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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS479/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 1 December 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the European Union requests such a ruling, Russia shall submit its response to the request in its first written submission. If Russia requests such a ruling, the European Union shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following

the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party be aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the European Union could be numbered EU-1, EU-2, etc. If the last exhibit in connection with the first submission was numbered EU-5, the first exhibit of the next submission thus would be numbered EU-6.

10. Each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1, to the extent that it is practical to do so.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

- a. The Panel shall invite the European Union to make an opening statement to present its case first. Subsequently, the Panel shall invite Russia to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the European Union presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

- a. The Panel shall ask Russia if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Russia to present its opening statement, followed by the European Union. If Russia chooses not to avail itself of that right, the Panel shall invite

the European Union to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

- a. All third parties may be present during the entirety of this session.
- b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.
- c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.
- d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

- a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).
- b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 2 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.
- c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx.xxxxx@wto.org and xxxxx.xxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

- d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.
 - e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.
 - f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.
26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 14 January 2016

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS479.

1. For the purposes of these Panel proceedings, BCI includes

- a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.
- b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute may not be designated as BCI if the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.

3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.

5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

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ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1 INTRODUCTION

1. In this integrated executive summary, the European Union ("EU") summarizes the facts and arguments presented to the Panel in its first written submission, its opening and closing oral statements at the first substantive meeting and its responses to the Panel's and Russia's questions.

2 FACTUAL BACKGROUND AND THE MEASURES AT ISSUE

2. On 3 October 2011 Sollers-Elabuga LLC ("Sollers") filed an Application requesting the imposition of anti-dumping duties on imports of light commercial vehicles ("LCVs") from Germany, Italy and Turkey on the territory of the Customs Union of Belarus, Kazakhstan and Russia.

3. The product concerned is LCVs of gross vehicle weight from 2.8 tonnes to 3.5 tonnes, van-type bodies and diesel engines with cylinder capacity not exceeding 3.000 cc, designed for the transport of cargo of up to two tonnes (cargo all-metal van version) or for the combined transport of cargo and passengers (combi cargo and passenger van version) falling under HS code 8704 21 3100 and HS code 8704 21 9100 and imported in the Customs Union from Germany, Italy and Turkey.

4. The applicant argued that its output during the first half of 2011 amounted to 85.2% of the total production of the like product, and identified another producer of the like product, Gorkovsky Avtomobilny Zavod ("GAZ") for the period concerned.

5. The anti-dumping investigation was initiated on 16 November 2011. The dumping investigation period ("DIP") is from 1 July 2010 until 30 June 2011. The injury investigation period ("IIP") is from 1 January 2008 until 31 December 2011. By Notice of 16 November 2012 the Department of Internal Market Defence ("DIMD") of the Eurasian Economic Commission ("EAEC") extended the duration of the investigation for 6 months, until 16 May 2013.

6. On 14 May 2013 the DIMD introduced anti-dumping duties on imports of LCVs from Germany, Italy and Turkey on the territory of the Customs Union. The Decision entered into force on 15 June 2013. The anti-dumping duties are 29.6% for imports from Germany, 23% for imports from Italy and 11.1% for imports from Turkey. The Decision is based on the Report "Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union" of the Domestic Market Protection Department of the Eurasian Economic Commission ("the Report").

3 LEGAL ARGUMENT

3.1 Claim under Articles 3.1 and 4.1 of the AD Agreement: failure to properly determine the domestic industry

7. Pursuant to Articles 3.1 and 4.1 of the AD Agreement, provisions which are inextricably linked, the "domestic industry" should be defined as referring to the domestic producers as a whole of the like products, or as those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. Domestic producers may be left out from the definition of "domestic industry" on the basis of the two limitative reasons provided for in subparagraphs (i) and (ii) of Article 4.1 of the AD Agreement. The possibility to define the domestic industry as producers producing a major proportion of the total domestic production is not unfettered. The Appellate Body has specified that these limits are of a quantitative and qualitative nature. The proportion relied upon by the investigating authority should be representative of the domestic industry as a whole and be unbiased, without favouring the interest of any interested party, or group thereof. The investigating authority must ensure that the way in

which the domestic industry is defined does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry.

8. By excluding GAZ from the definition of "domestic industry", the DIMD acted in a biased manner, potentially leading to a risk of materially distorting the injury analysis and, thus, violating the obligations under Articles 3.1 and 4.1 of the AD Agreement.

9. First, without providing any reasons for it, the DIMD defined the product concerned by this investigation very narrowly: LCVs with diesel engine. This definition was designed to conform precisely to the type of products that Sollers was assembling in the Special Economic Zone when the application was filed (in particular, Fiat Ducato with diesel engines). LCVs with diesel engine were also the product being made and sold by GAZ during the investigation period. Sollers already noted that GAZ was producing two models of LCVs which fell under the product concerned during the IIP and DIP.

10. Second, DIMD was well aware that GAZ, the leader in the overall LCVs market in Russia, was a producer engaged in the full production cycle ("producer") manufacturing the product concerned (in particular, LCVs with diesel engine) in Russia and directly competing with Sollers. GAZ's production amounted, on average, to 12.1% of the total production during the period of investigation (i.e. the remaining production not accounted for by Sollers). Evidence on the record showed that GAZ, with its petrol and diesel models, was the undisputed leader in the overall LCV market in Russia in 2010, with 51.4% share in that market, thanks to its main models Gazelle and Sobol, whereas Fiat was the third with a share of 9.6%. In fact, evidence on the record showed that the overall market share of GAZ increased by 13% between the second half of 2010 and the first half of 2011 (i.e. the DIP), while Sollers' market share decreased by 11% during the same period, as a consequence of the fact that the price of the Gazelle Diesel was even lower than Sollers' Fiat Ducato Diesel. Being such a market leader of LCVs in Russia, it could be expected that, in principle, GAZ's economic data could have shown a somehow different picture from that portrayed by Sollers in its Application. Thus, an undistorted injury analysis would have to take data pertaining to GAZ, the overall market leader, into account.

11. Third, the DIMD failed to take into account important qualitative differences between GAZ and Sollers which could have consequences for the injury analysis. Indeed, GAZ manufactures LCVs from the beginning of the production cycle, whereas Sollers assembled Fiat Ducato from semi-knocked down sets imported from Italy. In this sense, GAZ may be regarded as a domestic "producer" of the product concerned, whereas Sollers would rather be an "assembler", bringing the LCV into existence in Russia from mainly imported parts. This is an important distinction that may have a bearing on the injury analysis. While the truly domestic producer may be more stable in its production cycle by adjusting its production costs and prices to market demand, an assembler of LCVs is more at the mercy of the value of the imported parts and other exogenous commercial considerations, without being able to quickly adapt its assembly operations to the evolution of the market. This may put "assemblers" in a more delicate situation than "producers".

12. Another relevant factor distinguishing the situation between GAZ and Sollers is that, while the former is based in Russia and is subject to the regular economic conditions in Russia, Sollers is based in the Special Economic Zone of Elabuga ("SEZ"). Despite the benefits it enjoyed in the SEZ, Sollers was still losing market share against a very efficient producers and GAZ remained in a very strong position as a market leader for the overall LCV market.

13. As a consequence of such an incorrect definition of the domestic industry, the DIMD's injury determination was also based on an incorrect data set, in violation of Article 3.1 of the AD Agreement.

3.2 Claim under Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement: selection of non-consecutive periods of non-equal duration in the injury and causation analyses

14. By selecting non-consecutive periods of non-equal duration for the examination of the trends for the whole domestic industry, the DIMD's injury determination was not based on an objective examination of positive evidence, contrary to the obligations under Article 3.1 of the AD Agreement.

15. According to the panel in *Mexico – Olive Oil* an examination can only be "objective" if it is based on data which provide an accurate and unbiased picture of what it is that one is examining. An investigating authority must ensure that in examining the evidence in the context of its injury determination an accurate and unbiased picture is provided (See also Panel Report, *China – X-Ray Scanners*). The use of non-equal, non-consecutive periods by an investigating authority, absent any justification to do so, fails to provide such an accurate and unbiased picture.

16. The use of non-equal, non-consecutive periods interrupts the logical and temporal progression of the analysis which is done for a period of one year. Moreover, it changes the logical temporal sequence of the analysed half-year periods without any explanation for the necessity to do so. The DIMD failed to provide an explanation as to why the use of non-equal, non-consecutive periods was necessary in this case.

17. The information in question should have been provided on an equal and consecutive basis, so that meaningful trends can be observed on the basis of which the investigating authority could come to the conclusion in its injury determination. Indeed, in order to present such an accurate and objective picture of the information, the DIMD should have examined the information on the basis of a sequence of measurements of the same variable collected over time (i.e. a trend). For instance, the DIMD could have provided trends on the basis of consistent annual comparisons (e.g. by comparing 2009, 2010 and 2011 with 2008, and also comparing the DIP on an annual basis with 2008). However, the EAEC further distorted its injury and causation analyses by predominantly examining information on the basis of the data of the respective preceding period, i.e. without comparing the data of each year, including the year 2011, with 2008 on a consecutive annual basis.

18. Since the DIMD relied on an examination of non-equal, non-consecutive periods for the purpose of gauging the effects of the dumped imports on the domestic industry and assessing whether the injury found to exist is caused by the dumped imports, the DIMD's injury determination is further inconsistent with Articles 3.2, 3.4 and 3.5 of the AD Agreement.

3.3 Claim under Articles 3.1 and 3.2 of the AD Agreement: failure to make an objective examination based on positive evidence of whether the effect of the allegedly dumped imports was to prevent domestic price increases, which otherwise would have occurred, to a significant degree

19. According to the AD Agreement, an investigating authority's inquiry regarding the last price effect listed in Article 3.2 (i.e. price suppression) must provide it with a meaningful understanding of whether subject imports have explanatory force for the significant depression or suppression of domestic prices that may be occurring in the domestic market, without disregarding any evidence that may call into question such explanatory force. Such analysis under Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the investigation period and needs to consider whether the price effects, including price suppression, is "significant". This understanding, in turn, provides a building block for the authority to determine whether subject imports, through their price effects, are causing injury to the domestic industry within the meaning of Article 3.5 (Appellate Body Report in *China – GOES* and *China – HP-SSST (EU)*). Indeed, the analysis under Article 3.2 concerns the relationship between subject imports and domestic prices, whereas the analysis under Article 3.5 concerns the causal relationship between the subject imports and the material injury to the domestic industry.

20. The DIMD failed to make an objective analysis based on positive evidence when considering whether the effect of the dumped imports was to prevent domestic price increases, which otherwise would have occurred, to a significant degree (i.e. price suppression). It failed to examine whether the subject imports had explanatory force for the occurrence of significant suppression of domestic prices.

21. DIMD incorrectly based its analysis on the year 2009 to show price suppression, while this year cannot – according to the DIMD's own description – be considered to be a "normal year". Second, the DIMD relied on data expressed in USD to suggest there was price suppression, ignoring the developments in the exchange rate. Third, the DIMD did not show that the dumped imports have "explanatory force" for the alleged price effects, failing to examine whether the

market would be ready to absorb further price increases. Fourth, the DIMD did not explain and demonstrate why the alleged price suppression would be "to a significant degree".

22. Because the DIMD failed to make an objective analysis based on positive evidence when considering whether the effects of the dumped imports was to prevent domestic price increases, Russia violated Articles 3.1 and 3.2 of the AD Agreement.

3.4 Claim under Articles 3.1 and 3.4 of the AD Agreement: state of the domestic industry

23. The DIMD failed to make a proper evaluation of all injury factors in context and thus failed to reach a reasoned and adequate conclusion with respect to the impact of dumped imports on the domestic industry. As a result, the EAEC failed to make a determination of injury on the basis of an "objective examination" of the disclosed factual basis (Panel Report, *Argentina – Poultry*). Therefore, the DIMD's determination of injury is inconsistent with Russia's obligations under Articles 3.1 and 3.4 AD Agreement.

24. WTO panels and the Appellate Body have consistently held that, according to Articles 3.1 and 3.4, investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to each potentially relevant factor having a bearing on the state of the industry and the weight to be attached to it (Appellate Body Report, *US – Hot-Rolled Steel*). In assessing the state of the domestic industry, investigating authorities must evaluate all factors listed in Article 3.4 and any other relevant factors having a bearing on the state of the domestic industry in the case at hand. This analysis cannot be limited to a mere identification of the "relevance or irrelevance" of each factor, but rather must be based on a thorough evaluation of the state of the industry. The analysis must explain in a satisfactory way why the evaluation of the injury factors set out under Article 3.4 leads to the determination of material injury, including an explanation of why factors which would seem to lead in the other direction do not undermine the conclusion of material injury (Panel Report, *Korea – Paper AD Duties*).

25. When examining the state of the domestic industry in the Customs Union, the DIMD acted inconsistently with Articles 3.1 and 3.4 of the AD Agreement. First, the DIMD did not base its examination of various injury factors on positive evidence, as demonstrated by the contradictions between the DIMD's findings and the evidence put forward by Sollers.

26. Second, the DIMD failed to make a proper evaluation of all injury factors in context and thus failed to reach a reasoned and adequate conclusion with respect to the impact of dumped imports on the domestic industry. It made contradictory observations and failed to consider a number of facts on the record relating to the state of the domestic industry that contradict the alleged negative trends in the domestic industry during the dumping investigation period.

27. The evidence on the record, if considered in an objective and even-handed manner, as well as evidence regarding factors that the DIMD failed to examine, demonstrate that Sollers performed extraordinarily well at the beginning of the analysed period (2008-2009), with abnormal profit levels that were due to consumers' preferences of purchasing cheaper domestic products. When the effects of the financial crisis started to fade out (in 2010 and 2011), Sollers returned to normal profitability levels, in view of the competition in the market. Returning to normality is not a state of material injury. When the trends of production and sales of each year are compared to the base year of 2008, it becomes apparent that those factors showed positive trends, even in 2011. In addition, the DIMD found material injury at a time and in a situation where a company was materially dissolving, i.e. leaving the production operations of the Fiat Ducato to move to another cooperation. This may be a challenging moment in business. However, this is not a state of material injury in an anti-dumping context.

28. Finally, the DIMD also failed to examine several injury factors, listed in Article 3.4 of the AD Agreement, i.e. the magnitude of the margin of dumping, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments.

3.5 Claim under Articles 3.1 and 3.5 of the AD Agreement: causation

29. Pursuant to Articles 3.1 and 3.5 of the AD Agreement, investigating authorities are called upon to make a determination that the material injury found was caused by the dumped imports. Moreover, investigating authorities have to examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Investigating the authorities' establishment of the facts has to be proper and their evaluation of those facts unbiased and objective so that the investigating authority's explanations are reasonable and supported by the evidence cited.

30. The DIMD found that dumped imports displaced similar goods produced by the domestic industry. The DIMD stated that, while volumes of dumped imports decreased during 2009 compared to 2008, "in 2010, during the investigated period, and in 2011, the share of imports in total consumption in the territory of the Customs Union was rising steadily, in the context of the proportional reduction of the share of the like product manufactured in the territory of the Customs Union".¹

31. Three main facts challenge the DIMD's conclusion of a causal link between the dumped import volume and the material injury. First, facts on the record reveal that imports recovered from the financial crisis and merely reached the pre-crisis level in 2011. Second, the domestic market share of Sollers and GAZ combined remained very high (at 57% in 2011). Third, the reduction in domestic share between 2009 and 2011 was less than half of the increase of the market share of dumped imports. All this evidence on the record demonstrates that the DIMD failed to properly examine the causal relationship between dumped import volume and injury.

32. Evidence on the record even showed that domestic prices were below import prices during the DIP. This further contradicts the DIMD's finding that the "dumped imports significantly prevented the growth of prices for the same Products produced by the domestic industry in the Customs Union". The DIMD failed to address how higher import prices could be the cause of suppressing an increase in domestic prices. Given that these domestic prices were below the import prices, Sollers had still a margin to further increase its domestic prices. The fact that import prices were higher than domestic prices during the DIP strongly suggests that the subject imports were not responsible for the alleged price suppression (Panel Report, *China – GOES*). This point was repeatedly raised by interested parties, but was not elaborated on by the DIMD.

33. In addition, the DIMD strongly relied on the fact that the domestic producer's costs increased by 42.7% between 2009 and 2011 whereas its prices merely rose by 6.4%. Leaving aside the issue that this finding was not based on an objective assessment of the evidence, the DIMD failed to address whether Sollers could pass on such a cost increase to its prices. The EU already stressed that the DIMD could not assume that producers can continuously increase their prices and that the domestic market would be willing to absorb these increases.

34. The DIMD failed to examine the relevance of other known factors. Sollers' own misguided business decisions that created self-inflicted harm; the termination of Sollers' cooperation with Fiat in early 2010; the domestic competition between Sollers and GAZ in the domestic market of LCVs; the difficulties in accessing finance; and the discontinuation of the government programme supporting sales of cars at the end of 2010, are known factors, other than the dumped imports, that the DIMD failed to properly examine and that caused the injury that Sollers suffered during the DIP. These factors were "known" to the investigating authority since they were raised by the participants in the investigation. They are factors "other than dumped imports" since they were not related at all to the imports. These factors were injuring the domestic industry at the same time as the dumped imports (Appellate Body Report, *EC – Pipe Fittings*). As consequence, Russia violated its obligation under Article 3.5 of the AD Agreement by failing to examine the relevance of such factors.

35. For the reasons explained above, the DIMD's causality analysis is inconsistent with Russia's obligations in Articles 3.1 and 3.5 of the AD Agreement.

¹ Report (Exhibit EU-22), Section 5.1.

3.6 Claim under Articles 6.5 and 6.5.1 of the AD Agreement: Treatment of Information as Confidential without Showing Good Cause and without Providing a Meaningful Summary

36. The Appellate Body in *EC – Fasteners (China)* considered that Articles 6.5 and 6.5.1 of the AD Agreement "set[s] out specific rules governing an investigating authority's acceptance and treatment of confidential information". Article 6.5 imposes two conditions in order for the investigating authority to be obliged to treat information submitted by the parties to an investigation as "confidential". The first condition is split up in two alternatives. Authorities must treat information as confidential (i) if it is "by nature" confidential or if it is "provided on a confidential basis" and (ii) "upon good cause shown".

37. Article 6.5.1 establishes an "alternative method" for communicating the content of confidential information "so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests". Under Article 6.5.1, an investigating authority is under an obligation to require that (i) a non-confidential summary of the information is furnished, and (ii) to ensure that the summary contains sufficient detail to permit a reasonable understanding of the information submitted in confidence. Whether the summary contains "sufficient detail" depends on the confidential nature of the information at issue, but "it must permit a *reasonable understanding* of the substance of the information withheld to allow the other parties to the investigation an opportunity to respond and defend their interests" (Appellate Body Report, *EC – Fasteners (China)*).

38. Only in "exceptional circumstances", the information may be "not susceptible of summary". In such "exceptional circumstances", the reasons why summarization is impossible must be provided in a statement. The investigating authority must scrutinize such statement. The Appellate Body has stressed that it is not enough for a party simply to claim that providing a summary "would be burdensome or costly". Rather, it must be shown that "no alternative method of presenting that information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence". Without such scrutiny by the investigating authority of the non-confidential summary, or of the statement explaining why "exceptional circumstances" make summarisation not possible, the "due process rights of other parties to the investigation are not fully respected" (Appellate Body Report, *EC – Fasteners (China)*). The jurisprudence also explains that the obligations to perform an objective assessment of good cause and require meaningful non-confidential summaries do not depend on "whether or not the underlying issue was contested in the investigation", and that a "lack of contestation is not an excuse for the absence of any assessment."²

39. Throughout the anti-dumping investigation, the DIMD treated a wide range of information as confidential. However, no good cause was required to be shown for such confidential treatment, nor did the DIMD properly assess whether there was good cause. There is no evidence in the Report or in any related documents of any objective assessment of whether good cause was shown for confidential treatment, or even that the DIMD at any point required the parties seeking confidential treatment to explain and provide reasons as to why the information at issue should be treated as confidential (Appellate Body Report, *China – HP-SSST (Japan)*).

