



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

REPORT OF THE PANEL

*BCI deleted, as indicated [***]*

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<i>China – Autos (US)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
<i>China – Broiler Products</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
<i>China – GOES</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
<i>China – GOES (Article 21.5 – US)</i>	Panel Report, <i>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</i> , WT/DS414/RW and Add.1, adopted 31 August 2015
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>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</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Panel Reports, <i>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</i> , WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R
<i>China – X-Ray Equipment</i>	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
<i>EC – Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077
<i>EC – Bed Linen (Article 21.5 – India)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, p. 1269
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , 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
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/AB/RW and Add.1, adopted 12 February 2016
<i>EC – Hormones</i>	Appellate Body Report, <i>EC – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135

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<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>EU – Footwear (China)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
<i>Mexico – Corn Syrup</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, p. 1345
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
<i>Ukraine – Passenger Cars</i>	Panel Report, <i>Ukraine – Definitive Safeguard Measures on Certain Passenger Cars</i> , WT/DS468/R and Add.1, adopted 20 July 2015
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769

Short title	Full case title and citation
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , 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
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , 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, <i>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</i> (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, <i>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</i> (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:

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 Procedures⁵ 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 parties⁸ 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 provisions¹⁰:

- a. Articles 3.1 and 4.1 of the Anti-Dumping Agreement, because, by excluding GAZ¹¹ 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 also 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 "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 argues²⁰:

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.

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 two 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 asserted²³:

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. Evidence on the record apparently shows that the DIMD required positive evidence that it needed to consider.

Nothing on the record shows that the Russian Federation actually evaluated 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. ... the fact that the requested data was submitted in confidential form gives an

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 reasoned²⁹ and adequate³⁰ explanation as to:
 - i. how the evidence on the record supported its factual findings³¹, and
 - ii. how those factual findings support the overall determination³²;
- 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 investigation³³;
- d. take into account all such evidence submitted by the parties to the dispute³⁴; 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

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 3.1⁴¹ 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 LCVs⁴³;
- 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 product⁴⁴; 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 CU⁴⁶;
- 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 market⁴⁷;
- 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 industry⁴⁸;
- 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 production⁴⁹; 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

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 observed⁶⁷, 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 2011⁶⁸;
- b. the DIMD initiated the investigation on 16 November 2011⁶⁹;
- c. the DIMD identified the domestic like product in the notice of initiation⁷⁰;
- d. the DIMD identified the universe of domestic producers of the like product as comprising Sollers and GAZ⁷¹;
- e. the DIMD then sent "domestic producer" questionnaires to both Sollers and GAZ, and received responses from both⁷²;
- 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 Sollers⁷⁴; and
- h. the DIMD conducted its injury determination solely on the basis of data regarding Sollers.⁷⁵

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 events⁷⁶, 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 justify⁷⁸ 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 here⁷⁹; 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 LCVs⁸⁰; 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 submissions⁸⁸;
- 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 alternative⁸⁹ 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 chronology⁹⁰:

- 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 evidence⁹¹, 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 data¹⁰⁴;
- 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 case¹⁰⁷; 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 basis¹¹⁰;
- 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 Application¹¹²;
- 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 consecutive¹¹³;
- 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 Report¹¹⁵; and
- e. an end-point to end-point comparison of data for 2008 and 2011¹¹⁶ 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 investigation¹¹⁹ 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 2 nd half of 2009	Change compared with 1 st 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 2008¹²², or 2009¹²³ 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 trends¹³⁰:

- 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*: as 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 basis¹³⁷, 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 Application¹³⁹:

Table 2: format of the tables used in the Application

Injury factor	2008	2009	2010	1 st half 2010	1 st 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.

