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

AB-2017-3

*Report of the Appellate Body*

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## ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	business confidential information
confidential investigation report	Eurasian Economic Commission, DIMD, <i>Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union</i> (Confidential version) (Moscow, 2013) (Panel Exhibit RUS-14 (BCI))
Customs Union	Customs Union between the Republic of Belarus, the Republic of Kazakhstan, and the Russian Federation
Customs Union Commission	Customs Union Commission
DIMD	Department for Internal Market Defence of the EEC
draft investigation report	Eurasian Economic Commission, DIMD, <i>Report on the findings of the anti-dumping investigation on imports of light commercial vehicles from Germany, Italy, Poland, and Turkey</i> (Non-confidential version) (Draft report, 28 March 2013) (Panel Exhibits EU-16 and RUS-10)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EAEU	Eurasian Economic Union
EEC	Eurasian Economic Commission
electronic customs database	Electronic customs database of national customs authorities of the Customs Union between the Republic of Belarus, the Republic of Kazakhstan, and the Russian Federation
Fiat	Fabbrica Italiana Automobili Torino
GATT 1994	General Agreement on Tariffs and Trade 1994
GAZ	Gorkovsky Avtomobilny Zavod
LCVs	light commercial vehicles
MIT	Ministry of Industry and Trade of the Russian Federation
non-confidential investigation report	Eurasian Economic Commission, DIMD, <i>Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland, and Turkey and imported into the common customs territory of the Customs Union</i> (Moscow, 2013) (Non-confidential version) (Panel Exhibits EU-21 and RUS-12)
Panel Interim Report	Interim Report of the Panel issued to the parties on 26 August 2016
Panel Report	Panel Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/R and Add.1
PCA	Peugeot Citroen Automobiles SA
PCR	Peugeot Citroën Russia
period of injury assessment	1 January 2008 to 31 December 2011
period of investigation	1 July 2010 to 30 June 2011
RUB	Russian roubles
Sollers	Sollers-Elabuga LLC
USD	US dollars

Abbreviation	Description
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

## PANEL EXHIBITS CITED IN THIS REPORT

Panel Exhibit	Short title	Description
EU-4	Sollers' updated questionnaire response of 31 January 2013	Response dated 31 January 2013 by Sollers-Elabuga LLC to the EEC's "Questionnaire to Determine Material Injury to an Industry in the Member States of the Customs Union for Manufacturers" (Non-confidential version)
EU-6	Turin Auto's updated questionnaire response of 31 January 2013	Response dated 31 January 2013 by Turin Auto to the EEC's "Questionnaire for Trading Houses" (Non-confidential version)
EU-8	Daimler's and Mercedes' comments of 16 March 2012 on the public hearing	Letter dated 16 March 2012 from Daimler AG and CJSC Mercedes-Benz RUS to the MIT, concerning "Information to be presented ... during the public hearings scheduled for 22 March 2012 in respect of the anti-dumping investigation concerning light commercial vehicles conducted by the Ministry for Industry and Trade of the Russian Federation under the claim of OOO Sollers-Elabuga" (including Annexes 1-9)
EU-11	Volkswagen's comments of 6 April 2012 on the public hearing	Letter dated 6 April 2012 from Volkswagen AG to the MIT, concerning the public consultation of 22 March 2012 (anti-dumping investigation on light commercial vehicles from Germany, Italy, Poland and Turkey)
EU-12	Annex 2 to Volkswagen's comments of 6 April 2012	Republic of Tartastan Business Center, Press article, "Ford Sollers Elabuga plant delivered first 1200 cars to dealers", 1 March 2012
EU-16	draft investigation report	Eurasian Economic Commission, DIMD, <i>Results of the anti-dumping investigation with regard to light commercial vehicles originating in Germany, Italy, Poland and Turkey imported into the common customs area of the Customs Union</i> (Non-confidential version) (Draft report, 28 March 2013)
EU-19	Daimler's and Mercedes' comments of 11 April 2013 on the draft investigation report	Letter dated 11 April 2013 from Daimler AG and ZAO Mercedes-Benz RUS, concerning "Comments presented on the Report of 28 March 2013, prepared by the Department of Protection of Internal Market of the Eurasian Economic Commission on the preliminary findings of the anti-dumping investigation in respect of light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union of Russia, Belarus and Kazakhstan"
EU-20	PCA's and PCR's comments of 11 April 2013 on the draft investigation report	Letter dated 11 April 2013 from Peugeot Citroën Automobiles SA (PCA) and Peugeot Citroën Russia (PCR), concerning "the report on the results of the anti-dumping investigation in respect of light commercial motor vehicles originated from Federal republic of Germany, Italian republic, Polish Republic and Republic of Turkey and imported into the common customs territory of the Customs Union"

Panel Exhibit	Short title	Description
EU-21	non-confidential investigation report	Eurasian Economic Commission, DIMD, <i>Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland, and Turkey and imported into the common customs territory of the Customs Union</i> (Non-confidential version) (Moscow, 2013)
EU-22	EEC Decision No. 113	Eurasian Economic Commission, Board Decision No. 113 of 14 May 2013, "Regarding the application of an anti-dumping measure by introducing an anti-dumping duty on light commercial vehicles originating from the Federal Republic of Germany, the Italian Republic and the Republic of Turkey, and imported into the common customs territory of the Customs Union"
EU-31	Comments of the Association of Turkish exporters from the automotive industry of 11 February 2012	Letter dated 11 February 2012 (No. 14/02-11) from the Association of Turkish exporters from the automotive industry, concerning the dumped import [and its conditions], the possible injury to the domestic industry, the causal link between the two and the national interest factor in the investigation
RUS-2	Notice of Initiation	Ministry of Industry and Trade of the Russian Federation, Order No. 1587 (15 November 2011), Notice "On Initiation of Anti-dumping Investigation related to Light Commercial Vehicles Originating from German, Italy, Poland and Turkey and Imported into the Single Customs Territory of the Customs Union"
RUS-10	draft investigation report	Eurasian Economic Commission, DIMD, <i>Findings from the anti-dumping investigation relating to light commercial vehicles originating from Germany, Italy, Poland and Turkey and imported into the single customs territory of the Customs Union</i> (Non-confidential version) (Draft report, 28 March 2013)
RUS-12	non-confidential investigation report	Eurasian Economic Commission, DIMD, <i>Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland, and Turkey and imported into the common customs territory of the Customs Union of the Department for Internal Market Defence of the Eurasian Economic Commission</i> (Non-confidential version) (Moscow, 2013)
RUS-14 (BCI)	Confidential investigation report	Eurasian Economic Commission, DIMD, <i>Findings from the anti-dumping investigation relating to light commercial vehicles originating in Germany, Italy, Poland and Turkey and imported into the common customs territory of the Customs Union</i> (Confidential version) (Moscow, 2013)
RUS-18	EEC Letter No. 14-176	Letter No. 14-176 dated 11 April 2013 from the Eurasian Economic Commission to ZAO Mercedes-Benz RUS and OOO Volkswagen Group RUS

## CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Australia – Salmon</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS18/AB/R, DSR 1998:VIII, p. 3407
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
<i>China – Broiler Products</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
<i>China – GOES</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Panel Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/AB/RW and Add.1, adopted 12 February 2016
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7



Short Title	Full Case Title and Citation
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>India – Solar Cells</i>	Appellate Body Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/AB/R and Add.1, adopted 14 October 2016
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Olive Oil</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179
<i>Russia – Commercial Vehicles</i>	Panel Report, <i>Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy</i> , WT/DS479/R and Add.1, circulated to WTO Members 27 January 2017
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R and Add.1, adopted 22 May 2017
<i>US – Anti-Dumping Methodologies (China)</i>	Panel Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/R and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Countervailing Duty Investigation on DRAMS</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, p. 8243
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697

Short Title	Full Case Title and Citation
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R and Add.1, adopted 26 September 2016

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy**

Russian Federation, *Appellant/Appellee*  
European Union, *Other Appellant/Appellee*

Brazil, *Third Participant*  
China, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
Turkey, *Third Participant*  
Ukraine, *Third Participant*  
United States, *Third Participant*

AB-2017-3

Appellate Body Division:

Zhao, Presiding Member  
Bhatia, Member  
Servansing, Member

## 1 INTRODUCTION

1.1. The Russian Federation (Russia) and the European Union each appeals certain issues of law and legal interpretations developed in the Panel Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*<sup>1</sup> (Panel Report). The Panel was established on 20 October 2014<sup>2</sup> to consider a complaint by the European Union<sup>3</sup> with respect to the consistency of the levying of certain anti-dumping duties by Russia with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994). The factual aspects of this dispute are set forth in greater detail in the Panel Report.

1.2. Following consultation with the parties, the Panel adopted its Working Procedures on 1 December 2015 and Additional Working Procedures Concerning Business Confidential Information on 14 January 2016.<sup>4</sup>

1.3. Before the Panel, the European Union raised several claims<sup>5</sup> in relation to anti-dumping duties levied by Russia on certain light commercial vehicles (LCVs) from Germany and Italy pursuant to Decision No. 113 of 14 May 2013 of the Board of the Eurasian Economic Commission (EEC)<sup>6</sup>, including related annexes, notices, and reports of the Department for Internal Market Defence of the EEC (DIMD).<sup>7</sup> Specifically, the European Union claimed that the measure at

<sup>1</sup> WT/DS479/R, 27 January 2017.

<sup>2</sup> WT/DSB/M/351, para. 5.4.

<sup>3</sup> Panel Report, para. 1.3; Request for the Establishment of a Panel by the European Union, WT/DS479/2.

<sup>4</sup> Panel Report, paras. 1.8.a and 1.8.c, and Annexes A-1 and A-2.

<sup>5</sup> Panel Report, paras. 3.1.a-3.1.i; European Union's first written submission to the Panel, para. 453.

<sup>6</sup> See Eurasian Economic Commission, Board Decision No. 113 of 14 May 2013, "Regarding the application of an anti-dumping measure by introducing an anti-dumping duty on light commercial vehicles originating from the Federal Republic of Germany, the Italian Republic and the Republic of Turkey, and imported into the common customs territory of the Customs Union" (Panel Exhibit EU-22).

<sup>7</sup> While the European Union challenged anti-dumping duties imposed by Russia, it was the DIMD that completed the anti-dumping investigation underlying the decision to impose those duties. When the European Union requested consultations (on 21 May 2014) with Russia in relation to this dispute, Russia was the only WTO Member that was part of the then called Customs Union between Belarus, Kazakhstan, and Russia (the Customs Union), which is now the Eurasian Economic Union (EAEU).

issue<sup>8</sup> was inconsistent with the following provisions of the Anti-Dumping Agreement: (i) Articles 3.1 and 4.1 by excluding Gorkovsky Avtomobilny Zavod (GAZ) from the definition of domestic industry; (ii) Articles 3.1, 3.2, 3.4, and 3.5 by selecting non-consecutive periods of non-equal duration for the examination of the trends in the domestic industry; (iii) Articles 3.1 and 3.2 by failing to analyse properly price suppression; (iv) Articles 3.1 and 3.4 by failing to evaluate properly all injury factors; (v) Articles 3.1 and 3.5 by failing to examine properly (a) the causal relationship between the imports at issue and the alleged injury, and (b) factors other than the imports at issue that have injured the domestic industry; (vi) Article 6.5 by according confidential treatment to information without a proper showing of "good cause"; (vii) Article 6.5.1 by failing to require interested parties to provide proper non-confidential summaries or to explain why summarization was not possible; and (viii) Article 6.9 by failing to inform the interested parties of the essential facts under consideration which formed the basis for the decision to impose anti-dumping measures. As a consequence of these inconsistencies, the European Union claimed that Russia also acted inconsistently with Articles 1 and 18.4 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

1.4. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 27 January 2017, the Panel found that:

- a. with respect to the definition of domestic industry:
  - i. the DIMD acted inconsistently with Article 4.1 of the Anti-Dumping Agreement in its definition of "domestic industry"<sup>9</sup>; and
  - ii. the DIMD acted inconsistently with Article 3.1 of the Anti-Dumping Agreement because it undertook its injury and causation analyses on the basis of information related to an improperly defined domestic industry<sup>10</sup>;
- b. the European Union had failed to establish that the DIMD acted inconsistently with Article 3.1 of the Anti-Dumping Agreement by purportedly using "non-equal and non-consecutive" periods in the examination of developments in injury indicators for the domestic industry<sup>11</sup>;
- c. with respect to price suppression:
  - i. the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis in its price suppression analysis<sup>12</sup>;
  - ii. the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because the DIMD mixed data

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<sup>8</sup> The product at issue in the underlying anti-dumping investigation was LCVs originating from Germany, Italy, Poland, and Turkey and imported into the then territory of the Customs Union. The LCVs investigated were those with a gross vehicle weight of 2.8 tonnes to 3.5 tonnes inclusive, van-type bodies, with a diesel engine 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 21 310 0 and HS code 8704 21 910 0". (European Union's first written submission to the Panel, para. 11. See also Eurasian Economic Commission, DIMD, *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 Department for Internal Market Defence of the Eurasian Economic Commission* (Non-confidential version) (Moscow, 2013) (non-confidential investigation report) (Panel Exhibits EU-21, p. 16 and RUS-12, p. 15); Notice of Initiation (Panel Exhibit RUS-2), p. 1).

<sup>9</sup> Panel Report, paras. 7.16 and 8.1.a.

<sup>10</sup> Panel Report, paras. 7.16 and 8.1.b.

<sup>11</sup> Panel Report, paras. 7.53 and 8.1.c. Having reached this conclusion, the Panel also rejected the European Union's consequential claims of inconsistency under Articles 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement.

<sup>12</sup> Panel Report, paras. 7.67, 7.108.a, and 8.1.d.i.

expressed in US dollars (USD) and Russian roubles (RUB) without any explanation in its price suppression analysis<sup>13</sup>;

- iii. the European Union had not established that the DIMD's consideration of whether the subject imports have "explanatory force" for the occurrence of significant suppression of domestic prices was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement<sup>14</sup>; and
  - iv. the European Union had not established that the DIMD did not demonstrate that the alleged price suppression was "to a significant degree" because the DIMD did not compare the target domestic prices and the actual prices for the domestic like product<sup>15</sup>;
- d. with respect to the state of the domestic industry:
- i. the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in its consideration of profit/profitability data<sup>16</sup>;
  - ii. the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in its consideration of inventories data<sup>17</sup>;
  - iii. the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to compare systematically data for 2011 with data for 2008 for all economic indicators<sup>18</sup>;
  - iv. the European Union had not established that the DIMD failed to examine objectively the domestic industry's profit/profitability during the period of investigation, the first half of 2011, and the full year of 2011<sup>19</sup>;
  - v. the European Union had not established that the DIMD assumed that the exceptional positive developments in the domestic industry during 2009 could continue during 2010-2011 without more explanation and "base[d] its conclusions on a comparison between these two time periods"<sup>20</sup>;
  - vi. the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to consider whether the market would accept further price increases<sup>21</sup>;
  - vii. the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to address specifically the interested parties' arguments on the comparison of the domestic industry's market share in 2010 and 2008<sup>22</sup>;
  - viii. the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to evaluate the inventories of independent dealers and the reason for the increase in inventories<sup>23</sup>;

<sup>13</sup> Panel Report, paras. 7.73, 7.108.b, and 8.1.d.ii.

<sup>14</sup> Panel Report, paras. 7.108.c and 8.1.d.iii.

<sup>15</sup> Panel Report, paras. 7.107, 7.108.d, and 8.1.d.iv.

<sup>16</sup> Panel Report, paras. 7.117, 7.173.a, and 8.1.e.i.

<sup>17</sup> Panel Report, paras. 7.123, 7.173.b, and 8.1.e.ii.

<sup>18</sup> Panel Report, paras. 7.133, 7.173.c, and 8.1.e.iii.

<sup>19</sup> Panel Report, paras. 7.138, 7.173.d, and 8.1.e.iv.

<sup>20</sup> Panel Report, paras. 7.141, 7.173.e, and 8.1.e.v.

<sup>21</sup> Panel Report, paras. 7.143, 7.173.f, and 8.1.e.vi.

<sup>22</sup> Panel Report, paras. 7.153, 7.173.g, and 8.1.e.vii.

<sup>23</sup> Panel Report, paras. 7.155, 7.157, 7.173.h, and 8.1.e.viii.

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- ix. the DIMD acted inconsistently with Article 3.4 of the Anti-Dumping Agreement by failing to evaluate the magnitude of the margin of dumping<sup>24</sup>; and
  - x. the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to evaluate the domestic industry's return on investments, actual and potential effects on cash flow, and the ability to raise capital or investments<sup>25</sup>;
- e. with respect to causation and non-attribution:
- i. the DIMD acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement insofar as it relied on its price suppression analysis in its causation determination<sup>26</sup>;
  - ii. the European Union had failed to establish that the DIMD's determination that the increased volume of dumped imports caused material injury to the domestic industry was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement<sup>27</sup>;
  - iii. the European Union had failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to conduct a proper non-attribution analysis of the termination of the licence agreement with Fabbrica Italiana Automobili Torino (Fiat)<sup>28</sup>;
  - iv. the European Union had failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in its non-attribution analysis of the competition from GAZ<sup>29</sup>;
  - v. the European Union had failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to consider the alleged financing difficulties as an "other factor" causing injury<sup>30</sup>;
  - vi. the European Union had failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to consider the alleged discontinuation of the government support programmes as an "other factor" causing injury<sup>31</sup>; and
  - vii. the DIMD acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to: (a) examine whether the alleged overly ambitious business plan of Sollers-Elabuga LLC (Sollers), in particular its level of capacity, was causing injury to the domestic industry at the same time as dumped imports; and, if so, (b) separate and distinguish the injurious effects of that factor from the injurious effects of the dumped imports<sup>32</sup>;

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<sup>24</sup> Panel Report, paras. 7.162, 7.174, and 8.1.e.ix.

<sup>25</sup> Panel Report, paras. 7.172, 7.173.i, and 8.1.e.x.

<sup>26</sup> Panel Report, paras. 7.182, 7.236, and 8.1.f.i.

<sup>27</sup> Panel Report, paras. 7.237.a and 8.1.f.ii.

<sup>28</sup> Panel Report, paras. 7.202, 7.237.b, and 8.1.f.iii.

<sup>29</sup> Panel Report, paras. 7.214, 7.237.c, and 8.1.f.iv.

<sup>30</sup> Panel Report, paras. 7.230, 7.237.d, and 8.1.f.v.

<sup>31</sup> Panel Report, paras. 7.235, 7.237.e, and 8.1.f.vi.

<sup>32</sup> Panel Report, paras. 7.226, 7.237, and 8.1.f.vii.

- f. with respect to confidential treatment of information:
  - i. the DIMD acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by treating all information set out in Table 11 of the Panel Report as confidential in the absence of any showing of "good cause"<sup>33</sup>; and
  - ii. the European Union had failed to establish that the DIMD treated the Sollers letter dated 25 December 2012 and the letter of the Association of Russian Automakers dated 11 February 2013 as confidential<sup>34</sup>;
- g. with respect to claims concerning the disclosure of essential facts:
  - i. the European Union had failed to establish that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of the information listed in items (a) to (c) of Table 12 in paragraph 7.278 of the Panel Report<sup>35</sup>; and
  - ii. the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of the information listed in items (d) to (o) of Table 12 in paragraph 7.278 of the Panel Report<sup>36</sup>; and
- h. with respect to the European Union's consequential claims:
  - i. Russia acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994<sup>37</sup>; and
  - ii. the European Union had not established its consequential claim under Article 18.4 of the Anti-Dumping Agreement.<sup>38</sup>

1.5. In accordance with Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and having found that Russia acted inconsistently with certain provisions of the Anti-Dumping Agreement and the GATT 1994, the Panel recommended that Russia bring its measure into conformity with its obligations under those Agreements.<sup>39</sup>

1.6. On 20 February 2017, Russia notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>40</sup> and appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>41</sup> (Working Procedures). On 27 February 2017, the European Union notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal<sup>42</sup> and other appellant's submission pursuant to Rule 23 of the Working Procedures.

1.7. On 24 February 2017, the Appellate Body received a communication from the United States requesting an extension of the deadline for filing third participants' submissions. On 1 March and 3 March 2017, the Appellate Body received a communication from Russia and the European Union, respectively, requesting an extension of the deadline for filing appellees' submissions. After having invited the participants and third participants to comment on these requests, the Division issued a Procedural Ruling on 4 March 2017, extending the deadline for filing appellees' submissions to

<sup>33</sup> Panel Report, para. 8.1.g.i. See also para. 7.247. In light of this finding, the Panel did not consider it necessary to address the European Union's claims under Article 6.5.1 of the Anti-Dumping Agreement. (Ibid., paras. 7.249 and 8.2)

<sup>34</sup> Panel Report, paras. 7.246.d and 8.1.g.ii.

<sup>35</sup> Panel Report, paras. 7.278 and 8.1.h.i.

<sup>36</sup> Panel Report, paras. 7.278 and 8.1.h.ii.

<sup>37</sup> Panel Report, paras. 7.280 and 8.3.a.

<sup>38</sup> Panel Report, paras. 7.281 and 8.3.b.

<sup>39</sup> Panel Report, para. 8.5.

<sup>40</sup> WT/DS479/6.

<sup>41</sup> WT/AB/WP/6, 16 August 2010.

<sup>42</sup> WT/DS479/7.

14 March 2017, and the deadline for filing third participant's submissions and notifications under Rule 24(1) and (2) of the Working Procedures to 17 March 2017.<sup>43</sup>

1.8. On 14 March 2017, the European Union and Russia each filed an appellee's submission.<sup>44</sup> On 17 March 2017, Brazil, Japan, Ukraine, and the United States each filed a third participant's submission.<sup>45</sup> On the same day, Korea notified its intention to appear at the oral hearing as a third participant.<sup>46</sup> Subsequently, China and Turkey each notified its intention to appear at the oral hearing as a third participant.<sup>47</sup>

1.9. By letter dated 13 April 2017, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.<sup>48</sup> The Chair of the Appellate Body explained that this was due to a number of factors, including the substantial workload of the Appellate Body in 2017, scheduling issues arising from overlap in the composition of the Divisions hearing different appeals, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these appellate proceedings place on the WTO Secretariat's translation services, and the shortage of staff in the Appellate Body Secretariat. By letter dated 8 March 2018, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated no later than 22 March 2018.<sup>49</sup>

1.10. On 11 September 2017, the Chair of the Appellate Body notified the participants and third participants that Appellate Body Member Mr Hyun Chong Kim, a member of the Division selected to hear this appeal, had resigned on 1 August 2017 pursuant to Rule 14 of the Working Procedures with immediate effect. The Chair of the Appellate Body indicated that, pursuant to Rules 6(2) and 13 of the Working Procedures, Appellate Body Member Mr Shree B.C. Servansing replaced Mr Kim on the Appellate Body Division hearing this appeal.

1.11. On 21 September 2017, Russia requested the Division hearing this appeal to reschedule the oral hearing from 13-14 November 2017 to the middle of January 2018. On 22 September 2017, the Division invited the European Union and the third participants to comment on Russia's request. In a letter dated 25 September 2017, the European Union objected to Russia's request to delay the hearing. By letter dated 27 September 2017, the Division informed the participants and third participants that it was not in a position to accommodate Russia's request.

1.12. By letter dated 23 October 2017, Russia and the European Union jointly requested the Division hearing this appeal to adopt additional procedures for the protection of business confidential information (BCI) in these appellate proceedings. On 25 October 2017, the Division invited the third participants to comment on the joint request. By letter dated 27 October 2017, the United States commented on the suggested provision regarding the resolution of any disagreement on the BCI designation of information. No other third participant commented on the joint request. On 7 November 2017, the Division issued a Procedural Ruling according additional protection, on specified terms, to the information that the Panel treated as BCI in its Report and in the Panel record.<sup>50</sup>

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<sup>43</sup> On 6 March 2017, in order to rectify a clerical error, a corrected version of the Procedural Ruling and a revised Working Schedule for this appeal were conveyed to the participants and third participants. The corrected Procedural Ruling is contained in Annex D-1 of the Addendum to this Report (WT/DS479/AB/R/Add.1).

<sup>44</sup> Pursuant to Rules 22 and 23(4) of the Working Procedures.

<sup>45</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>46</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>47</sup> On 7 and 8 November 2017, respectively, China and Turkey submitted their delegation lists for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For purposes of this appeal, we have interpreted China's and Turkey's action to be a notification expressing the intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

<sup>48</sup> WT/DS479/8.

<sup>49</sup> WT/DS479/9.

<sup>50</sup> The Procedural Ruling is contained in Annex D-2 of the Addendum to this Report (WT/DS479/AB/R/Add.1).



1.13. The oral hearing in this appeal was held on 13-14 November 2017. The participants and four of the third participants (Japan, Ukraine, Turkey, and the United States) made oral statements and responded to questions posed by the Members of the Division hearing the appeal.

## 2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.<sup>51</sup> The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS479/AB/R/Add.1.

## 3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission (Brazil, Japan, Ukraine, and the United States) are reflected in the executive summaries of their written submissions provided to the Appellate Body<sup>52</sup>, and are contained in Annex C of the Addendum to this Report, WT/DS479/AB/R/Add.1.

## 4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

- a. whether the Panel erred in its interpretation and application of Articles 3.1 and 4.1 of the Anti-Dumping Agreement in finding that the DIMD acted inconsistently with these provisions in its definition of "domestic industry" (raised by Russia);
- b. with respect to price suppression:
  - i. whether the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the DIMD acted inconsistently with these provisions because it failed to take into account the impact of the financial crisis in determining the rate of return used to construct the target domestic price for its price suppression analysis (raised by Russia);
  - ii. whether the Panel failed to make an objective assessment under Article 11 of the DSU in finding that the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement when assessing the "explanatory force" of dumped imports for price suppression and whether the degree of price suppression was "significant" (raised by the European Union);
    - conditionally, in the event the Appellate Body disagrees with the European Union's claims under Article 11 of the DSU, whether the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the DIMD's methodology will necessarily show that the dumped imports have "explanatory force" for the existence of price suppression (raised by the European Union); and
    - in the event that the Appellate Body reverses the Panel's findings in this regard, whether the Appellate Body can complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether the dumped imports have explanatory force for the existence of "significant" price suppression (requested by the European Union);

<sup>51</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

<sup>52</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

- iii. whether the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the evidence on the record was not sufficient to require an objective and unbiased investigating authority to consider whether the market would absorb price increases beyond those that actually took place in the context of its consideration of price suppression (raised by the European Union);
  - conditionally, in the event that the Appellate Body reverses the Panel's findings in this regard, whether the Appellate Body can complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to examine whether the market would accept additional domestic price increases (requested by the European Union);
- c. whether, by basing its assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on parts of the confidential investigation report, the Panel failed to: (i) make an objective assessment of the matter before it pursuant to Article 11 of the DSU; and (ii) determine whether the DIMD's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective within the meaning of Article 17.6 of the Anti-Dumping Agreement (raised by the European Union);
  - i. conditionally, in the event that the Appellate Body reverses the Panel findings, whether the Appellate Body can complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to evaluate the three injury factors at issue (requested by the European Union);
- d. with respect to dealers related to Sollers, whether the Panel erred in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in finding that the DIMD was not required to evaluate the inventory information of Turin Auto in examining injury to the domestic industry (raised by the European Union); and
- e. with respect to the disclosure of essential facts:
  - i. whether the Panel erred in its interpretation and application of Article 6.9 of the Anti-Dumping Agreement in finding that:
    - a failure to disclose essential facts that were not properly treated as confidential under Article 6.5 would lead to an inconsistency with Article 6.9 of the Anti-Dumping Agreement (raised by Russia);
    - the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by not disclosing the actual figures for the import volumes and the weighted average import price of LCVs produced by each German exporting producer and the figures for domestic consumption and production volumes of LCVs in the Customs Union (raised by Russia);
    - the data concerning the actual import volumes and the weighted average import price of LCVs produced by Daimler AG and Volkswagen AG that originated from the electronic customs database was not properly treated as confidential (raised by Russia);
    - a methodology is not an "essential fact" within the meaning of Article 6.9 of the Anti-Dumping Agreement (raised by the European Union);
    - not every "essential fact" is required to be disclosed, but only those that are additionally shown to be "under consideration" (raised by the European Union);
    - a source of data in general and the source of data concerning import volumes and values used by the DIMD in its dumping and injury determinations are not "essential facts" within the meaning of Article 6.9 of the Anti-Dumping Agreement (raised by the European Union);

- ii. whether the Panel acted inconsistently with Articles 15.2 and 7 of the DSU by adding, in paragraph 7.270 of the Panel Report, a legal finding under Article 6.5 of the Anti-Dumping Agreement that had not appeared in the Panel's Interim Report (raised by Russia);
- iii. conditionally, in the event that the Appellate Body reverses the relevant Panel's findings concerning essential facts:
  - whether the Appellate Body can complete the analysis and find that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose the "essential facts" at issue (requested by the European Union); and
  - whether the Appellate Body can complete the analysis and find that, by failing to disclose the source of information concerning import volumes and values in its dumping and injury determinations, the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement (requested by the European Union).

## 5 ANALYSIS OF THE APPELLATE BODY

### 5.1 Definition of domestic industry

#### 5.1.1 Introduction

5.1. Russia appeals the Panel's finding that the DIMD acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement when defining the domestic industry.<sup>53</sup> Russia's main claim is that the Panel erred in its interpretation and application of Article 4.1 by failing to take into account Article 3.1 of the Anti-Dumping Agreement. Russia argues that an injury determination would be inconsistent with Article 3.1 if an investigating authority were to rely on deficient information provided by domestic producers of the like product. To Russia, producers that provided such deficient information cannot be included in the definition of domestic industry under Article 4.1.<sup>54</sup> Russia requests us to reverse the Panel findings at issue.<sup>55</sup> By contrast, the European Union requests us to uphold the Panel's findings. To the European Union, the Panel correctly found that Article 4.1, "in light of the requirement to carry out an objective assessment based on positive evidence, implies that an investigating authority cannot define ... a 'domestic industry' on the basis of the alleged deficient information provided by one or some producers."<sup>56</sup>

5.2. At the outset, we recall that both Sollers and GAZ produced the domestic like product at issue in this anti-dumping investigation. The DIMD sent anti-dumping questionnaires to both companies and, after reviewing their responses, defined the domestic industry as comprising only Sollers.<sup>57</sup>

5.3. Before examining Russia's claims of error on appeal, we summarize the relevant Panel findings with respect to Article 4.1 of the Anti-Dumping Agreement. We then set out our understanding of this provision. Thereafter, we turn to examine the merits of Russia's claims on appeal.

#### 5.1.2 Panel's findings

5.4. Before the Panel, the European Union argued that the DIMD's definition of domestic industry is inconsistent with Articles 4.1 and 3.1 of the Anti-Dumping Agreement because GAZ was impermissibly excluded from the domestic industry, leading to a risk of distorting the injury

<sup>53</sup> Panel Report, paras. 7.15-7.16; Russia's appellant's submission, paras. 63-65.

<sup>54</sup> Russia's appellant's submission, paras. 40-42, 44, 50-51, and 54.

<sup>55</sup> Russia refers to: (i) paragraphs 7.15.c, 7.21.b, 7.21.c, 7.26.a, 7.27, 8.1.a, and footnote 85 to paragraph 7.15.c (regarding the interpretation of Article 4.1); (ii) paragraphs 7.15.a and 7.21.d (regarding the risk of distortion); and (iii) paragraphs 7.16, 7.22, 7.27, and 8.1.b of the Panel Report (regarding the consequential inconsistency with Article 3.1). (Russia's appellant's submission, paras. 63-65)

<sup>56</sup> European Union's appellee's submission, para. 34.