40. Regarding the **claims related to Sollers' Application**, its non-confidential version that was made available to interested parties contains a wide range of information that is treated as confidential. The DIMD's treatment of that confidential treatment violates the AD Agreement in several ways.

41. First, Sollers did not show any "good cause" for the confidential treatment of this information, and the DIMD did not require Sollers to provide such good cause, or properly assess an alleged "good cause". The Appellate Body has stressed that the requirement to show "good cause" applies to *both* information that is "by nature" confidential *and* that which is provided to the authority "on a confidential basis" (Appellate Body Report, *EC – Fasteners (China)*). For this reason, Russia violated Article 6.5 of the AD Agreement.

² Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.61; Panel Report, *EC – Fasteners (China)*, para. 7.46.

42. Second, no meaningful summary of this information, and no explanation of why such a summary would not be possible, was provided by Sollers or required by the EAEC. For this reason, Russia violated Article 6.5.1 of the AD Agreement.

43. In addition, some of the information that is treated as confidential, notably in the non-confidential version of Sollers' questionnaire responses, seems not to be confidential by nature. This is an additional violation of the obligations under Article 6.5 of the AD Agreement. It should be stressed, however, that the other violations just described (no good cause shown, required or properly assessed, and an absence of either a meaningful summary or an explanation of why a summary would not be possible) apply to those points as well.

44. Regarding the **claims related to Sollers' questionnaire responses**, their non-confidential version³ of 3 March 2012, as updated on 31 January 2013, contains a wide range of information that is treated as confidential. Sollers did not show any "good cause" for this confidential treatment and the DIMD did not require Sollers to provide nor did it properly assess whether Sollers had shown such "good cause". For this reason, Russia violated Article 6.5 of the AD Agreement.

45. Furthermore, Sollers did not provide, and the DIMD failed to require Sollers to provide, a meaningful summary of this information, and no explanation was provided or required on why a summary would not be possible. There is nothing more than a mere indication that the information is "[CONFIDENTIAL]". For this reason, Russia violated its obligation in Article 6.5.1 of the AD Agreement.

46. The EU also makes equivalent claims of violations of Articles 6.5 and 6.5.1 of the AD Agreement, *mutatis mutandis*, regarding the confidential treatment of information in the non-confidential versions **of Turin-Auto's questionnaires responses**, along with their update of 31 January 2013 and amendment of 13 February 2013, as well as in Sollers' written comments after the hearing of 6 April 2012. The EU also challenges under Articles 6.5 and 6.5.1 the confidential treatment of the questionnaire response of GAZ, Sollers' letter of 25 December 2012, the letter of the 'Association of Russian Automakers' of 11 February 2013 and GAZ's letter of 6 March 2013.

47. In light of the foregoing, the EU submits that the DIMD's treatment of confidential information violated the obligations under Article 6.5 of the AD Agreement, by treating as confidential certain information that is neither confidential by nature nor provided on a confidential basis and by treating information as confidential without requiring a good cause to be shown and without properly assessing whether such good cause was shown, and under Article 6.5.1 of the AD Agreement, by failing to require interested parties providing confidential information to either provide non-confidential summaries thereof that would permit a reasonable understanding of the information submitted in confidence, or to indicate and state the reasons why that information is not susceptible of summary.

3.7 Claim under Article 6.9 of the AD Agreement: Failure to disclose all essential facts under consideration that formed the basis for the decision by the EAEC

48. The Appellate Body has noted that at the heart of Article 6.9 is the "requirement to disclose, before a final determination is made, the essential facts under consideration which form the basis for the decision whether or not to apply definitive measures". A timely and complete disclosure is essential for preserving the ability of interested parties to defend their interests, in particular by enabling them to challenge omissions or the use of incorrect facts (Appellate Body Report, *China – GOES*).

49. The "essential facts" are those facts that are significant in the process of reaching a decision as to whether or not to apply definitive anti-dumping measures. The facts may be those "salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome" (Appellate Body Report, *China – GOES*). The body of essential facts to be disclosed under Article 6.9 concerns the facts "under consideration" by the investigating authority in determining whether (or not) to apply measures, including but not limited to the facts that support

³ If not otherwise indicated, the European Union's references to Sollers' "questionnaire responses" relate to both the Questionnaire Response of 3 March 2012 and the Update of 31 January 2013.

the final determination to apply measures (Panel Report, *China - HP-SSST (EU)*). Essentially, in order to apply such definitive measures, an investigating authority must find dumping (including, depending upon the authority's findings, the determination of normal value, export price and the fair comparison between normal value and export price, the home market and export sales being used and the calculation methodology used to determine the dumping margin), injury and a causal link between the dumping and the injury to the domestic industry. Therefore, what constitutes an "essential fact" must be understood "in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the Anti-Dumping Agreement, as well as the factual circumstances of each case" (Appellate Body Report, *China - GOES*). When confidential information constitutes "essential facts" within the meaning of Article 6.9, the disclosure obligations under that provision should be met by disclosing non-confidential summaries of those facts.⁴ If an essential fact is treated as confidential, and either Article 6.5 or Article 6.5.1 is not complied with, the investigating authority infringes Article 6.9 by wrongly treating this information as confidential.

50. First, the DIMD failed to inform Volkswagen and Daimler of the essential facts under consideration underlying the determinations of the existence of dumping.

51. Volkswagen and Daimler did not receive an individual confidential dumping disclosure. They could only examine the non-confidential version of the Draft Report by the DIMD. The opportunity of these interested parties to inspect the facts that formed the basis of the calculation of the normal value by the EAEC was therefore limited to the EAEC Draft Report of 28 March 2013. The EU understands that the DIMD attempted to justify this on the basis of an alleged lack of cooperation in the investigation.

52. Partial non-cooperation in the context of an anti-dumping investigation can have legal consequences, including the use of facts available (Article 6.8 of the AD Agreement) and even adversely affect the outcome of the investigation for the non-cooperating party (Article 7 of Annex II to the AD Agreement). It does not, however, remove the rights of any interested party under Article 6.9 of the AD Agreement. Even if Volkswagen and Daimler failed to provide certain information to the DIMD, they should nevertheless have been informed of the essential facts under consideration.

53. The DIMD failed to disclose to Volkswagen and Daimler the essential facts under consideration that formed the basis for the calculation of the normal value of LCVs for Volkswagen and Daimler, those that formed the basis for the calculation of the export price, as well as the source of the information concerning import volumes and values.

54. Second, in the sections of the Draft Report dealing with DIMD's analysis of injury and of the existence of a causal link, the DIMD failed to disclose the essential facts under consideration to the interested parties.

55. In the section of the Draft Report dealing with DIMD's injury analysis, a wide range of essential facts is entirely omitted. In the absence of any additional individual confidential disclosure, it was therefore impossible for the interested parties to be adequately informed of the essential facts under consideration which form the basis of DIMD's determination of injury.

56. The section of the Draft Report concerning the causal link between dumping and injury similarly omits a wide range of essential facts. In the absence of any additional individual disclosure, it was therefore impossible for the interested parties to be adequately informed under the standard set by Article 6.9 of the AD Agreement. The Draft Report also does not provide a source for the information on the volume and value of imports of LCVs which formed the basis for DIMD's decision whether to apply definitive measures, in respect of the existence of injury (Section 4 of the Draft Report). The Draft Report thus failed to disclose the "essential facts under consideration which form the basis for the decision whether to apply definitive measures". Therefore, the Russia violated the obligation under Article 6.9 of the AD Agreement.

⁴ Appellate Body Report, *China - GOES*, para. 247; Panel Report, *China - Broiler Products*, para. 7.321.

3.8 Russia's anti-dumping measures on LCVs from the Germany and Italy further are inconsistent with Articles 1 and 18.4 of the AD Agreement and Article VI of the GATT 1994

57. In light of the abovementioned violations of the AD Agreement, the measures at issue are also inconsistent with Articles 1 and 18.4 of the AD Agreement, as well as with Article VI of the GATT 1994.

ANNEX B-2**FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE RUSSIAN FEDERATION****1 BURDEN OF PROOF**

1. The Russian Federation maintains that the European Union failed to meet its burden of proof to establish *prima facie* case of violation. In this respect, we recall that *prima facie* case must be based on evidence and legal argument. The Appellate Body made it clear that "[a] complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."¹

2. We recall the findings of the Appellate Body in *US-Hot-Rolled Steel* that "an objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".² This interpretation provides a standard for objective examination requirement.

3. Specifically, in this dispute the European Union claims that the DIMD acted in a biased manner. At the same time the European Union failed to prove the existence of bias. In our view, bias implies an intent that results in a situation that is more favourable to any interested party or group of interested parties. Therefore, in order to prove the existence of a bias, the existence of a reference standard which is unbiased has to be clearly demonstrated.

2 DEFINITION OF THE DOMESTIC INDUSTRY

4. The European Union asserts that "[t]he EAEC therefore deliberately excluded GAZ from the definition of "domestic industry", despite the fact that GAZ was a known producer of the like products which participated throughout the investigation".³ The European Union also argues that "the EAEC acted in a biased manner, favouring the interests of Sollers, and thus introducing a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry".⁴

5. With respect to alleged failure of the DIMD to provide "a satisfactory explanation as to why it was not necessary to include GAZ within the definition of "domestic industry" and thus examining directly or specifically its economic data", we maintain that the issue of explanation is clearly outside the scope of obligations under Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

2.1 The DIMD did not "exclude" GAZ from the definition of the domestic industry

6. The European Union's arguments are based upon the presumption that GAZ was actively participating in the investigation.⁵ This presumption is flawed because it does not take into account the fact that GAZ's questionnaire reply contained multiple deficiencies, which was the reason why the data pertaining to GAZ could not be used in the injury analysis.

7. In this respect, the Russian Federation recalls that the following approach to defining the domestic industry was used in the anti-dumping investigation at issue. The domestic industry, as referring to domestic producers of the like product, was defined, when the investigating authority defined the like product. Two domestic producers of the like product, namely GAZ and Sollers, were known to the investigating authority in the course of the anti-dumping investigation. From the outset, both producers could be included into the definition of the domestic industry for the

¹ Appellate Body Report, *US – Gambling*, para. 140.

² Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

³ First Written Submission by the European Union, para. 44.

⁴ Ibid, para. 46.

⁵ First Written Submission by the European Union, paras. 44-45.

purpose of the injury analysis. The MIT sent questionnaires for domestic producers of the like product in the territory of the Customs Union to both of them, i.e. sought information from both of them. However, both the MIT and the DIMD were unable to rely on the data submitted by GAZ given the multiple deficiencies and inconsistencies in the questionnaire reply.

8. Specifically, the questionnaire reply did not contain information on total costs per unit of production of the like product for the first half of 2010, capacity utilization, investments. The questionnaire reply contained substantial errors and inaccurate data (namely, with regard to total costs per unit, volume of production). Moreover, the analysis of the questionnaire reply raised serious doubts whether some of the information did relate only to the product concerned.

9. The Russian Federation maintains that the situation when the deficient data from one of the domestic producers of the like product cannot be used in the injury analysis is not the same as the "exclusion" of the domestic producer from the definition of the domestic industry in the meaning of Article 4.1 of the Anti-Dumping Agreement.

2.2 The DIMD did not introduce the material risk of skewing the economic data and, consequently, distorting the analysis of the state of the domestic industry

10. Further, the European Union made a number of incorrect assertions with respect to "bias of the DIMD, favouring the interests of Sollers", and alleged "introduction of the material risk of skewing the economic data and, consequently, distorting analysis of the state of the industry".⁶ The Russian Federation is of the view that bias implies an intent that results in a situation that is more favourable to any interested party or group of interested parties. We maintain that the European Union has not presented sufficient and accurate evidence to make a *prima facie* case of bias and alleged material risk of distortion.

11. First, the European Union incorrectly asserts that GAZ was the "undisputed leader" in the overall LCV market. The European Union operated with mixed figures that include the data on LCVs with gasoline engines which fall outside the scope of the like product, as defined in the anti-dumping investigation at issue.

12. Second, the European Union alleges that there are important differences between the domestic producers "which could have consequences for the injury analysis".⁷ Specifically, the European Union alleges that Sollers is rather an "assembler" than a "producer"⁸ in contrast to GAZ that may be regarded as a domestic "producer". The European Union also alleges that "Sollers' activities in Elabuga were not of sufficient economic importance"⁹ due to the rules of origin requirements. Finally, the European Union considers favourable conditions in Special Economic Zone of Elabuga to be "another relevant factor distinguishing the situation between GAZ and Sollers".¹⁰ At the same time the European Union does not provide sufficient evidence as to how these alleged distinctions could have affected the injury analysis.¹¹

13. The Russian Federation maintains that there is no obligation in the Anti-Dumping Agreement to consider these allegedly "important" distinctions when defining the domestic industry. If that were the case, it would create uncertainty and significant impediments in the course of the anti-dumping investigation.¹²

2.3 The DIMD's injury determination is not distorted, as it is based on a very high proportion that substantially reflects the total domestic production

14. The DIMD's injury determination was based on 87.9% of total domestic production of the like product. We recall that the Appellate Body in *EC-Fasteners (China)* emphasised that "a very high

⁶ First Written Submission by the European Union, para. 46.

⁷ First Written Submission by the European Union, para. 50.

⁸ Ibid.

⁹ Ibid, para. 55.

¹⁰ Ibid, para. 56.

¹¹ See First Written Submission by the Russian Federation, paras. 53-58.

¹² Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras.15-16.

proportion that "substantially reflects the total domestic production" will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1".¹³

15. We maintain that 87.9% of total domestic production qualifies for "a major proportion" of total domestic production and is a very high proportion that substantially reflects the total domestic production in the meaning of Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

3 SELECTION OF PERIODS FOR THE INJURY AND CAUSATION ANALYSES

3.1 The DIMD did not select non-consecutive periods of non-equal duration

16. First, contrary to what the European Union alleges, the DIMD did not select non-consecutive periods of non-equal duration. The DIMD has analysed the data for the period from 1 January 2008 to 31 December 2011 for the purposes of the injury and causation analysis. The DIMD has consequently considered the data for the entire period from 1 January 2008 to 31 December 2011 in relation to respective calendar years, namely 2008, 2009, 2010 and 2011. In addition to year-to-year comparison, the DIMD analysed the change of the data for the half-year sub-periods (the periods from 1 July 2010 to 31 December 2010 and 1 January 2011 to 30 June 2011) as compared to the data for the comparable periods of the respective previous year. The analysis of the data for the half-year sub-periods was supplementary to the analysis of the data for the entire period of investigation from 2008 to 2011. This method was uniformly used with regard to all injury factors.

3.2 The European Union failed to demonstrate that the DIMD's injury and causation analysis does not involve the objective determination based on positive evidence

17. Second, there is nothing in the European Union's argument capable of supporting its assertion that the investigating authority in this case made a determination that does not involve an objective examination based on positive evidence. The European Union failed to demonstrate how the alleged selection of the periods can lead to a result that would be more favourable to any interested party or how the DIMD has favoured the interests of any party to the investigation.

18. To support its claim under Article 3.1 of the Anti-Dumping Agreement, the European Union criticizes the analysis conducted by the DIMD. The European Union suggests an alternative methodology for the DIMD that "could give an accurate and objective picture". However, the proposed method offers overlaps in the periods that distort the overall picture over the entire period in its progression. In our view, such method simply cannot be used.

4 PRICE SUPPRESSION

19. The European Union submits that the DIMD failed to make objective analysis based on positive evidence when considering price suppression due to a number of reasons. First, the European Union states that the DIMD incorrectly based its analysis on the year 2009. It is convinced that "the 2009 profit level was abnormally high i.e. it represents a significant increase of 233% from the level of the profit in 2008". The Russian Federation completely disagrees with this assertion and emphasizes that the European Union mistakenly based its conclusion on relative indicators. In fact, profit increased substantially in relation to 2008 to reach its normal level in 2009. The rate of return used in the analysis was based on the year when the influence of dumped imports on the market was minimal and the domestic industry could reasonably expect to achieve such profitability taking into account macroeconomic indicators and economic performance of the relevant sector.¹⁴ The European Union insists that the DIMD "should have based itself on the year 2008 rather than the abnormal year 2009"¹⁵ without providing any evidence as to why the analysis based on 2009 was biased while the analysis based on 2008 would not have been.

20. Second, the European Union claims that the DIMD "mixed up data expressed in USD and RUB without any explanation in its price suppression analysis".¹⁶ The European Union does not show

¹³ Appellate Body Report, *EC – Fasteners (Article 21.5 - China)*, para. 5.303.

¹⁴ Responses by the Russian Federation to the Questions from the Panel after the First Substantive Meeting with the Parties, question 31, para.79-80.

¹⁵ Opening Oral Statement by the European Union, para. 39.

¹⁶ First Written Submission by the European Union, para.136.

where alleged mixing up took place in price effects analysis and how it deteriorated the results of that analysis. The Russian Federation is convinced that the evaluation of price data in the same currency provides for the objectivity of the analysis and it cannot be regarded as biased approach.

21. Third, the European Union claims that the DIMD "failed to explain and demonstrate why it was dumped imports that had brought about the alleged price suppression".¹⁷ It erroneously argues that "import and domestic prices were moving in the "contrary directions"¹⁸ while, in fact, gap between imports and domestic prices was tightening. The European Union based its conclusion on erroneous and inconsistent analysis.¹⁹ Moreover, the European Union insists that the DIMD should have analysed import prices excluding customs duties. The Russian Federation is of the view that exclusion of customs duties would undermine price comparability and lead to the breach of obligation under Article 3.1 of Anti-Dumping Agreement.

22. The European Union claims that the DIMD failed to examine "whether the market could take further increases" of domestic prices.²⁰ It believes that price suppression analysis involves such assessment.²¹ The Russian Federation supposes that Article 3.2 of Anti-Dumping Agreement does not establish the obligation to determine whether market could absorb price increases. Taking into account the fact that the DIMD did not have any evidence which could call into question the ability of the market to absorb prices (especially when import prices were higher than domestic prices) the Russian Federation maintains that the DIMD did not violate the obligations in terms of price suppression analysis.

23. Finally, the European Union claims that the DIMD "failed to explain and demonstrate why the alleged price suppression would be "to a significant degree".²² Furthermore the European Union insists that the investigating authority must determine the significance of price suppression on the basis of the list of factors.²³ The Russian Federation believes that Anti-Dumping Agreement does not oblige the investigating authority to make such inquiry. Neither such interpretation of Article 3.2 has been confirmed by the WTO case law.²⁴ The Russian Federation is convinced that the DIMD fulfilled the obligations under Article 3.2 in terms of *consideration* of significant price suppression.

5 STATE OF THE DOMESTIC INDUSTRY

5.1 The DIMD based its evaluation of injury factors on positive evidence

24. The DIMD evaluated the factors "profits" and "inventories" on the basis of positive evidence. The Report contains aggregated profit and profitability figures for the Sollers group which were calculated on the basis of data provided by Sollers and its related trading house Turin Auto, and the inventories reflected in the Report are the inventories held by Sollers.