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 findings¹⁴⁵:

- a. The DIMD constructed¹⁴⁶ 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 2011¹⁴⁹; 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 prices¹⁵⁸;
 - ii. the DIMD considered the competition from GAZ as part of its non-attribution analysis¹⁵⁹; 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 suppressed 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 industry¹⁷⁰; 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 considers 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 product¹⁷⁷, and as a general matter, industry performance in a start-up period is likely to be out-of-line with normal operations¹⁷⁸; 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	2 nd half 2010	1 st 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 analysis¹⁸²; 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.

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-frame¹⁸⁷ 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 depression¹⁹⁰ 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 suppression¹⁹²;
- b. the long term price trends of dumped imports and the domestic like product do not support the conclusion of price suppression¹⁹³; 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.

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 duty²⁰¹ imposed after 2009. This downward trend in dumped import prices is seen throughout the entire period of investigation.

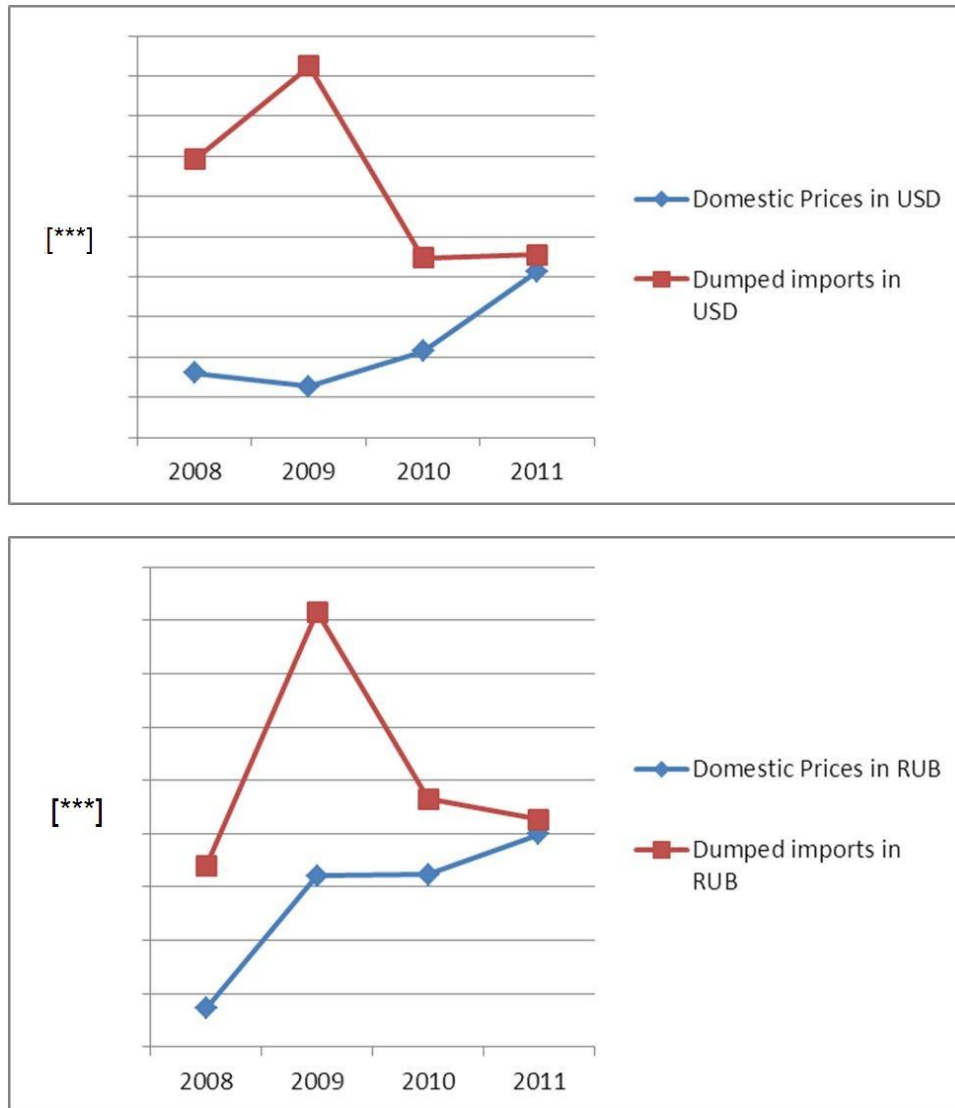
¹⁹⁷ To give an example, the domestic price would have been higher (constructed target domestic price A) in the absence of dumped imports; it increased only to a lower level (actual domestic price B) during the period when dumping occurred; it follows that the inability of domestic prices to increase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