<sup>57</sup> Panel Report, para. 7.12.

analysis.<sup>58</sup> Russia responded that, although the domestic industry initially included both Sollers and GAZ, the DIMD conducted the injury analysis only in relation to Sollers due to the deficiency in GAZ's questionnaire responses.<sup>59</sup>

5.5. The Panel noted that the term "domestic industry" in Article 4.1 of the Anti-Dumping Agreement may be interpreted as either the domestic producers as a whole of the like products, or domestic producers whose collective output constitutes a major proportion of the total domestic production of those products. The Panel also observed that "producers of domestic like products may not be left out of the definition of domestic industry on the basis of considerations or selection methods that, by their nature, are likely to distort the subsequent injury determination."<sup>60</sup>

5.6. Turning to the facts of this case, the Panel observed that, according to the DIMD's investigation report on imports of LCVs from Germany, Italy, Poland, and Turkey<sup>61</sup>, the DIMD initially identified the domestic producers of the like product as Sollers and GAZ. The DIMD then sent questionnaires to both producers, reviewed their responses, and defined the domestic industry as comprising only Sollers on the basis of its 87.9% share of total domestic production of the like product.<sup>62</sup> The Panel considered that an 87.9% share of total domestic production falls within the quantitative bounds of the term "major proportion" of the total domestic production in Article 4.1 of the Anti-Dumping Agreement.<sup>63</sup> The Panel noted, however, that the definition of domestic industry as a "major proportion of the total domestic production" under Article 4.1 has both a quantitative and a qualitative aspect.<sup>64</sup> A qualitative assessment of a "major proportion" of the total domestic production implies ensuring that the approach of the investigating authority, including its methodology for selecting the domestic industry, does not create a risk of distortion in the injury analysis.<sup>65</sup>

5.7. The Panel identified three concerns related to the DIMD's approach in this investigation. First, the DIMD decided not to include in the definition of domestic industry a known producer of the like product that had provided data and had sought to cooperate in the investigation, after having reviewed that producer's data. To the Panel, this sequence of events gave rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome, resulting in a risk of distortion in the subsequent injury analysis.<sup>66</sup>

5.8. Second, the reasons given by Russia for the DIMD's decision not to include GAZ in the definition of domestic industry were not set out in the investigation report. The Panel thus considered that these reasons constituted an impermissible *post hoc* rationalization.<sup>67</sup>

5.9. Third, in relation to Russia's argument that the data provided by GAZ suffered from deficiencies, the Panel considered that nothing in Article 4.1 of the Anti-Dumping Agreement suggests that a Member may ignore a domestic producer for purposes of defining the domestic industry on the basis of alleged deficiencies in the information provided by that producer to the

<sup>58</sup> Panel Report, paras. 7.4-7.5; European Union's first written submission to the Panel, para. 63.

<sup>59</sup> Panel Report, paras. 7.6-7.8; Russia's first written submission to the Panel, paras. 38 and 41-43; response to Panel question No. 13(c), para. 44; second written submission to the Panel, paras. 24 and 46-47; response to Panel question No. 64, paras. 20-22.

<sup>60</sup> Panel Report, para. 7.11. In this respect, the Panel noted the following two examples: (i) an investigating authority may not leave out an entire group of domestic producers of the like product (referring to Panel Report, *EC – Salmon (Norway)*, paras. 7.107-7.108 and 7.112); and (ii) an investigating authority may not limit the domestic industry to only those producers willing to participate in the investigation by providing data for a sample (referring to Appellate Body Report, *EC – Fasteners (China)*, paras. 426-427 and 430). (Panel Report, para. 7.11)

<sup>61</sup> Non-confidential investigation report (Panel Exhibits EU-21 and RUS-12).

<sup>62</sup> Panel Report, para. 7.12.

<sup>63</sup> Panel Report, para. 7.13.

<sup>64</sup> Panel Report, para. 7.15 (referring to Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – *China*), paras. 5.298-5.303).

<sup>65</sup> Panel Report, para. 7.15.

<sup>66</sup> Panel Report, para. 7.15.a.

<sup>67</sup> Panel Report, para. 7.15.b.

investigating authority.<sup>68</sup> To the Panel, the definition of domestic industry and the collection and use of data from that domestic industry are separate issues.<sup>69</sup>

5.10. The Panel concluded that the DIMD defined the domestic industry as Sollers only after it had received the questionnaire responses from both Sollers and GAZ. For the reasons set out above, the Panel found that the DIMD acted inconsistently with Article 4.1 of the Anti-Dumping Agreement in its definition of domestic industry. As a consequence, the Panel also found that the DIMD acted inconsistently with Article 3.1 of the Anti-Dumping Agreement.<sup>70</sup>

### 5.1.3 Article 4.1 of the Anti-Dumping Agreement

5.11. Article 4.1 of the Anti-Dumping Agreement defines the term "domestic industry" as referring to: (i) the domestic producers as a whole of the like products; or (ii) those producers whose collective output of the products constitutes a major proportion of the total domestic production of those products. At the same time, Article 4.1 provides for two situations where producers of the like product may be excluded from the definition of domestic industry: (i) where producers are "related" to exporters or importers or are themselves importers of the allegedly dumped product; and (ii) where the territory of a Member is divided into competitive markets and the producers within each market are regarded as a separate industry under specified conditions.

5.12. The Appellate Body has explained that, by using the term "major proportion", the second method of defining the domestic industry focuses on the question of *how much* production must be represented by those producers of the like product making up the domestic industry when the domestic industry is defined as less than the domestic producers as a whole.<sup>71</sup> The Appellate Body has read the "major proportion" requirement in Article 4.1 as having both quantitative and qualitative connotations.<sup>72</sup>

5.13. Regarding the quantitative element, Article 4.1 of the Anti-Dumping Agreement does not stipulate a specific proportion for evaluating whether a certain percentage constitutes a "major proportion".<sup>73</sup> The Appellate Body, however, has indicated that "[t]he absence of a specific proportion does not mean ... that any percentage, no matter how low, could automatically qualify as 'a major proportion'."<sup>74</sup> The qualitative element, in turn, is concerned with ensuring that the domestic producers of the like product that are included in the definition of domestic industry are representative of the total domestic production. The Appellate Body has explained that there is an inverse relationship between, on the one hand, the proportion of total production included in the domestic industry and, on the other hand, the existence of a material risk of distortion in the definition of domestic industry and in the assessment of injury. The lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used sufficiently

<sup>68</sup> Panel Report, para. 7.15.c. The Panel explained that, where producers included in the domestic industry fail to cooperate with the investigation, the investigating authority "may be forced to ... seek additional information, ... may face difficulties in verifying information received [and] may ultimately have to proceed on the basis of less than complete information regarding the domestic industry". (Ibid., fn 85 thereto)

<sup>69</sup> Panel Report, fn 85 to para. 7.15.c.

<sup>70</sup> Panel Report, para. 7.16. Given that, at the later stages of the Panel proceedings, both Russia and the European Union suggested a different sequence of events with respect to the timing of the definition of domestic industry, the Panel made alternative findings in relation to alternative factual scenarios. In this respect, the Panel addressed Russia's contention that the DIMD had initially defined the domestic industry as comprising both Sollers and GAZ, then considered only Sollers' information because of deficiencies in GAZ's information, and redefined the domestic industry to include only Sollers. The Panel noted that Russia's contention is not supported by the chronology of events set out in the DIMD's investigation report, and thus constituted a *post hoc* rationalization. (Ibid., paras. 7.22, 7.26.b, and 7.27) Even if it were to accept that the DIMD initially defined the domestic industry to include Sollers and GAZ, the Panel explained that it would have found that the DIMD acted inconsistently with Article 4.1 of the Anti-Dumping Agreement by excluding GAZ from the domestic industry. (Ibid., paras. 7.22 and 7.27)

<sup>71</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 411.

<sup>72</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.302.

<sup>73</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 411. As the Appellate Body clarified, the 25% benchmark under Article 5.4 of the Anti-Dumping Agreement concerns the issue of standing of the domestic industry for the initiation of an investigation, and does not address the question of what constitutes "a major proportion" in Article 4.1 of the Anti-Dumping Agreement. (Ibid., paras. 418 and 425)

<sup>74</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 412.

represents the total production of the producers as a whole.<sup>75</sup> A definition of domestic industry that includes a very high proportion that "substantially reflects the total domestic production" will very likely satisfy both the quantitative and qualitative aspects of the requirements of Articles 4.1 and 3.1 of the Anti-Dumping Agreement.<sup>76</sup>

5.14. The Appellate Body has read the definition of domestic industry in Article 4.1 of the Anti-Dumping Agreement together with the requirement in Article 3.1 of the Anti-Dumping Agreement that the determination of injury "be based on positive evidence and involve an objective examination".<sup>77</sup> An "objective examination", pursuant to Article 3.1, requires that the effects of dumped imports on the domestic industry be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties in the investigation.<sup>78</sup> In this respect, to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product.<sup>79</sup>

#### **5.1.4 Whether the Panel erred in its interpretation and application of Articles 3.1 and 4.1 of the Anti-Dumping Agreement**

5.15. At the outset, we observe that the European Union submits that certain of Russia's claims and arguments concern the Panel's alternative findings<sup>80</sup> and thus need not be addressed. To the European Union, given that Russia has not appealed the assessment of facts by the Panel under Article 11 of the DSU, Russia accepts the factual basis on which the Panel made its main finding.<sup>81</sup> The Panel's main finding was based on the factual assessment that the DIMD defined the domestic industry as Sollers only after it had received the questionnaire responses from both Sollers and GAZ.<sup>82</sup> The Panel's alternative findings were based on the alternative factual assessment that the DIMD had initially defined the domestic industry as comprising both Sollers and GAZ, then considered only Sollers' information because of deficiencies in GAZ's information, and redefined the domestic industry to include only Sollers.<sup>83</sup>

5.16. We note that Russia has not challenged on appeal the Panel's factual assessment underpinning its main finding under Article 4.1. To the extent that this assessment is left undisturbed, we consider that it is not necessary to address Russia's claims and arguments concerning the Panel's alternative factual findings. Nevertheless, we observe that some of the Panel's reasoning substantiating its main and alternative findings is intertwined. Thus, insofar as Russia refers to elements of the Panel's alternative findings that are also reflected in the Panel's main finding, we consider these references when addressing the substantive issues raised by Russia on appeal.

<sup>75</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 412; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.302.

<sup>76</sup> Appellate Body Reports, *EC – Fasteners (China)*, paras. 414 and 419; *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.300 and 5.303. The Appellate Body has recognized the difficulty of obtaining information regarding domestic producers, particularly in special market situations, such as fragmented industries with numerous producers. In such special cases, the term "major proportion" in Article 4.1 of the Anti-Dumping Agreement provides an investigating authority with some flexibility to define the domestic industry. Therefore, what constitutes a "major proportion" may be lower in light of the practical constraints of obtaining information in a special market situation. Nevertheless, in such cases, an investigating authority bears the same obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry. Ultimately, the definition of domestic industry must remain representative of total domestic production. (See Appellate Body Reports, *EC – Fasteners (China)*, para. 416; *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.301 and 5.303)

<sup>77</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 414; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.300.

<sup>78</sup> Appellate Body Reports, *US – Hot-Rolled Steel*, para. 193; *EC – Fasteners (China)*, para. 414; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.300. See also Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.319 and 5.323.

<sup>79</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 414; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.300.

<sup>80</sup> See *supra*, fn 70.

<sup>81</sup> European Union's appellee's submission, paras. 27-28, 31, 60, 75, and 83.

<sup>82</sup> See Panel Report, paras. 7.15-7.16.

<sup>83</sup> See Panel Report, paras. 7.17-7.27.

5.17. Russia claims that the Panel erred in its interpretation and application of Article 4.1 by failing to take into account Article 3.1 of the Anti-Dumping Agreement.<sup>84</sup> Russia's claim concerns the Panel's understanding that the definition of domestic industry and the collection and use of data from that domestic industry are separate issues. The Panel considered that "data collection concerns cannot be a consideration for determining which specific producers are included in the domestic industry and which are not."<sup>85</sup>

5.18. Russia submits that the definition of domestic industry must be based on ample and reliable data to ensure an accurate injury analysis. To Russia, where the definition of domestic industry includes the domestic producers of the like product that did not provide credible and reliable data, an investigating authority is not able to meet the requirement of Article 3.1 of the Anti-Dumping Agreement to determine injury based on "positive evidence". Russia thus argues that, when interpreted in the context of Article 3.1, Article 4.1 of the Anti-Dumping Agreement requires investigating authorities to define the domestic industry based on considerations of "objective examination" and "positive evidence".<sup>86</sup> Russia submits that the Panel's interpretation of Article 4.1 creates a conflict between the obligation to define the domestic industry under Article 4.1 and the obligation to base the injury determination on "positive evidence" under Article 3.1.<sup>87</sup> In Russia's view, the Panel's conclusion results in a situation where, in the absence of reliable data on injury indicators, the investigating authority would be required to base its injury determination on data that does not comport with the requirements of Article 3.1.<sup>88</sup>

5.19. The European Union submits that Russia confuses, on the one hand, the obligation to define the domestic industry in an objective manner and the evidence required to do so under Article 4.1 of the Anti-Dumping Agreement and, on the other hand, the collection and use of data from the domestic industry to determine injury under Article 3.1 of the Anti-Dumping Agreement.<sup>89</sup> To the European Union, there is no reason why compliance with Article 4.1 would conflict with the obligation to base the injury determination on "positive evidence".<sup>90</sup> In addition, the European Union contends that allowing an investigating authority to define the domestic industry on the basis of its assessment of the quality of the information gives rise to a material risk of distortion in the injury analysis.<sup>91</sup>

5.20. As noted above, Article 4.1 of the Anti-Dumping Agreement defines the term "domestic industry" in relation to the domestic producers of the *like product*. Article 4.1 also provides for two specific situations where those producers may be excluded from the definition of domestic industry.<sup>92</sup> This provision does not, however, refer to the non-inclusion of producers of the like product in the domestic industry definition based on the investigating authority's consideration of alleged deficiencies in the information submitted by domestic producers. In addition, as noted earlier, the Appellate Body has read the definition of domestic industry in Article 4.1 together with the requirement in Article 3.1 of the Anti-Dumping Agreement that the determination of injury "be based on positive evidence and involve an objective examination".<sup>93</sup> To ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry.<sup>94</sup>

<sup>84</sup> Russia's appellant's submission, paras. 40-42.

<sup>85</sup> Panel Report, fn 85 to para. 7.15.c.

<sup>86</sup> Russia's appellant's submission, paras. 23 and 40-41.

<sup>87</sup> Russia's appellant's submission, paras. 42 and 44.

<sup>88</sup> Russia's appellant's submission, para. 45.

<sup>89</sup> European Union's appellee's submission, paras. 61, 65, 67, and 77. To the European Union, while data collection problems can arise during an investigation, the issue under Article 4.1 concerns the definition of domestic industry and not the quality of the data provided by domestic producers. (Ibid., para. 61)

<sup>90</sup> European Union's appellee's submission, paras. 65 and 70. The European Union submits that, rather than excluding a part of the domestic industry, an investigating authority making an objective assessment based on positive evidence under Article 3.1 of the Anti-Dumping Agreement is required to seek the evidence necessary to undertake the injury assessment in relation to the domestic industry, as defined at the outset. (Ibid., para. 70)

<sup>91</sup> European Union's appellee's submission, para. 61.

<sup>92</sup> See para. 5.11 above.

<sup>93</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 414; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.300.

<sup>94</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 414; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.300.

5.21. Thus, contrary to Russia's argument, Article 3.1 of the Anti-Dumping Agreement neither permits nor obliges an investigating authority to derogate from defining the domestic industry in relation to the domestic producers of the like product, so as to leave out producers that provided allegedly deficient data. Rather than being permitted or even required by Article 3.1, as Russia seems to argue, the non-inclusion of domestic producers of the like product in the domestic industry definition solely on the basis that they furnished allegedly deficient information is incompatible with the requirements of this provision. This is because, if an investigating authority were permitted to leave out, from the definition of domestic industry, domestic producers of the like product that provided *allegedly* deficient information, a material risk of distortion would arise in the injury analysis.<sup>95</sup> The non-inclusion of this category of producers could make the domestic industry definition no longer representative of the total domestic production, thereby undermining the accuracy of the injury analysis.

5.22. Rather than leaving a producer of the like product that provided allegedly deficient information out of the domestic industry, the investigating authority should seek to obtain additional information from that domestic producer. In this respect, Article 6.6 of the Anti-Dumping Agreement provides that investigating authorities shall, "during the course of an investigation", satisfy themselves as to the accuracy of the information supplied. Article 6.7 of the Anti-Dumping Agreement sets out additional actions that authorities may take to verify information provided or to obtain further details. Article 6.8 of the Anti-Dumping Agreement allows investigating authorities to make determinations on the basis of facts available in cases where an interested party refuses access to or otherwise does not provide necessary information, or significantly impedes the investigation. Thus, tools exist under the Anti-Dumping Agreement to address the inaccuracy and incompleteness of information. We therefore disagree with Russia's proposition that, in order to ensure the accuracy of the injury analysis, an investigating authority needs, from the outset, to leave out of the definition of domestic industry the domestic producers of the like product that provided allegedly deficient information. As noted by the United States, the deficiency of information need not have a bearing on whether a domestic producer can be included in the definition of domestic industry under Article 4.1, or on whether the requirements of Article 3.1 could be met.<sup>96</sup>

5.23. For the reasons above, we do not consider that the requirements of Article 3.1 of the Anti-Dumping Agreement permit investigating authorities to leave domestic producers of the like product out of the definition of domestic industry because of *alleged* deficiencies in the information submitted by those producers. We also disagree with Russia that the Panel's interpretation of Article 4.1 of the Anti-Dumping Agreement creates a conflict between the obligation to define the domestic industry under Article 4.1 and the obligation to base the injury determination on "positive evidence" under Article 3.1.<sup>97</sup> To the contrary, the requirement in Article 3.1 that an investigating authority conduct an "objective examination" does not provide support for the proposition that domestic producers of the like product providing allegedly deficient information may be left out of the definition of domestic industry. Instead, as explained above, the Appellate Body has relied on Article 3.1 to explain that an investigating authority must not act so as to give rise to a material risk of distortion in the injury analysis when defining the domestic industry.<sup>98</sup>

5.24. Russia also claims that the Panel erred in its interpretation of Article 4.1 of the Anti-Dumping Agreement by reducing the term "major proportion" to inutility.<sup>99</sup> Russia argues that Article 4.1 allows an investigating authority to define the domestic industry as a "major proportion

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<sup>95</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 414; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.300.

<sup>96</sup> United States' third participant's submission, para. 13.

<sup>97</sup> Russia's appellant's submission, paras. 42 and 44.

<sup>98</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 414; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.300.

<sup>99</sup> Russia's appellant's submission, paras. 51 and 55.



of the total domestic production" when information on certain domestic producers is deficient, unreliable, incomplete, or unavailable.<sup>100</sup>

5.25. The European Union submits that the Panel's interpretation of Article 4.1 of the Anti-Dumping Agreement does not prevent an investigating authority from basing the definition of domestic industry on a "major proportion of the total domestic production". The European Union stresses that the "major proportion" criterion is subject to the qualitative requirement under Article 4.1.<sup>101</sup>

5.26. We first observe that Russia contended before the Panel that GAZ was not part of the definition of domestic industry because of the alleged deficiency in the information provided by this producer. The Panel considered that the reason given by Russia was not set out in the DIMD's investigation report. On this basis, the Panel stated that this reason constituted an impermissible *post hoc* rationalization.<sup>102</sup> We note that Russia does not challenge this Panel statement on appeal. Thus, this assertion by Russia has not been substantiated and was rejected by the Panel as an impermissible *post hoc* rationalization.

5.27. Turning to the substance of this claim, we note Russia's argument that Article 4.1 of the Anti-Dumping Agreement allows an investigating authority to define the domestic industry as a "major proportion of the total domestic production" when information on certain domestic producers is deficient, unreliable, incomplete, or unavailable.<sup>103</sup> We recall that, if an investigating authority does not include domestic producers of the like product in the domestic industry definition because those producers submitted allegedly deficient information, a material risk of distortion would arise in the injury analysis. This is because the failure to include those producers could make the definition of domestic industry no longer representative of the total domestic production.<sup>104</sup> As explained earlier, the Appellate Body has interpreted the "major proportion" requirement under Article 4.1 as having both quantitative and qualitative connotations.<sup>105</sup> The qualitative element is concerned with ensuring that the domestic producers of the like product that are included in the "domestic industry" are representative of the total domestic production. While the definition of domestic industry that is based on the "major proportion" needs to satisfy both elements, there is an inverse relationship between, on the one hand, the proportion of the total production included in the domestic industry and, on the other hand, a material risk of distortion in the definition of domestic industry and in the assessment of injury.<sup>106</sup>

5.28. Moreover, we recall that the Appellate Body has recognized the difficulty of obtaining information regarding domestic producers in certain situations, such as fragmented industries with numerous producers.<sup>107</sup> In such special cases, the term "major proportion" in Article 4.1 allows an investigating authority a certain degree of flexibility in defining the domestic industry.<sup>108</sup> Nevertheless, an investigating authority continues to bear the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of distortion into the

<sup>100</sup> Russia's appellant's submission, para. 54. Russia takes issue with the Panel's understanding that, pursuant to Article 4.1 of the Anti-Dumping Agreement, it is not possible to leave domestic producers of the like product out of the definition of domestic industry on account of the non-availability of reliable and correct information from those producers. (See *ibid.*, paras. 50-51) While Russia refers to a passage of the Panel's alternative findings (*ibid.*, para. 49 (referring to Panel Report, para. 7.27)), we observe that the Panel made a similar statement in the context of its main finding under Article 4.1. There, the Panel stated that "[n]othing in Article 4.1 suggests that a Member may ignore a domestic producer for the purposes of defining the domestic industry on the basis of alleged 'gaps' in the information the producer has provided to the investigating authority." (Panel Report, para. 7.15.c. (emphasis original))

<sup>101</sup> European Union's appellee's submission, para. 79.

<sup>102</sup> Panel Report, para. 7.15.b (in relation to the Panel's main finding), and para. 7.27 (in relation to the Panel's alternative findings).

<sup>103</sup> Russia's appellant's submission, para. 54.

<sup>104</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 414; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.300.

<sup>105</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.302.

<sup>106</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 412; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.302.

<sup>107</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 415; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.301.

<sup>108</sup> Appellate Body Reports, *EC – Fasteners (China)*, paras. 414-416 and 419; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.301.

injury analysis.<sup>109</sup> In our view, the situation where an investigating authority is unable to collect any information at all from every domestic producer due to the fragmented nature of the industry is different from the situation where a domestic producer sought to cooperate in the investigation and did submit information that the investigating authority, however, considered to be deficient.

5.29. We consider that the Panel correctly recognized that an investigating authority could define the domestic industry as a "major proportion" of the total domestic production as long as both the quantitative and qualitative elements are satisfied.<sup>110</sup> The Panel also correctly found that Article 4.1 does not allow an investigating authority to leave out of the definition of domestic industry the domestic producers of the like product that provided allegedly deficient information. Thus, contrary to Russia's claim on appeal<sup>111</sup>, we do not consider that the Panel's interpretation of Article 4.1 of the Anti-Dumping Agreement reduces the term "major proportion" in this provision to inutility.

5.30. Russia also claims that the Panel erred in its interpretation and application of Article 4.1 of the Anti-Dumping Agreement in finding that the sequence of events in the anti-dumping investigation at issue resulted in a risk of distortion in the injury analysis.<sup>112</sup> Russia submits that the Anti-Dumping Agreement does not prescribe the exact sequence of steps to be taken in defining the domestic industry. Thus, Russia claims that the Panel erred in reading obligations into Article 4.1 concerning the timing of the definition of domestic industry that are not there.<sup>113</sup> Russia also argues that it is not possible for an investigating authority to select from the information provided so as to ensure a particular outcome in the injury analysis if the information at issue is deficient and incorrect.<sup>114</sup>

5.31. The European Union submits that defining the domestic industry only after having examined the information submitted by the domestic producers results in an appearance of selecting among domestic producers based on their information. This, in turn, creates a risk of distortion in the subsequent injury analysis, as the Panel correctly found.<sup>115</sup>

5.32. In its third participant's submission, the United States does not consider that collecting and reviewing data before defining the domestic industry is *per se* contrary to Articles 4.1 and 3.1 of the Anti-Dumping Agreement or that such an approach inherently gives rise to a risk of distortion. For example, an authority may need to collect and review evidence to define what constitutes the "like product" or to assess whether parties are "related" before the "domestic industry" is defined. These are steps that ordinarily precede the definition of domestic industry.<sup>116</sup>

5.33. The Panel found that the DIMD decided not to include in its definition of domestic industry a known producer of the like product that had provided data and sought to cooperate in the

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<sup>109</sup> Appellate Body Reports, *EC – Fasteners (China)*, para. 416; *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.301.

<sup>110</sup> Panel Report, para. 7.15.

<sup>111</sup> Russia's appellant's submission, paras. 51 and 55.

<sup>112</sup> Russia's appellant's submission, paras. 58-62 (referring to Panel Report, para. 7.15.a).

<sup>113</sup> Russia's appellant's submission, paras. 59-60. Russia also submits that the sequence of events in this investigation was the only possible sequence that allowed the DIMD to comply with Article 3.1 of the Anti-Dumping Agreement. Russia refers to its earlier arguments that Article 4.1 of the Anti-Dumping Agreement allows investigating authorities to define the domestic industry based on considerations of "objective examination" and "positive evidence", in particular where a domestic producer has not provided credible and reliable information. (*Ibid.*, para. 61) We have examined above Russia's arguments at issue and explained that Article 3.1 of the Anti-Dumping Agreement does not allow investigating authorities to leave domestic producers of the like product out of the definition of domestic industry because of *alleged* deficiencies in the information submitted by those producers. (See paras. 5.20-5.23 above)

<sup>114</sup> Russia's appellant's submission, para. 62.

<sup>115</sup> European Union's appellee's submission, para. 83 (referring to Panel Report, para. 7.15.a).

<sup>116</sup> United States' third participant's submission, para. 24. The United States also notes that Articles 4.1 and 3.1 of the Anti-Dumping Agreement do not suggest that the domestic industry may only be defined at a particular point in the investigation, without the possibility of future revision. The United States considers that it may be appropriate to redefine the domestic industry in certain scenarios, and this would not necessarily give rise to a risk of distortion in the injury analysis. The United States submits that, e.g. it may be appropriate to narrow or broaden the original definition if, after gathering evidence, an authority modifies the scope of the investigated product. This could, in turn, affect the definition of domestic industry. (*Ibid.*, para. 25)

investigation after having reviewed that producer's data.<sup>117</sup> The Panel then stated that this "sequence of events gives rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome, resulting in an obvious risk of ... distortion in the subsequent injury analysis."<sup>118</sup>

5.34. We note that this statement by the Panel is not accompanied by specific references to any determination, exhibits, or other factual evidence on the record of the investigation. Rather, the Panel considered the sequence of events by itself, and concluded that it gave rise to an appearance of selecting among domestic producers to ensure a particular outcome. The Appellate Body's interpretation of the "domestic industry" based on a "major proportion of total domestic production" does not take into account the timing of the definition of domestic industry. Rather, it is concerned with ensuring that the domestic producers of the like product selected for inclusion in the domestic industry are sufficiently representative of the total domestic production. Given the relationship between Article 3 and Article 4.1 of the Anti-Dumping Agreement – namely, that the injury analysis under Articles 3.1 and 3.4 is conducted on the basis of the domestic industry as defined under Article 4.1 – the domestic industry would logically be defined before the injury analysis.<sup>119</sup> That said, we do not consider that these provisions prevent an investigating authority from initially examining the information submitted by the domestic producers before defining the domestic industry to the extent that the information submitted or collected is pertinent to defining the domestic industry. Indeed, for example, Article 4.1(i) of the Anti-Dumping Agreement provides for a scenario where this may be necessary. It cannot be excluded that an investigating authority may need to examine the information submitted in relation to a certain domestic producer before coming to a definitive assessment of whether that producer is *related* to an exporter or importer, or is itself an importer of the alleged dumped product.<sup>120</sup>

5.35. Notwithstanding the above observations, our analysis of the Panel Report suggests that the Panel's reasoning is more nuanced than the statements above concerning the "sequence of events", and that the Panel's findings should be viewed holistically in light of its entire reasoning. In this respect, we note that the Panel based its finding of inconsistency on the following elements: (i) the DIMD decided not to include in its definition of domestic industry a known producer of the like product that had provided information and sought to cooperate in the investigation after having reviewed that producer's information<sup>121</sup>; (ii) the DIMD did not explain in its investigation report the decision not to include GAZ in the domestic industry<sup>122</sup>; and (iii) even if the DIMD had justified its decision based on the fact that GAZ submitted allegedly deficient information – as Russia contended before the Panel – this is not a valid reason to leave a domestic producer out of the definition of domestic industry.<sup>123</sup>

5.36. Thus, in light of the above, we are of the view that the Panel did not reach its finding solely on the basis of the fact that the DIMD reviewed the information submitted by Sollers and GAZ before defining the domestic industry. Rather, the Panel focused on the actions taken by the DIMD in the investigation at issue, including the fact that no explanation was contained in the DIMD's investigation report for the decision not to include GAZ in the definition of domestic industry. In addition, we agree with the Panel's understanding that the fact that GAZ *allegedly* failed to distinguish between confidential and non-confidential information and that GAZ's questionnaire responses *allegedly* suffered from gaps and inaccuracies are not the grounds on which the DIMD should have left GAZ out of the domestic industry in this investigation. Thus, in light of the specific circumstances of this case, we find no reversible error in the Panel's interpretation and application of Article 4.1, as read together with Article 3.1 of the Anti-Dumping Agreement.

<sup>117</sup> Panel Report, para. 7.15.a.

<sup>118</sup> Panel Report, para. 7.15.a. The European Union advances a similar understanding when it submits that defining the domestic industry only after having examined the data from the relevant producers necessarily brings about an appearance of selecting among domestic producers based on their data. (European Union's appellee's submission, para. 83)

<sup>119</sup> See European Union's appellee's submission, para. 84.

<sup>120</sup> As explained above, however, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry.

<sup>121</sup> Panel Report, para. 7.15.a.

<sup>122</sup> Panel Report, para. 7.15.b.

<sup>123</sup> Panel Report, para. 7.15.c.

5.37. Finally, we examine Russia's request that we reverse the Panel's finding under Article 4.1 of the Anti-Dumping Agreement because, according to Russia, the DIMD acted in conformity with one of the "permissible" interpretations of Article 4.1 within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement.<sup>124</sup>

5.38. The second sentence of Article 17.6(ii) of the Anti-Dumping Agreement provides that, where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the investigating authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations. Read together with the first sentence of Article 17.6(ii), the second sentence allows for the possibility that the application of the rules of the Vienna Convention on the Law of Treaties<sup>125</sup> (Vienna Convention) may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect by holding the challenged measure to be in conformity with the Anti-Dumping Agreement.<sup>126</sup>

5.39. In this case, the Panel did not find that the interpretation of Article 4.1 of the Anti-Dumping Agreement, according to the customary rules of interpretation codified in the Vienna Convention, resulted in at least two permissible interpretations. We have found above that, if an investigating authority does not include certain domestic producers of the like product in the domestic industry definition because those producers submitted *allegedly* deficient information, a material risk of distortion would arise in the injury analysis. Therefore, Russia's proposed interpretation of Article 4.1 is not a permissible interpretation within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement.

