considers that the aspect of the European Union's Article 6.9 claims related to causation and non-attribution falls outside the Panel's jurisdiction.

3.2. In its panel request the European Union set out the following claims:

> 1. Articles 3.1, 3.2, 3.4 and **3.5** of the AD Agreement, because, by selecting non-consecutive periods of non-equal duration for the examination of the trends for the whole domestic industry, Russia's **injury determination** was not based on an objective examination of positive evidence. …
>
> 4. Articles 3.1 and **3.5** of the AD Agreement, because Russia failed to conduct an objective examination, based on positive evidence, **of the causal relationship** between the imports under investigation and the alleged injury to the domestic industry. Russia also failed to conduct an objective examination, based on positive evidence, of **factors other than the imports** under investigation which have been injuring the domestic industry, and therefore improperly attributed the injuries caused by these other factors to the imports under investigation. …
>
> 8. Article 6.9 of the AD Agreement, because Russia failed to inform the interested parties of the essential facts under consideration which form the basis of **the decision to impose antidumping measures**, including the essential facts underlying the

[11] Appellate Body Report, *Mexico – Taxes on Soft Drinks,* para. 45.
[12] Panel Report, *Brazil – Desiccated Coconut*, para. 288; Appellate Body Report, *US – Carbon Steel*, para. 126.
[13] Appellate Body Report, *EC – Bananas III*, para. 143.
[14] Appellate Body Report, *US – Carbon Steel,* para. 127.
[15] Appellate Body Reports, *India – Patents (US)*, para. 90; and *EC – Fasteners* (China), para. 597.
[16] Appellate Body Report, *US – Carbon Steel, para.* 126.
[17] Appellate Body Report, *US – FSC*, para. 166.

> determinations of the existence of dumping and the calculation of the margins of dumping and **the determination of injury**.[18]

The European Union specifically identified both causation and non-attribution in the claim related to Article 3.5 of the Anti-Dumping Agreement set out in paragraph 4 of its panel request. While no specific reference is made to either causation or non-attribution in paragraph 8, which sets out the Article 6.9 claims, the reference to the determination of injury is introduced by the word "including". The European Union argues that in paragraph 1 of the panel request mention is made of Article 3.5 of the Anti-Dumping Agreement in respect of the "injury determination". For this reason, both here and in paragraph 8, the term "injury determination" should be read to include causation and non-attribution.

3.3. The Russian Federation's argument raises a concern that the absence of any specific reference to causation and non-attribution in paragraph 8 of the panel request risks a measure of imprecision in the scope of the European Union's Article 6.9 claims. In this regard, we recall the findings of the panel in *Canada – Wheat Exports and Grain Imports*:

> Due process requires that the complaining party fully assume the burden of identifying the specific measures under challenge.
>
> ...
>
> In our view, it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request.[19]

At the same time, however, we recall that to determine whether a claim meets the due process requirements of Article 6.2 of the DSU, it must be viewed in the context of the panel request as a whole. As well, in any claim the measure at issue and the legal basis of the complaint impart meaning to one another.

3.4. In this context, we make the following two observations. First, the use of the same term in different places in the same document implies, absent indications to the contrary, that it should be understood to have the same scope throughout the document, and there is nothing in the panel request to suggest that this should not be the case here: following on from paragraph 1 of the panel request, subsequent references to the "injury determination" in the context of a claim referring to Articles 3.1, 3.2, 3.4, or 3.5 of the Anti-Dumping Agreement suggest to us that the term may properly be understood to include all the relevant elements of an injury determination set out in those provisions, including causation and non-attribution. Accordingly, "injury determination" when used in paragraph 8 should be understood to have the same scope as when used in paragraph 1 – that is, to also include the causation and non-attribution aspects of Article 3.5 of the Anti-Dumping Agreement. Second, paragraph 8 closely tracks the text of Article 6.9 of the Anti-Dumping Agreement in referring to "essential facts under consideration which form the basis of the decision to impose antidumping measures". The decision to impose anti-dumping measures rests on consideration of all the relevant elements of the determination of injury set out in Article 3 of the Anti-Dumping Agreement.

3.5. In our view, it is clear that Article 6.9 of the Anti-Dumping Agreement covers all elements of a decision to impose an anti-dumping measure, and that this also includes causation and non-attribution.[20] Moreover, we note that in setting out the scope of its obligation under Article 6.9 of

[18] Emphases added. These are substantially similar to the corresponding paragraphs of the consultation request.

[19] Panel Report, *Canada – Wheat Exports and Grain Imports*, paras. 24-25. (emphasis added)

[20] Appellate Body Report, *China – HP-SST*, para. 5.130: "In order to apply a definitive measure, an investigating authority must find dumping, injury to the domestic industry, and a causal link between the dumping and the injury." See also Appellate Body Report, *China – GOES*, para. 241: "We agree with the Panel that, '[i]n order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link'". And panel Report, *China – Autos (US)*, para 7.71:

> In order to apply definitive measures at the conclusion of AD investigations, an IA must find three key elements: (i) dumping; (ii) injury; and (iii) a causal link. Therefore, the "essential

the Anti-Dumping Agreement in its first written submission, the Russian Federation referred to the panel's findings in *China – Broiler Products*:

> In this regard the panel in *China – Broiler Products* has noted that the investigating authority must find three key elements in order to apply definitive measures: (i) dumping, (ii) injury **and (iii) causal link**. Therefore, **the "essential facts" underlying the findings and conclusion relating to these elements form the basis of the decision to apply definitive measures** and must be disclosed.[21]

This demonstrates that the Russian Federation was or should have been aware that in the panel request in this case, the term "determination of injury" in paragraph 8 was to be understood to encompass the elements of causation and non-attribution. The use of the term "determination of injury" without specifying the elements of causal link or non-attribution does not detract from the clear Article 6.9 legal requirement.

4 CONCLUSION

4.1. The Russian Federation has failed to establish that the claim of the European Union under Article 6.9 of the Anti-Dumping Agreement in relation to alleged failure to disclose essential facts concerning causation and non-attribution is a "new claim" that falls outside the jurisdiction of the Panel.

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facts" underlying the findings and conclusions relating to these elements form the basis for the decision to apply definitive measures, and must be disclosed.

[21] Russian Federation's first written submission, para. 718. (emphasis added) See also Russian Federation's second written submission, at para. 327 (in the section dealing with the interpretation of Article 6.9): "It is a clear that a definitive measure is applied if dumping and injury **caused by dumping** are found." (emphasis added)