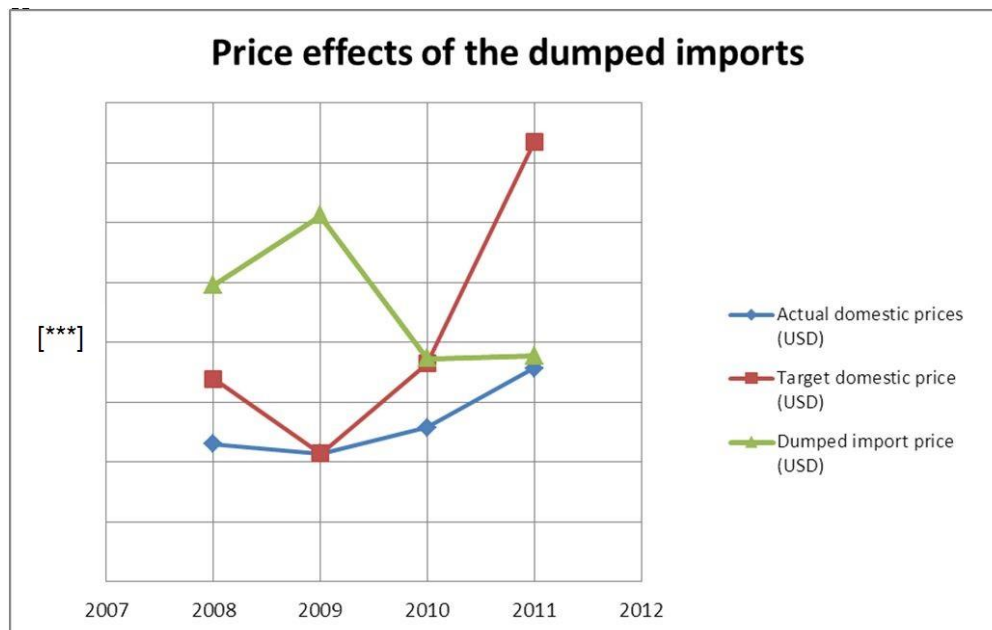
Source: European Union's second written submission (BCI).

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 costs²⁰⁸ 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 scope²²¹ 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 basis²³⁰) 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.

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.

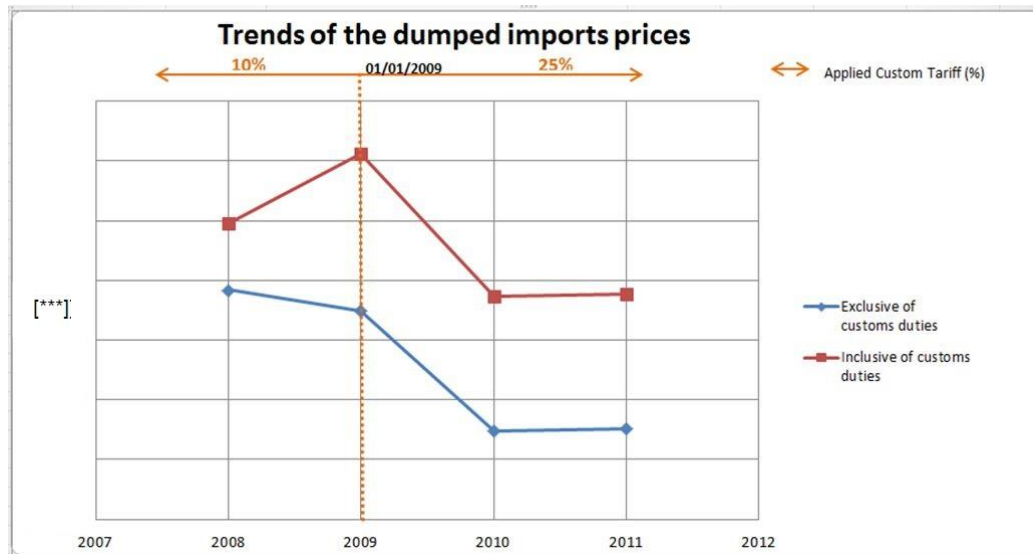
²²⁹ Russian Federation's second written submission, para. 87.