#### 5.1.5 Conclusions

5.40. Article 4.1 of the Anti-Dumping Agreement provides that the "domestic industry" is composed of domestic producers of the like product. If an investigating authority were permitted to leave out, from the definition of domestic industry, the domestic producers of the like product that provided *allegedly* deficient information, a material risk of distortion would arise in the injury analysis. This is because the non-inclusion of those producers could make the definition of domestic industry no longer representative of the total domestic production. We do not consider that Article 3.1 of the Anti-Dumping Agreement allows investigating authorities to leave domestic producers of the like product out of the definition of domestic industry because of *alleged* deficiencies in the information submitted by those producers. The Anti-Dumping Agreement, in particular Article 6, sets out tools to address the inaccuracy and incompleteness of information. Thus, in our view, the Panel's interpretation of Article 4.1 does not create a conflict between the obligations in Article 3.1 and Article 4.1 of the Anti-Dumping Agreement. We also do not read the Panel's interpretation of Article 4.1 as having reduced the term "major proportion" to inutility in this provision. Moreover, we do not consider that Articles 3.1 and 4.1 prevent an investigating authority from initially examining the information submitted by domestic producers before defining the domestic industry to the extent that the information collected is pertinent to defining the domestic industry. We do not consider that the Panel reached its finding solely on the basis of the fact that the DIMD reviewed the information submitted by Sollers and GAZ before defining the domestic industry. In light of the specific circumstances of this case, we find no reversible error in the Panel's interpretation and application of Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

5.41. We therefore find that the Panel did not err in its interpretation and application of Articles 3.1 and 4.1 of the Anti-Dumping Agreement in finding that the DIMD acted inconsistently with these provisions in its definition of "domestic industry". Consequently, we uphold the Panel's findings in paragraphs 8.1.a and 8.1.b of the Panel Report.

#### 5.2 Price suppression

5.42. In this section, we address the claims of error raised by both Russia and the European Union relating to the Panel's findings with respect to the DIMD's determination of price

<sup>124</sup> Russia's appellant's submission, paras. 66-67.

<sup>125</sup> Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

<sup>126</sup> Appellate Body Reports, *US – Continued Zeroing*, para. 272; *US – Hot-Rolled Steel*, para. 59.

suppression under Article 3.2 of the Anti-Dumping Agreement. We examine, first, Russia's claim of error, and then turn to examine the European Union's claims on appeal.

### 5.2.1 The 2009 rate of return used to construct the target domestic price

#### 5.2.1.1 Introduction

5.43. Russia challenges the Panel's findings that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis in determining the rate of return used to construct the target domestic price. To Russia, the focus on one particular factor – such as the financial crisis – would lead to a biased price suppression analysis because the rate of return could be potentially influenced by a number of factors<sup>127</sup>, and an analysis of all known factors is not required under Article 3.2.<sup>128</sup> Russia requests us to reverse the Panel's findings at issue.<sup>129</sup> The European Union disagrees with Russia's contention that an investigating authority is not obliged to consider evidence that questions the rate of return used to construct the domestic target price.<sup>130</sup> The European Union seeks to have the Panel's findings at issue upheld.<sup>131</sup>

5.44. We begin by summarizing the relevant Panel findings. Thereafter, we set out our understanding of the relevant aspect of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Finally, we examine the merits of Russia's claim on appeal.

#### 5.2.1.2 Panel's findings

5.45. Before the Panel, the European Union claimed that the DIMD's price suppression analysis is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because the DIMD used an improper rate of return when constructing the target domestic price.<sup>132</sup> The Panel observed that, for its price suppression analysis, the DIMD constructed the estimated domestic price that would have existed in the absence of dumped imports – the "target domestic price" – on the basis of the actual costs of production and a "reasonable rate of return".<sup>133</sup> The DIMD used the rate of return achieved by Sollers in 2009 as the benchmark rate of return for constructing the target domestic price. According to its investigation report, the DIMD chose this rate of return because 2009 was the year in which the market share of dumped imports was the lowest. The Panel explained that the DIMD compared the data pertaining to actual economic indicators (e.g. the prices and profits achieved by the domestic industry) with the data pertaining to the constructed counterfactual, and concluded that domestic prices had been significantly suppressed by dumped imports.<sup>134</sup>

5.46. The Panel noted that the reference price for assessing price suppression under Article 3.2 of the Anti-Dumping Agreement is the domestic price "which otherwise would have occurred".<sup>135</sup> Article 3.2 does not provide specific guidance on how such a counterfactual situation should be constructed.<sup>136</sup> According to the Panel, the investigating authority is guided by the principle set out in Article 3.1 of the Anti-Dumping Agreement. Thus, where an investigating authority constructs a target domestic price, it must use a rate of return that is objective and based on positive evidence.<sup>137</sup> The Panel therefore considered that an investigating authority would act inconsistently with Articles 3.1 and 3.2 if the rate of return used in constructing a counterfactual target domestic price is not one that the domestic industry could have expected to achieve in the

<sup>127</sup> Russia's appellant's submission, para. 76.

<sup>128</sup> Russia's appellant's submission, para. 77.

<sup>129</sup> Russia's appellant's submission, para. 89 (referring to Panel Report, paras. 7.64-7.67 and 8.1.d.i). In the event that we reverse the Panel findings at issue, Russia also requests us to reverse the Panel's findings in paragraphs 7.181-7.182 and 8.1.f.i of the Panel Report regarding the consequential inconsistency with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. (Ibid., para. 90)

<sup>130</sup> European Union's appellee's submission, paras. 92 and 105-106.

<sup>131</sup> European Union's appellee's submission, paras. 120-121.

<sup>132</sup> Panel Report, para. 7.59; European Union's first written submission to the Panel, paras. 138-142; response to Panel questions No. 29, para. 98 and No. 35, paras. 113 and 116.

<sup>133</sup> Panel Report, para. 7.58.

<sup>134</sup> Panel Report, para. 7.58 (referring to investigation report, Section 5.2).

<sup>135</sup> Panel Report, para. 7.61 (referring to Appellate Body Report, *China – GOES*, para. 141).

<sup>136</sup> Panel Report, para. 7.61.

<sup>137</sup> Panel Report, para. 7.61.

subsequent years under normal conditions of competition and in the absence of dumped imports.<sup>138</sup> If there is evidence before the investigating authority of market conditions during the selected year that calls into question whether that rate of return could be achieved in subsequent years under normal conditions of competition and in the absence of dumped imports, an investigating authority may not ignore such evidence.<sup>139</sup>

5.47. In relation to the rate of return used by the DIMD, the Panel did not find it unreasonable for the DIMD to have used the 2009 rate of return as a starting point for the calculation of the target domestic price. It was the rate of return actually achieved by the domestic industry during a period in which the dumped imports had a low market share.<sup>140</sup> The Panel then noted that, as acknowledged by the DIMD in its investigation report, Sollers' performance in 2009 was positively affected by the financial crisis, when "consumers preferred the cheaper light commercial vehicles" manufactured in the Customs Union between the Republic of Belarus, the Republic of Kazakhstan, and the Russian Federation.<sup>141</sup> In the Panel's view, the financial crisis was an extraordinary event affecting the domestic industry's operations in 2009.<sup>142</sup> Therefore, the Panel did not consider it reasonable for an investigating authority to base its analysis on facts relating to a period in which extraordinary conditions prevailed without, at a minimum, explaining why the extraordinary conditions are not relevant to its counterfactual analysis.<sup>143</sup> The Panel concluded that nothing in the DIMD's investigation report suggested that it had considered, in its evaluation of price suppression, whether the high rate of return reported in 2009 could reasonably be expected in the subsequent years in the absence of dumped imports.<sup>144</sup>

5.48. For these reasons, the Panel found that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis in determining the appropriate rate of return in its consideration of price suppression.<sup>145</sup>

#### 5.2.1.3 Articles 3.1 and 3.2 of the Anti-Dumping Agreement

5.49. This dispute calls for us to examine the disciplines of Article 3 of the Anti-Dumping Agreement, and in particular those paragraphs relating to price suppression. The paragraphs of Article 3 stipulate, in detail, an investigating authority's obligations in determining the injury to the domestic industry caused by dumped imports.<sup>146</sup> These provisions contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination.<sup>147</sup> This process entails a consideration of the volume of dumped imports and their price effects, and requires an examination of the impact of such imports on the state of the domestic industry. These various elements are linked through a causation and non-attribution analysis between the dumped imports and the injury to the domestic industry, taking into account all factors that must be considered and evaluated.<sup>148</sup>

5.50. Articles 3.1 and 3.2 of the Anti-Dumping Agreement provide:

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic

<sup>138</sup> Panel Report, paras. 7.61 and 7.64.

<sup>139</sup> Panel Report, para. 7.64.

<sup>140</sup> Panel Report, para. 7.63.

<sup>141</sup> Panel Report, para. 7.66 (quoting investigation report, Section 4.3).

<sup>142</sup> Panel Report, para. 7.66.

<sup>143</sup> Panel Report, para. 7.66. In the Panel's view, an investigating authority may take extraordinary conditions into account in its consideration of price effects in different ways, but it may not ignore the possibility that such conditions will not continue. According to the Panel, this could involve making an adjustment to the chosen rate of return, or taking into account the extraordinary circumstances in considering the "explanatory force" of dumped imports for price suppression. (Ibid.)

<sup>144</sup> Panel Report, para. 7.66.

<sup>145</sup> Panel Report, para. 7.67.

<sup>146</sup> Appellate Body Report, *China – GOES*, para. 128.

<sup>147</sup> Appellate Body Report, *China – GOES*, para. 128. See also Appellate Body Reports, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, para. 5.140.

<sup>148</sup> Appellate Body Reports, *China – HP-SSST (Japan)* / *China – HP-SSST (EU)*, para. 5.140. See also Appellate Body Report, *China – GOES*, para. 128.

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

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

5.51. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation with respect to the determination of injury and informs the more detailed obligations in succeeding paragraphs.<sup>149</sup> In Article 3.1, the thrust of an investigating authority's obligation lies in the requirement that it base its determination on "positive evidence" and conduct an "objective examination".<sup>150</sup> The term "positive evidence" relates to the quality of the evidence that authorities may rely on in making a determination.<sup>151</sup> The term "objective examination" is concerned with the investigative process itself. The word "examination" relates to the way in which the evidence is gathered, inquired into, and, subsequently, evaluated. The word "objective" indicates that the examination process must conform to the principles of good faith and fundamental fairness.<sup>152</sup> Thus, 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.<sup>153</sup>

5.52. Pursuant to the second sentence of Article 3.2, an investigating authority shall consider whether the effect of dumped imports is to prevent price increases, which otherwise would have occurred, to a significant degree. Articles 3.1 and 3.2 do not prescribe a particular methodology that an investigating authority must follow in assessing whether price suppression has occurred. An investigating authority enjoys a certain degree of discretion in adopting a methodology to guide its analysis. Within the bounds of this discretion, an investigating authority may have to rely on reasonable assumptions or draw inferences.<sup>154</sup> The exercise of this discretion must nonetheless comply with the requirements of Articles 3.1 and 3.2. Accordingly, when an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.<sup>155</sup> An investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence.<sup>156</sup> An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis.<sup>157</sup>

5.53. With regard to the examination of whether imports have prevented domestic price increases to a significant degree under Article 3.2, it would not be sufficient that prices of like domestic products have not risen during the period of investigation, even though they would normally be expected to have risen.<sup>158</sup> Rather, by asking the question "whether the effect of" the dumped imports is significant price suppression, the second sentence of Article 3.2 specifically instructs an investigating authority to consider whether certain price effects are the consequences of dumped

<sup>149</sup> Appellate Body Report, *Thailand – H-Beams*, para. 106.

<sup>150</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

<sup>151</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

<sup>152</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 193. See also Appellate Body Reports, *China – GOES*, para. 126; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.138.

<sup>153</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 193. See also Appellate Body Reports, *China – GOES*, para. 126; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.138.

<sup>154</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204.

<sup>155</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204.

<sup>156</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 205.

<sup>157</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 205.

<sup>158</sup> Appellate Body Report, *China – GOES*, para. 138.



imports.<sup>159</sup> Article 3.2 thus contemplates an inquiry into the relationship between dumped imports and domestic prices. Specifically, in *China – GOES*, the Appellate Body stated that an investigating authority is required to consider whether dumped imports have "explanatory force" for the occurrence of significant suppression of domestic prices.<sup>160</sup> In this respect, an investigating authority may not disregard evidence regarding elements that call into question the explanatory force of dumped imports for significant price suppression. Where there is evidence on the investigating authority's record concerning elements other than dumped imports that may explain the significant suppression of domestic prices, the investigating authority must consider relevant evidence pertaining to such elements for purposes of understanding whether dumped imports indeed have a suppressive effect on domestic prices.<sup>161</sup>

5.54. The inquiry into whether dumped imports have "explanatory force" for significant suppression of domestic prices under Article 3.2 of the Anti-Dumping Agreement is distinct from the injury causation and non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement.<sup>162</sup> While the assessments under both Article 3.2 and 3.5 are interlinked elements of the single, overall injury analysis<sup>163</sup>, the inquiry under each provision has a distinct focus. The analysis under Article 3.2 focuses on the relationship between dumped imports and *domestic prices*.<sup>164</sup> In contrast, the analysis under Article 3.5 focuses on the causal relationship between dumped imports and *injury* to the domestic industry.<sup>165</sup> More specifically, the examination under Article 3.5 encompasses "all relevant evidence" before the investigating authority, including the volume of dumped imports and their price effects listed under Article 3.2, as well as all relevant economic factors concerning the state of the domestic industry as listed in Article 3.4.<sup>166</sup> The examination under Article 3.5, by definition, covers a distinct and broader scope than the scope of the elements considered in relation to price suppression under Article 3.2.<sup>167</sup> Therefore, while an investigating authority is not required under Article 3.2 to conduct an "analysis of all known factors that may cause *injury* to the domestic industry"<sup>168</sup>, as required by Article 3.5, the authority must consider under Article 3.2 whether dumped imports have "explanatory force" for the occurrence of significant suppression of *domestic prices*.<sup>169</sup>

#### 5.2.1.4 Whether the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in connection with the financial crisis

5.55. In challenging the Panel's finding that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis, Russia submits two main arguments. We examine each of them in turn below.

5.56. Russia first argues that focusing on certain particular factors in the price suppression analysis – such as the financial crisis – would lead to a biased and non-objective analysis because the rate of return can potentially be influenced by a number of factors.<sup>170</sup> The European Union disagrees with Russia's contention that an investigating authority is not obliged to consider any evidence that questions the rate of return used to construct the domestic target prices.<sup>171</sup> To the European Union, if there is evidence before the investigating authority that the rate of return selected is very high because of exceptional circumstances in the market, relying on this rate

<sup>159</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>160</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>161</sup> Appellate Body Report, *China – GOES*, para. 152.

<sup>162</sup> Appellate Body Report, *China – GOES*, para. 147.

<sup>163</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141.

<sup>164</sup> Appellate Body Report, *China – GOES*, para. 147.

<sup>165</sup> Appellate Body Report, *China – GOES*, para. 147. Article 3.5 of the Anti-Dumping Agreement provides, in relevant part:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. ... The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.

<sup>166</sup> Appellate Body Report, *China – GOES*, para. 147.

<sup>167</sup> Appellate Body Report, *China – GOES*, para. 147.

<sup>168</sup> Appellate Body Report, *China – GOES*, para. 151. (emphasis original)

<sup>169</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>170</sup> Russia's appellant's submission, paras. 76 and 86.

<sup>171</sup> European Union's appellee's submission, paras. 105-106.



without considering whether these circumstances will likely continue to exist, and without making any adjustments, leads to a biased price suppression analysis.<sup>172</sup>

5.57. The Panel found that an investigating authority would act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement if the rate of return used in constructing a counterfactual target domestic price is not one that the domestic industry could have expected to achieve in the subsequent years under normal conditions of competition and in the absence of dumped imports. To the Panel, if there is evidence before the investigating authority of market conditions during the selected year that calls into question whether that rate of return could be achieved in subsequent years under normal conditions of competition and in the absence of dumped imports, an investigating authority may not ignore such evidence.<sup>173</sup> The Panel noted that, as acknowledged by the DIMD, Sollers' performance in 2009 was positively affected by the financial crisis.<sup>174</sup> The Panel did not consider it reasonable for an investigating authority to base its analysis on facts relating to a period in which extraordinary conditions prevailed without, at a minimum, explaining why the extraordinary conditions are not relevant to its counterfactual analysis.<sup>175</sup>

5.58. As noted earlier, the second sentence of Article 3.2 of the Anti-Dumping Agreement requires an investigating authority to consider whether dumped imports prevent an increase in the price of the domestic like product. When an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.<sup>176</sup> An investigating authority is required to consider whether dumped imports have "explanatory force" for the occurrence of significant suppression of domestic prices.<sup>177</sup> In this respect, an investigating authority may not disregard evidence that calls into question the explanatory force of dumped imports for significant price suppression. We consider that the Panel statements at issue are in line with our understanding of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

5.59. In our view, the fact that several factors or elements could potentially influence the rate of return used to construct the target domestic price does not allow an investigating authority to disregard evidence regarding any particular factor or element that calls into question the explanatory force of dumped imports for significant price suppression.<sup>178</sup> Thus, we do not believe that the consideration of evidence regarding factors or elements – such as, in this dispute, the financial crisis – that call into question the explanatory force of dumped imports for the existence of price suppression would lead to a biased analysis simply because there could be other factors that could also potentially affect the selected rate of return.

5.60. Russia also argues that the examination of "all known factors" is not required in the price suppression analysis under Article 3.2 of the Anti-Dumping Agreement.<sup>179</sup> Russia submits that considering the impact of the financial crisis in the price suppression analysis would put an additional burden on the investigating authority to conduct, under Article 3.2, an exhaustive causation and non-attribution analysis analogous to the one required under Article 3.5 of the Anti-Dumping Agreement.<sup>180</sup>

5.61. In response, the European Union submits that factoring into the price suppression analysis the exceptional circumstances surrounding the 2009 high rate of return does not involve a consideration of whether other factors caused injury under Article 3.5 of the

<sup>172</sup> European Union's appellee's submission, para. 109.

<sup>173</sup> Panel Report, paras. 7.61 and 7.64.

<sup>174</sup> Panel Report, para. 7.66 (referring to investigation report, Section 4.3).

<sup>175</sup> Panel Report, para. 7.66.

<sup>176</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204.

<sup>177</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>178</sup> We note that Russia has not identified, before the Panel or on appeal, any other relevant factor that should have influenced the rate of return used by the DIMD to construct the target domestic price.

<sup>179</sup> Russia's appellant's submission, para. 77. (emphasis original)

<sup>180</sup> Russia's appellant's submission, paras. 78-81 and 83-85 (referring to Panel Reports, *EC – Countervailing Measures on DRAM Chips*, paras. 7.337-7.339; *US – Countervailing Duty Investigation on DRAMS*, para. 7.351; *China – GOES*, para. 7.522; Appellate Body Report, *China – GOES*, paras. 142, 151, and 164).

Anti-Dumping Agreement.<sup>181</sup> Rather, the European Union submits that an investigating authority's inquiry under Article 3.2 is focused on the relationship between dumped imports and domestic prices.<sup>182</sup> While the investigating authority is not required to conduct an analysis of all known factors that may cause *injury*, it cannot disregard evidence that calls into question the explanatory force of the dumped imports for the significant price suppression.<sup>183</sup>

5.62. We do not consider that the Panel's interpretation of Article 3.2 of the Anti-Dumping Agreement suggests that an investigating authority is required to conduct a non-attribution analysis of all known factors that may be causing *injury* to the domestic industry in the context of its price suppression analysis. Rather, the Panel considered that it was not reasonable for an investigating authority to base its analysis on facts relating to a period where extraordinary conditions prevailed without, at a minimum, explaining why the extraordinary conditions are not relevant to its price suppression analysis or making pertinent adjustments.<sup>184</sup>

5.63. As explained earlier, the inquiries under Article 3.5 and under Article 3.2 have distinct focuses. The analysis under Article 3.5 focuses on the causal relationship between dumped imports and *injury* to the domestic industry. In contrast, the analysis under Article 3.2 focuses on the relationship between dumped imports and *domestic prices*.<sup>185</sup> Considering whether a factor such as the financial crisis called into question the explanatory force of dumped imports for the existence of price suppression would relate to the consideration of price effects under Article 3.2. Thus, such examination would not implicate the injury causation or non-attribution analysis under Article 3.5.<sup>186</sup> Indeed, the consideration of price effects under Article 3.2 is not conclusive of the determination of injury under Article 3.5. As far as Article 3.2 is concerned, an assessment of the relationship between dumped imports and significant suppression of *domestic prices* relates only to the impact on domestic prices. Such an assessment need not take into account factors that may be relevant to the analysis of *injury* causation and non-attribution under Articles 3.4 and 3.5 of the Anti-Dumping Agreement.<sup>187</sup> In addition, we agree with the United States that, while a panel need not make a determination of injury causation in the context of Article 3.2, a panel may find it necessary to consider some of the same facts in its analyses under Article 3.2 and under Article 3.5.<sup>188</sup>

5.64. For the reasons above, we consider that the Panel did not err in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement when finding that the DIMD acted inconsistently with these provisions by failing to take into account the impact of the financial crisis in its price suppression analysis.

## 5.2.2 Article 11 of the DSU

### 5.2.2.1 Introduction

5.65. The European Union challenges certain Panel findings concerning the explanatory force of the dumped imports for price suppression and the degree of such price suppression. The European Union claims that, in making these findings, the Panel acted inconsistently with Article 11 of the DSU. This is because, to the European Union, the Panel's reasoning at issue is inconsistent and incoherent with its earlier finding that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis when using the 2009 rate of return for constructing the target domestic price.<sup>189</sup> The European Union requests us to reverse the Panel's findings at issue.<sup>190</sup> In the event that we

<sup>181</sup> European Union's appellee's submission, para. 113.

<sup>182</sup> European Union's appellee's submission, para. 116.

<sup>183</sup> European Union's appellee's submission, para. 116.

<sup>184</sup> Panel Report, para. 7.66.

<sup>185</sup> Appellate Body Report, *China – GOES*, para. 147.

<sup>186</sup> An investigating authority may consider whether a financial crisis calls into question the explanatory force of dumped imports for significant suppression of *domestic prices*, and whether the same financial crisis calls into question the causal relationship between dumped imports and *injury* to the domestic industry.

<sup>187</sup> See Appellate Body Report, *China – GOES*, para. 151.

<sup>188</sup> United States' third participant's submission, para. 39.

<sup>189</sup> European Union's other appellant's submission, paras. 76 and 90.

<sup>190</sup> European Union's other appellant's submission, para. 100 (referring to Panel Report, paras. 7.77-7.81 and fn 197 thereto, 7.104-7.107, 8.1.d.iii, and 8.1.d.iv).

dismiss the European Union's claims under Article 11 of the DSU, the European Union also claims that the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the DIMD's methodology explained that the effect of the dumped imports was to suppress domestic prices.<sup>191</sup> In this respect, the European Union requests us to reverse the Panel's findings at issue, complete the analysis, and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether the dumped imports have explanatory force for the existence of significant price suppression.<sup>192</sup>

5.66. Russia responds that the European Union has not demonstrated that the Panel's assessment was not objective within the meaning of Article 11 of the DSU.<sup>193</sup> Russia thus seeks to have the Panel's findings at issue upheld.<sup>194</sup>

5.67. Before examining the European Union's claim under Article 11 of the DSU, we summarize the relevant Panel findings. Thereafter, we examine the merits of the European Union's claim on appeal.

### 5.2.2.2 Panel's findings

5.68. Before the Panel, the European Union claimed that the price gap between higher priced imports and domestic products calls into question the explanatory force of the dumped imports for the alleged price suppression. To the European Union, this is because the price gap may suggest that other factors, unrelated to the dumped imports, were responsible for the alleged price suppression.<sup>195</sup> The European Union also argued that the long-term price trends of dumped imports and the domestic like product did not support the conclusion of price suppression.<sup>196</sup> This is because, according to the European Union, from 2008 to 2011, the increase in domestic prices was higher than the increase in import prices.<sup>197</sup> To the European Union, this stands in contrast with a price suppression situation, where the domestic prices should fail to increase or increase less than would otherwise be the case, while import prices decrease.<sup>198</sup> Finally, the European Union argued that the DIMD did not demonstrate that the alleged price suppression was to a significant degree, because it failed to compare the target domestic prices and the actual domestic prices, and to consider the gap between these prices.<sup>199</sup>

5.69. To the Panel, the fact that dumped import prices were higher than domestic prices is not, in itself, evidence that dumped imports do not have explanatory force for significant suppression of domestic prices.<sup>200</sup> The Panel therefore found that the absence of price undercutting, or the presence of a "price gap" between import and domestic prices, does not necessarily preclude or call into question the explanatory force of the dumped imports for price suppression.<sup>201</sup> Furthermore, the Panel indicated that, "where an investigating authority constructs a target domestic price that otherwise would have occurred in the absence of the dumped imports, the methodology itself ensures that the failure of actual domestic prices to rise to the level of the target domestic price is an effect of the dumped imports."<sup>202</sup> Thus, according to the Panel, in the anti-dumping investigation at issue, "the DIMD's use of that methodology itself explained the

<sup>191</sup> European Union's other appellant's submission, paras. 101-102.

<sup>192</sup> European Union's other appellant's submission, para. 132 (referring to Panel Report, paras. 7.77-7.78 and 8.1.d.iii).

<sup>193</sup> Russia's appellee's submission, paras. 93, 95, and 99.

<sup>194</sup> Russia's appellant's submission, para. 120.

<sup>195</sup> Panel Report, para. 7.75.

<sup>196</sup> Panel Report, para. 7.75.

<sup>197</sup> Panel Report, para. 7.79.

<sup>198</sup> Panel Report, para. 7.79.

<sup>199</sup> Panel Report, para. 7.101.

<sup>200</sup> Panel Report, para. 7.77. According to the Panel, higher dumped import prices can have a suppressing effect on domestic prices, particularly in situations where imports command a price premium over the domestically produced product. (Ibid.)

<sup>201</sup> Panel Report, para. 7.77.

<sup>202</sup> Panel Report, para. 7.78.

effect of the dumped imports to suppress domestic prices in the absence of price undercutting and despite the price gap."<sup>203</sup>

5.70. Regarding the European Union's argument that the long-term price trends of dumped imports and the domestic like product do not support the conclusion of price suppression, the Panel noted that this argument was premised on a simple end-point-to-end-point (2008-2011) comparison of domestic and import prices. To the Panel, this could not be determinative of the question of whether the effect of the dumped imports was to suppress domestic prices to a significant degree. This is because, according to the Panel, this simple comparison ignored intervening developments over the period considered.<sup>204</sup>

5.71. In addition, on the basis of the trends in domestic prices and dumped import prices during the period under consideration, the Panel noted that dumped import prices increased from 2008 to 2009, but then decreased in 2010, and eventually converged with steadily increasing domestic prices in 2011. The Panel found it significant that, after 2009, dumped import prices continued on a deep downward trend, despite an additional 15% customs duty imposed after 2009.<sup>205</sup> The Panel noted that the DIMD relied on the downward pressure of dumped imports on domestic prices in considering price suppression.<sup>206</sup> The Panel considered that, by virtue of this downward pressure at least since 2009, the long-term price trends did not call into question the explanatory force of dumped imports for price suppression, contrary to the European Union's argument. Rather, relying on a graph depicting actual domestic prices, the target domestic price, and the dumped import prices between 2008 and 2011, the Panel found that the long-term price trends corroborated the DIMD's counterfactual analysis.<sup>207</sup>

5.72. Finally, regarding the significant degree of price suppression, the Panel noted that Article 3.2 of the Anti-Dumping Agreement does not set out any methodological guidance on how to consider price suppression, and thus nothing requires that a comparison be made between target domestic prices in the absence of dumped imports and actual prices of the domestic like product.<sup>208</sup> Furthermore, in assessing the approach chosen by the DIMD in determining whether price suppression was to a significant degree, the Panel noted that, while the DIMD did not explicitly compare the actual domestic prices and the constructed target domestic prices, Table 5.2.2 of the investigation report set out both actual and target domestic prices, and the difference between these prices was "evident on the face of the table".<sup>209</sup>

5.73. The Panel found that the European Union had not demonstrated that the DIMD failed to consider evidence that was self-evidently before it, or that its consideration of evidence was biased or otherwise lacked objectivity.<sup>210</sup> The Panel then noted that the DIMD had compared the actual domestic prices with the dumped import prices, and the target domestic prices with the dumped import prices. The DIMD had also considered the difference between the total profit/loss actually reported and the profit/loss that would have occurred in the absence of dumped imports during the period of investigation.<sup>211</sup> On this basis, the Panel concluded that the DIMD had, in fact, considered whether the effect of dumped imports was significant price suppression, and in fact ultimately concluded that this was the case.<sup>212</sup>

#### **5.2.2.3 Whether the Panel findings are internally incoherent and inconsistent**

5.74. The European Union claims that the Panel acted inconsistently with Article 11 of the DSU because certain of its findings are internally incoherent and inconsistent with its earlier finding that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis when using the 2009 rate of return for the

<sup>203</sup> Panel Report, para. 7.78.

<sup>204</sup> Panel Report, para. 7.80.

<sup>205</sup> Panel Report, para. 7.80.

<sup>206</sup> Panel Report, para. 7.81 (referring to investigation report, Section 5.2).

<sup>207</sup> Panel Report, para. 7.81.

<sup>208</sup> Panel Report, para. 7.102.

<sup>209</sup> Panel Report, para. 7.104 and Table 5 thereto.

<sup>210</sup> Panel Report, para. 7.104.

<sup>211</sup> Panel Report, para. 7.105.

<sup>212</sup> Panel Report, para. 7.105.

construction of the target domestic price.<sup>213</sup> In particular, the European Union claims that the Panel's finding concerning the DIMD's "methodology itself" is problematic since "any application of such methodology is necessarily affected by the illegal profit rate chosen to construct the target domestic prices."<sup>214</sup> In addition, the European Union challenges the Panel's finding that the long-term price trends corroborate the DIMD's counterfactual analysis, because, as the European Union stresses, the target domestic prices were based on the 2009 rate of return.<sup>215</sup> Finally, with respect to the significant degree of price suppression, the European Union notes that the Panel found that the DIMD considered the difference between the total profit/loss actually reported by the domestic industry and the profit/loss that would have occurred in the absence of dumped imports.<sup>216</sup> The European Union contends that the target domestic prices and the profit/loss used by the DIMD were calculated on the basis of the 2009 rate of return, which the Panel found earlier to be inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.<sup>217</sup>

5.75. Russia responds that the Panel's findings regarding the DIMD's methodology concern the interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and not the objectivity of the Panel's analysis under Article 11 of the DSU.<sup>218</sup> In relation to the long-term price trends, Russia contends that the European Union has not shown why the analysis of the Panel was not objective.<sup>219</sup> Finally, Russia contends that the European Union mischaracterizes the Panel's findings concerning the significant degree of price suppression.<sup>220</sup> Russia recalls that the Panel found that there is no requirement in the Anti-Dumping Agreement to compare target domestic prices and actual prices of the domestic like product to assess the significance of price suppression.<sup>221</sup> In this regard, Russia again argues that the Panel's findings concern the interpretation of Article 3.2 of the Anti-Dumping Agreement rather than the objectivity of the Panel's analysis under Article 11 of the DSU.<sup>222</sup>

5.76. We recall that Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation that embraces all aspects of a panel's examination of the "matter", both factual and legal.<sup>223</sup> In previous disputes, the Appellate Body has held that a panel does not comply with its obligations under Article 11 if its findings are internally incoherent and inconsistent. For example, in *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body considered the panel's treatment of the competing evidence submitted by the parties as internally inconsistent. That panel had dismissed the significance of certain re-estimates data because they were projections subject to uncertainty. At the same time, the panel had considered other estimates of central importance, despite the fact that they suffered from the same uncertainty, given that they too were estimates.<sup>224</sup>

5.77. Another example is found in *EC and certain member States – Large Civil Aircraft*, where the Appellate Body considered the panel's reasoning in relation to the United States' proposed project-specific risk premium as internally inconsistent. The panel dismissed venture capital financing as a source from which to derive the project risk of the projects financed with launch aid /member State financing because it considered venture capital financing to be more risky than launch aid /member State financing. Notwithstanding these reservations, which questioned the appropriateness of using the rates of return of venture capital financing as a proxy from which to derive the risk premium of the projects financed by launch aid /member State financing, the panel used a project-specific risk premium derived from the returns of venture capital financing in its analysis of large civil aircraft projects. To the Appellate Body, this type of internally inconsistent

<sup>213</sup> European Union's other appellant's submission, paras. 76 and 90.