25. The European Union claims that the DIMD failed to base its evaluation of profits and inventories on positive evidence. The evidence which the European Union adduced to support its claim is flawed. The European Union made incorrect comparisons of data from the Report with data from the Sollers' Application and/or its Questionnaire Reply, and then pointed to discrepancies, which otherwise would not have occurred. Accordingly, the European Union failed to make a *prima facie* case.

¹⁷ First Written Submission by the European Union, para. 136.

¹⁸ Ibid. para.150.

¹⁹ First Written Submission by the Russian Federation, para.181, Opening Oral Statement by the Russian Federation, para.35.

²⁰ First Written Submission by the European Union, para.154.

²¹ Opening Oral Statement by the European Union, para.44.

²² First Written Submission by the European Union, para.136.

²³ Ibid. para.157.

²⁴ Opening Oral Statement by the Russian Federation, para. 40-43, Responses by the Russian Federation to the Questions from the Panel after the First Substantive Meeting with the Parties, question 26, para. 71.

5.2 The European Union's claim that the DIMD failed to make an objective evaluation of factors and indices having a bearing on the domestic industry is not substantiated

26. The European Union claims that the DIMD failed to make a proper evaluation of factors because the Report does not always include comparisons of data for the year of 2011 to 2008. The European Union, first, overlooked the relevant parts of the Report in which the DIMD compared the evolution of production and sales from 2008 to 2011, and, second, made additional derivations of figures to complete the tables in the Report, which did not add any objectivity to the picture of the evolution of the factors over time.

27. The European Union's claim that the objectivity of the DIMD's analysis is hindered by the split of periods lacks factual basis. The DIMD did not "split" its analysis into two periods, which explains why the European Union failed to adduce any evidence from the text of the Report to substantiate its claim.

28. As to the European Union's claims regarding disclosure of the figures for profits and regarding the ability of the market to absorb a price increase, these claims are outside the scope of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

5.3 The DIMD properly took into account all facts and arguments on the record relating to the state of the domestic industry

29. The European Union claims that the DIMD should have analysed certain evidence from statements made by interested parties in the context of market shares. These statements do not contain any positive evidence relating to the overall evolution of market shares that should have been objectively examined by the DIMD under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. At the same time, the DIMD thoroughly considered in the Report the overall evolution of market shares, and examined and dismissed in the context of the causation analysis the alternative explanation of what caused the drop in production and, consequently, market shares of the domestic industry in 2011 which was referred to by an interested party.

30. The European Union believes that the DIMD should have analysed the evolution of stocks of independent dealers. Article 3.4 of the Anti-Dumping Agreement requires that an investigating authority analyse inventories without prescribing how inventories should be treated in this analysis. The DIMD analysed stocks held by the producer and the analysis was based on positive evidence. Unlike the data relating to independent dealers, the data used by the DIMD were verifiable, as required by Article 3.1 of the Anti-Dumping Agreement.

5.4 The DIMD examined all factors listed in Article 3.4 of the Anti-Dumping Agreement

31. The European Union claims that the DIMD failed to evaluate the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments. The Russian Federation submits that the DIMD evaluated the above factors. The results of the DIMD's evaluation were set forth in the confidential version of the Report.

32. The European Union could have understood from the evidence on the record that the DIMD evaluated the factors at issue but the results of such evaluation were not set forth in the public version of the Report for confidentiality reasons. The record shows that the DIMD requested the information which it needed for the evaluation of the said injury factors and that this information was submitted in confidential form.

33. Setting forth the results of the examination of some of the factors listed in Article 3.4 only in the confidential version of the final report does not amount to a violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. As the Appellate Body has observed, "Articles 3.1 and 3.4 of the Anti-Dumping Agreement do not regulate the *manner* in which the results of the "evaluation" of each injury factor are to be set out in the published documents". Article 3.4 contains an *obligation* to evaluate all fifteen factors, which is, according to the Appellate Body, "distinct from the *manner* in which the evaluation is to be set out in the published documents". Hence, Article 3.4 of the Anti-Dumping Agreement does not require that the results of the evaluation of each injury factor be set forth in the non-confidential version of the final report. The Appellate Body has also held that "the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve

an "objective" examination of the required elements of injury does not imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation".

34. The European Union also claims that the DIMD did not evaluate the factor "the magnitude of the margin of dumping". The European Union's claim is unsubstantiated. The DIMD apparently evaluated the magnitude of the margin of dumping in the context of the analysis of whether a cumulative assessment of the effects of imports under Article 3.3 of the Anti-Dumping Agreement is appropriate.

35. The evaluation of the injury factor "the magnitude of the margin of dumping" differs from the evaluation of the other listed injury factors, which are *factual indicators* of an industry's condition. What distinguishes the magnitude of the margin of dumping from the other listed factors is that it is a potential *cause* of the domestic industry's condition. The requirement of substantive compliance contained in Article 3.4 of the Anti-Dumping Agreement does not preclude the investigating authority from making an *apparent* evaluation of the factor "the magnitude of the margin of dumping" at its initial stage in the context of the analysis of whether a cumulative assessment of the effects of imports under Article 3.3 of the Anti-Dumping Agreement is appropriate. The magnitude of the margin of dumping is further *implicitly* analysed in the context of the analysis of domestic prices.

6 CAUSATION

6.1 Volume Effects

36. The European Union claims that the DIMD failed to properly examine the causal relationship between the volume of dumped imports and the injury. The European Union did not provide an alternative explanation of facts as a whole with relation to a causal link in the light of which the DIMD's explanation would not seem adequate. The reasoning in the Report is coherent and internally consistent. The DIMD provided adequate and reasonable explanation that the dumped imports, through the effects of dumping and by reason of a substantial increase in their volumes in 2010 and 2011, have captured a share of the growing market which would not have happened in the absence of dumping. The European Union's explanations, in turn, are placed outside of the context of market developments, such as trends in consumption, evolution of market shares and profitability of the domestic industry, and evolution of the share of dumped imports in the total volume of imports.

6.2 Import prices

37. The European Union claims that with respect to import prices the EAEC wrongly attributed the observed effects on the domestic industry to the dumped imports. It supports the claim by strongly relying on the arguments against the objectivity of the price suppression analysis conducted by the DIMD.²⁵

38. The Russian Federation emphasizes that the DIMD properly analysed the trends of imports prices including customs duties and domestic prices and objectively used 2009 as a benchmark for price suppression analysis. Therefore, it provided for the unbiased consideration of the effect of dumped imports on domestic prices which is the part of the causation determination.²⁶

6.3 Non-Attribution

39. The European Union argues that the findings of the DIMD with respect to termination of the license agreement between Sollers and Fiat and competition from GAZ are inconsistent with the investigation record. In fact, both factors were adequately considered by the DIMD and specifically addressed in the Report.

²⁵ First Written Submission by the European Union, paras.274-290.

²⁶ First Written Submission by the Russian Federation, paras. 301-308.

40. The European Union also claims that certain allegedly "known" factors were not examined at all.²⁷ The Russian Federation maintains that such factors were not *clearly raised* before the investigating authority. Moreover, the factors, referred to by the European Union, are unfounded because they are not supported by accurate evidence.²⁸

7 CONFIDENTIALITY

41. The European Union makes a number of claims related to confidentiality of information under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

42. Specifically, the European Union claims that a wide range of information was treated by the DIMD as confidential despite any "good cause" shown by Sollers and Turin-Auto or required to be shown by the DIMD and that there is no evidence that the DIMD properly assessed whether there was "good cause". The Russian Federation states that the DIMD required Sollers and Turin-Auto to provide "good cause" for information submitted in confidence. The requirement to provide justification for confidential treatment was established under the CU law and special instructions of the investigating authority. As nothing in the Anti-Dumping Agreement specifies how (in what form or manner) an investigating authority shall require the party submitting confidential information to show "good cause" for confidential treatment, the Russian Federation considers that the way how the DIMD required the good cause to be shown is consistent with Article 6.5 of the Anti-Dumping Agreement.

43. The European Union also argues that the DIMD treated as confidential certain information that is not confidential by nature because it cannot be considered as such or because it is expected to be reasonably available, if not public. In the view of the Russian Federation, the European Union failed to make a *prima facie* case in this respect because it bases its claim on allegations unsupported by evidence or tries to substantiate its claim on irrelevant references to some websites.

44. In respect of Article 6.5.1 of the Anti-Dumping Agreement, the European Union claims that for a wide range of information no meaningful summaries were provided by submitting party or required by the DIMD, nor any explanation of why such summaries were provided. The Russian Federation considers that the European Union's claim under Article 6.5.1 of the Anti-Dumping Agreement is unsubstantiated. The European Union in developing its arguments focused on the text, while the tables (which the text refers to) on the same page of the document actually contain information that permits a reasonable understanding of the substance of confidential information. At the same time, the text provides a description of data contained in the tables and could not be considered separately. Apparently, the European Union failed to look at the documents in their entirety and simply took the pieces of information out of context. The Russian Federation sees no violation of Article 6.5.1 of the Anti-Dumping Agreement because non-confidential summaries of confidential information were provided (except for the cases where summarization of confidential information was not possible) and such summaries permit a reasonable understanding of the confidential information.

45. In addition, the European Union claims that the DIMD omitted from the non-confidential file certain documents that were provided to the DIMD during the investigation and were relied upon by the DIMD and referred to in the Report. With respect to GAZ's Questionnaire Reply, we recall that the investigating authority could not rely upon this document due to its deficiencies and inconsistencies. The Russian Federation states that the European Union failed to substantiate the claim by accurate evidence, because the other documents mentioned by the European Union were in the public record.²⁹

46. In sum, the Russian Federation considers that the DIMD acted consistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

²⁷ First Written Submission by the European Union, paras.305-307.

²⁸ See Responses by the Russian Federation to the Questions from the Panel after the First Substantive Meeting with the Parties, paras. 91-103.

²⁹ First Written Submission by the Russian Federation, paras. 676-681.

8 ESSENTIAL FACTS

47. The issue of proper and fair disclosure demonstrates the clear relationship between Article 6.9 and Article 6.5 of the Anti-Dumping Agreement. This relationship is due to the mechanism for protection of confidential information, as set forth in the Anti-Dumping Agreement with respect to confidential data.³⁰ In this respect, the Russian Federation agrees with the findings in *China-Broilers* and *China-GOES* that "when confidential information constitutes "essential facts" within the meaning of Articles 6.9 and 12.8, the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts."³¹

8.1 Determination of Dumping

48. The Russian Federation would like to pay attention to the fact that for the purpose of the determination of margin of dumping for the German exporting producers the DIMD used the volume and the value of imports of LCVs produced by Daimler AG and Volkswagen AG because only those companies exported LCVs from Germany during the period of the investigation at issue.³²

49. The Russian Federation states that Daimler AG and Volkswagen AG were non-cooperating parties who failed to provide information requested in the questionnaire or even to respond to the questionnaire.³³ Pursuant to Article 6.9 of the Anti-Dumping Agreement the investigating authority is not obliged to provide a non-cooperating party, whose dumping rate was based on confidential data of the third parties, with confidential individual dumping disclosure.³⁴ Since the calculation of the margin of dumping for the German exporting producers was based on confidential facts available, which were not submitted by Daimler AG and Volkswagen AG, those companies could defend their interests on the basis of non-confidential summary of confidential determination of dumping³⁵ and information in their possession.³⁶

50. The DIMD explained to Daimler AG and Volkswagen AG the reasons of impossibility of individual disclosure of the volume and the value of imports of LCVs produced by these companies in its additional disclosure letter.³⁷ Moreover, the Russian Federation is of the view that aggregated data, which were calculated on the basis of confidential information pertaining to two interested parties, shall be always treated as confidential under Article 6.5 of the Anti-Dumping Agreement.³⁸ Hence, such aggregated data could not be disclosed to all interested parties in the non-confidential version of the Draft Report.

51. The non-confidential version of the Draft Report adequately and fully disclosed all the essential facts in connection with the data underlying the determination of dumping concerning the German exporting producers (e.g. the methodology and the source of data used to determine normal value and export price; the weighted average normal value and export price for LCVs

³⁰ First Written Submission by the Russian Federation, paras 722-724, 737-738, 799-800, 941-942; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 21-22.

³¹ Appellate Body Report, *China – GOES*, para. 247. Panel Report, *China – GOES*, para. 7.410. See also Panel Report, *China – Broiler Products*, para. 7.321.

³² First Written Submission by the Russian Federation, paras. 765, 832.

³³ First Written Submission by the Russian Federation, paras. 703-704, 707, 726, 742, 754, 809, 820, 877, 878; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 77; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 24.

³⁴ First Written Submission by the Russian Federation, paras. 710, 741, 766, 803, 833; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 79, 81; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 23.

³⁵ First Written Submission by the Russian Federation, paras. 710, 741, 760, 766, 803, 827, 833; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 79-80; Closing Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 23.

³⁶ First Written Submission by the Russian Federation, paras. 747-750, 771-772, 777-778, 787, 808-811, 814-816, 838-839, 853-854, 872, 877-915; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 82, 84.

³⁷ First Written Submission by the Russian Federation, paras. 786-787, 871-872; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 82.

³⁸ First Written Submission by the Russian Federation, paras. 767-782; 834-867.

produced by the German exporting producers; the formula for calculation of dumping margin, etc.).³⁹

8.2 Determination of Injury

52. Regarding the essential facts related to the determination of injury the Russian Federation outlines that the DIMD did not disclose in the Draft Report aggregate data pertaining to one or two domestic companies.⁴⁰ The Russian Federation is of the view that disclosing a confidential data in the Draft Report could lead to unauthorized disclosure of confidential information which was submitted by one of the two domestic producers.⁴¹ The types of information excluded from the Draft Report are generally those that might be treated as confidential relating *inter alia* to profitability, costs, production and sales data.⁴²

53. The non-confidential version of the Draft Report contained sufficiently-detailed disclosure of the essential facts under consideration that formed the basis for the determination of injury.⁴³ The Russian Federation outlines that each summary of redacted confidential data contains at least one of the following: (i) the year-on-year percentage changes; (ii) year-on-year percentage point changes; (iii) the mix of the year-on-year percentage changes or year-on-year percentage point changes and textual explanation of changes; (iv) textual description of trends with respect to the injury factor.⁴⁴ Moreover, the non-confidential summaries of some of the confidential information can be ascertained in terms of the relationships with other data in non-confidential version of the Draft Report.⁴⁵

9 THE ANTI-DUMPING MEASURE ON LCVS FROM GERMANY AND ITALY IS CONSISTENT WITH ARTICLES 1 AND 18.4 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF THE GATT 1994

54. The European Union claims that in light of the abovementioned alleged violations of the Anti-Dumping Agreement the anti-dumping measures on light commercial vehicles from Germany and Italy are also inconsistent with Articles 1 and 18.4 of the Anti-Dumping Agreement, as well as with Article VI of the GATT 1994.⁴⁶

55. Thus, the European Union's claim of inconsistency of the Russian anti-dumping measure on LCV from Germany and Italy with Articles 1 and 18.4 of the Anti-Dumping Agreement and Article VI of the GATT 1994 is clearly consequential and in this respect dependent on all other claims.

56. Since all other claims made by the European Union are to be rejected, the Russian Federation respectfully asks the Panel to reject the European Union's claim under consideration.

³⁹ First Written Submission by the Russian Federation, paras. 709-710, 726-730, 746-751, 770, 777, 786-787, 808-817, 838, 842, 845, 848, 853, 857, 859, 862, 892, 894, 898, 901, 922-925; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 82-83.

⁴⁰ First Written Submission by the Russian Federation, paras. 947-948, 959, 975, 988, 1002, 1016; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 87-88.

⁴¹ First Written Submission by the Russian Federation, paras. 947-948; 959-963, 973-978, 987-992, 1002-1003, 1016-1017; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 87-88.

⁴² First Written Submission by the Russian Federation, paras. 946, 954, 961, 976, 989, 1002, 1016; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 87.

⁴³ First Written Submission by the Russian Federation, paras. 945, 953, 956-957, 964-970, 979-984, 992-998, 1004-1012, 1018-1014; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, paras. 89-90.

⁴⁴ First Written Submission by the Russian Federation, paras. 89, 94, 96, 103, 104, 106, 109, 956, 968, 983, 996, 1006, 1007, 1018, 1019; Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 90.

⁴⁵ Opening Oral Statement of the Russian Federation at the First Substantive Meeting of the Panel, para. 90.

⁴⁶ First Written Submission by the European Union, para. 452.

10 CONCLUSION

57. The Russian Federation respectfully requests the Panel to reject all of the European Union's claims and arguments in their entirety, finding instead that, the Russian Federation acted consistently with all its obligations under the Anti-Dumping Agreement and the GATT 1994.

ANNEX B-3**SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE EUROPEAN UNION****1 INTRODUCTION**

1. In this integrated executive summary, the European Union ("EU") summarizes the facts and arguments presented to the Panel in its second written submission, its opening and closing oral statements at the second substantive meeting and its responses to the Panel's and Russia's questions.

2 RUSSIA'S REQUEST FOR A PRELIMINARY RULING

2. Russia requests the Panel to rule that the EU's claims under Article 6.9 of the Anti-Dumping Agreement ("AD Agreement") are outside the Panel's terms of reference insofar as they concern the issue of causal link between dumping and injury.

3. This request should be rejected. The EU's panel request, paragraph 8, clearly covers the disclosure of essential facts related to the causal link between dumping and injury. Moreover, the EU's panel request, paragraph 8, just like Article 6.9 of the AD Agreement, refers generally to all essential facts which formed the basis of the anti-dumping measure with the word "including". Therefore, the language of the panel request was not limited to dumping and injury. Thus, even if the issue of causal link was somehow said to fall outside the scope of the determination of injury, despite the clear language of the AD Agreement, it would still be covered by the language of the panel request.

3 CLAIMS RELATING TO THE DIMD'S INJURY DETERMINATION**3.1 Claim under Articles 3.1 and 4.1 of the AD Agreement: failure to properly determine the domestic industry****3.1.1 The definition of the domestic industry as Sollers only violates Articles 4.1 and 3.1 of the AD Agreement**

4. According to Article 4.1 of the AD Agreement, the domestic industry is defined for the purpose of the AD Agreement *either* as the domestic producers as a whole, *or* those of them whose collective output represents a major proportion of total domestic production. Hence, Article 4.1 provides two options for defining the domestic industry. Further, Article 4.1 specifies two exceptions that permit an investigating authority to exclude certain domestic producers that would otherwise fall within the definition, from the domestic industry. No other options for excluding producers from the domestic industry exist and thus no other exclusions are permissible under Article 4.1.

5. Russia confirms that the Department of Internal Market Defence ("DIMD") considered that both Sollers-Elabuga LLC ("Sollers") and Gorkovsky Avtomobilny Zavod ("GAZ") were "producers of the like product". Russia also confirms that GAZ produced the product concerned during the period under investigation. Nonetheless, according to Russia's clarifications, the DIMD excluded GAZ from the definition of the domestic industry, since "the domestic industry was eventually defined as not including GAZ".

6. This directly violates the obligation under Article 4.1 of the AD Agreement. Indeed, GAZ was not excluded under one of the two exceptions listed in paragraphs (i) and (ii) of Article 4.1. Rather, Russia claims that the reason for limiting the domestic industry to Sollers only, and excluding GAZ, was the "absence of correct and verifiable data" for GAZ. A WTO Member breaches Article 4.1 of the AD Agreement if it excludes a known producer from the definition of domestic industry in view of any other reasons not specified in Article 4.1, or if it excludes consciously a known producer of the product considered to be like, for instance, in *EC – Salmon (Norway)*.