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 1 st half	POI 2 nd 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 3.4²³⁸; 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 response²⁴⁰; 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 Sollers' 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 Application²⁴⁵; 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 Auto²⁵¹, 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 argues²⁵⁵ 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 volume²⁶¹, 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 explanation²⁶³, 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 *mutatis mutandis* 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 2008²⁷⁶;
- b. the DIMD ignored information on the record concerning independent dealers' inventories when evaluating the evolution of the inventories²⁷⁷; 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 from [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. ...

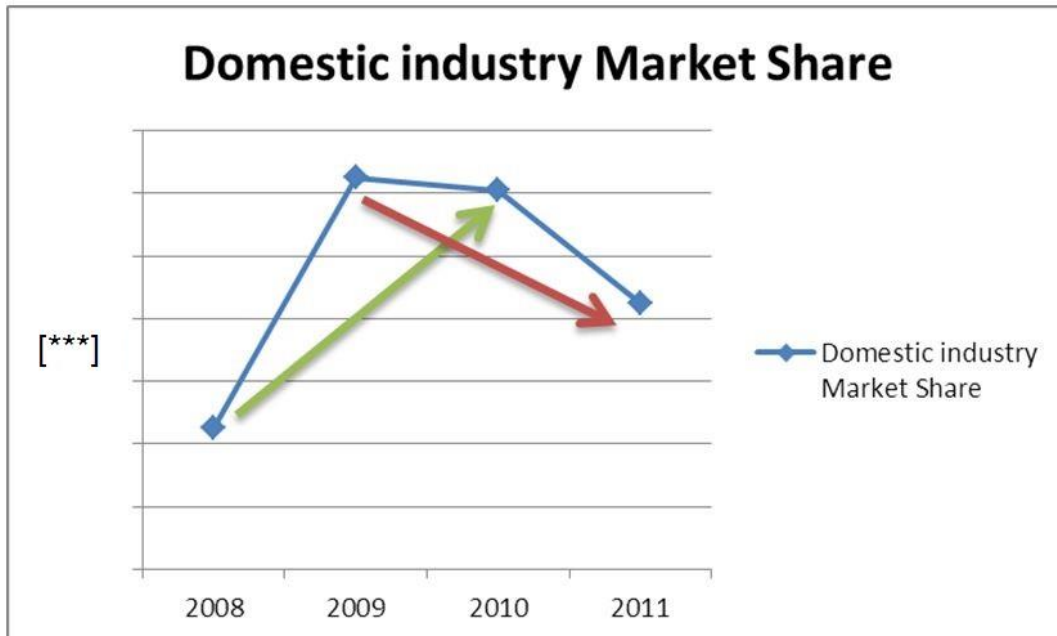
... (domestic) market share increased significantly overall.²⁸⁴

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

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 injury³¹²; 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 volume³¹⁷ and the price suppressive³¹⁸ 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.

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).