<sup>214</sup> European Union's other appellant's submission, para. 94.

<sup>215</sup> European Union's other appellant's submission, para. 96 (referring to Panel Report, para. 7.81). The European Union also argues that the Panel referred to Figure 2 contained in paragraph 7.81 of its Report, which included data pertaining to the target domestic prices calculated on the basis of the 2009 rate of return. (*Ibid.*)

<sup>216</sup> European Union's other appellant's submission, para. 98 (referring to Panel Report, para. 7.105).

<sup>217</sup> European Union's other appellant's submission, para. 99.

<sup>218</sup> Russia's appellee's submission, para. 93.

<sup>219</sup> Russia's appellee's submission, paras. 94-95.

<sup>220</sup> Russia's appellee's submission, para. 114.

<sup>221</sup> Russia's appellee's submission, para. 114.

<sup>222</sup> Russia's appellee's submission, para. 116.

<sup>223</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 54. See also Appellate Body Reports, *Colombia – Textiles*, para. 5.17; *India – Solar Cells*, para. 5.15.

<sup>224</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 287-292.

reasoning could not be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU.<sup>225</sup>

5.78. We now turn to examine the three sets of Panel findings challenged by the European Union under Article 11 of the DSU. In relation to the Panel's findings concerning the methodology itself, the Panel found that, "where an investigating authority constructs a target domestic price that otherwise would have occurred in the absence of the dumped imports, the methodology itself ensures that the failure of actual domestic prices to rise to the level of the target domestic price is an effect of the dumped imports."<sup>226</sup> The Panel then recalled the manner in which the DIMD applied its methodology in the anti-dumping investigation at issue. In particular, the Panel recalled that the DIMD identified a benchmark rate of return in the year with the lowest dumped import penetration. The Panel further recalled that the DIMD constructed, on the basis of the rate of return in that year, the target domestic prices that would otherwise have occurred in the absence of the dumped imports, and then compared those prices with the actual price during the period considered.<sup>227</sup> The Panel finally observed that it was because the actual prices were lower than the target domestic prices that the DIMD ultimately concluded that the effect of the dumped imports was to suppress domestic prices significantly. Given that the DIMD's methodology explained that the effect of the dumped imports was to suppress domestic prices, the Panel considered that the DIMD was not required to explain separately why, despite being higher priced, the effect of dumped imports was to prevent domestic price increases.<sup>228</sup>

5.79. Therefore, it is evident that, when the Panel stated that the "methodology itself" ensures that the failure of actual domestic prices to rise to the level of the target domestic price is an effect of the dumped imports<sup>229</sup>, the Panel was referring to the manner in which the DIMD designed and applied its methodology in the anti-dumping investigation at issue in order to consider whether significant price suppression had occurred. This finding, however, is not coherent and consistent with the Panel's earlier finding that the manner in which the DIMD used the 2009 rate of return to determine the target domestic price was WTO-inconsistent. As explained above, the Panel found that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis in determining the rate of return to be used in constructing the target domestic price.<sup>230</sup> By later finding that the DIMD's application of its methodology ensured that the failure of actual domestic prices to rise to the level of the target domestic price was an effect of the dumped imports, the Panel appears to have ignored its earlier finding that the DIMD's construction of the target domestic price was WTO-inconsistent. Such an internally incoherent reasoning cannot be reconciled with the Panel's duty to make an objective assessment of the matter before it, and is therefore inconsistent with Article 11 of the DSU.

5.80. In relation to the Panel's findings concerning the long-term price trends, the Panel found that, in light of the downward pressure exercised by dumped imports on domestic prices at least since 2009, the long-term price trends do not call into question the "explanatory force" of dumped imports for price suppression. The Panel considered that the long-term price trends, in fact, corroborate the DIMD's counterfactual analysis.<sup>231</sup> In making this finding, the Panel relied on Figure 2 in paragraph 7.81 of the Panel Report. Figure 2 shows three lines, one of which represents the trend in target domestic prices.

5.81. As explained above, in its counterfactual analysis, the DIMD used target domestic prices calculated on the basis of the 2009 rate of return. The Panel had found earlier that the DIMD's construction of the target domestic price was WTO-inconsistent. The Panel's finding that the long-term price trends corroborate the DIMD's counterfactual analysis<sup>232</sup> is not coherent and consistent with its earlier finding concerning the DIMD's construction of the target domestic price on the basis of the 2009 rate of return. This is because the DIMD's counterfactual analysis relied

<sup>225</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 884, 886, and 894.

<sup>226</sup> Panel Report, para. 7.78.

<sup>227</sup> Panel Report, para. 7.78.

<sup>228</sup> Panel Report, para. 7.78.

<sup>229</sup> Panel Report, para 7.78.

<sup>230</sup> We have upheld the Panel's findings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning the 2009 rate of return. See paras. 5.55-5.64 above.

<sup>231</sup> Panel Report, para. 7.81.

<sup>232</sup> Panel Report, para. 7.81.

on the target domestic price, and the Panel had found earlier that the manner in which the DIMD used the 2009 rate of return to determine the target domestic price was WTO-inconsistent. Thus, the Panel could not have later relied on the DIMD's counterfactual analysis as a basis for its finding concerning the price trends.

5.82. For these reasons, we consider that the Panel's finding concerning the long-term price trends is not coherent and consistent with its earlier finding that the manner in which the DIMD used the 2009 rate of return to determine the target domestic price was WTO-inconsistent. Thus, we find that, in this regard, the Panel acted inconsistently with Article 11 of the DSU.

5.83. Finally, in relation to the Panel's finding concerning the significant degree of price suppression, we recall that the Panel first observed that the DIMD did not explicitly compare the actual domestic prices and the constructed target domestic prices.<sup>233</sup> Nonetheless, the Panel noted that Table 5.2.2 of the investigation report sets out both actual and target domestic prices, and that the difference between these prices was "evident on the face of the table".<sup>234</sup> The Panel then stated that there was no basis for it to conclude that, "having set out the relevant data in the Investigation Report, the DIMD did not in fact consider it, including the self-evident fact that the actual domestic prices were consistently below the target domestic prices, apart from 2009, the benchmark year."<sup>235</sup> The Panel also observed that the DIMD had compared the dumped imports prices with: (i) the actual domestic prices and (ii) the target domestic prices, as well as considered the difference between the total profit/loss actually reported and the profit/loss that would have occurred in the absence of dumped imports. On this basis, the Panel concluded that it was "beyond question that the DIMD did, in fact, consider whether the effect of dumped imports [was] significant price suppression, and in fact ultimately concluded that this was the case".<sup>236</sup>

5.84. We consider that the Panel's reasoning at issue is not consistent with its earlier finding concerning the 2009 rate of return. The Panel could not have relied on the target domestic price, in particular on the difference between the actual domestic prices and the target domestic prices, in its assessment of the DIMD's consideration of the degree of price suppression, given that it had found earlier that the DIMD's construction of the target domestic price was WTO-inconsistent. Thus, we consider that the Panel's findings concerning the significant degree of price suppression are not coherent and consistent with its earlier finding concerning the 2009 rate of return. As a result, the Panel's reasoning is internally incoherent and contrary to the requirements of Article 11 of the DSU.

5.85. We recall that the European Union claims that the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the DIMD's methodology explained that the effect of the dumped imports was to suppress domestic prices.<sup>237</sup> The European Union requests us to reverse the Panel's findings at issue, complete the analysis, and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether the dumped imports have explanatory force for the existence of significant price suppression.<sup>238</sup> The European Union conditions this aspect of its other appeal to the dismissal of its claims under Article 11 of the DSU in connection with price suppression.<sup>239</sup> Given that we have found that the Panel acted inconsistently with Article 11 of the DSU, we do not examine that aspect of the European Union's appeal.

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<sup>233</sup> Panel Report, para. 7.104.

<sup>234</sup> Panel Report, para. 7.104 and Table 5 thereto.

<sup>235</sup> Panel Report, para. 7.104.

<sup>236</sup> Panel Report, para. 7.105.

<sup>237</sup> European Union's other appellant's submission, paras. 101-102 (referring to Panel Report, para. 7.78).

<sup>238</sup> European Union's other appellant's submission, para. 132 (referring to Panel Report, paras. 7.77-7.78 and 8.1.d.iii).

<sup>239</sup> European Union's other appellant's submission, paras. 100-101.

### 5.2.3 The ability of the market to absorb further price increases

#### 5.2.3.1 Introduction

5.86. The European Union appeals the Panel's finding that the evidence on the investigation record did not require the DIMD to examine whether the market could absorb further price increases. The European Union claims that the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement because, to the European Union, where there is evidence on the record of significant price and production cost increases, an investigating authority must consider whether the market would absorb further price increases.<sup>240</sup> The European Union requests us to reverse the Panel's finding at issue.<sup>241</sup> The European Union also requests us to complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 by failing to examine whether the market would accept additional domestic price increases.<sup>242</sup> Russia responds that there is no explicit requirement in Articles 3.1 and 3.2 to consider whether the market would accept price increases and that an investigating authority has to examine this issue only if it is faced with evidence that calls into question the ability of the market to absorb price increases.<sup>243</sup> Russia seeks to have the Panel's findings upheld.<sup>244</sup>

5.87. We begin by summarizing the relevant Panel findings. Thereafter, we examine the merits of the European Union's claim on appeal.

#### 5.2.3.2 Panel's findings

5.88. Before the Panel, the European Union contended that the DIMD failed to examine the reasons for the increase in the domestic industry's costs, and the likelihood that the market would accept additional domestic price increases.<sup>245</sup> The Panel noted that the parties did not disagree that, where there is evidence before an investigating authority that calls into question the ability of the market to absorb price increases, the authority should consider this question.<sup>246</sup> To the Panel, if the market would not accept price increases in the absence of dumped imports, it seems unlikely that price increases "otherwise would have occurred" within the meaning of Article 3.2 of the Anti-Dumping Agreement.<sup>247</sup>

5.89. The Panel then observed that the record did not indicate that the interested parties questioned the ability of the market to absorb additional price increases, made arguments, or presented evidence in this regard before the DIMD.<sup>248</sup> The Panel also noted that the investigation report does not contain any indication that the DIMD considered whether the market would accept additional price increases by the domestic industry.<sup>249</sup> The Panel nonetheless proceeded to examine whether, in the absence of any clearly raised arguments concerning the ability of the market to accept additional price increases, the evidence before the DIMD was such that an objective and unbiased investigating authority should nonetheless have considered this issue.<sup>250</sup>

5.90. First, the Panel addressed the European Union's argument that domestic prices increased between 2008 and 2009 and again between 2010 and 2011.<sup>251</sup> To the Panel, the fact that domestic prices increased during the period of investigation cannot in itself call into question the market's ability to absorb additional price increases. The Panel explained that there must be evidence that the price increases have resulted in prices having reached a level where the market

<sup>240</sup> European Union's other appellant's submission, para. 135.

<sup>241</sup> European Union's other appellant's submission, para. 159 (referring to Panel Report, paras. 7.87-7.91 and 8.1.d.iii).

<sup>242</sup> European Union's other appellant's submission, para. 159.

<sup>243</sup> Russia's appellee's submission, para. 159.

<sup>244</sup> Russia's appellee's submission, para. 168.

<sup>245</sup> Panel Report, para. 7.83 (referring to European Union's first written submission to the Panel, paras. 153-154; second written submission to the Panel, para. 113; response to Panel question No. 30, para. 99).

<sup>246</sup> Panel Report, para. 7.86.

<sup>247</sup> Panel Report, para. 7.86.

<sup>248</sup> Panel Report, para. 7.87.

<sup>249</sup> Panel Report, para. 7.85.

<sup>250</sup> Panel Report, para. 7.87.

<sup>251</sup> Panel Report, para. 7.83.



will not accept any further increases.<sup>252</sup> Second, the Panel turned to the European Union's argument that there were "quality issues" with Sollers' LCVs that raised doubts about whether consumers would be willing to pay high prices for those LCVs. The Panel considered that the evidence on the investigation record did not suffice to demonstrate the existence of quality problems of a degree that would support the conclusion that the DIMD acted unreasonably by failing to consider whether such problems affected the likelihood that the market would accept further price increases.<sup>253</sup> Finally, regarding the European Union's argument that there was a significant increase in the domestic industry's costs of production due to the increasing costs of raw materials, the Panel found that there was no evidence on the record to indicate that the rising costs of production could not have been passed on to consumers.<sup>254</sup>

5.91. The Panel therefore concluded that the evidence on the investigation record was not sufficient to require an objective and unbiased investigating authority to consider whether the market would absorb price increases beyond those that actually took place in the context of its consideration of price suppression.<sup>255</sup>

### **5.2.3.3 Whether the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in connection with further price increases**

5.92. The European Union claims that the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the evidence on the investigation record did not require the DIMD to examine whether the market could absorb further price increases.<sup>256</sup> The European Union argues that there is no requirement in these provisions that the interested parties must have explicitly questioned the ability of the market to absorb additional price increases.<sup>257</sup> The European Union submits that an investigating authority making an injury determination is required to base its determination on all relevant reasoning and facts before it, and not merely the specific arguments raised by the participants in the investigation.<sup>258</sup> The European Union also argues that the DIMD was faced with compelling evidence that questioned the market's ability to absorb further price increases.<sup>259</sup> To the European Union, the DIMD should have examined this question. The European Union points to evidence on the DIMD's investigation record relating to the increase in market prices and in Sollers' production costs between 2008 and 2011, as well as the alleged quality issues with the Fiat Ducato assembled domestically by Sollers.<sup>260</sup>

5.93. Russia responds that there is no explicit requirement in Articles 3.1 and 3.2 of the Anti-Dumping Agreement to consider whether the market would accept price increases and that an investigating authority must examine this issue only if it is faced with evidence that calls into question the ability of the market to absorb price increases.<sup>261</sup> Russia submits that the Panel did not limit the scope of its analysis to the arguments raised by the interested parties.<sup>262</sup> Rather, the Panel considered the evidence on the DIMD's investigation record and concluded that it was not sufficient to require an objective and unbiased investigating authority to consider whether the market would absorb price increases.<sup>263</sup> Russia thus argues that there is no error in the Panel's interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement.<sup>264</sup>

5.94. The Panel stated that the term "which otherwise would have occurred" in Article 3.2 of the Anti-Dumping Agreement suggests that an investigating authority should at least consider whether the market would accept price increases in the absence of dumped imports, when faced with relevant evidence suggesting it would not. To the Panel, if the market would not accept price

<sup>252</sup> Panel Report, para. 7.88.

<sup>253</sup> Panel Report, para. 7.89.

<sup>254</sup> Panel Report, para. 7.90.

<sup>255</sup> Panel Report, para. 7.91.

<sup>256</sup> European Union's other appellant's submission, paras. 135 and 158-159.

<sup>257</sup> European Union's other appellant's submission, para. 135.

<sup>258</sup> European Union's other appellant's submission, para. 153.

<sup>259</sup> European Union's other appellant's submission, paras. 154-155.

<sup>260</sup> European Union's other appellant's submission, paras. 140-142, 144, and 146-147.

<sup>261</sup> Russia's appellee's submission, para. 159.

<sup>262</sup> Russia's appellee's submission, para. 164.

<sup>263</sup> Russia's appellee's submission, para. 164 (referring to Panel Report, para. 7.87).

<sup>264</sup> Russia's appellee's submission, paras. 165 and 167.

increases in the absence of dumped imports, it seems unlikely that price increases "otherwise would have occurred" within the meaning of Article 3.2.<sup>265</sup>

5.95. We agree with these Panel statements to the extent that any assumptions relied on by the investigating authority are derived as reasonable inferences from a credible basis of facts, and are sufficiently explained. As explained above, pursuant to the second sentence of Article 3.2 of the Anti-Dumping Agreement, an investigating authority shall consider whether the effect of dumped imports is to prevent price increases, which otherwise would have occurred, to a significant degree. Although an investigating authority enjoys a certain degree of discretion in adopting a methodology to guide its price suppression analysis, the authority must nonetheless comply with the requirements of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. Accordingly, when an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.<sup>266</sup> Moreover, an investigating authority is required, under the second sentence of Article 3.2, to consider whether dumped imports are preventing domestic price increases "which otherwise would have occurred" to a significant degree. Therefore, an authority must ensure that its methodology assesses price increases "which otherwise would have occurred" in the absence of dumped imports. Were an investigating authority to rely on a methodology that concerned price increases that would *not* have occurred in the absence of dumped imports, it would not be able to consider objectively, pursuant to Article 3.2, whether the effect of dumped imports was to suppress significantly domestic prices.

5.96. In addition, by asking the question "whether the effect of" the dumped imports is significant price suppression, the second sentence of Article 3.2 of the Anti-Dumping Agreement specifically instructs an investigating authority to consider whether certain price effects are the consequences of dumped imports.<sup>267</sup> As explained earlier, an investigating authority is thus required to consider whether dumped imports have "explanatory force" for the occurrence of significant suppression of domestic prices.<sup>268</sup> In this respect, an investigating authority may not disregard evidence regarding elements that call into question the explanatory force of dumped imports for significant price suppression. Where there is evidence on the investigating authority's record concerning elements other than dumped imports that may explain the significant suppression of domestic prices, the investigating authority must consider relevant evidence pertaining to such elements for purposes of understanding whether dumped imports indeed have a suppressive effect on domestic prices.<sup>269</sup>

5.97. We note the European Union's contention that the Panel's interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement included a requirement that interested parties must have explicitly questioned the ability of the market to absorb additional price increases for an investigating authority to consider this question.<sup>270</sup> We do not read the Panel, however, to have added such a requirement. Indeed, although it noted that the investigation record does not indicate that interested parties questioned the ability of the market to absorb additional price increases<sup>271</sup>, the Panel went on to examine whether "the evidence before the DIMD was such that an objective and unbiased investigating authority should nonetheless have considered this issue."<sup>272</sup> This indicates that the Panel did not consider that interested parties must have explicitly questioned the ability of the market to absorb additional price increases for an investigating authority to consider this question. Thus, in this respect, we do not find that the Panel erred as far as its interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement is concerned.

5.98. Having examined the Panel's interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement, we now turn to the Panel's application of these provisions in its review of the anti-dumping determination at issue. We examine whether the Panel erred in finding that

<sup>265</sup> Panel Report, para. 7.86.

<sup>266</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204. An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis. (*Ibid.*, para. 205)

<sup>267</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>268</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>269</sup> Appellate Body Report, *China – GOES*, para. 152.

<sup>270</sup> European Union's other appellant's submission, para. 135.

<sup>271</sup> Panel Report, paras. 7.85 and 7.87.

<sup>272</sup> Panel Report, para. 7.87.

the evidence on the investigation record did not require the DIMD to examine whether the market could absorb further price increases.

5.99. As noted above, the European Union argues that the DIMD was faced with compelling evidence that questioned the market's ability to absorb further price increases.<sup>273</sup> The evidence in question on the DIMD's investigation record relates to the increase in market prices and in Sollers' production costs between 2008 and 2011, as well as the alleged quality issues with the FIAT Ducato assembled domestically by Sollers.<sup>274</sup> The Panel noted that the investigation report does not contain any indication that the DIMD considered whether the market would accept additional price increases by the domestic industry.<sup>275</sup> The Panel nonetheless proceeded to examine this evidence itself<sup>276</sup>, and concluded that it was not sufficient to require an objective and unbiased investigating authority to consider whether the market would absorb additional price increases.<sup>277</sup> We now turn to examining whether the Panel erred in making this conclusion.

5.100. We consider that the question before the Panel was whether the DIMD properly considered, in light of the circumstances of the underlying anti-dumping investigation, relevant evidence in relation to whether the market could absorb additional price increases. As noted above, however, the DIMD's investigation report does not contain such an explanation. We note in this respect that there is evidence on the DIMD's investigation record relating to increases in domestic prices and cost of production as well as alleged quality issues with the domestic product.<sup>278</sup> In our view, this evidence is relevant to an assessment of whether the domestic market at issue in the anti-dumping investigation could absorb additional price increases. We consider that the DIMD should have explained in its investigation report, at a minimum, why this evidence does not show that the target domestic price relied on by the DIMD was a price that would not have occurred in the absence of dumped imports. This is because, were the DIMD to rely on a constructed target domestic price that could not have been absorbed by the domestic market, the target domestic price would not correspond to one "which otherwise would have occurred" in the absence of dumped imports within the meaning of Article 3.2 of the Anti-Dumping Agreement. The failure of the actual domestic price to meet the constructed target domestic price may be due to the unrealistic construction of that target domestic price, rather than to the effect of the dumped imports on domestic prices.

5.101. As explained above, in its assessment reflected in the investigation report, the DIMD could not have disregarded evidence that calls into question the explanatory force of dumped imports for significant price suppression. In addition, to the extent that the DIMD's determination rested upon assumptions, these assumptions should have been derived as reasonable inferences from a credible basis of facts, and should have been sufficiently explained in the report so that their objectivity and credibility could be verified. In light of the above, given that there is no indication in the investigation report that the DIMD considered evidence that called into question the explanatory force of dumped imports for the occurrence of significant price suppression, we consider that the Panel did not have a basis to find that the DIMD did not act inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

5.102. In addition, in light of the standard of review under the Anti-Dumping Agreement, we recall that it is not for a panel to conduct a *de novo* review of the facts of the case or substitute its judgement for that of the investigating authority.<sup>279</sup> Rather, a panel must examine "whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate".<sup>280</sup> In this respect, a panel must ascertain whether the investigating authority has evaluated all of the relevant evidence in an objective and unbiased manner, including by taking sufficient account of conflicting evidence and responding to competing plausible

<sup>273</sup> European Union's other appellant's submission, paras. 154-155.

<sup>274</sup> European Union's other appellant's submission, paras. 140-142, 144, and 146-147.

<sup>275</sup> Panel Report, para. 7.85.

<sup>276</sup> Panel Report, paras. 7.88-7.90.

<sup>277</sup> Panel Report, para. 7.91.

<sup>278</sup> Panel Report, paras. 7.87-7.90.

<sup>279</sup> Appellate Body Reports, *US – Washing Machines*, para. 5.258; *US – Steel Safeguards*, para. 299; *Argentina – Footwear (EC)*, para. 121; *US – Anti-Dumping and Countervailing Duties (China)*, para. 379.

<sup>280</sup> Appellate Body Report, *US – Washing Machines*, para. 5.258 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

explanations of that evidence.<sup>281</sup> Thus, the Panel in this dispute could not have reached a conclusion about whether the DIMD should have examined certain evidence on the basis of the Panel's own appreciation of this evidence. The fact that the Panel itself undertook the assessment of the evidence on the investigation record does not change the fact that the DIMD failed to make such an assessment. The conclusion of whether the evidence effectively undermines or confirms the investigating authority's price suppression analysis under Article 3.2 of the Anti-Dumping Agreement can only be reached on the basis of the authority's review of the evidence within the particular circumstances of each investigation as reflected in the investigation report.

5.103. For the reasons above, we find that the Panel erred in its application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the evidence on the investigation record did not require the DIMD to examine whether the market could absorb further price increases. Consequently, we reverse the Panel's findings in paragraphs 7.87-7.91 and 8.1.d.iii of the Panel Report.

5.104. Having reversed the Panel's finding at issue, we turn to the European Union's request for us to complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to examine evidence relevant to whether the market would accept additional domestic price increases. The European Union submits that we can complete the analysis on the basis of the evidence on the Panel record cited by the European Union.<sup>282</sup>

5.105. The Appellate Body has generally decided to complete the analysis where it was necessary to do so in order to facilitate the prompt settlement and effective resolution of the dispute.<sup>283</sup> Further, completion of the analysis is possible where factual findings in the panel report, undisputed facts on the record, and admitted facts provide the Appellate Body with a sufficient basis for doing so.<sup>284</sup> Finally, where the complexity of the issues raised, the absence of full exploration of the issues before the panel, and considerations pertaining to the parties' due process rights do not warrant completing the analysis, or where doing so is not required to resolve the dispute, the Appellate Body has declined to complete the analysis.<sup>285</sup>

5.106. In this dispute, there is evidence on the investigation record relating to the increase in market prices and in Sollers' production costs between 2008 and 2011, as well as the alleged quality issues with the FIAT Ducato assembled domestically by Sollers.<sup>286</sup> In their comments of 11 April 2013 on the DIMD's draft investigation report<sup>287</sup>, Daimler AG and ZAO Mercedes-Benz RUS stated that the report fails to provide any assessment of other factors that could have caused the absence of increases in domestic prices. In particular, they stated that Sollers "faced serious problems with regard to the quality of the manufactured goods".<sup>288</sup> Daimler AG and ZAO Mercedes-Benz RUS concluded that "the inability to introduce further increases in prices, which had already risen significantly prior to the period under investigation, was a consequence of [Sollers'] own behaviour and the business solutions adopted by [Sollers]".<sup>289</sup> We also note that,

<sup>281</sup> Appellate Body Reports, *US – Washing Machines*, para. 5.258; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; *US – Anti-Dumping and Countervailing Duties (China)*, para. 443.

<sup>282</sup> European Union's other appellant's submission, para. 159.

<sup>283</sup> Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.146; *EC and certain member States – Large Civil Aircraft*, para. 1178; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1351; *EC – Asbestos*, para. 78.

<sup>284</sup> Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.146; *Australia – Salmon*, paras. 209, 241, and 255; *Korea – Dairy*, paras. 91 and 102; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 653; *US – Section 211 Appropriations Act*, para. 343; *EC – Asbestos*, paras. 78-79.

<sup>285</sup> Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.146; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224; *EC – Seal Products*, paras. 5.63 and 5.69; *US – Steel Safeguards*, para. 431.

<sup>286</sup> Panel Report, paras. 7.87-7.90.

<sup>287</sup> Eurasian Economic Commission, *Report on the findings of the anti-dumping investigation on imports of light commercial vehicles from Germany, Italy, Poland, and Turkey* (Non-confidential version) (draft investigation report, 28 March 2013) (Panel Exhibits EU-16 and RUS-10).

<sup>288</sup> Daimler's and Mercedes' comments of 11 April 2013 on the draft investigation report (Panel Exhibit EU-19), Section 2.2.

<sup>289</sup> Daimler's and Mercedes' comments of 11 April 2013 on the draft investigation report of (Panel Exhibit EU-19), Section 2.2. See also Daimler's and Mercedes' comments of 16 March 2012 on the public hearing (Panel Exhibit EU-8).

Peugeot Citroën Automobiles SA (PCA) and Peugeot Citroën Russia (PCR) stated in their comments of 11 April 2013 on the draft investigation report, that the report "shows that the [Customs Union] industry increased both its costs of production and its prices from 2008 to the [investigation period]."<sup>290</sup> In its comments of 11 February 2012, the Association of Turkish exporters from the automotive industry stated that the increase in Sollers' costs was related to "the increase in the production costs, which was based on the increase of the prices of the main raw materials (coal, iron ore), and also the increase in the tariffs of the natural monopolies."<sup>291</sup> In our view, the evidence above is relevant to the question of whether the market could absorb further price increases, and thus whether the dumped imports had explanatory force for the occurrence of price suppression. The DIMD's investigation report, however, does not contain any indication that the DIMD considered such evidence in the context of whether the market would accept additional price increases by the domestic industry. Indeed, we observe the Panel's statement that "[t]he notion that there was a margin for domestic prices to increase is not a part of the analysis set out by the DIMD in the Investigation Report."<sup>292</sup> Thus, we consider that the DIMD did not examine evidence relevant to whether the market would accept additional domestic price increases.

5.107. As noted above, an investigating authority is required under the second sentence of Article 3.2 of the Anti-Dumping Agreement to consider whether dumped imports are preventing domestic price increases "which otherwise would have occurred" to a significant degree. Therefore, an authority must ensure that its methodology assesses price increases "which otherwise would have occurred" in the absence of dumped imports. In addition, an investigating authority is required, under Article 3.2, to consider whether dumped imports have "explanatory force" for the occurrence of significant suppression of domestic prices.<sup>293</sup> In this respect, an investigating authority may not disregard evidence regarding elements that calls into question the explanatory force of dumped imports for significant price suppression. Where there is evidence on the investigating authority's record concerning elements other than subject imports that may explain the significant suppression of domestic prices, the investigating authority must consider relevant evidence pertaining to such elements for purposes of understanding whether dumped imports indeed have a suppressive effect on domestic prices.<sup>294</sup>

5.108. By failing to consider relevant evidence on the investigation record, the DIMD effectively disregarded evidence that called into question the explanatory force of the dumped imports for the occurrence of significant price suppression. Thus, we find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to examine evidence relevant to whether the market would accept additional domestic price increases.<sup>295</sup>

#### 5.2.4 Conclusions

5.109. In relation to Russia's appeal under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, the fact that several factors or elements could potentially influence the rate of return used to construct the target domestic price does not allow an investigating authority to disregard evidence regarding any particular factor or element that calls into question the explanatory force of dumped imports for significant price suppression under Article 3.2 of the Anti-Dumping Agreement. We thus disagree with Russia's argument that the consideration of evidence regarding factors or elements – such as, in this dispute, the financial crisis – that call into question the explanatory force of dumped imports for the existence of price suppression would lead to a biased analysis simply because there could be other factors that could also potentially affect the selected rate of return. In addition, we do not consider that the Panel's interpretation of Article 3.2 suggests that an investigating authority is required to conduct a non-attribution analysis of all known factors that may be causing *injury* to the domestic industry in the context of its price suppression analysis. The inquiries under Article 3.5 and under Article 3.2 of the Anti-Dumping Agreement have distinct

<sup>290</sup> PCA's and PCR's comments of 11 April 2013 on the draft investigation report (Panel Exhibit EU-20), p. 4.

<sup>291</sup> Comments of the Association of Turkish exporters from the automotive industry of 11 February 2012 (Panel Exhibit EU-31), p. 33.

<sup>292</sup> Panel Report, para. 7.85.

<sup>293</sup> Appellate Body Report, *China – GOES*, para. 136.

<sup>294</sup> Appellate Body Report, *China – GOES*, para. 152.

<sup>295</sup> In reaching this conclusion, we take no position on whether or not, in the circumstances of the anti-dumping investigation at issue, the market could have absorbed additional price increases in the absence of dumped imports.

focuses. The analysis under Article 3.5 focuses on the causal relationship between dumped imports and *injury* to the domestic industry. In contrast, the analysis under Article 3.2 focuses on the relationship between dumped imports and *domestic prices*.