3.1.2 Alleged deficiency of GAZ's questionnaire response

7. Russia considers that the DIMD was justified in excluding this known producer from the domestic industry definition on the basis of a number of factual arguments. Russia alleges that GAZ's questionnaire response was deficient.

8. Yet, the Report "Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union" of the Domestic Market Protection Department of the Eurasian Economic Commission ("the Report") does not contain any information that GAZ failed to provide the requested information. Russia acknowledges this explicitly. In fact, the questionnaire reply that Russia provided as an exhibit in these proceedings contains data on *all* injury factors. It is apparent from the Report that GAZ participated throughout the investigation.

9. The EU considers that, if the DIMD has defined domestic industry on the basis of Sollers only, relying on data outside such definition is contrary to Article 3.1 of the AD Agreement. Indeed, as stated in Panel Report in *EC – Bed Linen*, once the domestic industry is defined, it is not possible to use information in the injury analysis that does not belong to the defined domestic industry.

3.1.3 If the DIMD relied on a "major proportion" option in Article 4.1, the DIMD ignored the qualitative elements of the domestic industry

10. In its responses to the Panel's questions, Russia now argues that GAZ does not belong to the defined domestic industry in the first place. However, even if the DIMD defined the domestic industry as a "major proportion of the total domestic production", under the second option of Article 4.1 of the AD Agreement, it still violated Articles 4.1 and 3.1 of the AD Agreement because it ignored the qualitative components of the domestic industry definition.

11. The EU has explained in its responses to the Panel's questions that the obligations in Articles 3.1 and 4.1 must be read together, since the former provides relevant context for the latter. Indeed, reading the obligations in Articles 3.1 and 4.1 together, the Appellate Body in *EC – Fasteners (Article 21.5)* "read the requirement in Article 4.1 that domestic producers' output constitute a 'major proportion' as having both quantitative and qualitative connotations". Therefore, the authority may not leave out from the definition of the domestic industry producers that have relevant qualitative characteristics by relying on the "major proportion" option.

12. Thus, the DIMD could not limit its injury analysis to the domestic industry by focusing on Sollers only, on the basis that it constitutes a "major proportion of the total domestic production". Even if the proportion chosen to define the domestic industry is high, this does not mean that the qualitative aspects can automatically be disregarded by the investigating authority.

3.1.4 Distinctions between Sollers and GAZ show that GAZ was genuinely a domestic producer with relevant qualitative characteristics distinct from Sollers

13. Russia takes issue with the EU argument that Sollers is more adequately described as an "assembler", whereas GAZ is a true "producer" of light commercial vehicles ("LCVs"). Russia suggests that the EU did "not provide any evidence with respect to the consequences of including GAZ into the injury analysis".

14. The EU has explained that an investigating authority has the obligation to ensure that the definition is "representative of the domestic industry as a whole and be unbiased". As a producer, GAZ has relevant qualitative characteristics that are different from Sollers, as an assembler. Sollers assembled the Fiat Ducato from semi-knocked down sets imported from Italy. In contrast, GAZ produces LCVs from the very beginning of the production cycle. This is an important qualitative difference.

15. Whilst an investigating authority may not be required to examine the composition of the domestic industry as "assemblers" or "full producers" in all cases in order to avoid a violation of Article 3.1 of the AD Agreement, in the present case where there were only two domestic producers of the product concerned (one, a full producer, and the other an assembler), the EU considers that the DIMD should have included GAZ in its definition of domestic industry.

3.1.5 GAZ was the undisputed leader in the LCV market

16. Russia further suggests that the EU arguments that GAZ was the undisputed leader in the overall LCV market is flawed because the "alleged leadership does not relate to the market of LCVs with diesel engines that were identified as the product under consideration and the like product".

17. However, the evidence that is now before the Panel, as well as Russia's response to the EU's questions, shows that GAZ was producing the like product from the beginning of the injury investigation period (starting in 2008).

3.2 Claim under Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement: Selection of non-consecutive periods of non-equal duration in the injury and causation analysis

3.2.1 The DIMD's selective use of time periods is inconsistent with the legal obligations in Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement

18. The EU disagrees with Russia that the AD Agreement does not provide any guidance as to how the periods for the injury and causation analysis must be defined. Article 3.1 of the AD Agreement does impose limits on the manner in which an investigating authority selects time periods. An investigating authority must not depict the state of the domestic industry in a manner that lacks accuracy and involves bias. If the investigating authority deviates from the usual collection of data by year, it must explain the reasons for doing so, to take away any reasonable doubts with regard to its selection of time periods.

19. The Appellate Body in *Mexico – Beef and Rice* has stressed that when an investigating authority selects certain time periods for its injury determination such that the most negative side of the state of the industry is shown, it did not provide an "accurate and unbiased picture" of the domestic industry, and thus failed to make an "objective examination" as required by Article 3.1 of the AD Agreement.

20. Thus, the DIMD had to be particularly cautious, given that the presentation of the evidence by half-years in 2010 and 2011 was done by the petitioner (Sollers) itself in its application, and also without providing any valid reason to do so.

3.2.2 The DIMD relied on non-consecutive periods of non-equal duration to support its conclusions on injury

21. Russia ignores major parts of the Report when it suggests that the injury conclusions were principally based on year-by-year comparisons, and not on the consideration of non-consecutive, non-equal time periods. The DIMD has split up the injury investigation period in its evaluation of each injury factor, contrasting the developments in the time period 2008-2010 and the time period second half 2010-first half 2011 (in which the DIMD did not compare consecutive time periods, but "jumped" six months). Russia suggests that the reason for relying on non-consecutive time periods for its injury analysis, is the "need to eliminate the possible time lag in the injury suffered by the domestic industry of the CU as a result of dumped imports of Products in the 2nd half of 2010".

22. While the EU considers that in abstract terms there may be reasons for such an approach, such as the seasonality of the product at issue, nowhere in its Report did the EAEC explain whether or why there was, in fact, a time lag between the allegedly dumped imports and injury, or why precisely a six month time lag was expected. The EU wonders what the reason was to split the POI as the DIMD did, other than to show artificially negative trends, *inter alia*, that Sollers incurred losses already towards the end of the POI. Indeed, if the DIMD had considered the POI as a full year, rather than to split it up in two halves, it would have found that for the full POI, no losses were made.

3.2.3 The DIMD failed to make an end-point to end-point analysis of all factors it examined

23. The EU has explained that, in order to make an objective evaluation based on positive evidence, the DIMD had to assess the trends in the injury analysis by making both an analysis of the trend during the period of data collection by means of an end-point to end-point comparison

(2008-2011), and year-by-year (or half year-by-half year) comparison of equal time periods. This is necessary to provide an accurate and unbiased picture of the state of the domestic industry, and thus an objective examination.

24. Russia does not identify any other instances where the DIMD made a longer term trend analysis for the entire injury investigation period (2008-2011). The other examples that Russia provides in its responses only focus on 2009-2011. The EU reconstructed based on the public version of the Final Report the 2008-2011 trends which were omitted by the DIMD. The EAEC could have well provided those trends but consciously decided to omit them in the tables, presumably in an attempt to disguise the lack of objectivity in the presentation of the data.

3.2.4 The selection of non-consecutive periods of non-equal duration by the DIMD leads to a picture that is biased and lacks objectivity

25. The EU disagrees with Russia's allegation that the EU has not demonstrated why the DIMD's selection of non-successive periods of non-equal duration failed to provide an objective examination of the positive evidence. Although the EU considers that there is no obligation for the complainant to positively demonstrate that an investigating authority was biased, it has shown in detail the contrast between the DIMD's selective use of time periods, on the one hand, and what an objective picture of the developments in the domestic industry would look like.

26. Whereas, under the DIMD's approach, there was a suggestion that during the POI, i.e. from the second half of 2010 to the first half of 2011, the domestic industry underwent negative developments, placing the POI in the context of the longer-term developments from 2008 to 2010 shows quite a different, positive, picture. The figures presented by the EU show how domestic sales volumes, domestic production volume, domestic prices and domestic market shares, all showed a positive trend from 2008 to 2011, in that year reaching a level significantly above that of 2008.

27. The EU further disagrees with Russia that, in the present case, any deficiency caused by the consideration of non-equal and non-consecutive periods in the POI does not undermine the injury and causation analysis because the data for the period from 1 January 2008 to 31 December 2011 was analysed on an annual basis, which allegedly sufficed to establish the existence of the material injury and the causal link in an objective manner. Precisely in a situation where the POI includes two calendar years the investigating authority should contextualise the data shown in the POI with the other trends observed for the injury period. Otherwise, it is not possible to show attribution.

3.3 Claim under Articles 3.1 and 3.2 of the AD Agreement: The DIMD did not make an objective examination based on positive evidence when considering alleged price suppression to a significant degree

3.3.1 2009 was not a "normal year" and could not be used by the DIMD without any adjustment as the basis for calculating prices that would otherwise have occurred

28. The DIMD failed to make an objective assessment, based on positive evidence, of the price suppression because it took as "reasonable rate of return" the profit level during a year (2009) that was, according to the DIMD itself, marked by the financial and economic crisis and consumer preference for domestic LCVs. Russia ignores that fact that the DIMD itself considered 2009 to be exceptional.

29. The EU noted the enormous profit increase from 2008 to 2009 with 233.8%. Likewise, the EU showed on the basis of the actual data provided in the confidential version of the Final Report how the 2009 profit levels were extremely high when compared to the quasi-similar levels reached by Sollers in 2008 and 2010 respectively. Moreover, a number of injury indicators such as the production and sales volume, the capacity utilisation, the employment, the investment went down, and the cost of production clearly shows that 2009 was not an ordinary year in which the domestic industry was healthy.

3.3.2 The DIMD relied on data expressed in USD to suggest there was price suppression, while ignoring the impact of the exchange rate developments

30. The DIMD relied on data expressed in USD to suggest there was price suppression, while ignoring the impact of the exchange rate developments. The DIMD calculated only the domestic and the import prices in USD while other data related with the cost of production, the profit and loss analysis and the injury analysis are shown in RUB. Russia alleges that the conversion of domestic prices in USD was needed because it enabled the comparison of prices of imports and domestic sales in the same currency.

31. However, in the absence of any explanation for the reasons for this approach taken by the DIMD, the EU raised concerns with regard to the objectivity of this analysis. As can be seen from the figures provided by the EU, the trend expressed in RUB shows a constant and relatively moderate increase in the domestic prices throughout the period considered. In contrast, the same trend expressed in USD showed a decline of domestic prices at the beginning of the period considered (which was caused by the exchange rates) and higher change in the increase of domestic prices. This ultimately served to support the DIMD's allegation that Sollers could not increase domestic prices to pass on its costs of production, i.e. by showing how domestic prices had constantly increased throughout the period.

3.3.3 The DIMD did not show that the dumped imports have "explanatory force" for the alleged price effects

32. The EU questions that the dumped imports could have "explanatory force" for evolution of domestic prices. First, import prices remained above domestic prices during the entire POI. The fact that import prices were higher than domestic prices (regardless of the currency used to express those prices) during the POI suggest that other factors, unrelated to subject imports, were responsible for the alleged price suppression.

33. Second, the considerable increase in domestic prices between 2008 and 2009, and again between 2010 and 2011, in combination with quality problems experienced by the Fiat Ducato LCVs assembled by Sollers and the significant raise in costs of production (due to the raising costs of raw materials), should have lead the DIMD to examine whether consumers would be willing to absorb further price increases. When making its price suppression analysis, an investigating authority must examine elements that may explain the significant price suppression, such as market circumstances that indicate that consumers would, in any event, not be willing to accept further price increases.

34. Third, further questioning the explanatory force of the dumped imports for the domestic price effects is the presence of GAZ as a strong competitor in the market for LCVs. Russia has confirmed that the DIMD was aware of the fact that GAZ produced the product concerned during the period under investigation. By failing to examine and engage with this evidence in its analysis, which challenges the "explanatory force" of dumped imports for the price effects, the DIMD acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement.

3.3.4 The DIMD did not explain and demonstrate why the alleged price suppression would be "to a significant degree"

35. The DIMD did not explain and demonstrate why the alleged price suppression would be "to a significant degree". Russia considers that under Article 3.2 of the AD Agreement "the investigating authority is not obliged [...] to conduct the thorough analysis in order to determine whether price suppression is significant".

36. However, if the consideration of the impact of the dumped imports on the prices involves a finding of price suppression – as in this case – that finding must involve a consideration of the "significance" of the price suppression, i.e. important, notable, or consequential. This is demonstrated by the very words of Article 3.2, which requires price suppression to be "to a significant degree".

37. In response to the Panel's question where in the EAEC's report, the DIMD would have analysed or make conclusions regarding the significance of price suppression, Russia does nothing

more than refer to Section 5.2 of the Report. However, this Section, dealing with the "impact of dumped imports on the prices of the like product in the customs union market", does not contain any consideration of whether the degree of price suppression was "important, notable, or consequential". Merely stating that it was "significant" does not meet the required rigour of the inquiry under Article 3.2.

3.4 Claim under Articles 3.1 and 3.4 of the AD Agreement: State of the Domestic Industry

3.4.1 The DIMD's assessment of the state of Sollers is not based on positive evidence

38. The EU has pointed to inconsistencies between the evidence that Sollers provided and the evidence that the DIMD relied upon for its conclusions regarding the state of Sollers. First, with regard to profits, the EU has shown that profit figures in Table 4.2.5 of the EAEC's report differ significantly from the figures in Table 6.2.1 of Sollers' questionnaire responses. In response, Russia provides a formula purporting to explain how the figures were calculated. However, this formula does not clarify the significant differences between the data in the Report and in Sollers' Application and Questionnaire Response.

39. Second, in respect of stocks, the EU has argued in its first written submission that the figures on inventories in Table 11.4.3 of Sollers' application did not match the figures on stocks in Table 4.2.2 of the EAEC Report. Russia responds by claiming that Table 11.4.3 of Sollers' application "contains data on stocks of the Applicant *and* independent dealers". According to Russia, the DIMD must not include data from independent dealers and this would explain the differences in Table 4.2.2 of the EAEC Report, which would be based on Table 4.4 of Sollers' updated questionnaire response. However, the EU still fails to understand how Table 4.4 of Sollers' updated questionnaire response relates to Table 4.2.2 of the Report. Table 4.4 provides information on Sollers' stocks in the form of indexes, splitting up the information in half-years starting from 2009 and setting the first and second half of 2009 as 100.

3.4.2 The DIMD made contradictory observations in its examination of the evidence and ignored certain facts and arguments on the record relating to the state of the domestic industry

40. The EU has also demonstrated how the DIMD's observations that the domestic industry was suffering injury are contradicted by the evidence on the record that shows how the domestic industry's situation showed improvements when comparing the 2008 and 2011 data. While Russia does not dispute that domestic product, volume and prices indeed developed positively, it seeks to contrast the growth rate of production and sales with the slower growth rate of domestic consumption. However, Russia failed to explain and neither did the DIMD consider why it should be expected that consumption of the domestic product would follow the growth in production and prices.

41. The EU has also pointed out that the evidence on profits and losses contradicts the DIMD's findings that the domestic industry was suffering injury because of dumped imports during the POI. Russia responds by noting "the DIMD based its conclusion of material injury on the *fact* of losses and negative profitability rather than on the *amount* of losses". However, the mere suggestion that some undisclosed amount of "losses" would have happened during a small part of the POI is not sufficient to support a conclusion of material injury.

3.4.3 The DIMD failed to examine all factors listed in Article 3.4 of the AD Agreement

42. Article 3.4 of the AD Agreement contains a mandatory list of fifteen factors that an investigating authority must always evaluate in every investigation. The DIMD failed to examine in the EAEC's Report the magnitude of the margin of dumping, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments.

43. With respect to the margin of dumping, Russia admits that this was "not explicitly explained". Russia argues that it suffices that the margin of dumping was discussed in the section of the report where it was determined whether the margin of each country was more than 2% – and thus the conditions for assessing the cumulative impact of the dumping were met.

44. The EU disagrees. The panel in *China – X-Ray Equipment* made clear that a "simple listing of the margins" in other sections of the determination "is not sufficient evidence that the magnitude of the margin of dumping was evaluated in the context of examining the state of the domestic industry". Those issues would not normally be addressed under the analysis referred to by Article 3.3 of the AD Agreement, and were certainly not addressed by the DIMD's simple statement that "the dumping margin for each country exceeds 2%". This statement does not constitute or show evidence of any evaluation or assessment.

45. Further, with respect to the EU's argument that the DIMD failed to examine the domestic industry's return on investments, actual and potential effects on cash flow and the ability to raise capital or investments, Russia alleges that it is sufficient to meet the requirement of Article 3.4 that financial accounts were requested by the DIMD and submitted by Sollers in confidential form. According to Russia, the fact that data was requested and received from the domestic industry can be indicative that the relevant information has been evaluated, although the results of such evaluation were not set forth in the published document".

46. The EU disagrees. First, the Panel should not base its assessment under Articles 3.1 and 3.4 of the AD Agreement on the confidential version of the Report that was submitted by Russia as Exhibit RUS-14 only during WTO proceedings, to the extent that the same information was not apparent from the non-confidential version of the Report on which the EU based its claims. In the alternative, even if the Panel were to consider the confidential Report as part of the evidence, the EU still considers that the analysis laid down in the confidential Report is inconsistent with Articles 3.4 and 3.1.

47. Article 3.4 of the AD Agreement requires investigating authorities to examine the role, relevance and relative weight of each factor mentioned in that provision. This obligation cannot be fulfilled by simply requesting or even obtaining information concerning a given factor. Rather, this information must be analysed and interpreted by the authority.

3.5 Claim under Articles 3.1 and 3.5 of the AD Agreement: The DIMD did not properly establish a causal link between the dumped imports and the material injury to the domestic industry

3.5.1 The DIMD failed to properly examine the causal relationship between dumped imports and injury

48. The EU has demonstrated that the DIMD failed to demonstrate a causal link between the dumped imports and the material injury to the domestic industry. In respect of import volume, the EU explained that the evidence on the record indicated that the increase in the volume of imports was not significant when seen in the context of domestic consumption, domestic sales volume and the market share held by the domestic industry. In response, Russia argues that "[i]t does not seem less plausible [...] that these decreases in domestic market share happened because of the effects of dumping". However, merely stating that it is "plausible" does demonstrate a causal link between the import volumes and the injury to the domestic production. Under Article 3.5 of the AD Agreement, it must be demonstrated that the subject imports have caused the injury to the domestic industry.

49. With respect to import prices, the EU explained that the DIMD failed to demonstrate the necessary "linkage" between decreasing import prices and the alleged price suppression. The DIMD makes statements on the difference between the import prices and domestic prices, but does not explain how higher import prices show that the import prices caused price suppression. Russia does not address this point. It merely states that the DIMD made an objective and unbiased conclusion that there was no price undercutting and no price depression. Russia's argument does not respond to the fact that the DIMD did not demonstrate any causal link between the evolution of the import prices and the domestic prices.

3.5.2 The DIMD failed to properly examine the relevance of other known factors

50. Pursuant to Article 3.5, the DIMD's establishment of the facts had to be proper and the evaluation of the facts had to be unbiased and objective such that the explanations are reasonable and supported by the evidence. The EU has listed several known factors that explained the state of

Sollers during the POI and that the DIMD either failed to properly examine, or did not examine at all. A first factor that the DIMD did not properly examine was the termination of the licensing agreement between Fiat and Sollers. A second non-attribution factor that the DIMD did not properly examine was the competition by GAZ during the POI.