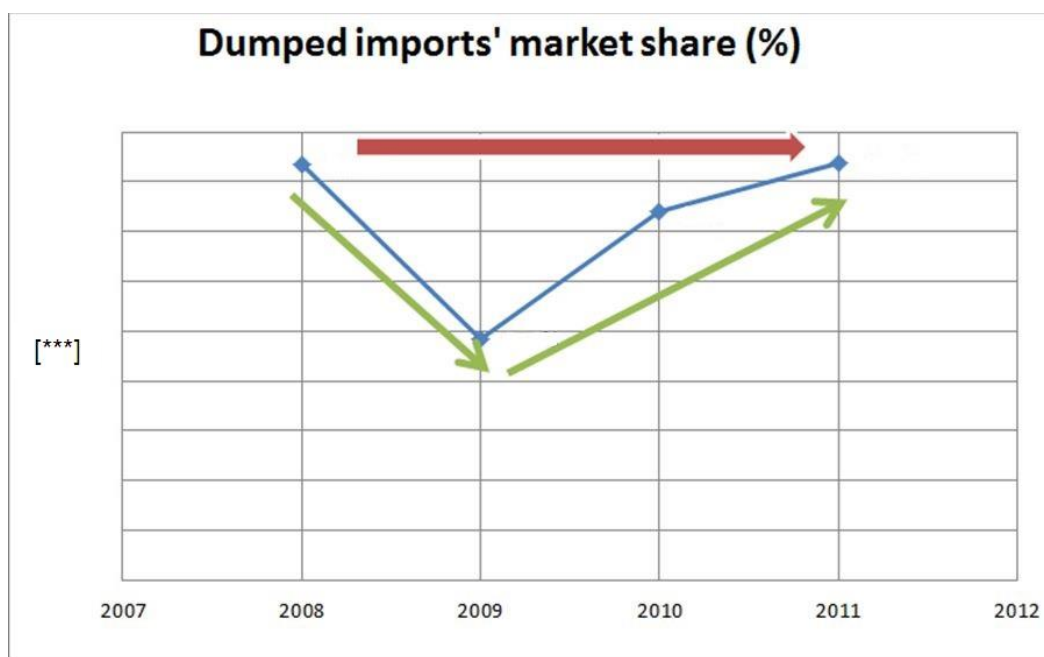
³¹⁹ European Union's first written submission, para. 275 (referring to Panel Reports, *China – GOES (Article 21.5 – US)*, para. 7.124; *China – X-Ray Equipment*, para. 7.239; *China – Autos (US)*, paras. 7.327 and 7.328; and *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 7.191).

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.

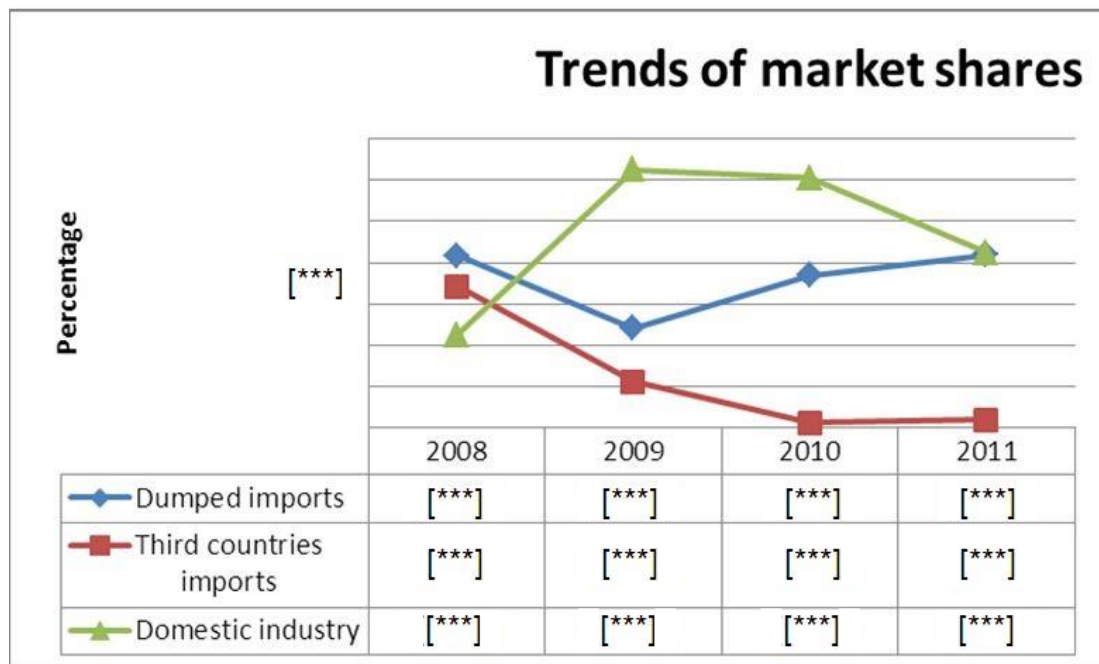
³²³ The DIMD stated in its Investigation Report that:

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.

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.

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 Sollers³³¹;
- b. competition by GAZ during the POI³³²;
- c. self-inflicted injury³³³;
- d. the financing difficulties³³⁴; 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 authority³³⁶ 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.

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 prices³⁵²;
- 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 LCVs³⁵³; 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

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 LCVs³⁶¹; 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/OD/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 injury³⁶⁷;
- b. the difficulties encountered by Sollers in obtaining financing for its joint venture with Fiat³⁶⁸; and
- c. the discontinuation of government support programmes by the end of 2010.³⁶⁹

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 at 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 at 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 once³⁷⁴ and a target to sell 75,000 Fiat Ducato vans per year³⁷⁵;
- 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 vehicles³⁸⁸ 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 6.5.1³⁹⁷;
- 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 shown³⁹⁸;
- 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)

format⁴⁰⁵, and this was sufficient to permit interested parties to have a reasonable understanding of the substance of the information submitted in confidence⁴⁰⁶; 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 information⁴⁰⁷, 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.

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 law⁴¹⁴ and certain "recommendations" issued by the investigating authority⁴¹⁵ "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 requirement⁴¹⁷ under CU law⁴¹⁸, 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 made⁴²⁰, 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/OD/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
Sollers' Application, section 11.9	imports on Sollers' obligations
Sollers' Application, section 12.2	Information on the supposed effect of the allegedly dumped imports on the diesel engine production project
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 price⁴³²;
- b. the weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG respectively⁴³³;
- c. the weighted average export price for subject products exported by each of the abovementioned companies into the CU⁴³⁴;
- d. the source of the information concerning import volumes and values used by the DIMD⁴³⁵;
- 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 2011⁴³⁷;
- 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 Sollers⁴⁴⁰;

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 2011⁴⁴¹;
- k. information on the relation of the volume of export to the total volume of production⁴⁴²;
- l. the figures for the production capacity of the domestic industry⁴⁴³;
- m. the figures for the structure of the costs of production of the domestic industry⁴⁴⁴;
- n. the production volumes, consumption volumes and sales volumes in aggregate form⁴⁴⁵;
- o. return on investments, actual and potential negative effects on cash flow and ability to raise capital or investments⁴⁴⁶; 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 confidential⁴⁴⁸;
- 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 parties⁴⁵⁰;
- 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 6.9⁴⁵³, it gives an indication both of why disclosure is to be made⁴⁵⁴ 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?

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 than 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

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 confidential⁴⁷⁴, 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 facts⁴⁸⁶ 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:

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	Not an essential fact under consideration.
b. the source of the data used to compile tables 4.1.1.3 (import volume and volume of dumped imports) ⁴⁹⁰	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.
c. market share held by GAZ in 2011 ⁴⁹¹	
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	Not properly treated as confidential. ⁵⁰⁴ <u>Accordingly</u> , the DIMD's failure to inform all interested parties of these items of information was not consistent with Article 6.9.
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	

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.
-