5.110. We therefore find that the Panel did not err in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the DIMD acted inconsistently with these provisions because it failed to take into account the impact of the financial crisis in determining the rate of return used to construct the target domestic price for its price suppression analysis. Consequently, we uphold the Panel's findings in paragraphs 7.64-7.67 and 8.1.d.i of the Panel Report.<sup>296</sup>

5.111. In relation to the European Union's claims under Article 11 of the DSU, we consider that the Panel's findings concerning the DIMD's methodology, the long-term price trends, and the degree of price suppression are not coherent and consistent with the Panel's earlier finding that the manner in which the DIMD used the 2009 rate of return to determine the target domestic price was WTO-inconsistent. We therefore find that the Panel acted inconsistently with its obligations under Article 11 of the DSU. Consequently, we reverse the Panel's findings in paragraphs 7.77-7.81, 7.104-7.107, 8.1.d.iii, and 8.1.d.iv of the Panel Report.

5.112. Having found that the Panel acted inconsistently with its obligations under Article 11 of the DSU, we do not examine the European Union's conditional claim that the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the DIMD's methodology explained that the effect of the dumped imports was to suppress domestic prices.<sup>297</sup> We also do not examine the European Union's request for us to complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 by failing to consider whether the dumped imports have explanatory force for the existence of significant price suppression.<sup>298</sup>

5.113. In relation to the European Union's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning whether the domestic market could absorb further price increases, we consider that an investigating authority must ensure that its price suppression methodology under Article 3.2 assesses price increases "which otherwise would have occurred" in the absence of dumped imports. In addition, an investigating authority is required to consider whether dumped imports have "explanatory force" for the occurrence of significant suppression of domestic prices. Contrary to the European Union's contention, we do not read the Panel to have added a requirement to Articles 3.1 and 3.2 that interested parties must have explicitly questioned the ability of the market to absorb additional price increases for an investigating authority to be required to consider this question. Thus, in this respect, we do not find that the Panel erred in its interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. We fault the Panel, however, for having itself undertaken the assessment of relevant evidence on the DIMD's investigation record. For these reasons, we find that the Panel erred in its application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the evidence on the investigation record did not require the DIMD to examine whether the market could absorb further price increases. Consequently, we reverse the Panel's findings in paragraphs 7.87-7.91 and 8.1.d.iii of the Panel Report.

5.114. Having reversed the Panel's finding at issue, we complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to examine evidence relevant to whether the market would accept additional domestic price increases.

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<sup>296</sup> Having upheld these Panel findings, we do not examine Russia's conditional request concerning paragraphs 7.181-7.182 and 8.1.f.i of the Panel Report regarding the consequential inconsistency with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

<sup>297</sup> European Union's other appellant's submission, paras. 101-102 (referring to Panel Report, para. 7.78).

<sup>298</sup> European Union's other appellant's submission, para. 132.

### 5.3 Confidential investigation report

#### 5.3.1 Introduction

5.115. The European Union takes issue with the Panel's reliance on the confidential investigation report of the DIMD<sup>299</sup> in its assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to the domestic industry's return on investments, actual and potential effects on cash flow, and the ability to raise capital or investments. The European Union claims that the Panel failed to make an objective assessment of the matter before it pursuant to Article 11 of the DSU and failed to determine whether the DIMD's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective within the meaning of Article 17.6 of the Anti-Dumping Agreement by basing its evaluation of the European Union's claims on the confidential investigation report without assessing whether that document formed part of the investigation record at the time the determination to impose the anti-dumping measure was made.<sup>300</sup> In the event that we reverse the Panel's findings, the European Union requests us to complete the analysis and find, on the basis of the non-confidential investigation report<sup>301</sup>, that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to evaluate the three injury factors at issue.<sup>302</sup>

5.116. We begin by recalling the Panel's findings concerning the DIMD's evaluation of the three injury factors at issue before turning to address the European Union's claims under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

#### 5.3.2 Panel's findings

5.117. Before the Panel, the European Union argued that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because it failed to examine, in the non-confidential investigation report, the domestic industry's return on investments, actual and potential effects on cash flow, and the ability to raise capital or investments.<sup>303</sup> The European Union contended that the Panel should not base its assessment under Articles 3.1 and 3.4 on the confidential investigation report to the extent that the same information did not appear in the non-confidential investigation report.<sup>304</sup>

5.118. The Panel noted that the evaluation of the Article 3.4 factors at issue was absent, in its entirety, from the non-confidential investigation report and that there was no indication in that report that the confidential information at issue had been redacted from it. The Panel further noted that this could give rise to a concern as to whether the non-confidential investigation report was consistent with Article 12 of the Anti-Dumping Agreement. The Panel recalled the European Union's argument that "total silence on a factor *may* call into question whether the DIMD actually examined it."<sup>305</sup> The Panel noted, however, that the European Union had not presented any evidence suggesting that the confidential investigation report was not "genuine".<sup>306</sup> Moreover, the Panel recalled that, although the European Union had raised a claim under Article 12 of the Anti-Dumping Agreement in its panel request<sup>307</sup>, it did not pursue this claim.<sup>308</sup> At the same time, the Panel observed that Article 3.1 of the Anti-Dumping Agreement "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".<sup>309</sup> Therefore, the Panel saw no basis for the

<sup>299</sup> Panel Exhibit RUS-14 (BCI).

<sup>300</sup> European Union's Notice of Other Appeal, pp. 1-2; other appellant's submission, para. 32.

<sup>301</sup> Panel Exhibits EU-21 and RUS-12.

<sup>302</sup> European Union's Notice of Other Appeal, pp. 1-2; other appellant's submission, paras. 72 and 74.

<sup>303</sup> Panel Report, para. 7.163.

<sup>304</sup> Panel Report, para. 7.164; European Union's second written submission to the Panel, para. 144.

<sup>305</sup> Panel Report, fn 300 to para. 7.165 (referring to European Union's second written submission to the Panel, para. 146; response to Panel question No. 50, para. 156). (emphasis original)

<sup>306</sup> Panel Report, fn 300 to para. 7.165.

<sup>307</sup> Request for the Establishment of a Panel by the European Union, WT/DS479/2, para. 9.

<sup>308</sup> Panel Report, fn 300 to para. 7.165.

<sup>309</sup> Panel Report, para. 7.165 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 111).



European Union's argument that the Panel could not base its assessment on the confidential investigation report.<sup>310</sup>

5.119. Having examined Section 4.2.7 of the confidential investigation report, the Panel concluded that the DIMD had evaluated the following three injury factors: (i) return on investments of the domestic industry; (ii) the actual and potential negative effects on cash flow of the domestic industry; and (iii) the industry's ability to raise capital or investments.<sup>311</sup> The Panel thus found that the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.<sup>312</sup>

### 5.3.3 Whether the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement

5.120. The European Union claims that the Panel failed to make an objective assessment of the matter before it pursuant to Article 11 of the DSU, and failed to determine whether the DIMD's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective within the meaning of Article 17.6 of the Anti-Dumping Agreement, by basing its assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concerning three injury factors on the confidential investigation report.<sup>313</sup> The European Union submits that the Panel erred by simply accepting that the entire content of the confidential investigation report "that emerged for the first time during WTO proceedings actually formed part of the investigation record", instead of "assess[ing] whether that was indeed the case".<sup>314</sup> In the European Union's view, the Panel should have made such an assessment and required Russia to show, by providing relevant explanations or evidence, that the confidential content of the report actually formed part of the investigation record.<sup>315</sup> The European Union considers that, by failing to do so, the Panel "made no attempt to 'objectively assess' or 'properly establish' the facts pertinent to deciding whether or not the [confidential investigation report] formed part of the investigation record".<sup>316</sup> In the European Union's view, while investigating authorities may base their injury determination partly on confidential facts that were not disclosed to interested parties, "a panel's assessment can only be based on facts and reasoning that *formed part of the investigation record*."<sup>317</sup> Moreover, the European Union recalls that, in *EC – Tube or Pipe Fittings*, the Appellate Body "made clear that panels cannot accept a document submitted by a respondent without question, and that they cannot simply rely on the presumption of good faith."<sup>318</sup>

5.121. Russia responds that the European Union "misrepresents" the arguments it made before the Panel.<sup>319</sup> Specifically, Russia points out that the issue before the Panel was whether the absence of indications in the non-confidential investigation report could preclude the Panel from considering certain parts of the confidential investigation report in its analysis of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.<sup>320</sup> In Russia's view, the European Union attempts to show on appeal that it did explain to the Panel why it was "doubtful whether the DIMD had actually examined the three injury factors at issue during the investigation".<sup>321</sup> Russia argues that the "European Union's attempt to explain why it considered that the DIMD actually might have not examined the three injury factors at issue during the

<sup>310</sup> Panel Report, para. 7.165.

<sup>311</sup> Panel Report, paras. 7.166-7.169.

<sup>312</sup> Panel Report, para. 7.172.

<sup>313</sup> European Union's Notice of Other Appeal, pp. 1-2; other appellant's submission, para. 32. We recall that, before the Panel, the European Union argued that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because it had 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. (Panel Report, para. 7.163)

<sup>314</sup> European Union's other appellant's submission, para. 51.

<sup>315</sup> European Union's other appellant's submission, para. 51.

<sup>316</sup> European Union's other appellant's submission, para. 60.

<sup>317</sup> European Union's other appellant's submission, para. 63 (referring to Appellate Body Report, *Thailand – H-Beams*, paras. 117-118). (emphasis original)

<sup>318</sup> European Union's other appellant's submission, para. 64 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 124-127 and fn 143 thereto).

<sup>319</sup> Russia's appellee's submission, para. 45.

<sup>320</sup> Russia's appellee's submission, paras. 37 and 40.

<sup>321</sup> Russia's appellee's submission, para. 43.



investigation was never made before the Panel."<sup>322</sup> Russia also contends that the European Union, as the complaining party, "carried the burden of proof which it failed to meet"<sup>323</sup>, and that the Panel was correct to state that the European Union had not presented any evidence suggesting that the confidential investigation report "was not genuine".<sup>324</sup> Moreover, Russia considers that, in light of the arguments put forward by the parties and the discussion that took place during the Panel proceedings, there was no need for the Panel to seek clarifications from Russia.<sup>325</sup>

5.122. The participants disagree on whether the European Union argued before the Panel that the analysis of the three injury factors at issue did not form part of the investigation record. We therefore start by addressing Russia's assertion that the European Union did not raise before the Panel the issue of whether the relevant parts of the confidential investigation report formed part of the investigation record.

5.123. We recall that the confidential investigation report<sup>326</sup> was submitted by Russia together with Russia's first written submission to the Panel. Accordingly, the European Union could not have been aware of the contents of the confidential investigation report before the receipt of Russia's first written submission to the Panel. The European Union originally based its claims under Articles 3.1 and 3.4 on the non-confidential investigation report that was available to it.<sup>327</sup> In its second written submission to the Panel, after having received the confidential investigation report, the European Union elaborated that the Panel should not base its assessment under Articles 3.1 and 3.4 on the confidential investigation report to the extent that the same information was not apparent from the non-confidential investigation report.<sup>328</sup>

5.124. The Panel posed several questions to the European Union regarding its claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement with respect to the three injury factors. In particular, in Panel question No. 50, the Panel asked the European Union to explain the nature of its claim concerning the DIMD's failure to set out the evaluation of the three injury factors at issue in the non-confidential investigation report. In response, the European Union stated that there was "no trace of the missing factors in the evaluation of the injury factors or in the conclusion as regards material injury", which "may [have] call[ed] into question whether the DIMD actually examined those factors".<sup>329</sup> For the European Union, the fact that the three injury factors were treated by the DIMD as confidential, without even indicating in the non-confidential investigation report that these factors were assessed, "strongly indicates *ex post* rationalisation for the purposes of WTO proceedings".<sup>330</sup> In the European Union's view, "at the very least the DIMD should have alerted the interested parties that an analysis had been carried out also with respect to those factors."<sup>331</sup>

5.125. In Panel question No. 70, the Panel asked the European Union to explain the basis for its request that the Panel not consider the confidential investigation report in its analysis. In response, the European Union stated that "the Panel can base its judgement on the confidential version of the Report to the extent that the Panel is reassured that the elements in the confidential version of the Report have always been there."<sup>332</sup> For the European Union, "conclusions that rely entirely on evidence that was kept confidential until well into the proceedings of a dispute should

<sup>322</sup> Russia's appellee's submission, para. 44.

<sup>323</sup> Russia's appellee's submission, para. 50.

<sup>324</sup> Russia's appellee's submission, para. 48.

<sup>325</sup> Russia's appellee's submission, para. 64. Specifically, Russia points that it was evidenced by the public record that the DIMD requested information on the financial state of the domestic industry and received it in confidential form. Moreover, Russia notes that it expressed willingness to answer any questions regarding the confidential investigation report. (Ibid., para. 65)

<sup>326</sup> Exhibit RUS-14 (BCI).

<sup>327</sup> In its first written submission to the Panel, the European Union asserted that the DIMD had failed to examine the three factors at issue because there was nothing in the non-confidential investigation report or on the investigation record showing that these factors had been evaluated. (European Union's first written submission to the Panel, para. 236)

<sup>328</sup> European Union's second written submission to the Panel, para. 144. In the European Union's view, the absence of any trace of the relevant injury factors analysis in the non-confidential investigation report "may [have] call[ed] into question whether the DIMD actually examined those factors". (Ibid., para. 146)

<sup>329</sup> European Union's response to Panel question No. 50, para. 156.

<sup>330</sup> European Union's response to Panel question No. 50, para. 158.

<sup>331</sup> European Union's response to Panel question No. 50, para. 161.

<sup>332</sup> European Union's response to Panel question No. 70, para. 22.

be avoided" because this "risks opening the door for WTO Members to be able to adjust the confidential version of the report in light of the arguments made by the complaining party in the dispute".<sup>333</sup>

5.126. In our view, these statements by the European Union indicate that, before the Panel, the European Union expressed its concern as to whether certain parts of the confidential investigation report in which the DIMD allegedly examined the three injury factors at issue formed part of the investigation record. Notably, the Panel itself recognized the European Union's concern by stating that "the European Union has not presented any evidence suggesting that the confidential ... Investigation Report is not genuine."<sup>334</sup> We consider that the essence of the European Union's argument before the Panel and on appeal has remained the same: before the Panel the European Union questioned whether certain parts of the confidential investigation report formed part of the investigation record; while on appeal it faults the Panel for not having engaged with its argument. We thus disagree with Russia that, on appeal, the European Union "misrepresents" the arguments that it made before the Panel.<sup>335</sup>

5.127. We now proceed to address the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by basing its assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the confidential investigation report "without assessing whether that document was indeed part of the investigation record".<sup>336</sup>

5.128. Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", which embraces "all aspects of a panel's examination of the 'matter', both factual and legal".<sup>337</sup> In conducting an assessment of the WTO-consistency of a determination by an investigating authority, a panel must examine "whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate".<sup>338</sup> First, a panel must ascertain whether the investigating authority has evaluated all of the relevant evidence in an objective and unbiased manner, including by taking sufficient account of conflicting evidence and responding to competing plausible explanations of that evidence.<sup>339</sup> Second, the panel must test the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning.<sup>340</sup> Finally, the adequacy of an investigating authority's explanations is also a function of the substantive provisions of the specific covered agreements that are at issue in the dispute.<sup>341</sup> Under Article 17.6(i) of the Anti-Dumping Agreement, the task of panels is to review the investigating authorities' "establishment" and "evaluation" of the facts. To that end, Article 17.6(i) provides that, "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective."<sup>342</sup>

5.129. We recall that the Panel considered that it could base its assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the confidential investigation report and, in reaching this conclusion, it referred to the Appellate Body report in *Thailand – H-Beams*.<sup>343</sup> In *Thailand – H-Beams*, the Appellate Body explained that "the requirement in Article 3.1 [of the Anti-Dumping Agreement] that an injury determination be based on 'positive' evidence and involve an 'objective' examination of the required elements of injury

<sup>333</sup> European Union's response to Panel question No. 70, para. 23.

<sup>334</sup> Panel Report, fn 300 to para. 7.165.

<sup>335</sup> Russia's appellee's submission, para. 45.

<sup>336</sup> European Union's other appellant's submission, para. 62.

<sup>337</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.

<sup>338</sup> Appellate Body Report, *US – Washing Machines*, para. 5.258 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

<sup>339</sup> Appellate Body Reports, *US – Washing Machines*, para. 5.258; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

<sup>340</sup> Appellate Body Reports, *US – Washing Machines*, para. 5.258; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

<sup>341</sup> Appellate Body Reports, *US – Washing Machines*, para. 5.258; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 95.

<sup>342</sup> In *US – Hot-Rolled Steel*, the Appellate Body stated that "it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment of the facts of the matter'." (Appellate Body Report, *US – Hot Rolled Steel*, para. 55 (emphasis original))

<sup>343</sup> Panel Report, para. 7.165 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 111).

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."<sup>344</sup> Moreover, according to the Appellate Body, Articles 17.5 and 17.6(i) of the Anti-Dumping Agreement "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".<sup>345</sup>

5.130. In the present dispute, the participants agree that, in principle, a panel could rely on parts of a confidential version of an investigation report in its examination of claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.<sup>346</sup> We note that the absence of any indication in the non-confidential investigation report that the three injury factors at issue were analysed may raise issues of due process. However, the issue of whether an investigating authority can conduct its analysis of the mandatory injury factors in a confidential version of an investigation report, without referring to it in a public version of the investigation report, is not before us in this appeal. Rather, as noted, the issue before us is whether the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by basing its assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the confidential investigation report without assessing whether or not it formed part of the investigation record at the time the determination was made.

5.131. We recall that the confidential investigation report was in Russia's exclusive possession until it was submitted to the Panel together with Russia's first written submission. In this respect, we note the difficulty faced by the European Union in challenging the validity of certain parts of the confidential investigation report first submitted in the course of WTO dispute settlement proceedings, in particular in obtaining and providing evidence to the Panel in support of its contention that the relevant parts of the confidential investigation report may not have formed part of the investigation record. In *US – Continued Zeroing*, the Appellate Body emphasized that "the nature and scope of the evidence that might be reasonably expected by an adjudicator in order to establish a fact or claim in a particular case will depend on a range of factors, including the type of evidence that is made available by a Member's regulating authority."<sup>347</sup> The Appellate Body further explained that, "in a specific case, a panel may have a sufficient basis to reach an affirmative finding regarding a particular fact or claim on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence."<sup>348</sup> Moreover, in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body observed that it could "conceive of circumstances in which a party [could not] reasonably be expected to meet [the] burden [of adducing evidence in support of its claims or defences] by adducing all relevant evidence required to make out its case, most notably when that information is in the exclusive possession of the opposing or a third party."<sup>349</sup> In such circumstances, a panel may have to seek out that information in order to make an objective assessment of the matter under Article 11 of the DSU.<sup>350</sup>

5.132. In this dispute, the European Union submitted circumstantial evidence in support of its claim that the confidential investigation report may not have formed part of the investigation record. In particular, the European Union argued that the absence of a summary or any trace of

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<sup>344</sup> Appellate Body Report, *Thailand – H-Beams*, para. 111. (emphasis original) The issue before the Appellate Body in that dispute was:

whether the terms 'positive evidence' and 'objective examination' in Article 3.1 [of the Anti-Dumping Agreement] require that 'the reasoning supporting the determination be 'formally or explicitly stated' in documents in the record of the investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination', and, further, that 'the factual basis relied upon by the authorities must be discernible from those documents'.

(*Ibid.*, para. 107)

<sup>345</sup> Appellate Body Report, *Thailand – H-Beams*, para. 118.

<sup>346</sup> European Union's other appellant's submission, para. 63; responses to questioning at the oral hearing; Russia's appellee's submission, para. 40; responses to questioning at the oral hearing.

<sup>347</sup> Appellate Body Report, *US – Continued Zeroing*, para. 357.

<sup>348</sup> Appellate Body Report, *US – Continued Zeroing*, para. 357.

<sup>349</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1139.

<sup>350</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1139. The Appellate Body noted that, "[i]n such circumstances, a panel may be unable to make an objective assessment of the matter without exercising its authority under Article 13 of the DSU to seek out that information, in particular if the party that needs this evidence can show that it has diligently exhausted all means to acquire it, to the extent such means exist." (*Ibid.*)

the examination of the three injury factors at issue in the non-confidential investigation report suggested that they were not evaluated by the DIMD, and that the confidential investigation report may have been adjusted for purposes of WTO dispute settlement proceedings.<sup>351</sup> In light of the circumstances of this case, we do not consider that it was incumbent upon the European Union to prove conclusively that the relevant parts of the confidential investigation report did not form part of the investigation record at the time the determination was made. To request the European Union to do so would require submission of information to which the European Union did not have access when it filed its panel request and its first written submission. Rather, it appears to us that the Panel should have requested from Russia evidence demonstrating that the confidential investigation report formed part of the investigation record at the time the determination was made, given that Russia was best placed to provide such evidence.

5.133. We recall that, in *EC – Tube or Pipe Fittings*, the Appellate Body addressed the issue of whether the panel's assessment of the facts was proper, under Article 17.6(i) of the Anti-Dumping Agreement, when it found that a certain document formed part of the record in the anti-dumping investigation in that dispute.<sup>352</sup> The Appellate Body rejected Brazil's contention that the panel based its conclusion "exclusively on a mere unsubstantiated assertion from the EC which was accepted by the [p]anel on the basis of a presumption of good faith".<sup>353</sup> The Appellate Body referred to the questions that the panel had posed to the European Communities concerning the document at issue and to the European Communities' responses to those questions.<sup>354</sup> In the Appellate Body's view, this demonstrated that the panel "took into account the European Communities' responses to its questions before reaching its finding" and did not rely exclusively on the presumption of good faith.<sup>355</sup> In the Appellate Body's view, the panel had "conducted an overall inquiry into the genuineness of [the document], including whether it formed part of the record of the anti-dumping investigation, and arrived at an overall finding on the basis of the results of that inquiry."<sup>356</sup> The Appellate Body was thus satisfied that the panel took steps to assure itself of the validity of the document at issue.

5.134. We consider that, when faced with a claim that a report, or parts of it, on the basis of which an anti-dumping measure was imposed did not form part of the investigation record at the time the determination was made, a panel has to take certain steps to assess objectively and assure itself of the report's validity and whether or not it formed part of the contemporaneous written record of the investigation. The panel may do so, for example, by posing specific questions to the respondent party submitting the investigation report about its origin and the point in time when it was incorporated into the record of the investigation. The manner in which a panel can assure itself of whether an investigation report, or parts of it, formed part of the investigation record will depend on the facts of the particular case and may include, in addition to posing questions to the submitting party, examining additional evidence demonstrating that the contested report, or parts of it, formed part of the investigation record.<sup>357</sup>

<sup>351</sup> European Union's second written submission to the Panel, para. 146; responses to Panel questions No. 50 and No. 70.

<sup>352</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 124. In that case, Brazil had expressed doubts before the panel as to "whether Exhibit EC-12 formed part of the record of the underlying anti-dumping investigation". (Ibid., para. 120)

<sup>353</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 122 and 127.

<sup>354</sup> The Appellate Body referred to the following excerpt from the panel report in that dispute:  
We asked the European Communities to indicate in the record of the investigation the sources of information and the methodology on which the statements and information in Exhibit EC-12 are based. The European Communities gave an account of the methodology and the sources of information on the basis of which the statements in Exhibit EC-12 were made. We further asked the European Communities to confirm and substantiate to us that Exhibit EC-12 was written within the time period of the investigation. The European Communities confirmed that this was the case. Given the EC responses, we find no basis to question whether Exhibit EC-12 forms part of the record of the underlying investigation and we must consequently take its contents into account in our examination of the relevant substantive claims made by Brazil.  
(Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 126 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.46) (fns omitted))

<sup>355</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 127.

<sup>356</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, fn 143 to para. 127.

<sup>357</sup> We recall that, pursuant to Article 13 of the DSU, a panel has the right to seek information from any individual or body which it deems appropriate.

5.135. In the present dispute, the Panel did not pose pertinent questions to Russia or seek otherwise to assure itself that the relevant parts of the confidential investigation report formed part of the investigation record at the time the determination was made.<sup>358</sup> We note that Russia commented on the European Union's responses to Panel questions Nos. 70 and 71, and noted, in particular, that it had "not 'adjust[ed] the confidential version of the report'".<sup>359</sup> In our view, the Panel should have engaged with Russia in this respect and taken steps to assure itself that the relevant parts of the confidential investigation report formed part of the investigation record at the time the determination was made.

5.136. The Panel, however, did not assure itself that the relevant parts of the confidential investigation report formed part of the investigation record. Instead, the Panel rejected the European Union's contention on the ground that it was not substantiated with evidence, and proceeded with its analysis of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the basis of the confidential investigation report as if it had been established that it formed part of the investigation record at the time the determination was made.<sup>360</sup> In our view, by doing so, the Panel failed to conduct an objective assessment of the facts, as required under Article 11 of the DSU, and to assess the facts of the matter pursuant to Article 17.6(i) of the Anti-Dumping Agreement.

5.137. On the basis of the above, we find that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by relying, in its examination of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, on the confidential investigation report without assuring itself of whether the relevant parts of it formed part of the investigation record at the time the determination to impose the anti-dumping measure was made. Accordingly, we reverse the Panel's intermediate finding, in paragraphs 7.165 and 7.166 of the Panel Report, that it could base its analysis of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the confidential investigation report. We also reverse the Panel's subsequent analysis, contained in paragraphs 7.166 to 7.171 of the Panel Report, and the Panel's ultimate finding, in paragraphs 7.172, 7.173.i, and 8.1.e.x of the Panel Report, that the European Union had failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to examine the three injury factors at issue.

5.138. Having reversed the Panel's intermediate finding that it could base its analysis on the confidential investigation report, we turn to consider whether we can complete the analysis. The European Union requests us to complete the analysis and find, on the basis of the non-confidential investigation report, that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to evaluate the three injury factors at issue, namely: (i) the domestic industry's return on investments; (ii) the actual and potential effects on cash flow; and (iii) the ability to raise capital or investments.

5.139. We consider that we would be in the position to address the European Union's request for completion on the basis of the non-confidential investigation report only if we were first to determine for ourselves that we cannot rely on the confidential investigation report. We, therefore, first turn to consider whether we can determine for ourselves whether certain parts of the confidential investigation report formed part of the investigation record at the time the determination was made and whether, accordingly, we can rely on the confidential investigation report in the assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

5.140. In previous disputes, the Appellate Body has completed the analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.<sup>361</sup> The Appellate Body

<sup>358</sup> By contrast, as we noted above, the Panel posed a number of questions to the European Union seeking to clarify its request that the Panel should not rely on the confidential investigation report in examining the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

<sup>359</sup> Russia's comments on the European Union's response to Panel question No. 70, para. 36.

<sup>360</sup> Panel Report, para. 7.165 and fn 300 thereto, and para. 7.166. We recall that the European Union could not have been aware of the contents of the confidential investigation report before the receipt of Russia's first written submission to the Panel.

<sup>361</sup> See Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1178; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1351; *EC – Asbestos*, para. 78.

has completed the analysis where the factual findings in the panel report, undisputed facts on the panel record, and admitted facts provided it with a sufficient basis for conducting its own analysis.<sup>362</sup> The Appellate Body has declined to complete the analysis in light of the complexity of issues, the absence of full exploration of the issues before the panel, and considerations pertaining to the parties' due process rights.<sup>363</sup>

5.141. We recall that the Panel did not pose pertinent questions to Russia or seek otherwise to assure itself that the relevant parts of the confidential investigation report formed part of the investigation record. As noted, the Appellate Body has refrained from completing the analysis in the absence of a full exploration of the issues before the panel that might have given rise to concerns about the parties' due process rights.<sup>364</sup> In light of the absence on the record of this dispute of a discernible attempt by the Panel to assure itself of whether the confidential investigation report formed part of the investigation record and, in particular, the absence of questions being posed to Russia concerning the confidential investigation report, we cannot now on appeal decide afresh whether the parts of the confidential investigation report relating to the three injury factors at issue formed part of the investigation record at the time the determination to impose the anti-dumping measure was made. Accordingly, we cannot determine for ourselves whether we can rely on the analysis contained in the confidential investigation report for purposes of the assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In these circumstances, we cannot complete the analysis with respect to the European Union's claims under Articles 3.1 and 3.4 concerning the three injury factors at issue. Consequently, we cannot reach a conclusion as to whether the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to examine the three injury factors at issue, as the European Union alleges.

#### 5.3.4 Conclusions

5.142. In relation to Russia's contention that, on appeal, the European Union misrepresents the arguments it made before the Panel, we consider that, before the Panel, the European Union raised the issue of whether certain parts of the confidential investigation report formed part of the investigation record at the time the final determination to impose the anti-dumping measure was made. On appeal, the European Union faults the Panel for not having engaged with that same argument.

5.143. We recall that the confidential investigation report was submitted by Russia together with its first written submission to the Panel and that the European Union could not have been aware of the contents of the confidential investigation report before the receipt of Russia's first written submission. We note the difficulty the European Union had in the present case in obtaining and providing evidence to the Panel in support of its contention that the relevant parts of the confidential investigation report may not have formed part of the investigation record. In our view, when faced with a claim that a report, or parts of it, on the basis of which an anti-dumping measure was imposed did not form part of the investigation record, a panel has to take certain steps to assess objectively and assure itself of the validity of such report, or its parts, and whether or not it formed part of the contemporaneous written record of the investigation. In the present dispute, the Panel did not seek to assure itself that the relevant parts of the confidential investigation report formed part of the investigation record at the time the determination to impose the anti-dumping measure was made.

5.144. On the basis of the above, we find that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by relying, in its examination of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, on the

<sup>362</sup> See Appellate Body Reports, *Australia – Salmon*, paras. 241 and 255; *Korea – Dairy*, para. 102; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 653; *US – Section 211 Appropriations Act*, para. 343; *EC – Asbestos*, para. 78; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.135; *US – Anti-Dumping Methodologies (China)*, para. 5.164.

<sup>363</sup> See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224; *EC – Seal Products*, paras. 5.63 and 5.69; *US – Anti-Dumping Methodologies (China)*, para. 5.178.

<sup>364</sup> See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224; *EC – Seal Products*, paras. 5.63 and 5.69; *US – Anti-Dumping Methodologies (China)*, para. 5.178.

confidential investigation report without properly assuring itself of its validity, that is to say, of whether the relevant parts of it formed part of the investigation record at the time the determination to impose the anti-dumping measure was made. Consequently, we reverse the Panel's intermediate finding, in paragraphs 7.165 and 7.166 of the Panel Report, that it could base its analysis of the European Union's claims concerning the three injury factors under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the confidential investigation report. We also reverse the Panel's subsequent analysis, contained in paragraphs 7.166 to 7.171, and the Panel's ultimate finding, in paragraphs 7.172, 7.173.i, and 8.1.e.x of the Panel Report, that the European Union had failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to examine the three injury factors at issue, namely: (i) the domestic industry's return on investments; (ii) the actual and potential effects on cash flow; and (iii) the ability to raise capital or investments.

5.145. In relation to the European Union's request for completion of the analysis, in light of the absence on the Panel record of a discernible attempt by the Panel to assure itself of whether certain parts of the confidential investigation report formed part of the investigation record at the time the determination to impose the anti-dumping measure was made, we are not in a position to decide whether these parts of the confidential investigation report formed part of the investigation record at the time the determination was made. Accordingly, we cannot determine whether we can rely on the confidential investigation report in the assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.<sup>365</sup> In these circumstances, we cannot complete the analysis on the basis of the non-confidential investigation report as requested by the European Union.