51. The EU has also identified three other factors that explain the state of Sollers. First, the EU pointed to the arguments by the interested parties that the difficulties by Sollers were, to a great extent, self-inflicted because of the quality problems with respect to the Fiat Ducatos assembled by Sollers. Another factor that the DIMD failed to examine is the difficulty encountered by Sollers in obtaining financing for its joint venture with Fiat. Finally, the DIMD also failed to examine the discontinuation of the local car manufacturers programmes.

4 PROCEDURAL CLAIMS

4.1 Claim under Articles 6.5 and 6.5.1 of the AD Agreement: Treatment of Information as Confidential without Showing Good Cause and without Providing a Meaningful Summary

52. The DIMD failed to require a showing of good cause or to assess whether such good cause is shown, and to require or provide a meaningful summary or an explanation of why a summary would not be possible. In some instances, the EU is also challenging the confidential treatment of certain information that does not appear to be confidential.

53. The DIMD took no specific action to require good cause in this investigation. Russia also considers that no action to assess whether good cause is shown needs to be taken when confidential treatment is accepted. This is contrary to the jurisprudence. If the published report and its supporting documents do not show that an assessment took place, there is no legal basis to for confidential treatment. With respect to meaningful summaries, interested parties should not be required to examine "documents in their entirety." It must be clear what constitutes the summary of which omitted information. Any subsequent explanations and calculations by Russia cannot compensate for the DIMD's failings.

4.1.1 The meaning of the terms "significant" and "significantly" in Article 6.5 of the AD Agreement

54. The EU agrees with Russia in general terms that disclosing a piece of information would not necessarily "be of significant competitive advantage to a competitor" or "have a significantly adverse effect", and that a document should normally be treated as confidential by nature only when its disclosure would risk causing a great harm. Whether any of this is the case must be objectively assessed by the investigating authority. This assessment should be apparent from the documents provided to interested parties. Simply marking certain pieces of information as "CONFIDENTIAL" or omitting them does not show such an assessment.

4.1.2 The nature of the investigating authority's obligation to require and assess good cause

55. As the EU has explained, the documents provided by the DIMD do not show that the interested parties concerned provided any good cause for confidential treatment, that the DIMD ever required them to do so or objectively assessed whether good cause exists. At a minimum, Article 6.5 requires investigating authorities to objectively assess whether a party has shown good cause for the confidential treatment, and to require the parties to provide the good cause if they failed to do so. It may not always be necessary for the investigating authority to issue a separate document detailing its good cause assessment, or separately determining good cause for each piece of confidential information. In this case, however, there is simply no evidence anywhere on the record that good cause was shown, required or assessed.

4.1.3 The relevance of the alleged absence of objections to confidential treatment or the adequacy of summaries by interested parties

56. In any investigation, due process requires that the interested parties are able to participate, that their views are taken into account, and that any summaries of information provided are clear

and understandable. Yet, this cannot mean that interested parties waive their due process rights if they do not immediately object to a particular document (which in this case they did, as the record demonstrates). If WTO proceedings are brought on the basis of Article 6.5 or Article 6.5.1, it must be possible for a panel to examine whether the confidential treatment and the summaries provided were proper, as Russia concedes.

4.2 Claim under Article 6.9 of the AD Agreement: Failure to disclose all essential facts under consideration that formed the basis for the decision by the EAEC

57. The EU claims that the EAEC Draft Report failed to disclose or meaningfully summarize a number of essential facts underlying the determinations of dumping (import volumes of LCVs produced by Volkswagen AG and Daimler AG respectively; export volumes and weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG respectively; source for the information on the volume and value of imports of LCVs), material injury (consumption, production and sales volumes of LCVs in the Customs Union; information on Sollers' profits and profitability; source for the information on the volume and value of imports of LCVs) and causation (consumption and production volumes of LCVs in the Customs Union; numerical data on the ratio of dumped imports versus consumption and production, prices, rate of return, profits and other issues; rate of return on sales of goods which would have occurred in the absence of dumped imports; market share held by GAZ in 2011). Moreover, the exhibits to Russia's first written submission, in particular the alleged confidential version of the EAEC Report, reveal additional violations of Article 6.9 of the AD Agreement, relevant for the assessment of mandatory injury factors.

58. Whether a fact is essential is an objective question, depending on the role of the fact in the determinations that must be made by the authority. It is not for the authority to list which facts it subjectively considers essential. All such facts must be disclosed, or at least meaningfully summarized. This is equally true when "facts available" are used. The due process rights of interested parties will be infringed by definition if essential facts are not disclosed, and there is no need to additionally show whether or not interested parties can defend their interests.

4.2.1 The relationship between Articles 6.5, 6.5.1 and 6.9 of the AD Agreement

59. The EU disagrees with Russia's statement that "in order to establish a consequential violation of Article 6.9 of the AD Agreement with regard to confidential essential facts, it is necessary to carry out two separate analyses of Article 6.5 and Article 6.9." There is no need for a separate claim, or finding of violation, under Article 6.5. It is only where a separate Article 6.5 or Article 6.5.1 claim has been made, and a panel found a violation of those provisions, that one could truly speak of a "consequential" violation (in practical terms, rather than because Article 6.9 necessarily depends on the correct treatment of information as confidential or not).

4.2.2 The treatment of so-called "non-cooperating producers" under Article 6.9 of the AD Agreement

60. Article 6.9 requires investigating authorities to disclose essential facts to all interested parties. No distinction is made in that respect between parties that the authority considers as "cooperating" and "non-cooperating". Any disclosure, whether general or specific, and whether it contains information on confidential matters or not, must be sufficiently detailed to enable the interested party concerned to defend its interests. All this is equally true when essential facts were not obtained from an interested party but from another public authority, such as a customs authority. Just because an individual dumping margin is not calculated for a so-called "non-cooperating" party based on its own data, it does not follow that such a party does not have an interest in essential facts pertaining to it.

4.2.3 Russia's treatment of Daimler's and Volkswagen's letter requesting additional disclosure of information on the calculation of dumping margins

61. Russia notes that the joint letter of Volkswagen Group Rus and Mercedes-Benz requested disclosure of data derived from customs statistics that was treated as confidential. Nevertheless, the DIMD failed to disclose such information, even as regards the sales to Volkswagen Group Rus

and Mercedes-Benz Rus. Russia seems to acknowledge that no summary of these essential facts was provided.

4.2.4 Russia's arguments regarding the non-disclosure of essential facts related to the determination of dumping and injury

62. With respect to the determination of dumping, Russia's first written submission discusses various calculation methodologies that *could* be used by interested parties to enhance their understanding of the information that was not disclosed. The EU does not consider that this approach is sufficient to provide a meaningful summary that would disclose essential facts.

63. First, there are numerous points in which Russia's explanations depart from what is apparent in the Draft Report, or merely reinforce the EU's conclusion that essential facts were not disclosed. Second, merely disclosing the "methodology" of a calculation does not necessarily constitute a meaningful summary, since it does not enable a reasonable understanding of the substance of the information. In the case at hand, no meaningful methodology was provided. Third, the disclosure requirement under Article 6.9 cannot be met by requiring interested parties to piece together information from various documents submitted by other interested parties and combine them with what is disclosed by the investigating authority.

64. Similar considerations hold true for the DIMD's failure to disclose facts related to the determination of injury. On several issues, the DIMD failed to disclose essential facts, replacing them with entirely uninformative summaries.

4.2.5 Additional undisclosed essential facts

65. The EU has argued that the Panel should not consider the confidential Report that was submitted by Russia as Exhibit RUS-14 (BCI). In the alternative, the EU claims that the confidential Report still fails to comply with Articles 3.4 and 3.1 of the AD Agreement.

66. In addition, were the Panel to consider the confidential Report, the EU submits the following. When compared to the Draft Report, the confidential version of the Report reveals that additional facts which formed the basis for the finding of material injury were determined and assessed by the DIMD, but were not disclosed to the interested parties. No attempt was made to provide a meaningful summary of this information; in fact, much of it was omitted without even being marked as confidential. With respect to these essential facts, Russia has therefore violated Article 6.9 of the AD Agreement, for the reasons already explored by the EU.

ANNEX B-4**SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE RUSSIAN FEDERATION****I. INTRODUCTION**

1. The European Union still has failed to establish that the Russian Federation has violated any provision of the Anti-Dumping Agreement and the GATT 1994. The European Union continues to propose that the DIMD should have used approaches and methodologies in the anti-dumping investigation at issue that have no legal basis in the WTO law and jurisprudence.

II. STANDARD OF REVIEW

2. The Russian Federation maintains that it is well-established in the WTO jurisprudence that the Anti-Dumping Agreement *requires* taking into account all information upon which the investigating authority relied in order to reach its final determination, whether or not this information forms part of the non-confidential or disclosed record of the investigation.¹ As confirmed by the Appellate Body in *Thailand – H-Beams*, "Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination".² In addition, the panel in *EC – Salmon (Norway)* acknowledged that the standard of review specified in Article 17.5(ii) does not mean that a panel is limited to "the information actually set forth or specifically referenced in the determination at issue".³

3. Therefore, the European Union cannot reasonably claim that the Panel should base its judgement on "the facts expressed in the non-confidential EAEC's report and supporting documents for which the Report shows a sign of existence".⁴

III. DEFINITION OF THE DOMESTIC INDUSTRY

4. The European Union's untenable interpretations of Articles 4.1 and 3.1 of the Anti-Dumping Agreement completely ignore the existence of objective reasons for defining the domestic industry as a "major proportion" of total domestic production. In addition, the European Union's approach to definition of the domestic industry that implies that such a definition shall remain fixed throughout an anti-dumping investigation undermines the "objective examination" standard that is required by Article 3.1 of the Anti-Dumping Agreement.

A. The European Union's arguments fail to address the objective reasons behind the DIMD's definition of the domestic industry for the purposes of injury determination

5. The Russian Federation believes that practical constraints of obtaining necessary information may prevent the investigating authority from defining the domestic industry for the purposes of injury analysis as all known domestic producers of the like product. The role of the investigating authority in seeking information from known domestic producers may be limited due to the factual circumstances of the anti-dumping investigation.

6. To recall, the reason why the data pertaining to GAZ could not have been used in the injury analysis is related to deficiencies and inconsistencies in the data submitted by GAZ. The investigating authority expressed its willingness to include GAZ into the domestic industry for the purposes of the injury analysis (sent a questionnaire for the producer of the like product in the

¹ See Panel Report, *EC – Tube or Pipe Fittings*, para. 7.45, Appellate Body Report, *Thailand – H-Beams*, paras. 115-118.

² Appellate Body Report, *Thailand – H-Beams*, para. 118.

³ Panel Report, *EC – Salmon (Norway)*, para. 7.837. See also Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 161-165.

⁴ Opening Oral Statement by the European Union at the Second Substantive Meeting of the Panel with the Parties, para. 5.

CU⁵, sought clarifications regarding the Questionnaire Reply and informed GAZ on inconsistencies in the data⁶). However, neither clarifications, nor corrected data were received by the investigating authority.

7. Given the inability to use the data pertaining to GAZ in the injury analysis, the domestic industry for the purposes of the injury determination was defined as Sollers that accounted for 87.9% of total domestic production of the like product. Such definition of the domestic industry is based upon a "major proportion" option and is in conformity with Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

8. The Russian Federation maintains that a "major proportion" of total domestic production is a legitimate way for defining the domestic industry for the purpose of the injury analysis.

B. The European Union erred in its interpretation of Article 4.1 of the Anti-Dumping Agreement

9. The European Union suggests that "allowing investigating authorities to define "domestic industry" on the basis of the questionnaire responses as "deficiency" or any other reason not foreseen in Article 4.1 of the AD Agreement risks materially distorting the injury determination".⁷

10. This interpretation proposed by the European Union renders useless a "major proportion" option provided in Article 4.1 of the Anti-Dumping Agreement and leaves the issue of known producers that do not respond to the questionnaire or provide deficient data that cannot be used in the injury analysis unresolved. In addition, Article 3.1 of the Anti-Dumping Agreement contains the requirement of objective examination based on "positive evidence". Appellate Body has clarified that "[t]he word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible".⁸ In this respect, the investigating authority shall not base its injury determination on evidence that is not verifiable and not credible.

C. The WTO law does not require that the definition of the domestic industry shall remain fixed throughout the anti-dumping proceedings

11. The European Union further notes that "the domestic industry should be defined as soon as possible in the course of the investigation"⁹ and "once the domestic industry is defined, relying on one of the two options in Article 4.1, the investigating authority must not adjust this definition as the injury analysis proceeds on the basis of difficulties in collecting data".¹⁰ In this respect, the Russian Federation notes that the WTO law and jurisprudence do not prescribe to follow an approach suggested by the European Union.

12. In the general context, at the outset of an anti-dumping investigation the domestic industry is identified when the like product is defined. Panel in *EC - Salmon (Norway)* stated that "Article 4.1 makes clear that the starting point for the identification of the domestic industry is the "like product".¹¹ Hence, the scope of domestic producers that form part of the domestic industry is limited to the domestic producers of the *like product*. Hence, at the outset all known domestic producers of the *like product* constitute the domestic industry.

13. At the same time if the definition of the domestic industry had to be fixed at a particular point in time at the outset of an anti-dumping investigation and could not be changed, as the investigation proceeds, this would contradict the requirements of Article 3.1 of the Anti-Dumping Agreement. In this regard, the Russian Federation maintains that the definition of the domestic industry is an evolving concept. The definition of the domestic industry can be changed in the course of the proceedings, as the investigating authority may be faced with new factual evidence that may trigger a redefinition of the domestic industry (e.g. existence of the domestic producers

⁵ See Report, Exhibit RUS-12. Section 1.2.

⁶ Exhibit RUS-30 (BCI).

⁷ Responses to the 2nd Set of Questions by the European Union, para. 3.

⁸ Appellate Body Report, *US - Hot-Rolled Steel*, para. 192.

⁹ Responses to the 2nd Set of Questions by the European Union, para. 1.

¹⁰ *Ibid.*, para.4.

¹¹ Panel Report, *EC - Salmon (Norway)*, para. 7.64.

that were not known to the investigating authority, absence of full and credible questionnaire response from known domestic producers, etc.).

14. Therefore, the European Union's interpretation that implies impossibility to redefine the domestic industry for the purposes of injury analysis should be rejected.

IV. SELECTION OF PERIODS FOR THE INJURY AND CAUSATION ANALYSES

15. The Russian Federation maintains that the European Union has misinterpreted the DIMD's injury and causation analysis and, therefore, presented incorrect and incomplete picture of the injury and causation analysis conducted by the DIMD in the course of the investigation. In fact, the DIMD has analysed the data for the period from 1 January 2008 to 31 December 2011. Such analysis has been conducted on a year-to-year basis, i.e. by comparing particular indicators as of 2008, 2009, 2010, 2011. The data for the period from 1 January 2008 to 31 December 2011 has been analysed consistently in relation to each indicator throughout the entire Report.¹²

16. Further, relevant WTO jurisprudence¹³ shows that in order to make a *prima facie* case of violation of Article 3.1 of the Anti-Dumping Agreement a complaining party should correctly identify the reference standard which excludes the possibility (risk) of favouring the interests of any interested party, or group of interested parties, in any investigation and specify how exactly the injury analysis at issue does not meet the above reference standard and thus may favour those interests.¹⁴

17. As far as the European Union's claim is concerned, the European Union bears the burden to identify how an investigating authority should select the periods for the analysis in general (reference standard) and specify in which way the DIMD's selection of periods for analysis could have favoured the interests of any interested party, or group of interested parties, in the investigation.¹⁵

18. The standard suggested by the European Union (comparison the data for 2009, 2010 and 2011 and also the period from 1 July 2010 to 30 June 2011 on an annual basis with 2008) cannot be considered as the appropriate reference standard as such standard involves the overlap between the periods analysed.¹⁶

19. The Russian Federation further submits that there is no logical connection between the European Union's argument regarding the failure by the DIMD to systematically make an end-point to end-point analysis of all of the economic indicators and the European Union's claim. The above argument does not deal with the selection of periods at the initial stage of the process of injury determination. Rather, it touches upon the analysis of economic indicators for the periods already selected.¹⁷

20. Based on the above, the European Union has failed to make a *prima facie* case of violation by the DIMD of Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. Therefore, the European Union's claim shall be dismissed.

V. PRICE SUPPRESSION

21. The European Union submits that the DIMD failed to make objective analysis based on positive evidence when considering price suppression. The European Union gives up its claim that the DIMD "should have based itself on the year 2008 rather than the abnormal year 2009".¹⁸ The European Union is now convinced that rate of return of 2009 should have been adjusted downwards by the DIMD. The Russian Federation stresses out that the DIMD accessed the

¹² Second Written Submission by the Russian Federation, paras. 56-58.

¹³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 196, 204.

¹⁴ Second Written Submission by the Russian Federation, para. 76.

¹⁵ Second Written Submission by the Russian Federation, para. 77.

¹⁶ Second Written Submission by the Russian Federation, para. 80.

¹⁷ Responses to the 2nd Set of Questions by the European Union, para. 23.

¹⁸ Second Written Submission by the European Union, para. 97, Opening Oral Statement by the European Union, para. 39.

conditions of the Russian economy. These conditions clearly show that the rate of return in 2009 could be considered reasonable.¹⁹

22. The European Union insists that 2009 was not a "normal year" and could not be used by the DIMD for the price suppression analysis because, according to the European Union, 2009 was an exceptional year. In order to support this standing the European Union simply refers to the market situation in 2009 without providing any clear explanations as to how it could make for the "abnormality" of the rate of return in 2009. The Russian Federation emphasizes that the DIMD took the economic crisis as well as the recovery after the crisis into account in its analysis²⁰, therefore, this factor could not in any way undermine the objectivity of the price suppression analysis.²¹

23. The European Union tries to show that there was some biased approach in the analysis of prices in USD.²² The Russian Federation is convinced that the claim of the European Union is unfounded as the European Union failed to demonstrate the ground on which it could be concluded that use of USD undermined the objectivity of price suppression analysis. The DIMD actually took the factor of currency fluctuations into account while conducting the analysis.²³ There was no significant difference between price trends expressed in RUB and USD that could distort the analysis.²⁴

24. European Union also challenges the explanatory force of dumped imports for the occurrence of price suppression.²⁵ The Russian Federation recalls that the DIMD demonstrated the explanatory force of dumped imports for the occurrence of price suppression in the Report.²⁶

25. The European Union's misunderstanding of the explanatory force stems from its conviction that there was significant gap between import and domestic prices and that price suppression implies that import prices should be higher than domestic prices.²⁷ The Russian Federation reminds that difference between import and domestic prices decreased during the entire analysed period.²⁸ Therefore, the European Union makes unfounded allegation and, at that, tries to substantiate it by referring to the comments of the interested parties²⁹ taken from the context and not related to the issues raised by the European Union in connection with the explanatory force of dumped imports for price suppression.³⁰

26. On the basis of foregoing, the Russian Federation concludes that the European Union failed to provide evidence that the DIMD failed to make an objective analysis based on positive evidence when considering whether the effects of the dumped imports was to prevent domestic price increases, which otherwise would have occurred, to a significant degree and its claim should be rejected.

VI. STATE OF THE DOMESTIC INDUSTRY

A. The DIMD based its evaluation of injury factors on positive evidence

27. With regard to profits, the European Union argues that the formula provided by the Russian Federation, which explains how the profit figures set out in the Report were calculated, does not clarify the significant differences between the data in the Report and in Sollers' Application and Questionnaire Response. This formula contains six elements, namely the volume of sales, the price and the cost for Sollers and its trading house separately. The European Union, for some reason,

¹⁹ Second Written Submission by the Russian Federation, paras. 102-103.