## 5.4 Related dealer

### 5.4.1 Introduction

5.146. The European Union appeals the Panel's finding that Article 3.4 of the Anti-Dumping Agreement does not generally require an investigating authority to consider the inventories of a dealer related to a domestic producer, but not itself part of the domestic industry.<sup>366</sup> To the European Union, the Panel erred in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in finding that the DIMD was not required to evaluate the inventory information of Turin Auto in examining injury to the domestic industry.<sup>367</sup> The European Union requests us to reverse the Panel's findings in paragraphs 7.122 and 7.123 and declare moot and of no legal effect the Panel's conclusions in paragraphs 7.173.c and 8.1.e.ii of the Panel Report.<sup>368</sup> In response, Russia requests us to uphold the Panel's findings at issue.<sup>369</sup>

5.147. Before examining the European Union's claim of error on appeal, we summarize the Panel's findings with respect to Articles 3.1 and 3.4 of the Anti-Dumping Agreement. We then set out our understanding of the relevant aspects of Articles 3.1 and 3.4. Thereafter, we turn to examine the merits of the European Union's claim of error on appeal.

### 5.4.2 Panel's findings

5.148. Before the Panel, the European Union claimed that Russia acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by, *inter alia*, only partially evaluating the domestic industry's inventories in its examination of the impact of the dumped imports.

<sup>365</sup> We note the European Union's contention that we should complete the analysis with respect to the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the basis of the evidence contained in the *non-confidential* investigation report. (European Union's other appellant's submission, para. 71) We are of the view, however, that we cannot do so without having determined first whether the *confidential* version of the investigation report formed part of the investigation record and whether we can rely on it in our analysis.

<sup>366</sup> Panel Report, para. 7.122; European Union's other appellant's submission, para. 160.

<sup>367</sup> European Union's Notice of Other Appeal, para. 5 (referring to Panel Report, paras. 7.122, 7.123, 7.173.b, and 8.1.e.ii). See also European Union's other appellant's submission, para. 31.

<sup>368</sup> European Union's other appellant's submission, paras. 161 and 179.

<sup>369</sup> Russia's appellee's submission, para. 181.

The European Union contended that the DIMD's evaluation of inventories should have included the inventory information of Turin Auto, an LCV dealer related to Sollers.<sup>370</sup>

5.149. The Panel first noted that Article 3.4 of the Anti-Dumping Agreement provides that the injury examination "shall" include an evaluation of all relevant economic factors, including each of the 15 factors listed in this provision.<sup>371</sup> The Panel recalled that the evidence to be considered and evaluated in relation to Article 3.4 must be evidence pertaining to the domestic industry as defined in the investigation. To the Panel, Article 3.4 does not suggest that an investigating authority is generally required to consider the inventories of a dealer related to a domestic producer, but not itself a producer of the like product and thus not part of the domestic industry.<sup>372</sup> Having made that statement, the Panel also recognized that, in certain circumstances, the information of a related dealer may constitute evidence pertaining to a relevant economic factor having a bearing on the state of the industry such that an investigating authority is required to evaluate it.<sup>373</sup> The Panel noted, however, that "the relevance of such evidence would have to be demonstrated to the investigating authority, on the basis of the facts of the particular investigation, in order that the investigating authority can be satisfied that it relates to the domestic industry and is therefore to be considered."<sup>374</sup>

5.150. Turning to the anti-dumping investigation at issue, the Panel recalled that the DIMD had defined the domestic industry as the LCV producer Sollers.<sup>375</sup> To the Panel, the DIMD was required to examine, for purposes of Article 3.4, "the state of Sollers, including its inventories".<sup>376</sup> The Panel found that the European Union had not identified evidence before the DIMD that would support the conclusion that the inventory information of Turin Auto was a relevant economic factor having a bearing on the state of the domestic industry producing LCVs. On this ground, the Panel found that the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 by not considering the inventory data of Turin Auto in its investigation report.<sup>377</sup>

#### 5.4.3 Whether the Panel erred in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement

5.151. The European Union claims that the Panel erred in finding that nothing in Article 3.4 of the Anti-Dumping Agreement suggests that "an investigating authority is generally required to consider the inventories of a dealer related to a domestic producer, but not itself a producer of the like product and therefore ... not part of the domestic industry."<sup>378</sup> To the European Union, "the Panel found that investigating authorities can disregard the data of economic entities related to the domestic producer"<sup>379</sup> and "meet the requirements under Articles 3.1 and 3.4 just by gathering and examining data from the 'domestic producer' in the narrow sense".<sup>380</sup> The European Union asserts that the Panel "adopted a very narrow interpretation of the meaning of the term 'domestic industry' in Article 3.4" by excluding information relating to companies that belong to a "single economic entity".<sup>381</sup> The European Union submits that, if a domestic producer is composed of several legal entities, the relevant data cannot relate to only the legal entity that brings the product into existence. Instead, the European Union argues that, in order to make an objective assessment based on positive evidence of the state of the domestic industry, as prescribed under

<sup>370</sup> Panel Report, paras. 7.109, 7.118.b, and 7.122; European Union's second written submission to the Panel, para. 130; response to Panel question No. 45, paras. 141-143.

<sup>371</sup> Panel Report, paras. 7.111 (referring to Appellate Body Report, *Thailand – H-Beams*, para. 125) and para. 7.122.

<sup>372</sup> Panel Report, para. 7.122.

<sup>373</sup> Panel Report, para. 7.122.

<sup>374</sup> Panel Report, para. 7.122.

<sup>375</sup> Panel Report, para. 7.123.

<sup>376</sup> Panel Report, para. 7.123 (referring to Panel Report, *Egypt – Steel Rebar*, para. 7.60).

<sup>377</sup> Panel Report, para. 7.123.

<sup>378</sup> European Union's other appellant's submission, para. 160. See also paras. 165, 172, and 179 (referring to Panel Report, paras. 7.122-7.123).

<sup>379</sup> European Union's other appellant's submission, para. 165.

<sup>380</sup> European Union's other appellant's submission, para. 172.

<sup>381</sup> European Union's other appellant's submission, para. 19. Before the Panel, and in its other appellant's submission, the European Union has referred to different terms, including "related trader", "single economic entity", "same economic group", "group of related entities", and "domestic producer ... composed of several legal entities". In response to questioning at the hearing, the European Union confirmed that it has used these terms interchangeably.



Article 3.1, the assessment of the relevant factors listed in Article 3.4 must relate to the "entire single economic entity".<sup>382</sup>

5.152. Russia responds that the Panel correctly stated that the focus of an injury determination must be on the state of the "domestic industry"<sup>383</sup>, and that the evidence to be considered must pertain to the domestic industry as defined in the investigation.<sup>384</sup> Russia submits that the text of Article 3 of the Anti-Dumping Agreement does not support a proposition that an investigating authority is generally required to analyse the data of entities that do not "bring into existence the like product" and that, consequently, are not part of the domestic industry.<sup>385</sup> Russia also notes that the Panel's interpretation does not exclude the possibility that, in certain circumstances, evidence pertaining to a related dealer that is not part of the domestic industry may constitute evidence pertaining to a relevant economic factor having a bearing on the state of the industry such that an investigating authority is required to evaluate it.<sup>386</sup>

5.153. At the outset, we note that the European Union's appeal is focused on the Panel's statement that "nothing in Article 3.4 [of the Anti-Dumping Agreement] ... suggests ... that an investigating authority is generally required to consider the inventories of a dealer related to a domestic producer, but not itself a producer of the like product".<sup>387</sup> The European Union contends that the Panel found that an investigating authority is not required to examine the inventory data of a related dealer.<sup>388</sup> In our view, the Panel's finding is more nuanced than the understanding advanced by the European Union. We note that, in making the statement at issue, the Panel was addressing and rejecting the European Union's argument that, "by not considering the inventories of Sollers' related dealer Turin Auto, the DIMD relied on a partial picture of inventories, and consequently, that it failed to objectively examine positive evidence of the domestic industry's inventories."<sup>389</sup> In so doing, the Panel emphasized that Article 3 is concerned with the determination of injury to the "domestic industry".<sup>390</sup> The Panel also recalled that Article 3.4 requires an evaluation of economic factors and indices having a bearing on the state of the domestic industry.<sup>391</sup> On this basis, the Panel considered that, "[a]s a rule, the evidence to be considered and evaluated for this purpose must be evidence pertaining to the domestic industry as defined in the investigation."<sup>392</sup> The Panel observed, however, that it could not preclude the possibility that, in certain circumstances, an investigating authority may also be required to evaluate evidence pertaining to a related dealer if that evidence concerns a relevant economic factor having a bearing on the state of the industry.<sup>393</sup>

5.154. The European Union also submits that, if a domestic producer and a dealer are part of a "single economic entity", the evaluation of "inventories" under Article 3.4 of the Anti-Dumping Agreement must extend beyond "the formal boundaries of the inventories of the producer at its premise"<sup>394</sup> and "must relate to the entire single economic entity".<sup>395</sup> We understand the European Union to argue that, to the extent that a domestic producer and a dealer are found to

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<sup>382</sup> European Union's other appellant's submission, para. 173. The European Union argues that, if the Panel's interpretation of the term "inventories" in Article 3.4 of the Anti-Dumping Agreement were accepted, this term "would be limited to the formal boundaries of the inventories of the producer at its premise and consequently could not extend to the inventories of the entire economic entity of which the producer forms a part together with other entities also holding stocks of the relevant products." (Ibid., para. 177)

<sup>383</sup> Russia's appellee's submission, para. 173.

<sup>384</sup> Russia's appellee's submission, para. 172.

<sup>385</sup> Russia's appellee's submission, para. 176. Russia argues that domestic industry refers only to "domestic producers of the like product" that "bring into existence the like product". (Ibid., paras. 174-176 (referring to Panel Reports, *EC – Salmon (Norway)*, para. 7.108, and *Mexico – Olive Oil*, para. 7.192))

<sup>386</sup> Russia's appellee's submission, para. 178 (referring to Panel Report, para. 7.122).

<sup>387</sup> Panel Report, para. 7.122.

<sup>388</sup> European Union's other appellant's submission, para. 161.

<sup>389</sup> Panel Report, para. 7.122. (fn omitted) As we understand it, the European Union argued before the Panel that an investigating authority is always required to consider the inventory data of a related dealer, as failing to do so would, as in this case, necessarily "provide[] only a partial picture of the state of the inventories of Sollers". (European Union's second written submission to the Panel, para. 130)

<sup>390</sup> Panel Report, para. 7.122.

<sup>391</sup> Panel Report, para. 7.122.

<sup>392</sup> Panel Report, para. 7.122.

<sup>393</sup> Panel Report, para. 7.122.

<sup>394</sup> European Union's other appellant's submission, para. 177.

<sup>395</sup> European Union's other appellant's submission, para. 173.

comprise a single economic entity, an investigating authority is required to undertake a broader evaluation of "inventories" under Article 3.4, even though the related dealer may not be a producer of the like product.

5.155. Article 3.4 of the Anti-Dumping Agreement provides that the examination under that provision "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". In our view, the clause "having a bearing on the state of the industry" focuses the evaluation on the factors and indices relevant to the state of the domestic industry. The dictionary definition of the term "bearing" includes "[p]ractical relation or effect (up)on; influence, relevance".<sup>396</sup> This definition suggests to us that Article 3.4 calls for an evaluation of the economic factors and indices that influence the state of the domestic industry.<sup>397</sup> In addition, the reference to "all" relevant economic factors and indices does not imply a narrow scope of evaluation. These factors and indices include those expressly listed in Article 3.4, as well as additional ones if they are relevant to the assessment of the state of the domestic industry. Thus, in our view, evidence on the record concerning all relevant economic factors and indices that influence the state of the domestic industry falls within the scope of an investigating authority's evaluation under Article 3.4.

5.156. In this respect, evidence pertaining to inventories of a related dealer that does not produce the like product and is not formally part of the domestic industry may be pertinent, in a particular case, to the evaluation of a relevant economic factor or index having a bearing on the state of the domestic industry. We agree with the Panel that whether an evaluation under Article 3.4 requires a consideration of such evidence can be assessed only on a case-by-case basis.

5.157. We do not consider the degree of proximity in the relationship between different entities to be dispositive, without more, of whether evidence relating to the inventory of a related dealer is pertinent to the evaluation of the injury factor "inventories" under Article 3.4. As explained above, the focus of the evaluation under this provision is not on the nature of the relationship between companies such as producers and dealers; it centres instead on the relevant economic factors and indices having a bearing on the state of the domestic industry. Thus, regardless of whether a domestic producer included in the domestic industry and a dealer are independent from one another, related to each other, or part of the same economic entity, an investigating authority is required to assess whether the evidence on record concerns a relevant economic factor or index having a bearing on the state of the domestic industry. To the extent that this includes evidence relating to a dealer, an investigating authority is required to examine it under Article 3.4.

5.158. We observe that the Panel stated that the relevance of evidence from a dealer related to a domestic producer "would have to be demonstrated to the investigating authority, on the basis of the facts of the particular investigation, in order that the investigating authority can be satisfied that it relates to the domestic industry and is therefore to be considered."<sup>398</sup> While this statement by the Panel is not devoid of ambiguity, we understand the Panel to have used the verb "demonstrate" to suggest that interested parties should show to the investigating authority the possible relevance of evidence on the record to the examination of the state of the domestic industry. To us, evidence concerning all relevant economic factors and indices having a bearing on the state of the domestic industry falls within the scope of an investigating authority's evaluation under Article 3.4 of the Anti-Dumping Agreement. That said, where it is not plainly discernible that evidence on the record is pertinent to the evaluation of economic factors or indices having a bearing on the state of the domestic industry, interested parties must provide an explanation or reasons as to why they deem the evidence to be pertinent to the assessment of the state of the industry under Article 3.4. In such circumstances, once interested parties have shown that evidence on the record may be pertinent to the assessment of the state of the

<sup>396</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stephenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 205.

<sup>397</sup> The factors and indices listed in Article 3.4 of the Anti-Dumping Agreement, including "inventories", are deemed to be relevant and must be evaluated in every investigation. (Appellate Body Report, *US – Hot-Rolled Steel*, para. 194)

<sup>398</sup> Panel Report, para. 7.122. We note that the European Union does not directly challenge on appeal the Panel statement at issue. The European Union refers to this statement twice in its other appellant's submission, without addressing it directly, as part of its description of the Panel's interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. (European Union's other appellant's submission, paras. 176-177)

domestic industry, an investigating authority is tasked with objectively examining such evidence, including its significance to particular injury factors and the injury determination overall.

5.159. We do not understand the Panel statement at issue to imply that investigating authorities are excused from examining pertinent evidence on the record merely because interested parties have not conclusively "demonstrated" the relevance of such evidence to the assessment of the state of the domestic industry. In this respect, we recall that Article 3.1 of the Anti-Dumping Agreement requires that an investigating authority's determination of injury be based on positive evidence and involve an objective examination. Article 3.4 of the Anti-Dumping Agreement, in turn, requires an evaluation of all relevant economic factors and indices having a bearing on the state of the industry. Investigating authorities must determine, objectively, and on the basis of positive evidence, the importance and weight to be attached to each potentially relevant factor.<sup>399</sup> In our view, in light of the requirements under Articles 3.1 and 3.4, an investigating authority cannot disregard evidence *on the record* relating to an injury factor or index concerning the state of the domestic industry merely because that authority is not satisfied that interested parties have conclusively "demonstrated" the relevance of that evidence to the state of the domestic industry.

5.160. For the reasons set out above, we do not consider that the European Union's argument accurately describes the Panel's understanding of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. As we see it, the Panel's finding, when read together with the remaining statements made by the Panel, comports with the text of Articles 3.1 and 3.4 specifying that the injury analysis concerns all relevant factors and indices having a bearing on the state of the "domestic industry".<sup>400</sup> In our view, as the Panel found, evidence concerning inventories of a related dealer that sells but does not produce the like product and is thus not formally part of the domestic industry may nevertheless be pertinent, in a particular case, to the evaluation of a relevant economic factor or index having a bearing on the state of the domestic industry. This is because evidence concerning all relevant economic factors and indices that have a bearing on the state of the domestic industry falls within the scope of the evaluation provided for under Articles 3.1 and 3.4. Consequently, we find that the Panel did not err in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in relation to the evaluation of inventories under Article 3.4.

#### **5.4.4 Whether the Panel erred in its application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement**

5.161. We now turn to the European Union's claim that the Panel erred in its application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement to the investigation at issue "by simply stating that the DIMD did not [act inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement] because the DIMD was only required to look into Sollers' [inventories] figures".<sup>401</sup>

5.162. The Panel noted that the European Union had not pointed to any evidence before the DIMD that would support the conclusion that Turin Auto's inventories were a relevant economic factor having a bearing on the state of the domestic industry producing LCVs.<sup>402</sup> In particular, the Panel considered that, apart from focusing its claim on the nature of the relationship between Sollers and Turin Auto, the European Union had not presented any evidence or argument in support of its proposition that the inventories of Turin Auto should have been taken into account by the DIMD in its evaluation of the state of the domestic industry.<sup>403</sup> On this basis, the Panel concluded that the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 by not considering the inventories data of Sollers' related dealer in the investigation report.<sup>404</sup>

5.163. We first note that the European Union's challenge to the Panel's application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement hinges upon its claim of error regarding the Panel's

<sup>399</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 197.

<sup>400</sup> See Appellate Body Reports, *EC – Fasteners (China)*, para. 413; *China – GOES*, para. 149.

<sup>401</sup> European Union's other appellant's submission, para. 174.

<sup>402</sup> Panel Report, para. 7.123.

<sup>403</sup> Panel Report, fn 254 to para. 7.123.

<sup>404</sup> Panel Report, para. 7.123.

*interpretation* of these provisions.<sup>405</sup> We have found above that the Panel did not err in its interpretation of Articles 3.1 and 3.4 in relation to the scope of evidence to be evaluated by an investigating authority pertaining to a relevant injury factor or index having a bearing on the state of the domestic industry and, more particularly, to the evaluation of inventories. As explained above, we do not consider the nature of the relationship between a domestic producer and its dealer to be dispositive, without more, of whether evidence relating to the inventory of a related dealer is pertinent to the evaluation of "inventories" for purposes of the injury analysis under Article 3.4. In our view, the thrust of the European Union's argument concerns the nature of the relationship between Sollers and Turin Auto. The European Union has not sought to argue, on the basis of the particular evidence before the DIMD, how the inventory information of Turin Auto was specifically pertinent to the evaluation of "inventories" in relation to the state of Sollers.

5.164. In any event, we note that certain elements as to whether Turin Auto's inventories may be pertinent to the evaluation of the injury factor "inventories" having a bearing on the state of Sollers were not explored before the DIMD or in the WTO panel proceedings. For instance, we note that the data on purchases and sales of LCVs, reported by Sollers and Turin Auto in their respective questionnaire responses, correspond to each other.<sup>406</sup> The European Union has not explained why the fact that the inventories data from both Sollers and Turin Auto correspond to each other could suggest that Turin Auto's inventories provide *additional* relevant information that would have assisted the DIMD in evaluating Sollers' inventories. Rather than addressing the extent to which Turin Auto's inventories were pertinent to the evaluation of the injury factor "inventories" and the extent to which they had a bearing on the state of Sollers, the European Union merely contended that the DIMD should have evaluated the "inventories" of Turin Auto because Turin Auto and Sollers allegedly constitute a single economic entity.

5.165. We have found above that an investigating authority's assessment of the state of the domestic industry does not focus on the nature of the relationship between related companies, but centres instead on whether the relevant economic factors and indices have a bearing on the state of the domestic industry. We therefore see no error in the Panel's finding that the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by not considering the inventories data of Turin Auto in the investigation report.<sup>407</sup>

#### 5.4.5 Conclusions

5.166. In sum, we consider that the Panel's interpretation, which is more nuanced than the European Union's arguments on appeal suggest, comports with the text of Articles 3.1 and 3.4 of the Anti-Dumping Agreement specifying that the injury analysis concerns all relevant factors and indices having a bearing on the state of the domestic industry. In our view, evidence concerning a related dealer that does not produce the like product and is thus not included in the "domestic industry" may be pertinent, in a particular case, to the evaluation of a relevant economic factor or index having a bearing on the state of the domestic industry. We agree with the Panel that whether an evaluation under Article 3.4 requires a consideration of such evidence can be assessed only on a case-by-case basis. We do not consider the degree of proximity in the relationship between different entities to be dispositive, without more, of whether evidence relating to the inventory of a related dealer is pertinent to the evaluation of "inventories" for purposes of the injury analysis under Article 3.4. With respect to the application of Articles 3.1 and 3.4 to the anti-dumping investigation at issue, we find that the European Union does not have a separate and independent basis for its claim that the Panel erred in applying these provisions when analysing the injury factor "inventories" in its assessment of the state of Sollers. We agree with the Panel's finding that the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 by not considering the inventories data of Turin Auto in the investigation report.

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<sup>405</sup> In response to questioning at the oral hearing, the European Union indicated that, if we did not find error in the Panel's interpretation of these provisions, no specific errors could be identified in the Panel's *application* of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

<sup>406</sup> Sollers' updated questionnaire response of 31 January 2013 (Panel Exhibit EU-4), Section 6; Turin's updated questionnaire response of 31 January 2013 (Panel Exhibit EU-6), Sections 3.1 and 3.2.

<sup>407</sup> Panel Report, para. 7.123.

5.167. We therefore find that the Panel did not err in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Consequently, we uphold the Panel's finding, in paragraphs 7.122, 7.123, 7.173.b, and 8.1.e.ii of the Panel Report, that the European Union had not established that the DIMD acted inconsistently with these provisions in its injury analysis by not examining inventory information of a dealer related to a domestic producer of the like product, but not itself part of the domestic industry.

## 5.5 Essential facts

### 5.5.1 Introduction

5.168. The participants appeal different aspects of the Panel's interpretation and application of Article 6.9 of the Anti-Dumping Agreement. Russia claims that, in reaching its conclusions, the Panel erred by interpreting and applying Article 6.9 in a way that suggests that, with respect to essential facts treated as confidential, a finding of inconsistency with Article 6.5 of the Anti-Dumping Agreement will "automatically entail" an inconsistency with Article 6.9.<sup>408</sup> Russia also raises claims of error under Articles 7 and 15.2 of the DSU with respect to an allegedly new finding concerning information originating from the electronic customs database of national authorities of the Customs Union (electronic customs database) that the Panel added to its Report at the interim review stage.<sup>409</sup>

5.169. The European Union claims that the Panel erred in its interpretation and application of Article 6.9 of the Anti-Dumping Agreement by concluding that the source of information cannot be an "essential fact" and thus finding that the source of information concerning import volumes and values in the DIMD's investigation report does not constitute "essential facts" under Article 6.9.<sup>410</sup> In the European Union's view, this error stems from two earlier interpretative errors made by the Panel in finding that: (i) a methodology is not an essential fact; and (ii) not every essential fact is required to be disclosed, but rather only those essential facts that are additionally shown to be "under consideration".<sup>411</sup> In the event that we reverse the Panel's findings under Article 6.9 in response to the participants' appeals, the European Union requests us to complete the analysis and find that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts at issue.<sup>412</sup>

5.170. We begin by recalling the relevant Panel findings. Thereafter, we set out the legal standard under Article 6.9 of the Anti-Dumping Agreement. We then examine the claims and arguments raised by the participants on appeal.

### 5.5.2 Panel's findings

5.171. Before the Panel, the European Union raised claims under Article 6.5 and Article 6.9 of the Anti-Dumping Agreement. Regarding the European Union's claims under Article 6.5, the Panel found that, with respect to all the information at issue treated as confidential by the DIMD, the DIMD acted inconsistently with Article 6.5 because "the submitters of that information did not show good cause for confidential treatment."<sup>413</sup> Having made that finding, the Panel considered that it did not need to address the European Union's claims under Article 6.5.1 of the Anti-Dumping Agreement.<sup>414</sup>

5.172. The Panel then addressed the European Union's claim of inconsistency under Article 6.9 of the Anti-Dumping Agreement with respect to the DIMD's alleged failure to inform Volkswagen AG and Daimler AG of the essential facts under consideration concerning the existence of dumping and the determination of material injury. The Panel observed that there are three cumulative elements as to the type of information that must be disclosed. First, the Panel noted that

<sup>408</sup> Russia's appellant's submission, para. 95.

<sup>409</sup> Russia's appellant's submission, paras. 99-103.

<sup>410</sup> European Union's other appellant's submission, paras. 195 and 203.

<sup>411</sup> European Union's other appellant's submission, paras. 192-193 and 195.

<sup>412</sup> European Union's other appellant's submission, para. 204; appellee's submission, para. 172.

<sup>413</sup> Panel Report, para. 7.247. The Panel summarized the specific information to which this conclusion applies in Table 11 of the Panel Report. (Ibid., para. 7.247)

<sup>414</sup> Panel Report, para. 7.249.

"Article 6.9 requires the disclosure of facts: the information underlying a decision rather [than] the reasoning, calculation or methodology that led to a determination."<sup>415</sup> Second, the Panel observed that "[a] fact is essential where it is 'extremely important and necessary', 'indispensable' or 'significant, important or salient' in the process of reaching a decision as to whether or not to apply definitive measures."<sup>416</sup> Third, the Panel noted that "[n]ot every 'essential fact' is required to be disclosed"<sup>417</sup>; rather, "Article 6.9 requires the disclosure of 'essential facts under consideration': the 'facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping and/or countervailing duties'."<sup>418</sup>

5.173. The Panel further found that the European Union had not demonstrated that certain alleged essential facts met the above-mentioned requirements. In particular, the Panel took the view that the sources of certain information – i.e. import volumes, volumes of dumped imports, and import values used by the DIMD – were not essential facts. The Panel explained that, "[i]n itself, the source of data is not an essential fact under consideration"<sup>419</sup> and that "[k]nowledge of the sources of data might be useful to establish the credibility of information used by investigating authorities, but the sources of data are not themselves essential facts under consideration."<sup>420</sup>

5.174. The Panel then turned to address the European Union's claim that, to the extent that certain information was treated as confidential, it was not properly disclosed under Article 6.9.<sup>421</sup> The Panel noted that Article 6.9 does not require the disclosure of essential facts that benefit from confidential treatment under Article 6.5.<sup>422</sup> It further observed that "Article 6.5 is not a carve-out to Article 6.9" and that "confidentiality of information is neither an absolute bar to disclosure nor a defence to the failure to disclose as required under Article 6.9."<sup>423</sup> Rather, a Member has "dual obligations" with respect to these provisions whereby, pertaining to the essential facts that "are properly treated as confidential, 'the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the 'essential' but confidential facts'".<sup>424</sup> Referring to its previous finding of inconsistency under Article 6.5, the Panel concluded that, "to the extent that the DIMD failed to disclose information that was not properly treated as confidential ..., it acted inconsistently with Article 6.9."<sup>425</sup>

5.175. The Panel further recalled that, with respect to information originating from the electronic customs database, Russia had argued that this information was submitted on a confidential basis to the DIMD and, accordingly, was treated as confidential by the DIMD.<sup>426</sup> The Panel noted that there was no showing of "good cause" on the record with respect to such information. For this reason, the Panel concluded that this information was not properly treated as confidential. The Panel then found that, to the extent that the DIMD failed to disclose such information, it acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.<sup>427</sup>

<sup>415</sup> Panel Report, para. 7.256.a (referring to Panel Report, *China – Broiler Products*, para. 7.90). (emphasis original)

<sup>416</sup> Panel Report, para. 7.256.b (quoting, respectively, Merriam-Webster dictionary online, definition of "essential", <http://www.merriam-webster.com/dictionary/essential>; Oxford English dictionary online, definition of "essential", <http://www.oed.com/view/Entry/64503?redirectedFrom=essential#eid>; Appellate Body Report, *China – GOES*, para. 240 (emphasis original)).

<sup>417</sup> Panel Report, para. 7.256.c.

<sup>418</sup> Panel Report, para. 7.256.c (quoting Appellate Body Report, *China – GOES*, para. 240). (emphasis added by the Panel)

<sup>419</sup> Panel Report, para. 7.257.a. (emphasis original)

<sup>420</sup> Panel Report, para. 7.257.a.

<sup>421</sup> The Panel observed that, while the European Union initially argued that the failure to disclose certain actual figures (whether or not confidential) amounted to acting inconsistently with Article 6.9, later the European Union appeared to argue that, to the extent that information was confidential, it was not properly disclosed. (Panel Report, para. 7.265)

<sup>422</sup> Panel Report, para. 7.268.

<sup>423</sup> Panel Report, para. 7.268.

<sup>424</sup> Panel Report, para. 7.268 (emphasis original) (quoting Panel Report, *China – GOES*, para. 7.410).

<sup>425</sup> Panel Report, para. 7.269.

<sup>426</sup> We note that, at the interim review, Russia requested the Panel to "reflect the reason why essential facts, which were determined on the basis of electronic customs database submitted to the DIMD by the national customs authorities of the Member States of the Customs Union on a confidential basis, did not meet the requirements of Article 6.5 of the Anti-Dumping Agreement." (Russia's comments on the Interim Report, para. 40)

<sup>427</sup> Panel Report, para. 7.270.

### 5.5.3 Article 6.9 of the Anti-Dumping Agreement

5.176. The first sentence of Article 6.9 of the Anti-Dumping Agreement provides that "[t]he authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." The second sentence of Article 6.9 further provides that "[s]uch disclosure should take place in sufficient time for the parties to defend their interests."

5.177. Unlike Article 12.2.2 of the Anti-Dumping Agreement, which governs the disclosure of matters of fact and law and reasons at the conclusion of anti-dumping investigations<sup>428</sup>, Article 6.9 concerns the disclosure of "facts" in the course of such investigations "before a final determination is made".<sup>429</sup> With respect to what kind of facts are "essential", the Appellate Body in *China – GOES* explained that Article 6.9 does "not require the disclosure of *all* the facts that are before an authority but, instead, those that are 'essential'; a word that carries a connotation of significant, important, or salient".<sup>430</sup> Essential facts are those that "form the basis for the decision whether to apply definitive measures" and those that ensure the ability of interested parties to defend their interests. Thus, the term "essential facts" refers to those facts that are significant in the process of reaching a decision whether to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether to apply definitive measures. 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.<sup>431</sup> Article 6.9 "require[s] in all cases that the investigating authority disclose those facts in such a manner that an interested party can understand clearly what data the investigating authority has used, and how those data were used to determine the margin of dumping".<sup>432</sup>

5.178. In order to apply a definitive anti-dumping measure, an investigating authority must establish the existence of dumping, injury to the domestic industry, and a causal link between the dumping and the injury. Whether a particular fact is essential or "significant in the process of reaching a decision" therefore depends on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, as well as the factual circumstances of each case, including the arguments and evidence submitted by the interested parties.<sup>433</sup> For example, with respect to the determination of dumping, the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* explained that an investigating authority is expected "to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, and the calculation methodology applied by the investigating authority to determine the margin of dumping".<sup>434</sup>

5.179. We now turn to the relationship between Article 6.5 and Article 6.9 of the Anti-Dumping Agreement. In particular, we examine whether a failure to disclose essential facts that were *not* properly treated as confidential under Article 6.5 would lead to an inconsistency with Article 6.9.

<sup>428</sup> Article 12.2.2 of the Anti-Dumping Agreement provides:

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

<sup>429</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>430</sup> Appellate Body Report, *China – GOES*, para. 240. (emphasis original)

<sup>431</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>432</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131. (fn omitted)

<sup>433</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130. (fn omitted)

<sup>434</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131 (quoting Appellate Body Report, *China – GOES*, para. 241).