²⁰ Second Written Submission by the Russian Federation, para.109.

²¹ Second Written Submission by the Russian Federation, para.111.

²² Second Written Submission by the European Union, paras. 100-110.

²³ Second Written Submission by the Russian Federation, para. 93.

²⁴ Ibid., paras. 94-96.

²⁵ First Written Submission by the European Union, para.156.

²⁶ Second Written Submission by the Russian Federation, paras. 113-118.

²⁷ Responses to the 2nd Set of Questions by the European Union, question 67, para. 18.

²⁸ Second Written Submission by the Russian Federation, para.117.

²⁹ Second Written Submission by the European Union, para.116,117, Opening Oral Statement by the European Union at the Second Substantive Meeting of the Panel with the Parties,para.39, Responses to the 2nd Set of Questions by the European Union, question 67, para.19.

³⁰ Second Written Submission by the Russian Federation, paras. 121,123.

fails to take into account that the aggregated profit figure depends not only on Sollers' volume of sales, price and cost but also on the corresponding figures of its trading house.

28. With regard to stocks, the European Union claims that the DIMD failed to conduct an objective examination because the DIMD, when determining the stocks of the domestic industry in the Report, used the data on stocks of the producer and did not rely on stocks of the trading house. This claim is unsubstantiated since the European Union has not even attempted to demonstrate that the DIMD's examination was thereby not conducted in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.

29. The Russian Federation emphasises that Article 3.4 of the Anti-Dumping Agreement does not prescribe the methodology to be used by an investigating authority in its evaluation of the injury factors. The Russian Federation underlines that Article 3.4 of the Anti-Dumping Agreement requires that there be an analysis of inventories and the DIMD included such an analysis in its evaluation of the state of the industry.

30. The European Union also alleges that the DIMD did not rely on positive evidence in its analysis of stocks held by Sollers because the figures in the Report do not correspond to the relevant non-confidential data provided by Sollers. The European Union's allegation lacks any factual basis since the European Union simply failed to extract the required information from the relevant non-confidential data.

B. The DIMD made a proper evaluation of the overall development and interaction among injury factors taken together

31. The European Union has not provided plausible alternative explanations of the evidence on the record in the light of which the explanations given by the DIMD are not reasoned or adequate. The European Union highlights upward trends in the internal evolution of certain injury factors, whereas discounting the factor "profits", which runs contrary to the picture of "normality" in the state of the industry portrayed by the European Union. The highlighted trends, including production and sales levels, are depicted by the European Union in isolation from other market developments, such as trends in the levels of dumped imports and consumption. As a result, any relative changes are disregarded by the European Union.

32. With reference to the European Union's allegation that the selection of the non-equal, non-consecutive periods in the injury and causation analysis tainted the EAEC's analysis since it failed to provide an accurate and unbiased picture of the relevant information, we have shown that when the data are provided for consecutive half-year periods, the injury to the domestic industry and the explanatory force of the subject imports for the state of the domestic industry are pronounced, and the observations made on the basis of these data are in line with the conclusions made in the Report.

C. The DIMD examined all the injury factors listed in Article 3.4 of the Anti-Dumping Agreement

1. The magnitude of the margin of dumping

33. The European Union claims that the DIMD failed to examine the magnitude of the margin of dumping in its injury analysis.

34. Contrary to the European Union, the magnitude of the margin of dumping was apparently examined by the DIMD in the context of establishing that the conditions for cumulative assessment of the effects of the dumped imports of a product from more than one country were fulfilled. This initial stage of the evaluation of the magnitude of the margin of dumping at the least implicitly indicates that the evaluation of the factor occurred.

35. The contribution of the magnitude of the margin of dumping to the impact of the dumped imports on the domestic industry was further implicitly examined in the context of the analysis of domestic prices. The DIMD implicitly evaluated the magnitude of the margin of dumping in the context of the analysis of the effect of the prices of dumped imports on the domestic prices. The determination of "a significant adverse effect", which the prices of the dumped imports had on the

domestic prices and profits, reflects the results of the evaluation of the magnitude of the margin of dumping.

2. Return on investments, actual and potential negative effects on cash flow and ability to raise capital or investments

36. The European Union alleges that the DIMD failed to examine return on investments, actual and potential negative effects on cash flow and ability to raise capital or investments. Contrary to the European Union's allegation, the DIMD analysed these injury factors, which is reflected in the confidential version of the Report. Setting out the results of evaluation of the injury factors at issue only in the confidential version of the Report does not amount to a violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement since Article 3.4 of the Anti-Dumping Agreement contains an *obligation* to evaluate the listed injury factors, and Article 3.1 of the Anti-Dumping Agreement does not preclude the investigating authority from using confidential reasoning or facts in the analysis.

VII. NON-ATTRIBUTION

37. With regard to non-attribution analysis, the European Union asserts that the Russian Federation provided *ex post* argumentation that "is of no relevance since it does not explain how the DIMD examined this known factor".³¹

38. The Russian Federation maintains that when the allegation on the "known factor other than the dumped imports" in the meaning of Article 3.5 of the Anti-Dumping Agreement contains factual errors that undermine its relevance in the non-attribution analysis, this factor proves to be unfounded and there is no point in its further consideration in the non-attribution analysis. This is the case with alleged "known factor other than the dumped imports" mentioned by the European Union, namely the so-called "local car manufactures programme" that allegedly expired in 2010.

39. The European Union also stated that "Russia ignores that the quality problems and their impact on the state of Sollers were not only raised by PCA, but also by Daimler, who submitted, as part of its comments, detailed test reports of the Fiat Ducato showing significant quality problems".³² However, the DIMD did not ignore these comments but concluded that the information on testing described in Auto Review falls short of being credible and does not meet the requirement of being "positive evidence".

VIII. CONFIDENTIALITY

40. With regard to confidentiality claim of the European Union, the Russian Federation believes that any document on the investigation record should be read consequentially and in its entirety. In contrast, the European Union's allegations on confidential treatment of information submitted in confidence have shown another approach. Mostly, the contested pieces of information are simply taken by the European Union out of context.

A. The DIMD properly assessed the "good cause"

41. In the investigation at issue the DIMD assessed the reasons for withholding the information from the public file and was satisfied with the "good cause" shown. Hence, no further clarifications or explanations were required.

42. We maintain that the Anti-Dumping Agreement could not be understood as to require an investigating authority to explain why an investigating authority accepted any piece of information submitted by the interested parties in the course of the anti-dumping investigation. Such explanations would go beyond the requirements of the Anti-Dumping Agreement. While the good cause alleged is to be reviewed by an investigating authority on a case-by-case basis, i.e. for each request for the confidential treatment, that does not mean that a separate or detailed explanation

³¹ Second Written Submission by the European Union, para. 170.

³² Second Written Submission by the European Union, para. 168.

of an investigation authority's decision whether to accept a particular request, or not, must be furnished in each case.

B. The EU failed to make a *prima facie* case with regard to customs statistics

43. To recall, the reason for treating customs statistics as confidential was to avoid disclosing the sales volumes used to calculate the volumes of imports of the product under investigation. The European Union, assuming that customs statistics in principle is publicly available and cannot, or even must not, be confidential, failed to make a *prima facie* case because it based its claim on allegations unsupported by evidence or tried to substantiate its claim on irrelevant references to some websites.

44. Specifically, to support its claim the European Union provides simply the following allegations: "[t]o a significant extent, this information is publicly available. It does not appear to be confidential by nature, and it was not indicated that it was provided on a confidential basis".³³ In its First Written Submission the European Union also refers to some web-sites where "a wide range of customs statistics" or "comprehensive customs statistics" "is made available".³⁴ With respect to the annexes to the Sollers' Application, the European Union did not even attempt to prove the publicity or "non-confidentiality" of the documents and information contained in the annexes.

45. The assertions of the European Union fall short of being substantiated enough and, therefore, must not be accepted.

IX. ESSENTIAL FACTS

46. The European Union's claim at issue touches upon sensitive systemic issues of Article 6.9 of the Anti-Dumping Agreement.³⁵ The explanations of obligations under Article 6.9 of the Anti-Dumping Agreement, proposed by the European Union³⁶, contradict the existing WTO jurisprudence. Such interpretations would lead to reduction in the level of cooperation by interested parties who would be against the disclosure of their sensitive confidential information, which is not susceptible of summary, in the different form of summary.

47. Pursuant to Article 6.9 of the Anti-Dumping Agreement the investigating authority is not obliged to disclose of data which (i) were not provided by parties to the investigation³⁷; (ii) were in the possession of the investigating authority³⁸; (iii) would permit to calculate specific confidential information pertaining to another interested party³⁹; (iv) not permitted to be disclosed under Article 6.5 of the Anti-Dumping Agreement⁴⁰. Therefore, before the assessing the adequacy of disclosure of "essential facts" it is necessary to understand the circumstances in which particular disclosure took place.⁴¹

A. Determination of Dumping

48. The Russian Federation states that the European Union still has not met its burden to establish that disclosure provided in the non-confidential version of the Draft Report and in the additional disclosure letter were inadequate.⁴² The DIMD in its Draft Report disclosed the necessary information for the interested parties (including Daimler AG, Volkswagen AG and the European Union) to scrutinise the calculation of the export price and normal value for the German

³³ Opening Oral Statement of the European Union, para. 79.

³⁴ First Written Submission by the European Union, para. 341, footnote 316.

³⁵ Second Written Submission by the Russian Federation, paras. 323-372; Closing Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 11.

³⁶ Second Written Submission by the European Union, paras. 289, 292, 295-296.

³⁷ Second Written Submission by the Russian Federation, paras. 367-372; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 73.

³⁸ Ibid.

³⁹ Second Written Submission by the Russian Federation, paras. 359-366; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, paras. 71, 75.

⁴⁰ Second Written Submission by the Russian Federation, paras. 338-340, 363; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, paras. 72, 75.

⁴¹ Second Written Submission by the Russian Federation, para. 323.

⁴² Second Written Submission by the Russian Federation, paras. 310-318.

exporting producers and assess the suitability and accuracy of the data concerning import volumes and values.⁴³

49. In spite of the fact that the individual volumes of imports and individual weighted average export price of LCVs produced by Daimler AG and Volkswagen AG are not susceptible of summary in the form of range⁴⁴, the Draft Report contains meaningful and detailed non-confidential version of the dumping margin calculation for the German exporting producers.⁴⁵ Moreover, the interested parties could defend their interests by submitting information on the actual volume of imports and customs value of LCVs produced by them and imported into the Customs Union and using linear relationship between the individual volumes of imports of LCVs for Daimler AG and the individual volumes of imports of LCVs for Volkswagen AG and between the individual weighted export price for Daimler AG and the individual weighted average price for Volkswagen AG.⁴⁶

B. Determination of Injury and Causality

50. Turning to the issue of essential facts related to the determination of injury and causality the Russian Federation notes that the European Union did not make a *prima facie* case because it did not reinforce its claim with demonstration of clear violation of Article 6.9 of the Anti-Dumping Agreement caused by action or inaction of the DIMD.⁴⁷ In particular, the Russian Federation sees no European Union's attempts to understand the substance of non-confidential version of the determination on injury and causality. All the Russian Federation can see is that the European Union is trying to justify its claim without substantive analysis of disclosure of each essential fact.⁴⁸

51. The Draft Report contains sufficiently-detailed disclosure of the essential facts under consideration that formed the basis for the determination of injury and causality.⁴⁹ Each summary of redacted confidential data contains at least one of the following: (i) the year-on-year percentage changes; (ii) year-on-year percentage point changes; (iii) the mix of the year-on-year percentage changes or year-on-year percentage point changes and textual explanation of changes; (iv) textual description of trends with respect to the injury factor.⁵⁰ Moreover, in order to get a full picture of the determination of injury and causality the interested parties should read the Draft Report in its entirety.⁵¹

52. Besides, the Russian Federation is of the view that if some facts are not central to the determination of injury, such facts do not constitute essential facts within the meaning of Article 6.9 of the Anti-Dumping Agreement.⁵²

X. CONCLUSION

53. For these reasons, along with those that were set forth in the Russian Federation's written submissions, oral statements, responses to questions and comments, the Russian Federation respectfully requests the Panel to reject all of the European Union's claims and arguments in their entirety.

⁴³ Second Written Submission by the Russian Federation, paras. 384-385; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 73.

⁴⁴ Second Written Submission by the Russian Federation, paras. 421-448, 455-467; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, paras. 71, 75.

⁴⁵ Second Written Submission by the Russian Federation, paras. 391-420, 449-454; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 73.

⁴⁶ Second Written Submission by the Russian Federation, paras. 421-448, 455-465; Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 71.

⁴⁷ Second Written Submission by the Russian Federation, paras. 319-322.

⁴⁸ Second Written Submission by the Russian Federation, para. 321.

⁴⁹ Second Written Submission by the Russian Federation, paras. 476, 479-623.

⁵⁰ Second Written Submission by the Russian Federation, para. 470.

⁵¹ Closing Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 11.

⁵² Opening Statement of the Russian Federation at the Second Substantive Meeting of the Panel, para. 78; Responses by the Russian Federation to the Questions from the Panel after the Second Substantive Meeting with the Parties, paras. 61-63.

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

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ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL**

1 Brazil focused its participation in these panel proceedings on five main aspects considered in its Third Party Submission, in its participation in the Third Party Session and in the answers to the Panel's questions.

2 The first problem addressed by Brazil is the definition of the domestic industry under Articles 3.1 and 4.1 of the "Anti-Dumping Agreement"¹.

3 Brazil commented in its TPS and in the answers to the Panel that the use of the term excluded by the EU was not in conformity with its strict technical meaning. For Brazil, whenever the investigating authority excludes certain producer from the concept of domestic industry, it is doing so as authorized by Article 4.1 (i) of the ADA, which allows the investigating authority to exclude certain producers from the concept of domestic industry whenever the producers are "related to the exporters or importers or are themselves importers of the allegedly dumped product"².

4 In the present case, if GAZ had been excluded from the definition of "domestic industry", for not qualifying specifically as a domestic producer, this company would not be included in the calculation of the collective output of the like product. In this scenario, Sollers would, thus, have held one hundred per cent of market share of the product at analysis.

5 Considering this view, Brazil believes that what happened in the investigation was not an exclusion as foreseen in Article 4.1 (i) of the ADA, but rather a possible disregard to the data that was sent by GAZ to the EAEC.

6 Brazil did not contest that a proper definition of domestic industry under Article 4.1 of the ADA is of paramount importance in order to ensure the accuracy of an injury determination. However, in order to assess whether the investigating authority acted so as to give rise to a material risk of distortion in defining the domestic industry one should not read in Article 4.1 of the ADA obligations that are not there, namely obligations that would result from a combined interpretation of Articles 4.1 and 3.1, as proposed by the EU.

7 Taking into account that the imposition of anti-dumping duties on the importation of dumped imports would benefit the domestic industry as a whole, it is certainly preferable that the "domestic industry" defined by an investigating authority encompasses every single producer, as set forth in the first sentence of Article 4.1. However, this provision clearly establishes that, in face of difficulties in obtaining reliable data from the producers as a whole, it is possible for the investigating authority to rely solely on a major proportion of the domestic producers. As Brazil stressed in the answers to the Panel, it is important that the investigating authority acts in a way to gather a complete set of data related to every producer, but that is not possible sometimes and an investigation based on a major proportion is apt.

8 Brazil does not dispute that data from the domestic producer(s) eventually left out of the "domestic industry" definition may also be relevant for the purposes of the injury analysis as they may (partially or totally) reflect the state of the industry. In the same line, Brazil does not contest that the more producers are included in the "domestic industry", the more ample the economic data set is and, therefore, the injury analysis is potentially more accurate.

9 In Brazil's understanding, however, there is no obligation in the text of Article 4.1 of the ADA that would invalidate *prima facie* an investigation based on a less ample set of data that represent, notwithstanding, a major proportion of the market share, as suggested by the EU. Under Article 4.1 of the ADA, the statistical determination of a "major proportion" by itself provides the amount of data required to ensure an accurate injury analysis. Therefore, there is no obligation to carry out a "qualitative" investigation, which, as argued by the EU, would result from a combined interpretation of Articles 3.1 and 4.1 of the ADA.

¹ EU's First Written Submission, para. 33.

² Article 4.1(i) of the Anti-Dumping Agreement.

10 Brazil reaffirms its understanding that a market share of 87.9% could certainly qualify as a major proportion in the sense of Article 4.1.

11 Brazil took issue as well with the EU's contention that in defining the "domestic industry" for the purposes of the injury analysis, the investigating authority should take into consideration differences in production process mainly in terms of the value added along the process and whether the domestic producer benefits or not from preferential regime. Once the like product is defined, producers engaged in its production are by definition the domestic industry.

12 Once again, it seems that the EU is conflating the standards under Article 3.1 and 4.1 of the ADA trying to evaluate the consistency of the definition of "domestic industry" adopted by the investigating authority with the lens of Article 3.1. It is Brazil's view that nothing in Article 4.1 of the ADA requires this type of qualitative assessment. For the purposes of defining the "domestic industry" it is irrelevant whether or not the producer benefits from a preferential treatment or is a manufacturer or an assembler of the like product.

13 This particular distinction has no grounds in the text of the ADA and would represent a major challenge for investigating authorities worldwide. It would be necessary, for instance, to create different categories of companies producing a specific product inside the territory of a member, divided by levels of local content and value added in the local chain of production. That would definitely render impracticable every investigation and the results of the margin of dumping would be even more biased. The same reasoning is true in respect to rules of origin³. Nowhere in the ADA there is an obligation to assess the origin of the product. Likewise, the fact that a producer may benefit from preferential regime is irrelevant for the purposes of Article 3.1 of the ADA as this kind of consideration does not have a bearing on the defining of the "domestic industry" in Article 4.1 of the ADA.

14 Brazil agreed with Russia that the ADA "does not provide any guidance as to how the periods for the injury and causation analysis [should be defined] nor does it require the investigating authorities to divide the period into sub-periods of a particular length"⁴. However, it was also recognized that the discretion of the investigation authority is not unlimited. As indicated in Brazil's answers to the Panel, the important is that the periods are chosen by the investigating authority as to permit verifying whether the dumping found was causing injury to the domestic industry.

15 Brazil understands that once the investigating authority has made a decision about the dumping and injury periods, and once it has determined the length of the time periods that it wishes to compare, every injury factor to be taken into account must be assessed in the chosen timeframe. The key aspect in assessing the trends in the injury analysis is to ensure that the investigating authority is comparing periods of the same duration, it does not matter whether it is a period of two years, a full calendar year or half-year/half-year, and all the concurring factors must be analyzed in the same period.

16 In Brazil's view, the kind of incoherence identified by the EU in the analysis made by the EAEC, if clearly demonstrated, would be inconsistent with Art. 3.1 of the ADA and, by consequence, with Articles 3.2, 3.4 and 3.5, and would jeopardize the objectiveness of EAEC's determination.

17 The use of different timeframes to assess the evolution of injury factors could only amount to an objective assessment if the investigating authority provided a proper justification for the practice adopted. In Brazil's view, the absence of explanation to justify the practice and the use of different approaches during the injury analysis, depending on the factual situation at hand, do not seem to be in accordance with the obligation to make an objective examination as required by Article 3.1 of the ADA.

18 Brazil considers that each of the aspects listed in Article 3.4 of the ADA must be considered during the investigation of injury. If the investigating authority does not have sufficient data or information regarding a specific issue, the report must indicate what was the reason that conducted to the absence of one of the aspects listed.