5.180. Articles 6.5 and 6.9 of the Anti-Dumping Agreement are part of Article 6 of the Anti-Dumping Agreement, entitled "Evidence". Article 6 contains 14 paragraphs setting out specific rules relating to the treatment of evidence in an anti-dumping investigation. In *EC – Tube or Pipe Fittings*, the Appellate Body explained that the obligations set out in Article 6 establish a "framework of procedural and due process obligations".<sup>435</sup> Particularly, the provisions of Article 6 "set out evidentiary rules that apply *throughout* the course of the anti-dumping investigation, and provide also for due process rights that are enjoyed by 'interested parties' *throughout* such an investigation".<sup>436</sup>

5.181. Article 6.5 of the Anti-Dumping Agreement requires investigating authorities to treat as confidential any information which is by nature confidential, or which is provided on a confidential basis by parties to an investigation upon "good cause" being shown. The "good cause" alleged must constitute a reason sufficient to justify the withholding of information from both the public and the other parties interested in the investigation.<sup>437</sup> The existence of a "good cause" alleged by a party must be examined by a panel on the basis of the investigating authority's published report and its related supporting documents, and in light of the nature of the information at issue and the reasons given by the submitting party for its request for confidential treatment.<sup>438</sup> In turn, Article 6.5.1 of the Anti-Dumping Agreement "serves to balance the goal of ensuring that the availability of confidential treatment does not undermine the transparency of the investigative process."<sup>439</sup> It does so by requiring that a non-confidential summary of the information be furnished by interested parties and that such summary contains "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".<sup>440</sup> Articles 6.5 and 6.5.1 thus:

accommodate the concerns of confidentiality, transparency, and due process by protecting information that is by nature confidential or is submitted on a confidential basis and upon 'good cause' shown, but establishing an alternative method for communicating its content 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.<sup>441</sup>

5.182. Articles 6.5 and 6.9 strike a balance between the duty imposed on the investigating authority to protect information as confidential upon a "good cause" shown, on the one hand, and the duty to disclose the essential facts under consideration in order to ensure transparency and due process rights, on the other hand. The text of these provisions does not suggest that a finding of inconsistency under Article 6.5 would automatically lead to a finding of inconsistency under Article 6.9. In particular, there is no indication in Article 6.9 of whether essential facts may or may not include information treated as confidential under Article 6.5 with or without a showing of "good cause". This suggests to us that essential facts may comprise information properly treated as confidential under Article 6.9 and information that does not qualify for such treatment. While the notions of essential facts under Article 6.9 and confidential information within the meaning of Article 6.5 may overlap, they are not co-extensive. Thus, not every piece of information that is treated as confidential under Article 6.5, with or without showing "good cause", may constitute essential facts under Article 6.9. The question of what is "salient" for the decision of whether or not to impose a measure is different from the question of what qualifies as "good cause" for confidential treatment of certain information. Indeed, the content and scope of the obligations under Article 6.5 and Article 6.9 are different. An assessment under Article 6.5 focuses on whether confidential treatment was conferred to information on the investigation record upon a proper showing of "good cause". By contrast, an assessment under Article 6.9 concerns whether all

<sup>435</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 138 (quoting Appellate Body Report, *Thailand – H-Beams*, para. 109).

<sup>436</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 138. (emphasis original) See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.73.

<sup>437</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 537.

<sup>438</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97 (referring to Appellate Body Report, *EC – Fasteners (China)*, paras. 536 and 538).

<sup>439</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 542 (quoting Panel Report, *EC – Fasteners (China)*, para. 7.515).

<sup>440</sup> Article 6.5.1 of the Anti-Dumping Agreement.

<sup>441</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 542. See also Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.36.



essential facts have been disclosed in a timely manner so as to ensure the ability of interested parties to defend their interests. Accordingly, an inquiry under Article 6.9 is separate and distinct from an assessment under Article 6.5 of the Anti-Dumping Agreement.

5.183. The treatment of information as confidential under Article 6.5 does not absolve the investigating authority from its obligation to disclose essential facts as required under Article 6.9. When information treated as confidential under Article 6.5 constitutes essential facts within the meaning of Article 6.9, "the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts."<sup>442</sup> Given the relationship between Article 6.5 and Article 6.9, regardless of whether or not the essential facts at issue were properly treated as confidential under Article 6.5 – i.e. with or without showing "good cause" – a panel must examine whether any disclosure made – including that made through non-confidential summaries pursuant to Article 6.5.1 – meets the legal standard under Article 6.9.<sup>443</sup> Thus, an inconsistency with Article 6.5 in relation to information that constitutes essential facts may not be presumed to result in an inconsistency with Article 6.9.

#### **5.5.4 Whether the Panel erred in allegedly finding that an inconsistency with Article 6.5 automatically entails an inconsistency with Article 6.9**

5.184. Russia takes issue with several findings made by the Panel under Article 6.9 of the Anti-Dumping Agreement.<sup>444</sup> First, Russia claims that the Panel erred in its interpretation and application of Article 6.9 by finding that, to the extent that the DIMD failed to disclose information that was not properly treated as confidential, it acted inconsistently with Article 6.9.<sup>445</sup> According to Russia, the Panel's approach suggests that a failure to disclose information, including essential facts that were not properly treated as confidential under Article 6.5, would automatically lead to an inconsistency with Article 6.9.<sup>446</sup> In Russia's view, this is incorrect, because the issue of treatment of information as confidential – which may include essential facts – "is a distinct legal question" from the disclosure of essential facts under Article 6.9.<sup>447</sup> According to Russia, the Panel erred by not examining the non-confidential summaries of redacted actual figures provided by the DIMD in its draft investigation report.<sup>448</sup>

5.185. The European Union responds that the Panel interpreted Articles 6.5 and 6.9 of the Anti-Dumping Agreement "harmoniously, without creating any 'automatic' link between them in the abstract, and without stating that any breach of Article 6.5 will necessarily entail a breach of Article 6.9".<sup>449</sup> To the European Union, the Panel's reasoning suggests that, if confidential treatment cannot properly be extended to an essential fact, that essential fact must be disclosed by the investigating authority.<sup>450</sup> The European Union argues that there was no need for the Panel to examine the summaries of redacted actual figures provided by the DIMD, because the absence of a showing of "good cause" meant that there was no legal basis to treat those figures as confidential and that they should have been disclosed.<sup>451</sup>

5.186. As noted, in Russia's view, the Panel's interpretation of Article 6.9 suggests that, where essential facts are not properly treated as confidential under Article 6.5, this will "automatically" entail a finding of inconsistency with Article 6.9, even if some essential facts were disclosed by means of a non-confidential summary.<sup>452</sup> We recall that, with respect to the European Union's claim under Article 6.9, Russia had argued before the Panel that certain essential facts in this case

<sup>442</sup> Appellate Body Report, *China – GOES*, para. 247.

<sup>443</sup> We note that the scenario reflected in the third sentence of Article 6.5.1 of the Anti-Dumping Agreement (i.e. when information is not susceptible of summary) is not before us in this appeal.

<sup>444</sup> Russia's appellant's submission, paras. 98, 103, and 109.

<sup>445</sup> Russia's appellant's submission, para. 95 (quoting Panel Report, para. 7.270).

<sup>446</sup> Russia's appellant's submission, paras. 94-95.

<sup>447</sup> Russia's appellant's submission, para. 95.

<sup>448</sup> Russia's appellant's submission, para. 96.

<sup>449</sup> European Union's appellee's submission, para. 145.

<sup>450</sup> European Union's appellee's submission, para. 151. The European Union recalls the Panel's finding that there are "dual obligations" resulting from Articles 6.5 and 6.9 of the Anti-Dumping Agreement, which means that, with respect to essential facts, investigating authorities must comply with both provisions. (Ibid., para. 154)

<sup>451</sup> European Union's appellee's submission, para. 162.

<sup>452</sup> Russia's appellant's submission, para. 95.

constituted confidential information and that therefore the DIMD had no opportunity to disclose the actual figures.<sup>453</sup> In its analysis, the Panel first expressed its understanding of the relationship between Article 6.5 and Article 6.9 of the Anti-Dumping Agreement. The Panel explained:

Nothing in Article 6.9 requires a complaining party to demonstrate that an investigating authority had "an opportunity" to make the required disclosure. Under Article 6.9, a complaining party presents a *prima facie* case where it demonstrates that essential facts have not been disclosed to the interested parties as required. Article 6.9 does not require the disclosure of essential facts that benefit from confidential treatment under Article 6.5. Indeed, the Russian Federation also argues that a Member is under "dual obligations"[\*] in respect of essential facts that are treated as confidential by an investigating authority. But Article 6.5 is not a carve-out to Article 6.9; confidentiality of information is neither an absolute bar to disclosure nor a defence to the failure to disclose as required under Article 6.9. Rather, a harmonious interpretation of the "dual obligation" is that where essential facts are properly treated as confidential, "the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the 'essential' but confidential facts".<sup>454</sup>

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[\*fn original]<sup>479</sup> The obligation to disclose under Article 6.9 and the obligation to protect confidential information under Article 6.5. Both provisions apply in respect of confidential information.

5.187. The Panel accepted that the disclosure of essential but confidential facts could be done through non-confidential summaries within the meaning of Article 6.5.1 of the Anti-Dumping Agreement. The Panel, however, emphasized that the "dual obligation" in Articles 6.5 and 6.9 of the Anti-Dumping Agreement could be met through the use of non-confidential summaries "where essential facts are properly treated as confidential".<sup>455</sup> The Panel further stated that "the condition precedent for treatment as confidential of such information by the investigating authority, a showing of good cause, was not met and therefore that information, including the essential facts at issue, was not properly treated as confidential in the investigation."<sup>456</sup> In its subsequent analysis, the Panel referred to its previous finding of inconsistency with Article 6.5 and found that, "to the extent that the DIMD failed to disclose information that was not properly treated as confidential ..., it acted inconsistently with Article 6.9."<sup>457</sup> Read together, these statements of the Panel suggest to us that the Panel considered that the requirements of Article 6.9 could be met by disclosing essential facts through non-confidential summaries only where no inconsistency with Article 6.5 had been established.

5.188. As we see it, the Panel's emphasis on the words "properly treated"<sup>458</sup> and the "condition precedent"<sup>459</sup> for confidential treatment support the conclusion that the Panel understood that, if confidential treatment was granted to information that constitutes essential facts without complying with the requirements of Article 6.5, the obligations under Article 6.9 may not be met through the disclosure of non-confidential summaries within the meaning of Article 6.5.1 of the Anti-Dumping Agreement. Accordingly, the Panel did not consider it necessary to examine the alleged disclosure of essential facts made through the non-confidential summaries of confidential information in the draft investigation report. Instead, the Panel merely referred to its previous finding of inconsistency with Article 6.5 to establish an inconsistency with Article 6.9.

5.189. We disagree with the Panel's statement, in paragraph 7.268 of the Panel Report, that, "where essential facts are properly treated as confidential, 'the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the 'essential' but confidential facts'"<sup>460</sup>, as read in light of the Panel's further statements in paragraph 7.269 of the Panel Report. We understand these statements to reflect the Panel's erroneous understanding

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<sup>453</sup> Panel Report, para. 7.266.

<sup>454</sup> Panel Report, para. 7.268. (emphasis original; fn omitted)

<sup>455</sup> Panel Report, para. 7.268. (emphasis original)

<sup>456</sup> Panel Report, para. 7.269. (emphasis original)

<sup>457</sup> Panel Report, para. 7.269.

<sup>458</sup> Panel Report, para. 7.268. (emphasis original)

<sup>459</sup> Panel Report, para. 7.269. (emphasis original)

<sup>460</sup> Panel Report, para. 7.268 (quoting Panel Report, *China – GOES*, para. 7.410 (emphasis original)).

that, where essential facts are not properly treated as confidential in accordance with Article 6.5, this would automatically lead to an inconsistency with Article 6.9. As explained above, regardless of whether or not the essential facts at issue were treated as confidential consistently with the requirements of Article 6.5, a panel must examine whether any disclosure made – including that made through non-confidential summaries under Article 6.5.1 – meets the requirements of Article 6.9.

5.190. As noted above, in its assessment of the European Union's claim under Article 6.9, the Panel referred to its previous finding of inconsistency with Article 6.5. The Panel then concluded that, to the extent that the DIMD failed to disclose essential facts because they constituted information that was not properly treated as confidential, the DIMD acted inconsistently with Article 6.9.<sup>461</sup> In our view, the Panel's analysis does not comport with the legal standard under Article 6.9, in particular in light of the relationship between Article 6.5 and Article 6.9 explained above. We consider that, having made a finding of inconsistency with Article 6.5, the Panel could not simply conclude, on that basis alone, that the DIMD had failed to comply with the requirements of Article 6.9. Rather, the Panel should have examined whether or not the alleged disclosure made through the non-confidential summaries met the requirements of Article 6.9.

5.191. For the above reasons, we find that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement by considering that, where essential facts are not properly treated as confidential in accordance with Article 6.5, this automatically leads to an inconsistency with Article 6.9. The Panel also erred in finding, in paragraph 7.269 of the Panel Report, that, "to the extent that the DIMD failed to disclose information that was not properly treated as confidential ..., it acted inconsistently with Article 6.9."<sup>462</sup> We therefore reverse the Panel's findings, in paragraph 7.268, as read in light of paragraph 7.269, and in paragraphs 7.269 and 7.278, Table 12, as well as the Panel's conclusion, in paragraph 8.1.h.ii of the Panel Report, that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of the information listed in items (d) to (o) of Table 12. Having reversed the Panel's findings, we examine whether we can complete the analysis and determine whether the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement below in section 5.5.6 of this Report.

#### 5.5.5 Whether the Panel erred in its finding relating to the customs electronic database

5.192. Russia claims that the Panel acted inconsistently with Articles 7 and 15.2 of the DSU by adding, in its Final Report, paragraph 7.270, which had not appeared in the Panel's Interim Report.<sup>463</sup> According to Russia, the Panel exceeded its terms of reference when it found that the data from the electronic customs database and the data on the volumes of LCVs produced by GAZ did not meet the requirements of Article 6.5 of the Anti-Dumping Agreement. Moreover, Russia considers that "an entirely new finding" cannot be made at the interim review stage.<sup>464</sup> Russia also claims that the Panel erred in finding that "the actual import volumes and the weighted average import price of LCVs produced by Daimler AG and Volkswagen AG, respectively, were not properly treated as confidential."<sup>465</sup> In this regard, Russia submits that those figures constitute sensitive business information for some interested parties and that, under the Russian and Customs Union law, the data from the electronic customs database is treated as confidential.<sup>466</sup>

5.193. The European Union responds that the Panel did not exceed its terms of reference because the failure to disclose information originating from the electronic customs databases was covered by the European Union's panel request and mentioned in its written submissions.<sup>467</sup> The European Union further notes that paragraph 7.270 of the Panel Report was "added at the specific request of Russia"<sup>468</sup>, and that Article 15.2 of the DSU "does not prevent a panel from

<sup>461</sup> Panel Report, para. 7.269.

<sup>462</sup> Panel Report, para. 7.269.

<sup>463</sup> Russia's appellant's submission, paras. 99, 101-102.

<sup>464</sup> Russia's appellant's submission, para. 102 (referring to Panel Report, *Australia – Salmon*, para. 7.3).

<sup>465</sup> Russia's appellant's submission, paras. 19 and 108.

<sup>466</sup> Russia's appellant's submission, para. 97.

<sup>467</sup> European Union's appellee's submission, para. 181. (fns omitted)

<sup>468</sup> European Union's appellee's submission, paras. 182 and 187. The European Union referred to the explanation provided by the Panel in paragraph 6.38 of its Report. (*Ibid.*, para. 176 (referring to Panel Report, para. 6.38))

modifying certain aspects of its reasoning or of its findings when requested to do so by a party".<sup>469</sup> With respect to Russia's claim concerning the actual import volumes and prices of LCVs produced by Daimler AG and Volkswagen AG, the European Union submits that Russia did not specify any provision in the covered agreements that the Panel is alleged to have erred in interpreting or applying.<sup>470</sup>

5.194. We recall that, before the Panel, the European Union argued that Russia had failed to inform interested parties of the essential facts, including the essential facts underlying the determinations of the existence of dumping and, in particular, the determination of normal value and the export price.<sup>471</sup> With respect to the determination of normal value, the European Union argued that, because the total number of LCVs imported by Volkswagen AG and Daimler AG into the Customs Union was treated as confidential, the interested parties were unable to verify the numbers used by the DIMD regarding volumes of imported LCVs, and to defend their interests.<sup>472</sup> With respect to the DIMD's calculation of the export price, the European Union contended that the DIMD had failed to disclose the weighted-average export prices and export volumes of LCVs produced by Volkswagen AG and Daimler AG and imported into the Customs Union.<sup>473</sup>

5.195. Russia explained before the Panel that the source of certain information used by the DIMD to calculate the dumping margin for the German exporting producers was the electronic customs database on imports of goods into the Customs Union. Russia submitted that the information from that database was provided by the national customs authorities of the member States of the Customs Union on a confidential basis.<sup>474</sup> According to Russia, the DIMD could not disclose aggregated data concerning the volume and value of LCVs produced by Volkswagen AG and Daimler AG and imported into the Customs Union in disclosure documents.<sup>475</sup> In Russia's view, information that is expressly protected from unauthorized disclosure by domestic legislation does not fall within the scope of Article 6.9 of the Anti-Dumping Agreement.<sup>476</sup>

5.196. In both the Interim and Final Reports, the Panel found that the DIMD had acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by not disclosing certain essential facts, including the actual volumes of LCVs imported into the Customs Union by Volkswagen AG and Daimler AG that were used for calculating the normal value and the export price, and the weighted-average export prices of LCVs produced by Volkswagen AG and Daimler AG.<sup>477</sup> Section 7.8.2.2 of the Interim Report ended with paragraph 7.267, which corresponds to paragraph 7.269 of the Final Report.

5.197. In its comments on the Interim Report, Russia requested, with regard to paragraph 7.267, that the Panel "reflect the reason why essential facts, which were determined on the basis of electronic customs database submitted to the DIMD by the national customs authorities of the

<sup>469</sup> European Union's appellee's submission, para. 187.

<sup>470</sup> European Union's appellee's submission, para. 196.

<sup>471</sup> European Union's first written submission to the Panel, para. 423; second written submission to the Panel, para. 278.

<sup>472</sup> European Union's first written submission to the Panel, para. 425; second written submission to the Panel, para. 278.

<sup>473</sup> European Union's first written submission to the Panel, paras. 428-429; second written submission to the Panel, para. 278.

<sup>474</sup> Russia's second written submission to the Panel, paras. 371 and 381; response to Panel question No. 69, para. 43 (referring to non-confidential investigation report (Panel Exhibit RUS-12), p. 16). In particular, according to Russia, the information from the electronic customs database was used by the DIMD to determine the total volume and value of LCVs produced by Volkswagen AG and Daimler AG and imported into the Customs Union (Russia's second written submission to the Panel, para. 405). In this respect, Russia also argued that, if the investigating authority uses facts available that are submitted not by interested parties but by national authorities on a confidential basis, the investigating authority is not obliged to disclose such data. (Ibid., para. 352)

<sup>475</sup> Russia's second written submission to the Panel, para. 371. In the same vein, Russia noted that "export prices of LCVs were determined on the basis of electronic customs database submitted by the national customs authorities of the Member States of the Customs Union." (Ibid., para. 381)

<sup>476</sup> Russia's second written submission to the Panel, paras. 346-365; appellant's submission, paras. 105-106.

<sup>477</sup> Interim Panel Report, para. 7.275; Panel Report, para. 7.278.

Member States of the Customs Union on a confidential basis, did not meet the requirements of Article 6.5 of the Anti-Dumping Agreement."<sup>478</sup>

5.198. The Panel added paragraph 7.270 to its Final Report in response to Russia's comment. It reads:

In respect of information originating from electronic customs database of national customs authorities of the CU, the Russian Federation argues that this information was submitted on a confidential basis to the DIMD and, accordingly, was treated as confidential by the DIMD. We note that there is no showing of good cause on the record in respect of such information. This does not mean that the information at issue was not confidential, or could not have been properly treated as confidential. Rather, the condition precedent for treatment as confidential of such information by the investigating authority, a showing of good cause, is nowhere on the record. For this reason, consistent with our finding in paragraph 7.269, this information, including the essential facts at issue, was not properly treated as confidential in the investigation. To the extent that the DIMD failed to disclose information that was not properly treated as confidential, it acted inconsistently with Article 6.9.<sup>479</sup>

5.199. As we see it, in its comments, Russia requested a clarification on the Interim Report because the information from the electronic customs database was not covered by the Panel's earlier findings under Article 6.5 of the Anti-Dumping Agreement.<sup>480</sup> In other words, given Russia's view that the Panel automatically found an inconsistency with Article 6.9 on the basis of a finding of inconsistency with Article 6.5, we understand Russia to have requested an explanation from the Panel as to why it referred to the treatment of confidential information under Article 6.5 in relation to information from the electronic customs database when no finding under Article 6.5 had been made with respect to that information.

5.200. In addressing Russia's interim review request, the Panel explained that the information from the electronic customs database was not properly treated as confidential by the DIMD due to the absence of a showing of "good cause" on the record.<sup>481</sup> Therefore, the Panel considered that, to the extent that the relevant information had not been disclosed, the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.<sup>482</sup> Russia takes issue with the Panel adding paragraph 7.270 to the Final Report. In particular, Russia submits that, in so doing, the Panel made a finding under Article 6.5 of the Anti-Dumping Agreement that was not within the Panel's terms of reference.<sup>483</sup>

5.201. As we see it, in adding the finding in paragraph 7.270 of the Panel Report, the Panel incorporated an element of analysis under Article 6.5 into its assessment under Article 6.9. This approach appears to stem from the Panel's erroneous understanding of the relationship between Article 6.5 and Article 6.9 of the Anti-Dumping Agreement, which we have addressed above. In particular, it seems to us that the finding at issue was premised on the Panel's understanding that, in circumstances where information that constitutes essential facts under Article 6.9 was improperly treated as confidential under Article 6.5, the requirements that apply under Article 6.9 to essential facts could not be met by means of the disclosure of non-confidential summaries within the meaning of Article 6.5.1. We thus do not consider that paragraph 7.270 of the Panel Report contains a separate finding of inconsistency with Article 6.5 of the Anti-Dumping Agreement. Rather, we see it as an error in application that stems from the Panel's erroneous interpretation of Article 6.9. As we have noted above, we disagree with this interpretation because we consider the inquiry under Article 6.9 to be separate and distinct from the inquiry under Article 6.5. Accordingly, we also disagree with the Panel's analysis in paragraph 7.270 of the Panel Report.

<sup>478</sup> Russia's comments on the Interim Report, para. 40.

<sup>479</sup> Panel Report, para. 7.270. (emphasis original)

<sup>480</sup> See Panel Report, para. 7.247 and Table 11.

<sup>481</sup> Panel Report, para. 7.270.

<sup>482</sup> Panel Report, para. 7.270.

<sup>483</sup> Russia's appellant's submission, paras. 100, 103, and 109(a).

5.202. As we have found above, the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement by considering that, where essential facts are not properly treated as confidential in accordance with Article 6.5, this automatically leads to an inconsistency with Article 6.9. The Panel also erred in finding, in paragraph 7.269 of the Panel Report, that "to the extent that the DIMD failed to disclose information that was not properly treated as confidential ..., it acted inconsistently with Article 6.9."<sup>484</sup> We find that, as a result of its erroneous interpretation of Article 6.9 of the Anti-Dumping Agreement, the Panel also erred in finding, in paragraph 7.270 of the Panel Report, that, "[t]o the extent that the DIMD failed to disclose information that was not properly treated as confidential, it acted inconsistently with Article 6.9" of the Anti-Dumping Agreement.<sup>485</sup> We therefore reverse the Panel's finding, in paragraph 7.270, and the Panel's conclusions, in paragraphs 7.278, Table 12, and 8.1.h.ii of the Panel Report, as they relate to the information originating from the electronic customs database. In light of this reversal, we do not address the remainder of Russia's claims regarding the Panel's finding in paragraph 7.270 of the Panel Report, including its claims of error under Articles 7 and 15.2 of the DSU.<sup>486</sup>

### 5.5.6 Completion of the analysis

5.203. Having reversed the relevant Panel findings, we turn to the European Union's request for completion of the analysis. We recall that, in the event we were to agree with Russia that the Panel erred in its interpretation and application of Article 6.9 of the Anti-Dumping Agreement, the European Union requests that we complete the analysis and find that the DIMD acted inconsistently with Article 6.9 by failing to disclose the essential facts listed in paragraphs 7.250 and 7.278, Table 12, of the Panel Report.<sup>487</sup>

5.204. In previous disputes, the Appellate Body has completed the analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.<sup>488</sup> The Appellate Body has done so where the factual findings in the panel report, undisputed facts on the panel record, and admitted facts provided it with a sufficient basis for conducting its own analysis.<sup>489</sup> The Appellate Body has declined to complete the analysis when the complexity of the issues raised, the absence of full exploration of the issues before the panel, and considerations pertaining to the parties' due process rights prevented it from doing so.<sup>490</sup>

5.205. The Panel found that the information concerning the return on investments, the actual and potential negative effects on cash flow, and the ability to raise capital or investments constitute essential facts subject to the disclosure requirements of Article 6.9.<sup>491</sup> This finding of the Panel has not been challenged on appeal. The Panel also found that the parties "d[id] not disagree as to whether the other facts at issue are 'essential facts under consideration' within the meaning of Article 6.9"<sup>492</sup> and that "the parties d[id] not disagree that the essential facts in question were not disclosed in their entirety to the two interested parties".<sup>493</sup> Furthermore, the Panel found that the draft investigation report constitutes Russia's disclosure under Article 6.9.<sup>494</sup> These findings of the

<sup>484</sup> Panel Report, para. 7.269.

<sup>485</sup> Panel Report, para. 7.270.

<sup>486</sup> In particular, we do not need to address Russia's claim that, by adding paragraph 7.270 in the Final Report, the Panel acted inconsistently with Articles 7 and 15.2 of the DSU. We also do not need to address Russia's claim that the Panel erroneously found that "the actual import volumes and the weighted average import price of LCVs produced by Daimler AG and Volkswagen AG, respectively, were not properly treated as confidential." (Russia's appellant's submission, paras. 99, 101-102, and 108)

<sup>487</sup> European Union's appellee's submission, para. 172.

<sup>488</sup> See Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1178; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1351; *EC – Asbestos*, para. 78.

<sup>489</sup> See Appellate Body Reports, *Australia – Salmon*, paras. 209, 241, and 255; *Korea – Dairy*, paras. 91 and 102; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 653; *US – Section 211 Appropriations Act*, para. 343; *EC – Asbestos*, paras. 78-79; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.135; *US – Anti-Dumping Methodologies (China)*, para. 5.164.

<sup>490</sup> See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224; *EC – Seal Products*, paras. 5.63 and 5.69; *US – Anti-Dumping Methodologies (China)*, para. 5.184.

<sup>491</sup> Panel Report, para. 7.263.

<sup>492</sup> Panel Report, para. 7.265.

<sup>493</sup> Panel Report, para. 7.265. The Panel noted that, instead, Russia considered that the information allegedly not disclosed was subject to confidentiality requirements. (Ibid.)

<sup>494</sup> Panel Report, para. 7.260.

Panel are not challenged on appeal. We will therefore examine the draft investigation report to determine whether we can complete the analysis, as requested by the European Union.

5.206. We note that, in certain instances, the relevant information is marked as confidential and is not disclosed at all in the draft investigation report. In particular, these instances concern information with respect to: (i) the actual volumes of subject products imported into the Customs Union by Volkswagen AG and Daimler AG that were used for the purpose of calculating the normal value and the export price<sup>495</sup>; and (ii) the weighted-average export price for subject products exported by Volkswagen AG and by Daimler AG into the Customs Union.<sup>496</sup> In some other instances, the draft investigation report does not disclose the relevant actual figures and instead provides either information on a change in relation to the preceding period in percentage terms or another uninformative summary. In particular, this concerns the following essential facts: (i) the actual figures that show the domestic consumption, production and sales volumes, and the evolution of the profits and profitability rate of Sollers in 2011<sup>497</sup>; (ii) the profit/loss of Sollers from the sale of LCVs in the Customs Union in 2011<sup>498</sup>; and (iii) the profitability rate of Sollers from the sale of LCVs in the Customs Union.<sup>499</sup> Finally, certain essential facts were entirely omitted from the draft investigation report. These are the following: (i) the return on investments, actual and potential negative effects on cash flow, and the ability to raise capital or investments<sup>500</sup>; (ii) information on the relation of the volume of exports to the total volume of production<sup>501</sup>; (iii) the figures for the production capacity of the domestic industry<sup>502</sup>; (iv) the figures for the structure of the costs of production of the domestic industry<sup>503</sup>; and (v) the figures for the numbers and salaries of staff.<sup>504</sup> Therefore, having reviewed the draft investigation report, we conclude that the DIMD did not disclose the relevant essential facts, listed in items (d) and (f) to (o) of Table 12 in paragraph 7.278 of the Panel Report, underlying its final determination that would permit the interested parties to understand what data had been used by the DIMD and to defend their interests.

5.207. We also note that, in response to questioning at the hearing, Russia indicated that the information concerning the weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG<sup>505</sup> was disclosed in the additional disclosure letter.<sup>506</sup> The Panel did not refer to the additional disclosure letter in its analysis under Article 6.9. We do not consider that there are sufficient factual findings by the Panel and uncontested evidence on the Panel record that would allow us to complete the analysis and rule on whether Russia disclosed the information concerning the weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG.

5.208. On the basis of the above, we find that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts contained in items (d) and (f) to (o) of Table 12 in paragraph 7.278 of the Panel Report.<sup>507</sup>

<sup>495</sup> Panel Report, para. 7.278, Table 12, item (d); draft investigation report (Panel Exhibits EU-16 and RUS-10), pp. 38-39.

<sup>496</sup> Panel Report, para. 7.278, Table 12, item (j); draft investigation report (Panel Exhibits EU-16 and RUS-10), p. 39.

<sup>497</sup> Panel Report, para. 7.278, Table 12, items (f) and (i); draft investigation report (Panel Exhibits EU-16 and RUS-10), Tables 4.1.1.1, 4.1.1.2, and 4.2.5.

<sup>498</sup> Panel Report, para. 7.278, Table 12, item (g); draft investigation report (Panel Exhibits EU-16 and RUS-10), Table 4.2.5.

<sup>499</sup> Panel Report, para. 7.278, Table 12, item (h); draft investigation report (Panel Exhibits EU-16 and RUS-10), Table 4.2.5.

<sup>500</sup> Panel Report, para. 7.278, Table 12, item (k); draft investigation report (Panel Exhibits EU-16 and RUS-10), Section 4.2.7.

<sup>501</sup> Panel Report, para. 7.278, Table 12, item (l); draft investigation report (Panel Exhibits EU-16 and RUS-10), Section 4.1.2.

<sup>502</sup> Panel Report, para. 7.278, Table 12, item (m); draft investigation report (Panel Exhibits EU-16 and RUS-10), Table 4.2.3.

<sup>503</sup> Panel Report, para. 7.278, Table 12, item (n); draft investigation report (Panel Exhibits EU-16 and RUS-10), Section 4.2.4.

<sup>504</sup> Panel Report, para. 7.278, Table 12, item (o); draft investigation report (Panel Exhibits EU-16 and RUS-10), Section 4.2.6.

<sup>505</sup> Panel Report, para. 7.278, Table 12, item (e).

<sup>506</sup> EEC Letter No. 14-176 (Panel Exhibit RUS-18).

<sup>507</sup> Panel Report, para. 7.278.