³ EU's First Written Submission, para. 55.

⁴ Russia's First Written Submission, para. 124.

19 Brazil supported that relevant factors raised by interested parties must be accompanied by a reasonable amount of evidence that minimally supports the "relevance" of the claim. Mere unfounded allegations are not sufficient to prove the presence of other factors that were injuring the domestic industry.

20 Furthermore, Brazil also upheld that an investigating authority should make this statement. Otherwise, a doubt would arise of whether the investigating authority really found that the party did not present relevant evidence or whether it deliberately avoided addressing the issue. If the latter is the case, and the authority deliberately excluded the analysis of a relevant known factor that might be causing injury, the investigating authority did not objectively examine the positive evidence before it and violated Art. 3.1 of the ADA.

21 In this particular it is also imperative to stress that the approach of the investigating authority in respect to the level of information it demands to analyze a relevant factor must be uniform. If an interested party presents two relevant factors accompanied by the same overall level of information, Brazil demonstrated its opinion that the investigating authority could not consider only one of those factors. The absence of comments by the investigating authority justifying the exclusion would result in a breach of the obligation set forth in Article 3.5 of the ADA.

22 According to the case-law⁵, in Article 6.5 of the ADA, an investigating authority is entitled to treat information received as confidential under two circumstances: (a) information which is by nature confidential; and (b) information which is provided on a confidential basis. It has already been clarified that the "good cause" requirement applies to both circumstances⁶ and that "the requisite 'good cause' must be shown by the interested party submitting the confidential information at issue"⁷.

23 For Brazil, if an interested party presents confidential information without a justification and if the investigating authority accepts treating this information as confidential without requiring any justification to be placed into the files, there would be a clear violation of Article 6.5 of the ADA.

24 If the confidential information is submitted with a justification – the "good cause" –, then two situations might be possible: (i) the investigating authority rejects the justification. In this case, the provisions of Article 6.5.2 apply, including footnote 18; or (ii) the investigating authority accepts the justification. The "good cause" requirement is not met simply by a request from the interested party, since the very nature of the "good cause" requires analysis by the investigating authority and its agreement that a "good cause" has been effectively presented. The fact that the investigating authority accepted to treat the information as confidential implies that the investigating authority agrees with the justification. In other words, it means that the investigating authority is convinced that the justification presented meets the good cause requirement.

25 It must be pointed out, however, that there is nothing in the ADA establishing that the investigating authority has to issue a special document or to place in any report an "objective assessment [...] of whether good cause was shown for confidential treatment". The requirement of Article 6.5 is that a "good cause" is presented by the interested party. For confidentiality to be granted, the investigating authority must be satisfied that the justification presented fulfill the "good cause" requirement.

26 Another issue raised by the EU is the treatment of information that is not confidential by nature as confidential information. Although there seems to be nothing in Article 6.5 of the ADA preventing a "good cause" from being presented by any interested party – and accepted by the investigating authority – for "information that is publicly available", it seems awkward to have situations in which being an interested party in an antidumping investigation entails access to less information than if the interested party was not part of the investigation. The fact that the publicly available information is not fully reflected into the files would unduly limit transparency, due process and the ability of interested parties to defend themselves.

27 It is the Brazil's view that aggregate information or information that refers to the market as a whole – like exports, imports, production, sales and inventories – should not be treated, as a rule,

⁵ Panel Report, Guatemala — Cement II, para. 8.219.

⁶ Panel Report, EC — Fasteners (China), para. 7.452.

⁷ Panel Report, Guatemala — Cement II, para. 8.220.

as confidential information. If, by any reason, an interested party believes that confidentiality is needed for publicly available information, the standard of the "good cause" requirement should be very high and very careful consideration should be given by the investigating authority. There must be a balance between requests for confidentiality by an interested party and the necessity of ensuring transparency for all interested parties. Confidentiality should not be used as a tool to diminish transparency.

28 If information is treated as confidential – because the investigating authority is convinced that a "good cause" has been shown –, then it falls upon the investigating authority to require the party submitting the confidential information to provide a non-confidential summary in such a level of detail that would not prevent other interested parties from understanding the substance of the information submitted in confidence. It falls also upon the investigating authority to demonstrate that its obligation of requesting the non-confidential summary has been fully fulfilled.

ANNEX C-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****A. Price Effect Analysis under Articles 3.1 and 3.2 of the AD Agreement**

1 First, Articles 3.1 and 3.2 of the Anti-Dumping Agreement require an investigating authority to examine "the volume of the dumped imports" (the "volume effect") and "the effect of the dumped imports on prices in the domestic market for like products" (the "price effect") as the initial step of analyses in its injury and causation determination under Article 3. With regard to the price effect inquiry, Article 3.2 specifies three paths through which dumped imports may give rise to a price effect, i.e., (i) price undercutting; (ii) price depression; and (iii) price suppression.

2 While Article 3.2 does not prescribe any particular methodologies to assess such price effects¹, the Appellate Body in *China – GOES* clarified, with respect to price depression and suppression under the second sentence of Article 3.2, that an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices.²

3 In considering whether subject imports provide explanatory force for the occurrence of price suppression or depression, an investigating authority typically begins its analysis with an examination of price developments or trends of subject imports and domestic like products over the period of investigation (the "POI") and compares them to see whether the observed price trends of subject imports and domestic like products moved in the same or similar direction over the POI. However, the mere coincidence in direction and/or extent of price development or trend hardly establishes price depression or suppression. As the Appellate Body pointed out in *China – GOES*:

[I]t would not be sufficient to identify a downward trend in the price of like domestic products over the period of investigation when considering significant price depression, or to note that prices have not risen, even though they would normally be expected to have risen, when analyzing significant price suppression. Rather, an investigating authority is required to examine domestic prices in conjunction with subject imports in order to understand whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices.³

Thus, the investigating authority must further consider relevant factors and, in particular look into the cause of the coincidence in direction and/or extent of price development or trend and, specifically, the dynamic interaction between subject imports and domestic products through the market competition between them. The investigating authority must analyze and explain, based on the positive evidence on the record, that subject imports have explanatory force for the occurrence of significant depression or suppression of the domestic like products including evidence of the above dynamic interaction. Were it not for any parallel, however, such difference in price development or trend between subject imports and domestic like products would likely suggest the lack of relationship between them, let alone the lack of dynamic interaction. Faced with such contrary evidence, the investigating authority would be required to make further inquiry with positive evidence to conclude nevertheless that subject imports have explanatory force for the occurrence of suppression of domestic prices.

4 The text of Article 3 and the Appellate Body's prior findings support this view. The assessment of price suppression under Article 3.2 appears to require a counterfactual analysis, as it provides "which otherwise would have occurred". Japan notes here that, in a counterfactual analysis, the investigating authority should compare the observed actual prices with counterfactual prices, which would have occurred if the subject imports were introduced into the domestic market at

¹ See Panel Report, *EC – Tube or Pipe Fittings*, para. 7.278; *EC – Fasteners (China)*, para. 7.328; and *China – GOES*, para. 7.546. See also Russia's First Written Submission, para. 157.

² Appellate Body Report, *China – GOES*, para. 154.

³ Ibid. para. 138.

normal value. To complete this analysis, the investigating authority must objectively examine various factors including a reasonable rate of return and actual costs of production. Also, it may examine, depending on the case and method used in the comparison, whether the market could have absorbed the price increase.

5 Second, in the examination of whether the subject imports have explanatory force for the occurrence of significant price suppression, the investigating authority must analyze the development or trend of price of subject imports and domestic like products, based on the assessment of price data and other information during the entire POI. This is because the price development or trend between subject imports and domestic like products and the interaction between them can only be ascertained by assessing all the relevant price data and other relevant information.

6 Findings based on the authority's picking and choosing of certain data in non-consecutive periods, while ignoring data in other periods, would be contrary to the requirement under Article 3.1. As the panel in *Mexico – Anti-Dumping Measures on Rice* found, "such an examination on the basis of an incomplete set of data cannot be objective, nor does the selective use of certain data for the injury analysis constitute a proper establishment of the facts on which to base the determination".⁴ The statement of the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* is instructive in this regard, although the case was in the context of price undercutting: "Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products *over the duration of the POI*".⁵

7 Finally, all the analysis of the investigating authority must be based on positive evidence as required by Article 3.1. The investigating authority then must provide a reasoned and adequate explanation in a published report on how it analyzed the factual situation of the present case based on the positive evidence on the record.⁶ Further, as the Appellate Body explained, where the authority is faced with elements other than subject imports that may explain the significant depression or suppression of domestic prices, the authority is also required to consider relevant evidence pertaining to such elements for purposes of understanding whether subject imports indeed have a depressive or suppressive effect on domestic prices.⁷ For example, when a price development or trend in subject imports and domestic prices diverges in its direction at a certain point in time during the POI, this would imply that elements other than subject imports affect the domestic prices. The investigating authority must then assess the implication of this fact carefully and explain why and how, notwithstanding such evidence, there still exists positive evidence that would outweigh such negative evidence and warrant the finding of depressive or suppressive effect on domestic prices for the entire POI.

B Definition of the "Domestic Industry" under Article 4.1 of the AD Agreement

8 Japan is of the view that the basis of the definition of the domestic industry must be all domestic producers of the like product, and not a part thereof, as explained in detail below.

⁴ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.81.

⁵ Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.160 (emphasis added).

⁶ Appellate Body Report, *China – GOES*, para. 131.

⁷ Ibid. para. 152. Japan agrees that an investigating authority must consider "elements other than subject imports that may explain the significant price suppression" in the context of the price effects analysis, separate from and independent of the non-attribution analysis mandated by Article 3.5. On the one hand, in the context of the price depression and suppression inquiry, an investigating authority must analyze "what brings about such price phenomena" and examine whether such phenomena are an effect of subject imports. As such, the analysis conducted by the investigating authority includes "element{s} other than subject import{s} that may explain the significant price suppression." On the other hand, Article 3.5 analysis concerns the causal relationship between subject imports and injury to the domestic industry and, by virtue of the phrase "through the effects of dumping, as set forth in paragraph 2 and 4", the examination of the causal relationship under Article 3.5 encompasses "all relevant evidence" before the authority, including the volume of subject imports and their price effects listed under Article 3.2, as well as all relevant economic factors concerning the state of the domestic industry listed in Article 3.4. As such, the examination under Article 3.5 covers a broader scope than the scope of the elements considered in relation to price depression and suppression under Article 3.2.

9 Article 3.1 provides that injury determinations must be based on the objective examination of both (a) the volume effect and the price effect, and (b) the consequent impact of dumped imports on "domestic producers" of the like product. The obligation to conduct objective assessment set forth in Article 3.1 requires an investigating authority to assess the significance, if any, of information it is made aware of during the process of defining the domestic industry for its assessment of injury.⁸ In this sense, Articles 3.1 and 4.1 "are inextricably linked".⁹

10 Accordingly, the definition of the domestic industry must be such that it enables the authority to make an objective examination of the impact of the dumped imports on all domestic producers. Should an investigating authority act in a biased manner in defining the domestic industry, thereby distorting the injury analysis, the determination of the domestic industry would be in violation of the obligations under Articles 3.1 and 4.1.

11 Article 4.1 defines the domestic industry in two ways, either as "the domestic producers as a whole of the like products" or "to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".¹⁰ In either case, the definition in a given investigation must allow the authority to make an objective examination of the injury of all domestic producers under Article 3, so as not to introduce a material risk of distortion to the injury determination.¹¹ The volume of production during the POI is an important factor to define the domestic industry, but the volume alone will not be decisive. As the Appellate Body pointed out, "when the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that 'substantially reflects the total domestic production' will very likely satisfy *both the quantitative and qualitative aspect of the requirements of Articles 4.1 and 3.1*".¹² The Appellate Body continued "if the proportion of the domestic producers' collective output included in the domestic industry definition is not sufficiently high that it can be considered as substantially reflecting the totality of the domestic production, then the *qualitative element becomes crucial* in establishing whether the definition of the domestic industry is consistent with Articles 4.1 and 3.1".¹³ As such, the investigating authority must define the domestic industry quantitatively as well as qualitatively to reflect accurately the total domestic production.

12 With regard to the qualitative aspect of the requirement of Articles 4.1 and 3.1, the investigating authority must consider various factors. Japan recognizes that the qualitative reflection of the total domestic production requires the investigating authority to ensure that the economic situation of the defined domestic industry represents the economic situation of domestic producers as a whole. To this end, the investigating authority must assess, for example, whether the particular method to select domestic producers to be included in the domestic industry is neutral and unbiased so as not to give rise to a material risk of distortion, or whether and to what extent the products made by the domestic producers within the scope of the domestic industry interact with the products made by domestic producers not included in the domestic industry in the market at issue.

C Transparency and Due Process Rights of Interested Parties under Article 6 of the AD Agreement

13 The AD Agreement ensures the due process rights of interested parties in investigations.¹⁴ The due process rights of adequate and sufficient opportunities of interested parties to defend their interest stand on the transparency of information during the investigation. Without adequate disclosure of information, interested parties would not be able to understand the substantive issues in a given investigation, and thus would not be able to make an effective defense. Unless interested parties provide relevant information throughout the defense process, the authority would not be able to make an appropriate determination based on enough information. In particular, an insufficient or inappropriate disclosure of essential facts would prevent the interested parties from understanding the substantive issues in the investigation, which would be the basis

⁸ See Panel Report, *China – Broiler Products*, para. 7.413.

⁹ Panel Report, *China – Broiler Products*, para. 7.408.

¹⁰ See Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.322; *China – Broiler Products*, para. 7.416; and *China – Autos (US)*, para. 7.206.

¹¹ Appellate Body Report, *EC – Fasteners (China)*, para. 414.

¹² Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.303 (emphasis added).

¹³ Ibid. (emphasis added).

¹⁴ See Article 6 of the AD Agreement.

for the authority's assessment and from making comments on the authority's determination. This precludes the authority from making analysis properly. Thus, the transparency is important from the perspective not only of protecting the right of interested parties but also of ensuring the appropriateness of the authority's determination.

14 Article 6.9 concerns "the disclosure of 'facts' in the course of such investigations 'before a final determination is made'".¹⁵ Facts that must be disclosed as essential facts are those that "form the basis for the decision whether to apply definitive measure." The Appellate Body clarified on this point:

An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Article[] 6.9 [] is paramount for ensuring the ability of the parties concerned to defend their interests.¹⁶

As such, the disclosure of essential facts is a critical process to secure the transparency and due process rights of the interested parties, and must be made in such depth that interested parties are able to comment on the factual basis of the determination.

15 The essential facts include the factual elements of dumping margin calculation, such as normal value, export price and comparisons to reach the dumping margins. The panel in *China – Broiler Products* confirmed that the disclose of such must include:

the underlying data for particular elements that ultimately comprise normal value (including the price in the ordinary course of trade of individual sales of the like product in the home market or, in the case of constructed normal value, the components that make up the total cost of production, selling and general expenses, and profit); export price (including any information used to construct export price under Article 2.3); the sales that were used in the comparisons between normal value and export price; and any adjustments for differences which affect price comparability.¹⁷

Indeed, no interested parties would be able to comment on the dumping determination without knowing the authority's factual basis for dumping determination.

16 Japan also notes that Article 6.9 does not permit a Member to make a distinction between "cooperating" and "non-cooperating" interested parties regarding the disclosure of the essential facts.

17 Where a fact contains confidential information, "the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the 'essential' but confidential facts."¹⁸ Accordingly, the adequacy of the disclosure of essential facts in such case would be in fact questions of the confidential nature of the information covered under Articles 6.5 and 6.5.1.

18 The treatment of confidential information under Article 6.5 and 6.5.1, however, would not apply to a party from which the relevant information originates. That treatment would be required only with respect to the parties other than the party which submitted the information. As the panel in *Korea – Certain Paper* found, "[t]he notion of confidentiality, as elaborated upon in Article 6.5 . . . is about preserving confidentiality of information that concerns one interested party *vis-à-vis* the other interested parties".¹⁹ Therefore, "confidentiality cannot be used as the basis for denying access to information against the company which submitted the information".²⁰ The actual facts, not a non-confidential summary, therefore, are required to be disclosed to the party who submitted the information on which such facts are based.

¹⁵ Appellate Body Report, *China – GOES*, para. 240.

¹⁶ Appellate Body Report, *China – GOES*, para. 240.

¹⁷ Panel Report, *China – Broiler Products*, para. 7.91. See also Panel Report, *China – Autos (US)*, paras. 7.72-7.73.

¹⁸ Panel Report, *China – GOES*, para. 7.410.

¹⁹ Panel Report, *Korea – Certain Paper*, para. 7.201.

²⁰ Ibid.

19 In connection with the injury determination, Article 6.9 requires the authority to disclose facts, not the authority's assessment of facts. As the panel in *China – GOES* found, "it is insufficient merely to state a general finding and conclusion regarding non-subject imports, namely that as a proportion of total imports into China, non-subject imports 'continued to drop' and therefore were not a cause of injury to the domestic industry."²¹ Confirming such findings, the Appellate Body stated "the essential facts that MOFCOM should have disclosed in respect of the 'low price' of subject imports include the price comparisons between subject imports and the like domestic products. ... because they were required for an understanding of the occurrence of price undercutting, which served as a basis for MOFCOM's price effects finding".²²

²¹ Panel Report, *China – GOES*, para. 7.658.

²² Appellate Body Report, *China – GOES*, para. 247.

ANNEX C-3**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY****1 INTRODUCTION**

Mr. Chairperson, Distinguished Members of the Panel.

1. The Republic of Turkey (hereinafter referred to as "Turkey") would like to thank the Panel for the opportunity to present this Oral Statement as a Third Party in the current proceedings.

2. As stated in our third party written submission, Turkey exercises its third party rights under Article 10 of the DSU in this case not only because of its systemic interest in the correct interpretation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "Anti-Dumping Agreement"), but also its substantial trade interests that is negatively affected by the measures at issue in this dispute. Turkey provided a written submission to the Panel on 29 January 2016. In this Oral Statement, Turkey does not wish to reiterate the arguments stated in its written submission but Turkey would like to briefly elaborate some important parts of its written submission.

2 CLAIMS UNDER ARTICLES 3.1 AND 4.1 OF THE ANTI-DUMPING AGREEMENT

3. In its written submission Turkey argued that the accurate definition of the "product under consideration" and "like product" constitutes the very foundation of a coherent and unbiased determination of the "domestic industry". Indeed, it is indispensable to conduct an objective injury analysis in line with the overarching principles stipulated in Article 3.1 of the Anti-Dumping Agreement.¹

4. Since, Article 4.1 of the Anti-Dumping Agreement defines the "domestic industry" as either the domestic producers as a whole or those domestic producers whose output constitutes a major proportion of the product under consideration, Turkey considers that the investigating authority is under the obligation to identify the domestic producers of the like product as precisely as possible.

5. In a dumping investigation, however, the issue whether the investigating authority has put "reasonable" effort to identify all domestic producers is a question that must be addressed on a case-by-case basis. Accordingly, assessing whether "reasonable effort" was shown depends, on different factors; *inter alia*, the structure of the market, number of the market players, the percentage of registered production facilities and willingness of the domestic producers to declare their output data.

6. Finally, the risk of distortion of the injury analysis can be mitigated if the universe of all domestic producers is defined as entirely and accurately as possible and the "domestic industry" is defined with a view of reaching an objective picture of the injury based on positive evidence.²

3 CLAIMS UNDER ARTICLES 3.1, 3.2, 3.4 AND 3.5 OF THE ANTIDUMPING AGREEMENT

7. Considering the claims and arguments on the period of investigation Turkey reiterates its position that maintaining symmetry between the "period of dumping determination" and "period of injury determination" is imperative to ensure an objective and even-handed analysis on injury and

¹ Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, para. 7.315; Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R, adopted 18 June 2014, para. 7.211.

² Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron and Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, para. 414; Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, adopted 25 September 2013, para. 7.413.

causation. As underlined in its written submission³, Turkey is of the view that the rules set in the Recommendation of the Committee on Anti-Dumping Practices reflect this rationale clearly.

8. Turkey understands that the "price effect" analysis is one of the fundamental components of a coherent injury and causation assessment. As confirmed by the case law, the concepts of "explanatory force" and "dynamic price assessment" are significant instruments to strengthen the legal discipline of Article 3.2 and drive the investigating authority to inquire further the link between the state of the domestic industry and the price impact of the dumped imports. Turkey, however, opines that examinations to satisfy the requirements of these concepts may not be always straight forward or easily handled. Turkey acknowledges that investigating authority is under the obligation to achieve this complicated work with a view of acting in line with the principles of Article 3.1 of the Anti-Dumping Agreement.⁴

9. As regards the legal discipline stipulated in Article 3.4 of the Anti-Dumping Agreement, Turkey underlines that the investigating authority is expected not only to analyze the trend of individual factors but also to establish the cross-connections between factors that will depict a more complete and precise picture of the domestic industry's state. Furthermore, Turkey understands that the Article 3.1 of the Anti-Dumping Agreement implicitly directs the investigating authority to evaluate economic indicators of the domestic industry in a holistic manner without singling out or giving less emphasis to those indicators that display affirmative outcomes on the viability of the domestic industry.

10. Finally, as underscored in case law⁵ Article 3.5 of the Anti-Dumping Agreement stipulates two separate paths of evaluation to reach the conclusion that causality is present between the dumped imports under consideration and injury of the domestic industry. From a practitioner's point of view, Turkey acknowledges that "causality" analysis is one of the most challenging parts of an investigation. In that context, Turkey opines that while the investigating authority is expected to show the link between the dumped imports and injury, it is equally responsible to examine whether the "other known factors" are in such a magnitude that they render the link between dumped imports and injury irrelevant.

4 CONCLUSION

11. Mr. Chairperson, distinguished Members of the Panel, with these comments, Turkey would like to contribute to the legal debate of the parties in this case, and express again its appreciation for this opportunity to share its views on this relevant debate, regarding the interpretation of Anti-Dumping Agreement.

12. We thank you for your kind attention and remain at your disposal for any question you may have.

³ Turkey's Third Party Written Submission, para. 29.

⁴ Ibid, paras. 34, 35.

⁵ Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, para. 151.

ANNEX C-4**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE**

1. In its written submission and oral statement Ukraine provided comments on certain legal issues involving the consistency of the anti-dumping measures applied by Eurasian Economic Commission ("EAEC") with Articles 3.1, 3.2, 3.4, 3.5, 4.1, 6.5, 6.5.1, 6.9, and 12.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-dumping Agreement") and Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

2. Ukraine considers that the fact that EAEC excluded "Gorkovsky Avtomobilny Zavod" from the definition of the domestic industry on the grounds that it provided lacking or deficient information violates provisions of Articles 3.1, 4.1, and 6.6 of Anti-dumping Agreement.

3. First, Article 6.6 places "the burden of satisfying oneself of the accuracy of the information on the investigating authority"¹ with a sole exception of circumstances provided in Article 6.8 and Annex II to Anti-dumping Agreement following the extensive procedures provided therein. Moreover, Panel in *US – Hot-Rolled Steel* explicitly stated that "where information is actually submitted in time to be verified, and actually could be verified, we consider that it should generally be accepted".² Therefore, declaring a producer non-cooperating and disregarding its information after finding it deficient shall not be done without making an extensive effort to verify the provided information.

4. Second, Ukraine considers that deviation from specific definition of the domestic industry may result in a violation of Article 4.1. Specifically, the Panel in *Argentina – Poultry Anti-Dumping Duties* states "if a Member were to interpret the term differently in the context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1".³ As Article 4.1 sets out explicitly only two specific circumstances that permit an investigating authority to deliberately exclude producers from the domestic industry (one for related producers and one for definition of separate competitive markets), the investigating authority shall include every producer into domestic industry unless it has very strong reasons for the opposite.

5. Third, the Appellate Body in *EC – Fasteners (China)* provided plainly that "excluding a whole category of producers of the like product" is an example of behaviour that creates a risk of "distortion in defining the domestic industry"⁴ and results in a lack of objective examination contrary to provisions of Article 3.1. Ukraine fails to understand how EAEC could have conducted objective examination by intentionally ignoring a producer as non-cooperating and limiting its definition of the domestic industry with applicant only even though the other producer fully participated in the investigation.

6. In connection to the fact that the Russian Federation excluded examination of certain factors (namely, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments) Ukraine notes that it was not consistent with several provisions of Anti-Dumping Agreement.

7. Ukraine finds it important to understand the precise scope of explanations of the Appellate Body in *Thailand – H-Beams*. While the Appellate Body explained that there is "no justification for reading these obligations [of Article 12] into the substantive provisions of Article 3.1"⁵ and that the determination made by the investigating authority under Article 3.1 must not be "based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation"⁶, Ukraine considers that these conclusions applied only to the factual basis and reasoning that is the basis for investigating authority's conclusions: nothing in Article 3.1 or 3.4

¹ Panel Report, *Argentina – Ceramic Tiles*, para. 6.57.

² Panel Report, *US – Hot-Rolled Steel*, para. 7.55.

³ Panel report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, para. 7.338

⁴ Appellate Body Report, *EC – Fasteners*, para. 414.

⁵ Appellate Body Report, *Thailand – H-Beams*, para. 110.

⁶ Appellate Body Report, *Thailand – H-Beams*, para. 111.

could justify making the whole examination of the required elements of injury confidential and excluding it from the public report.

8. Moreover, such exclusion should also violate requirements of Article 12.2 Anti-dumping Agreement that reasons which have led to the imposition of final measures should be included into public notice with "due regard being paid to the requirement for the protection of confidential information". The findings of the investigating authority are not such information.

9. Therefore, Ukraine considers that excluding findings of the investigating authorities on obligatory factors from the public record violates both Article 3.4 and 12.2 of Anti-dumping Agreement.

ANNEX C-5**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****1 THE EUROPEAN UNION'S CLAIMS REGARDING ARTICLES 3.1 AND 4.1 OF THE AD AGREEMENT**

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

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

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

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

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

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

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

7. First, the United States observes that Article 3.2 requires that an authority "consider" the volume and price effects of the relevant imports. Article 3.1 provides important context for

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

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

3 CLAIMS REGARDING ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

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

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

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

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

4 CLAIMS REGARDING ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT

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

14. The first sentence of Article 3.5 sets out the general requirement for a demonstration that dumped imports are causing injury under the AD Agreement, and contains an explicit link back to Articles 3.2 (volume and price effects) and 3.4 (impact on domestic industries). If the volume or price effects findings are found to be inconsistent with Articles 3.1 and 3.2, or the impact findings are found to be inconsistent with Articles 3.1 and 3.4, an Article 3.5 causal link analysis relying on

such findings would fail. That is, if an authority relies on a price effects finding to support its impact and injury determinations, its decision must be supported by positive evidence on these counts. In such circumstances, a failure to demonstrate price effects or significant impact would constitute a failure to demonstrate that dumped imports are causing injury, as required by the first sentence of Article 3.5 of the AD Agreement.

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

16. The third sentence of Article 3.5 of the AD Agreement provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. Under Article 3.5, the premise of a non-attribution analysis is that there is at least one known factor other than the dumped imports that is injuring the domestic industry. As the Appellate Body has found, if a known factor other than dumped imports is a cause of injury, the third sentence of Article 3.5 requires the authority to engage in a non-attribution analysis to ensure that the effects of that other factor are not attributed to the dumped imports. If there are no other known factors other than the dumped imports that are injuring the domestic industry, Article 3.5 does not require an authority to conduct a non-attribution analysis. Indeed, in such circumstances, the authority can appropriately attribute all injury to the dumped imports.

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

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

A. Articles 6.5 and 6.5.1 of the AD Agreement Require Designation of Confidential Information and Public Summaries

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

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

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

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

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

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

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

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

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

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

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

27. Regarding the interpretation of the domestic industry, Article 4.1 of the AD Agreement defines the "domestic industry" as referring to the industry as a whole, or those producers whose production constitutes a "major proportion" of the total domestic production. For the purpose of our comments today, we focus on the latter situation, where an authority seeks to define the domestic industry as a "major proportion" of domestic production. Under such circumstances, the "major proportion" requirement is to be read in conjunction with the overarching obligation of Article 3.1. That provision requires that a final material injury determination be based on "positive evidence" and an "objective examination" of the facts. To result in such a determination, the

authority's definition of the domestic industry must be unbiased so as not to give rise to a material risk of distortion.

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

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

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

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

ANNEX D

PRELIMINARY RULING

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ANNEX D-1

PRELIMINARY RULING ON THE PANEL'S JURISDICTION UNDER ARTICLE 6.2 OF THE DSU

20 April 2016

1 INTRODUCTION AND ARGUMENTS OF THE PARTIES

1.1. The Russian Federation requests a preliminary ruling on whether certain claims addressed by the European Union in its first written submission are within the scope of the request for the establishment of a panel in this dispute and therefore within the jurisdiction of this Panel.

1.2. According to the **Russian Federation**, in its Request for Consultations of 26 May 2014¹ and Request for the Establishment of a Panel of 16 September 2014², the European Union claimed that, inconsistently with Article 6.9 of the Anti-Dumping Agreement, the Russian Federation failed to inform the interested parties of the essential facts under consideration which form the basis of the decision to impose anti-dumping measures, including facts underlying the determinations of the existence of dumping, the calculation of the margins of dumping and "the determination of injury".³ In its first written submission, the European Union argued that the Russian Federation had violated its obligations under Article 6.9 of the Anti-Dumping Agreement by failing to disclose to the interested parties the essential facts under consideration that formed the basis for the determination of "a causal link between the dumping and the injury".⁴ In the Russian Federation's view, this is a "new claim" that was not included in either the consultations request or the panel request. As such, it impermissibly expanded the scope of the dispute and changed "the essence of the complaint".⁵ The test established by the Appellate Body in respect of Article 6.2 of the DSU is "the ability of the respondent to defend itself".⁶ The panel request does not meet this test in relation to the claim regarding the determination of causality. Therefore, the Russian Federation requests a preliminary ruling that this claim is not within the jurisdiction of the Panel.⁷

1.3. The **European Union** responds that the "phrase 'determination of injury' in the EU's consultation and panel requests should be read in light of Article 3 of the Anti-Dumping Agreement ... [which] is entitled 'Determination of injury'".⁸ Paragraph 5 of Article 3 deals with causation and non-attribution, and thus, for the European Union, the phrase "determination of injury" includes these elements. The European Union considers that paragraph 1 of the panel request refers to "injury determination" in the same sense – that is, as including causation and non-attribution.⁹ Finally, paragraph 8 of the panel request is drafted in a non-exhaustive manner.¹⁰

2 THE GOVERNING LAW

2.1. Articles 7 and 6.2 of the DSU set out the jurisdiction of the Panel. Article 7 of the DSU provides that, unless the parties agree otherwise, the terms of reference of a panel are set out in the DSB document establishing that panel. These terms of reference are, in turn, based on the request for the establishment of the panel under Article 6.2 of the DSU, which states in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a

¹ WT/DS479/1; G/L/1070; G/ADP/D103/1; 26 May 2014 (hereinafter consultations request).

² WT/DS479/2; 16 September 2014 (hereinafter panel request).

³ Russian Federation's response to Panel question No. 2, para. 6. (emphasis added)

⁴ Russian Federation's first written submission, para. 684. (emphasis added)

⁵ Russian Federation's first written submission, para. 685.

⁶ Appellate Body Report, *Korea – Dairy*, para. 127.

⁷ Russian Federation's first written submission, para. 688; See also Russian Federation's second written submission, paras. 306-309.

⁸ European Union's response to Panel question No. 2, para. 2; second written submission, paras. 7-14.

⁹ *Ibid.*, para. 4.

¹⁰ *Ibid.*, para. 5.

brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2.2. Previous panel and Appellate Body reports have clarified these provisions, and it is now well understood that:

- a. A panel has the inherent jurisdiction to determine whether a matter falls within its terms of reference.¹¹
- b. Where a matter or a claim does not satisfy the requirements of Article 6.2, it is not within the jurisdiction of the panel.¹²
- c. A defect in the panel request may not be "cured" in later submissions.¹³
- d. To determine whether a matter or a claim falls within the terms of reference of the panel, the panel request should be read in its entirety.¹⁴
- e. The use of terminology such as "including" "cannot operate to include any and all other claims not specifically included in the request".¹⁵
- f. Article 6.2 protects a Member's due process interests in the course of litigation.¹⁶ At the same time, the procedural rules of the WTO should not be used as litigation techniques.¹⁷

3 ANALYSIS

3.1. The Russian Federation argues that the European Union referred only to "injury determination" but not to "causation" or "non-attribution" in the context of its claims under Article 6.9 of the Anti-Dumping Agreement (Article 6.9 claims) as set out in the consultation request and panel request. For this reason, the Russian Federation considers that the aspect of the European Union's Article 6.9 claims related to causation and non-attribution falls outside the Panel's jurisdiction.

3.2. In its panel request the European Union set out the following claims:

1. Articles 3.1, 3.2, 3.4 and **3.5** of the AD Agreement, because, by selecting non-consecutive periods of non-equal duration for the examination of the trends for the whole domestic industry, Russia's **injury determination** was not based on an objective examination of positive evidence. ...
4. Articles 3.1 and **3.5** of the AD Agreement, because Russia failed to conduct an objective examination, based on positive evidence, **of the causal relationship** between the imports under investigation and the alleged injury to the domestic industry. Russia also failed to conduct an objective examination, based on positive evidence, of **factors other than the imports** under investigation which have been injuring the domestic industry, and therefore improperly attributed the injuries caused by these other factors to the imports under investigation. ...
8. Article 6.9 of the AD Agreement, because Russia failed to inform the interested parties of the essential facts under consideration which form the basis of **the decision to impose antidumping measures**, including the essential facts underlying the

¹¹ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.

¹² Panel Report, *Brazil – Desiccated Coconut*, para. 288; Appellate Body Report, *US – Carbon Steel*, para. 126.

¹³ Appellate Body Report, *EC – Bananas III*, para. 143.

¹⁴ Appellate Body Report, *US – Carbon Steel*, para. 127.

¹⁵ Appellate Body Reports, *India – Patents (US)*, para. 90; and *EC – Fasteners (China)*, para. 597.

¹⁶ Appellate Body Report, *US – Carbon Steel*, para. 126.

¹⁷ Appellate Body Report, *US – FSC*, para. 166.

determinations of the existence of dumping and the calculation of the margins of dumping and **the determination of injury**.¹⁸

The European Union specifically identified both causation and non-attribution in the claim related to Article 3.5 of the Anti-Dumping Agreement set out in paragraph 4 of its panel request. While no specific reference is made to either causation or non-attribution in paragraph 8, which sets out the Article 6.9 claims, the reference to the determination of injury is introduced by the word "including". The European Union argues that in paragraph 1 of the panel request mention is made of Article 3.5 of the Anti-Dumping Agreement in respect of the "injury determination". For this reason, both here and in paragraph 8, the term "injury determination" should be read to include causation and non-attribution.

3.3. The Russian Federation's argument raises a concern that the absence of any specific reference to causation and non-attribution in paragraph 8 of the panel request risks a measure of imprecision in the scope of the European Union's Article 6.9 claims. In this regard, we recall the findings of the panel in *Canada – Wheat Exports and Grain Imports*:

Due process requires that the complaining party fully assume the burden of identifying the specific measures under challenge.

...

In our view, it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request.¹⁹

At the same time, however, we recall that to determine whether a claim meets the due process requirements of Article 6.2 of the DSU, it must be viewed in the context of the panel request as a whole. As well, in any claim the measure at issue and the legal basis of the complaint impart meaning to one another.

3.4. In this context, we make the following two observations. First, the use of the same term in different places in the same document implies, absent indications to the contrary, that it should be understood to have the same scope throughout the document, and there is nothing in the panel request to suggest that this should not be the case here: following on from paragraph 1 of the panel request, subsequent references to the "injury determination" in the context of a claim referring to Articles 3.1, 3.2, 3.4, or 3.5 of the Anti-Dumping Agreement suggest to us that the term may properly be understood to include all the relevant elements of an injury determination set out in those provisions, including causation and non-attribution. Accordingly, "injury determination" when used in paragraph 8 should be understood to have the same scope as when used in paragraph 1 – that is, to also include the causation and non-attribution aspects of Article 3.5 of the Anti-Dumping Agreement. Second, paragraph 8 closely tracks the text of Article 6.9 of the Anti-Dumping Agreement in referring to "essential facts under consideration which form the basis of the decision to impose antidumping measures". The decision to impose anti-dumping measures rests on consideration of all the relevant elements of the determination of injury set out in Article 3 of the Anti-Dumping Agreement.

3.5. In our view, it is clear that Article 6.9 of the Anti-Dumping Agreement covers all elements of a decision to impose an anti-dumping measure, and that this also includes causation and non-attribution.²⁰ Moreover, we note that in setting out the scope of its obligation under Article 6.9 of

¹⁸ Emphases added. These are substantially similar to the corresponding paragraphs of the consultation request.

¹⁹ Panel Report, *Canada – Wheat Exports and Grain Imports*, paras. 24-25. (emphasis added)

²⁰ Appellate Body Report, *China – HP-SST*, para. 5.130: "In order to apply a definitive measure, an investigating authority must find dumping, injury to the domestic industry, and a causal link between the dumping and the injury." See also Appellate Body Report, *China – GOES*, para. 241: "We agree with the Panel that, '[i]n order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link'". And panel Report, *China – Autos (US)*, para 7.71:

In order to apply definitive measures at the conclusion of AD investigations, an IA must find three key elements: (i) dumping; (ii) injury; and (iii) a causal link. Therefore, the "essential

the Anti-Dumping Agreement in its first written submission, the Russian Federation referred to the panel's findings in *China – Broiler Products*:

In this regard the panel in *China – Broiler Products* has noted that the investigating authority must find three key elements in order to apply definitive measures: (i) dumping, (ii) injury **and (iii) causal link**. Therefore, **the "essential facts" underlying the findings and conclusion relating to these elements form the basis of the decision to apply definitive measures** and must be disclosed.²¹

This demonstrates that the Russian Federation was or should have been aware that in the panel request in this case, the term "determination of injury" in paragraph 8 was to be understood to encompass the elements of causation and non-attribution. The use of the term "determination of injury" without specifying the elements of causal link or non-attribution does not detract from the clear Article 6.9 legal requirement.

4 CONCLUSION

4.1. The Russian Federation has failed to establish that the claim of the European Union under Article 6.9 of the Anti-Dumping Agreement in relation to alleged failure to disclose essential facts concerning causation and non-attribution is a "new claim" that falls outside the jurisdiction of the Panel.

facts" underlying the findings and conclusions relating to these elements form the basis for the decision to apply definitive measures, and must be disclosed.

²¹ Russian Federation's first written submission, para. 718. (emphasis added) See also Russian Federation's second written submission, at para. 327 (in the section dealing with the interpretation of Article 6.9): "It is a clear that a definitive measure is applied if dumping and injury **caused by dumping** are found." (emphasis added)