### 5.5.7 Whether the Panel erred in its interpretation and application of Article 6.9 of the Anti-Dumping Agreement in relation to sources of information

5.209. The European Union claims that the Panel erred in its interpretation and application of Article 6.9 of the Anti-Dumping Agreement in finding that a source of data cannot constitute an "essential fact under consideration" and that the source of data on import volumes and values in the context of the DIMD's dumping and injury analyses is not an essential fact under consideration in this dispute.<sup>508</sup> The European Union notes that, without knowing the source of data, in certain cases, it may be "impossible to properly understand the overall 'factual basis' of the findings, or to put the raw data in its proper context".<sup>509</sup> Thus, the source of data may very well be an essential fact under consideration depending on the circumstances of a case, and the disclosure of the data may be necessary for the interested parties to defend their interests.<sup>510</sup> The European Union submits that the Panel's error flows from two earlier interpretative errors that it committed. First, the European Union argues that "the Panel incorrectly interpreted Article 6.9 by finding, in general terms, that a 'methodology' is not a fact, or an essential fact."<sup>511</sup> According to the European Union, this interpretation contradicts the Appellate Body's findings in *China – HP-SSST (Japan) / China – HP-SSST (EU)* that certain methodologies, such as an investigating authority's methodology for calculating the dumping margin, constitute essential facts.<sup>512</sup> Second, the European Union argues that the Panel erred in its interpretation of Article 6.9 when it found that only "essential facts which are additionally shown to be 'under consideration'" need to be disclosed.<sup>513</sup> In the European Union's view, this would suggest that "essential facts" and "facts under consideration" are two wholly separate and cumulative criteria for the application of Article 6.9<sup>514</sup>, an interpretation that would contradict the Appellate Body's findings in *China – GOES*.<sup>515</sup>

5.210. In response, Russia requests us to reject the entirety of the European Union's claims. Russia argues that the Panel correctly interpreted and applied Article 6.9 in accordance with the Appellate Body's findings in *China – GOES*, when it found that "[k]nowledge of the sources of data might be useful to establish the credibility of information", but that the sources are not themselves essential facts under consideration.<sup>516</sup> Russia draws a distinction between, on the one hand, the facts that are simply "useful" and that need not be disclosed under Article 6.9 and, on the other hand, the facts that would "form the basis for the decision to apply [a] definitive measure", be "salient for a contrary outcome", and "ensure the ability of interested parties to defend their interest", the disclosure of which is mandated by Article 6.9.<sup>517</sup> Moreover, with respect to the European Union's argument regarding methodologies constituting essential facts, Russia submits that not all methodologies used by the investigating authority to reach its final determination should constitute "essential facts under consideration" under Article 6.9. According to Russia, "methodologies applied by the investigating authority in its determinations of dumping, injury and causality" would constitute "essential facts under consideration", while "methodologies of presenting facts used by the investigating authority in preparing the disclosure document" would not.<sup>518</sup>

5.211. We note that the European Union essentially takes issue with three aspects of the Panel's analysis: (i) the Panel's statement that Article 6.9 does not require the disclosure of methodologies because they do not constitute "facts" or "essential facts"<sup>519</sup>; (ii) the Panel's statement that Article 6.9 does not require the disclosure of "every 'essential fact'", but of those that are "under

<sup>508</sup> European Union's other appellant's submission, paras. 191-203.

<sup>509</sup> European Union's other appellant's submission, para. 201.

<sup>510</sup> European Union's other appellant's submission, para. 198.

<sup>511</sup> European Union's other appellant's submission, para. 192 (referring to Panel Report, para. 7.256).

<sup>512</sup> European Union's other appellant's submission, para. 192 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131; Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.238).

<sup>513</sup> European Union's other appellant's submission, para. 193 (referring to Panel Report, para. 7.256).

<sup>514</sup> European Union's other appellant's submission, para. 193.

<sup>515</sup> According to the European Union, the Appellate Body report in *China – GOES* rather indicates that the term "essential facts under consideration" must be read in a holistic manner, so that "essential facts" are a subset of "facts under consideration". (European Union's other appellant's submission, paras. 193-194 (referring to Appellate Body Report, *China – GOES*, para. 240))

<sup>516</sup> Russia's appellee's submission, paras. 199-201 (quoting Panel Report, para. 7.257).

<sup>517</sup> Russia's appellee's submission, para. 201.

<sup>518</sup> Russia's appellee's submission, para. 210.

<sup>519</sup> Panel Report, para. 7.256.a.



consideration"<sup>520</sup>; and (iii) the Panel's finding that the source of information in itself and the source of information with respect to import volumes and values used by the DIMD in this case do not constitute essential facts.<sup>521</sup>

5.212. Above, we have set out our understanding of the legal standard under Article 6.9 of the Anti-Dumping Agreement. In particular, we recall that the scope of Article 6.9 "cover[s] 'facts under consideration', that is, those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping ... duties".<sup>522</sup> Whether a particular fact is essential depends on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual circumstances of each case.<sup>523</sup> For example, with respect to the determination of dumping, an investigating authority is expected "to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, as well as the calculation methodology applied by the investigating authority to determine the margin of dumping."<sup>524</sup> The purpose of the disclosure of essential facts is to enable the interested parties to defend their interests.<sup>525</sup>

5.213. We first examine whether, as the European Union contends, the Panel found that "[n]ot every 'essential fact' is required to be disclosed", but only those essential facts that are additionally shown to be "under consideration".<sup>526</sup> We recall that the relevant part of paragraph 7.256.c of the Panel Report reads as follows:

Not every "essential fact" is required to be disclosed. Article 6.9 requires the disclosure of "essential facts under consideration": the "facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping and/or countervailing duties."[\*]<sup>527</sup>

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[\*fn original]<sup>461</sup> Appellate Body Report, *China – GOES*, para. 240.

5.214. In this statement, the Panel appears to have summarized its understanding of the relevant Appellate Body's statements in *China – GOES* which read as follows:

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. ... [Article 6.9 does] not require the disclosure of *all* the facts that are before an authority but, instead, those that are "essential"; a word that carries a connotation of significant, important, or salient.<sup>528</sup>

5.215. The Appellate Body explained that Article 6.9 of the Anti-Dumping Agreement does "not require the disclosure of *all* the facts that are before an authority but, instead, those that are 'essential'".<sup>529</sup> The Appellate Body understood the essential facts to be those that are "under consideration" and form the basis for the decision whether to apply definitive measures. The Appellate Body thus read the terms "essential facts under consideration" and "which form the basis for the decision whether to apply definitive measures" together. Subsequently, the Appellate Body has used the term "essential facts" as a shorthand in specifying that it understood this term to refer to "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures."<sup>530</sup>

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<sup>520</sup> Panel Report, para. 7.256.c.

<sup>521</sup> Panel Report, para. 7.257.a and b.

<sup>522</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>523</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.

<sup>524</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.

<sup>525</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>526</sup> European Union's other appellant's submission, para. 193 (quoting Panel Report, para. 7.256.c).

<sup>527</sup> Panel Report, para. 7.256.c. (emphasis original)

<sup>528</sup> Appellate Body Report, *China – GOES*, para. 240. (emphasis original)

<sup>529</sup> Appellate Body Report, *China – GOES*, para. 240. (emphasis original)

<sup>530</sup> Appellate Body Report, *China – GOES*, para. 240.

5.216. In making the statement challenged by the European Union, the Panel sought to reflect the Appellate Body's understanding that Article 6.9 does "not require the disclosure of *all* the facts that are before an authority but, instead, those that are 'essential'".<sup>531</sup> In rephrasing the Appellate Body's statement in *China – GOES*, the Panel may have cursorily stated that "[n]ot every 'essential fact' is required to be disclosed"<sup>532</sup>, instead of saying that *not every fact* is required to be disclosed, but only those that are under consideration and form the basis for the decision whether to apply definitive measures. We further note that, in paragraph 7.256 of the Panel Report, the Panel correctly reflected the legal standard under Article 6.9 by stating that it "requires the disclosure of 'the essential facts under consideration which form the basis for the decision whether to apply definitive measures'".<sup>533</sup> Accordingly, we have reservations with the Panel statement at issue to the extent that the Panel may be read as having distinguished between two categories of information: (i) essential facts (some of which are not required to be disclosed); and (ii) essential facts under consideration (that are required to be disclosed). Nevertheless, given that the Panel correctly expressed its understanding of this aspect of the legal standard under Article 6.9 elsewhere in its Report, we do not consider that the Panel's rephrasing of the Appellate Body's statement in *China – GOES*, in itself, amounts to a reversible error of law.

5.217. In addition, the European Union contends that the Panel erred in finding that a methodology does not constitute an "essential fact".<sup>534</sup> Specifically, the European Union takes issue with the Panel's statement that "Article 6.9 requires the disclosure of facts: the information underlying a decision rather than the reasoning, calculation or methodology that led to a determination."<sup>535</sup> In this statement, the Panel juxtaposed facts, which may be subject to the disclosure requirements under Article 6.9, with the reasoning, calculation, and methodology, which are not, in the Panel's view, "facts" and thus cannot be subject to Article 6.9 requirements.

5.218. As we have noted, in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body stated that, with respect to the determination of dumping, an investigating authority is expected "to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, and the calculation methodology applied by the investigating authority to determine the margin of dumping."<sup>536</sup> The Appellate Body thus found that, in that dispute, the calculation methodology used by the investigating authority to determine the margin of dumping constituted an essential fact within the meaning of Article 6.9 of the Anti-Dumping Agreement. We note, in this respect, that disclosure of the data underlying a dumping determination alone may not enable an interested party to defend its interests, unless that interested party was also informed of the methodology applied by the investigating authority to determine the margin of dumping. At the same time, not all methodologies used by an investigating authority may constitute essential facts within the meaning of Article 6.9. Rather, only those methodologies the knowledge of which is necessary for the participants to understand the basis of the investigating authority's decision and to defend their interests would be essential facts under Article 6.9. An assessment of whether a particular methodology constitutes an essential fact should therefore be made on a case-by-case basis. Consequently, we disagree with the Panel's statement to the extent that the Panel considered that a methodology cannot constitute an "essential fact" under Article 6.9 of the Anti-Dumping Agreement.

5.219. We next turn to the European Union's argument that the Panel erred in its interpretation and application of Article 6.9 of the Anti-Dumping Agreement by finding that the source of information, in general, and the source data concerning import volumes and values in the present case are not essential facts.<sup>537</sup> We recall that the Panel stated in this respect that, "[i]n itself, the source of data is not an essential fact under consideration."<sup>538</sup> The Panel further observed that "[k]nowledge of the sources of data might be useful to establish the credibility of information used

<sup>531</sup> Appellate Body Report, *China – GOES*, para. 240. (emphasis original)

<sup>532</sup> Panel Report, para. 7.256.c.

<sup>533</sup> Panel Report, para. 7.256. (emphasis original)

<sup>534</sup> European Union's other appellant's submission, para. 192 (referring to Panel Report, para. 7.256.a).

<sup>535</sup> Panel Report, para. 7.256.a (referring to Panel Report, *China – Broiler Products*, para. 7.90). (emphasis original)

<sup>536</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.

<sup>537</sup> European Union's other appellant's submission, para. 195.

<sup>538</sup> Panel Report, para. 7.257.a. (emphasis original)

by investigating authorities, but the sources of data are not themselves essential facts under consideration."<sup>539</sup>

5.220. We recall that the scope of Article 6.9 "cover[s] 'facts under consideration', that is, those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping ... duties."<sup>540</sup> An assessment of whether a particular fact is essential will depend on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual circumstances of each case.<sup>541</sup> The Appellate Body has previously emphasized that the disclosure of essential facts should "permit an interested party to understand the basis for the decision whether or not to apply definitive measures" and enable an interested party to defend itself.<sup>542</sup> In certain circumstances, knowledge of the data itself may not be sufficient to enable an interested party to properly defend itself, unless that party is also informed of the source of such data and how it was used by the investigating authority. Thus, knowing the source of data may be pivotal to the ability of an interested party to defend itself. In particular, knowing the source of information may enable the party to comment on the accuracy or reliability of the relevant information and allow it to propose alternative sources for that information. This may be particularly important in the circumstances where the investigating authority uses data that was not submitted by an interested party, but obtained from other sources (e.g. from a customs or statistical database).

5.221. On the basis of the above, we disagree with the Panel's general statement that sources of data are not essential facts within the meaning of Article 6.9 of the Anti-Dumping Agreement.<sup>543</sup> We note that the Panel relied on this interpretation as the reason for finding, in paragraph 7.257.a and b of the Panel Report, that the European Union had failed to demonstrate that the source of information concerning import volumes and values, and volumes of dumped imports used by the DIMD in the context of its dumping and injury determinations, constitutes an essential fact under Article 6.9 of the Anti-Dumping Agreement.<sup>544</sup> Accordingly, we also disagree with the Panel's conclusion with respect to the source of information concerning import volumes and values, and volumes of dumped imports used by the DIMD.

5.222. For all these reasons, we find that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement as to whether methodologies and sources of information may qualify as "essential facts" under Article 6.9 of the Anti-Dumping Agreement, as set out in paragraphs 7.256.a and 7.257.a of the Panel Report. The Panel also erred in the subsequent application of its general understanding that sources of information do not constitute essential facts to the facts of this case, as set out in paragraph 7.257.a and b of the Panel Report.<sup>545</sup> We therefore reverse the Panel's findings, in paragraphs 7.256.a and 7.257.a and b, and the Panel's conclusions, in paragraphs 7.278, Table 12, items (a) and (b), and 8.1.h.i of the Panel Report, as they relate to items (a) and (b) of Table 12.

### 5.5.8 Completion of the analysis

5.223. In the event that we reverse the Panel's findings, the European Union requests us to complete the analysis and find that, "by failing to disclose the source of information concerning import volumes and values in the context of its dumping and injury analyses, the DIMD acted inconsistently with Article 6.9" of the Anti-Dumping Agreement.<sup>546</sup>

5.224. As noted above, the Appellate Body has completed the analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.<sup>547</sup> The Appellate Body has done so where the factual findings in the panel report, undisputed facts on the panel record, and admitted

<sup>539</sup> Panel Report, para. 7.257.a.

<sup>540</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>541</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.

<sup>542</sup> Appellate Body Report, *China – GOES*, para. 240.

<sup>543</sup> Panel Report, para. 7.257.a.

<sup>544</sup> Panel Report, para. 7.257.b.

<sup>545</sup> Panel Report, para. 7.257.b.

<sup>546</sup> European Union's other appellant's submission, para. 204.

<sup>547</sup> See Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1178; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1351; *EC – Asbestos*, para. 78.

facts provided it with a sufficient basis for conducting its own analysis.<sup>548</sup> The Appellate Body has declined to complete the analysis when the complexity of the issues raised, the absence of full exploration of the issues before the panel, and considerations pertaining to the parties' due process rights did not permit it to do so.<sup>549</sup>

5.225. Turning to the case before us, we recall that, before the Panel, the European Union argued that the DIMD's draft investigation report did not provide the source of the information concerning the volume and value of LCV imports, which formed the basis for the DIMD's decision to apply definitive measures, with respect to the dumping determination.<sup>550</sup> Having considered that sources of information in general do not constitute essential facts, the Panel found that the source of the information concerning the import volumes and values used by the DIMD in its dumping determination was not an essential fact.<sup>551</sup> The Panel did not engage further with the European Union's and Russia's arguments and did not examine the contents of the draft investigation report. Consequently, the Panel proceedings were conducted without the Panel sufficiently exploring with the parties the issue of whether the sources of information of import volumes and values used by the DIMD in its dumping determination constituted essential facts and were actually disclosed in this case, and we thus lack the benefit of sufficient elaboration of this issue in the Panel Report.<sup>552</sup>

5.226. On appeal, the participants agree that the DIMD disclosed essential facts to Volkswagen AG and Daimler AG by means of the draft investigation report.<sup>553</sup> Moreover, in its appellee's submission and in response to questioning at the oral hearing, Russia referred to a letter dated 11 April 2013 sent by the DIMD to ZAO Mercedes-Benz RUS and Volkswagen Group RUS as an additional source of disclosure of essential facts.<sup>554</sup> The European Union did not refer to the additional disclosure letter in its submissions. In response to questioning at the oral hearing, the European Union indicated that it accepted that it was a letter sent by the DIMD to one of the investigated companies.<sup>555</sup> As a result, it is not clear whether the participants agree on whether the additional letter is a disclosure document.

5.227. As noted, the Panel's inquiry into the issue of whether the DIMD had to disclose the source of information concerning the import volumes and values of LCVs was limited. Having considered that sources of information in general do not constitute essential facts, the Panel did not engage further with the European Union's arguments. In these circumstances, we do not consider that there are sufficient factual findings by the Panel and uncontested evidence on the Panel record that would allow us to complete the analysis and rule on whether the DIMD had to, and in fact did, disclose the source of information concerning import volumes and values that it used in its dumping and injury determinations.

### 5.5.9 Conclusions

5.228. In relation to Russia's appeal, we note that an inconsistency under Article 6.5 of the Anti-Dumping Agreement with respect to the confidential treatment of information that constitutes essential facts may not be presumed to result in an inconsistency with the requirements that apply to essential facts under Article 6.9 of the Anti-Dumping Agreement. The inquiry under Article 6.9 is separate and distinct from the assessment under Article 6.5 of the Anti-Dumping Agreement.

<sup>548</sup> See Appellate Body Reports, *Australia – Salmon*, paras. 209, 241, and 255; *Korea – Dairy*, paras. 91 and 102; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 653; *US – Section 211 Appropriations Act*, para. 343; *EC – Asbestos*, paras. 78-79; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.135; *US – Anti-Dumping Methodologies (China)*, para. 5.164.

<sup>549</sup> See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224; *EC – Seal Products*, paras. 5.63 and 5.69; *US – Anti-Dumping Methodologies (China)*, para. 5.184; *EC – Export Subsidies on Sugar*, para. 339.

<sup>550</sup> European Union's first written submission to the Panel, paras. 430-431 (referring to Tables 3.2, 3.3, and 3.4 of the draft investigation report).

<sup>551</sup> Panel Report, para. 7.257.a and b.

<sup>552</sup> In its other appellant's submission, the European Union indicated that it "has explained, and the Panel has largely ignored, why the source of the data pertaining to import volumes and values used by the DIMD was an essential fact under consideration". (European Union's other appellant's submission, para. 199)

<sup>553</sup> Russia's and European Union's responses to questioning at the oral hearing.

<sup>554</sup> Russia's appellee's submission, para. 186 (referring to EEC Letter No. 14-176 (Panel Exhibit RUS-18)), response to questioning at the oral hearing.

<sup>555</sup> European Union's response to questioning at the oral hearing.

Regardless of whether or not the essential facts at issue were properly treated as confidential under Article 6.5, a panel must examine whether any disclosure made – including those made through non-confidential summaries under Article 6.5.1 of the Anti-Dumping Agreement – meets the legal standard under Article 6.9. We find that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement by considering that, where essential facts are not properly treated as confidential in accordance with Article 6.5, this automatically leads to an inconsistency with Article 6.9. We also find that the Panel erred in finding, in paragraph 7.269 of the Panel Report, that, "to the extent that the DIMD failed to disclose information that was not properly treated as confidential ..., it acted inconsistently with Article 6.9."<sup>556</sup> In addition, with respect to the information from the electronic customs database, we find that the Panel erred in finding, in paragraph 7.270 of the Panel Report, that, "[t]o the extent that the DIMD failed to disclose information that was not properly treated as confidential, it acted inconsistently with Article 6.9" of the Anti-Dumping Agreement.<sup>557</sup> Consequently, we reverse the Panel's findings, in paragraph 7.268, as read in light of paragraph 7.269, and in paragraphs 7.269, 7.270, and 7.278, Table 12, as well as the Panel's conclusion, in paragraph 8.1.h.ii of the Panel Report, that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of the information listed in items (d) to (o) of Table 12.

5.229. In relation to the European Union's request that we complete the analysis and find that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping, having examined the draft investigation report, we find that the DIMD acted inconsistently with Article 6.9 by failing to disclose the essential facts contained in items (d) and (f) to (o) of Table 12 in paragraph 7.278 of the Panel Report.

5.230. In relation to the European Union's appeal, we consider that not all methodologies used by an investigating authority in a particular investigation can constitute essential facts within the meaning of Article 6.9 of the Anti-Dumping Agreement. Rather, only those methodologies the knowledge of which is necessary for the participants to understand the basis of the investigating authority's decision and to defend their interests may be essential facts under Article 6.9 of the Anti-Dumping Agreement. An assessment of whether a particular methodology constitutes an essential fact should therefore be made on a case-by-case basis. Moreover, in certain circumstances, knowledge of the data itself may not be sufficient to enable an interested party to properly defend itself, unless that party is also informed of the source of such data and how it was used by the investigating authority. In particular, knowing the source of information may enable a party to comment on the accuracy or reliability of the relevant information and allow it to propose alternative sources of that information. This may be particularly important in the circumstances where the investigating authority uses data that was not submitted by an interested party, but obtained from other sources (e.g. from a customs or statistical database). Thus, in certain circumstances, the source of the data may be an essential fact under Article 6.9 of the Anti-Dumping Agreement.

5.231. We therefore find that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement concerning whether methodologies and sources of information may qualify as essential facts, as set out in paragraphs 7.256.a and 7.257.a of the Panel Report. We also find that the Panel erred in the subsequent application of its general understanding that sources of information do not constitute essential facts to the specifics of this case, as set out in paragraph 7.257.a and b of the Panel Report. Consequently, we reverse the Panel's findings, in paragraphs 7.256.a and 7.257.a and b, and the Panel's conclusions, in paragraphs 7.278, Table 12, items (a) and (b), and 8.1.h.i of the Panel Report, as they relate to items (a) and (b) of Table 12.

5.232. In relation to the European Union's request that we complete the analysis and find that, by failing to disclose the source of information concerning import volumes and values, the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement, we do not consider that there are sufficient factual findings by the Panel and uncontested evidence on the Panel record that would allow us to complete the analysis.

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<sup>556</sup> Panel Report, para. 7.269.

<sup>557</sup> Panel Report, para. 7.270.

## 6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

### 6.1 Definition of domestic industry

6.2. Article 4.1 of the Anti-Dumping Agreement provides that the "domestic industry" is composed of domestic producers of the like product. If an investigating authority were permitted to leave out, from the definition of domestic industry, domestic producers of the like product that provided, in the authority's view, *allegedly* deficient information, a material risk of distortion would arise in the injury analysis. This is because the non-inclusion of those producers could make the definition of the domestic industry no longer representative of total domestic production. We do not consider that Article 3.1 of the Anti-Dumping Agreement allows investigating authorities to leave domestic producers of the like product out of the definition of domestic industry because of *alleged* deficiencies in the information submitted by those producers. The Anti-Dumping Agreement, in particular Article 6, sets out tools to address the inaccuracy and incompleteness of information. Thus, in our view, the Panel's interpretation of Article 4.1 does not create a conflict between the obligations in Article 3.1 and Article 4.1 of the Anti-Dumping Agreement. We also do not read the Panel's interpretation of Article 4.1 as having reduced the term "major proportion" to inutility. Moreover, we do not consider that Articles 3.1 and 4.1 prevent an investigating authority from initially examining the information submitted by domestic producers before defining the domestic industry to the extent that the information collected is pertinent to defining the domestic industry. We do not consider that the Panel reached its finding solely on the basis of the fact that the DIMD reviewed the information submitted by Sollers and GAZ before defining the domestic industry. In light of the specific circumstances of this case, we find no reversible error in the Panel's interpretation and application of Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

- a. We therefore find that the Panel did not err in its interpretation and application of Articles 3.1 and 4.1 of the Anti-Dumping Agreement in finding that the DIMD acted inconsistently with these provisions in its definition of "domestic industry".
- b. Consequently, we uphold the Panel's findings in paragraphs 8.1.a and 8.1.b of the Panel Report.

### 6.2 Price suppression

6.3. In relation to Russia's appeal under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, the fact that several factors or elements could potentially influence the rate of return used to construct the target domestic price does not allow an investigating authority to disregard evidence regarding any particular factor or element that calls into question the explanatory force of dumped imports for significant price suppression under Article 3.2 of the Anti-Dumping Agreement. We thus disagree with Russia's argument that the consideration of evidence regarding factors or elements – such as, in this dispute, the financial crisis – that call into question the explanatory force of dumped imports for the existence of price suppression would lead to a biased analysis simply because there could be other factors that could also potentially affect the selected rate of return. In addition, we do not consider that the Panel's interpretation of Article 3.2 suggests that an investigating authority is required to conduct a non-attribution analysis of all known factors that may be causing *injury* to the domestic industry in the context of its price suppression analysis. The inquiries under Article 3.5 and under Article 3.2 of the Anti-Dumping Agreement have distinct focuses. The analysis under Article 3.5 focuses on the causal relationship between dumped imports and *injury* to the domestic industry. In contrast, the analysis under Article 3.2 focuses on the relationship between dumped imports and *domestic prices*.

- a. We therefore find that the Panel did not err in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement by finding that the DIMD acted inconsistently with these provisions because it failed to take into account the impact of the financial crisis in determining the rate of return used to construct the target domestic price for its price suppression analysis.

- b. Consequently, we uphold the Panel's findings in paragraphs 7.64-7.67 and 8.1.d.i of the Panel Report.<sup>558</sup>

6.4. In relation to the European Union's claims under Article 11 of the DSU, we consider that the Panel's findings concerning the DIMD's methodology, the long-term price trends, and the degree of price suppression are not coherent and consistent with the Panel's earlier finding that the manner in which the DIMD used the 2009 rate of return to determine the target domestic price was WTO-inconsistent.

- a. We therefore find that the Panel acted inconsistently with its obligations under Article 11 of the DSU.
- b. Consequently, we reverse the Panel's findings in paragraphs 7.77-7.81, 7.104-7.107, 8.1.d.iii, and 8.1.d.iv of the Panel Report.

6.5. Having found that the Panel acted inconsistently with its obligations under Article 11 of the DSU, we do not examine the European Union's conditional claim that the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the DIMD's methodology explained that the effect of the dumped imports was to suppress domestic prices. We also do not examine the European Union's request for us to complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 by failing to consider whether the dumped imports have explanatory force for the existence of significant price suppression.

6.6. In relation to the European Union's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning whether the domestic market could absorb further price increases, we consider that an investigating authority must ensure that its price suppression methodology under Article 3.2 assesses price increases "which otherwise would have occurred" in the absence of dumped imports. In addition, an investigating authority is required to consider whether dumped imports have "explanatory force" for the occurrence of significant suppression of domestic prices. Contrary to the European Union's contention, we do not read the Panel to have added a requirement to Articles 3.1 and 3.2 that interested parties must have explicitly questioned the ability of the market to absorb additional price increases for an investigating authority to be required to consider this question. Thus, in this respect, we do not find that the Panel erred in its interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. We fault the Panel, however, for having itself undertaken the assessment of relevant evidence on the DIMD's investigation record.

- a. For these reasons, we find that the Panel erred in its application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the evidence on the investigation record did not require the DIMD to examine whether the market could absorb further price increases.
- b. Consequently, we reverse the Panel's findings in paragraphs 7.87-7.91 and 8.1.d.iii of the Panel Report.
- c. Having reversed the Panel's finding at issue, we complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to examine evidence relevant to whether the market would accept additional domestic price increases.

### 6.3 Confidential investigation report

6.7. In relation to Russia's contention that, on appeal, the European Union misrepresents the arguments it made before the Panel, we consider that, before the Panel, the European Union raised the issue of whether certain parts of the confidential investigation report formed part of the

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<sup>558</sup> Having upheld these Panel findings, we do not examine Russia's conditional request concerning paragraphs 7.181-7.182 and 8.1.f.i of the Panel Report regarding the consequential inconsistency with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.



investigation record at the time the final determination to impose the anti-dumping measure was made. On appeal, the European Union faults the Panel for not having engaged with that same argument.

6.8. We recall that the confidential investigation report was submitted by Russia together with its first written submission to the Panel and that the European Union could not have been aware of the contents of the confidential investigation report before the receipt of Russia's first written submission. We note the difficulty the European Union had in the present case in obtaining and providing evidence to the Panel in support of its contention that the relevant parts of the confidential investigation report may not have formed part of the investigation record. In our view, when faced with a claim that a report, or parts of it, on the basis of which an anti-dumping measure was imposed did not form part of the investigation record, a panel has to take certain steps to assess objectively and assure itself of the validity of such report, or its parts, and whether or not it formed part of the contemporaneous written record of the investigation. In the present dispute, the Panel did not seek to assure itself that the relevant parts of the confidential investigation report formed part of the investigation record at the time the determination to impose the anti-dumping measure was made.

- a. On the basis of the above, we find that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by relying, in its examination of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, on the confidential investigation report without properly assuring itself of its validity, that is to say, of whether the relevant parts of it formed part of the investigation record at the time the determination to impose the anti-dumping measure was made.
- b. Consequently, we reverse the Panel's intermediate finding, in paragraphs 7.165 and 7.166 of the Panel Report, that it could base its analysis of the European Union's claims concerning the three injury factors under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the confidential investigation report.
- c. We also reverse the Panel's subsequent analysis, contained in paragraphs 7.166 to 7.171, and the Panel's ultimate finding, in paragraphs 7.172, 7.173.i, and 8.1.e.x of the Panel Report, that the European Union had failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to examine the three injury factors at issue, namely: (i) the domestic industry's return on investments; (ii) the actual and potential effects on cash flow; and (iii) the ability to raise capital or investments.

6.9. In relation to the European Union's request for completion of the analysis, in light of the absence on the Panel record of a discernible attempt by the Panel to assure itself of whether certain parts of the confidential investigation report formed part of the investigation record at the time the determination to impose the anti-dumping measure was made, we are not in a position to decide whether these parts of the confidential investigation report formed part of the investigation record at the time the determination was made. Accordingly, we cannot determine whether we can rely on the confidential investigation report in the assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In these circumstances, we cannot complete the analysis on the basis of the non-confidential investigation report as requested by the European Union.

#### **6.4 Related dealer**

6.10. In relation to the European Union's claim that the Panel erred in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement by finding that the DIMD was not required to evaluate the inventory information of Turin Auto in examining injury to the domestic industry, we consider that the Panel's interpretation, which is more nuanced than the European Union's arguments on appeal suggest, comports with the text of Articles 3.1 and 3.4 specifying that the injury analysis concerns all relevant factors and indices having a bearing on the state of the domestic industry. In our view, evidence concerning a related dealer that does not produce the like product and is thus not included in the "domestic industry" may be pertinent, in a particular case, to the evaluation of a relevant economic factor or index having a bearing on the



state of the domestic industry. We agree with the Panel that whether an evaluation under Article 3.4 requires a consideration of such evidence can be assessed only on a case-by-case basis. We do not consider the degree of proximity in the relationship between different entities to be dispositive, without more, of whether evidence relating to the inventory of a related dealer is pertinent to the evaluation of "inventories" for purposes of the injury analysis under Article 3.4. With respect to the application of Articles 3.1 and 3.4 to the anti-dumping investigation at issue, we find that the European Union does not have a separate and independent basis for its claim that the Panel erred in applying these provisions when analysing the injury factor "inventories" in its assessment of the state of Sollers. We agree with the Panel's finding that the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 by not considering the inventories data of Turin Auto in the investigation report.

- a. We therefore find that the Panel did not err in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.
- b. Consequently, we uphold the Panel's finding, in paragraphs 7.122, 7.123, 7.173.b, and 8.1.e.ii of the Panel Report, that the European Union had not established that the DIMD acted inconsistently with these provisions in its injury analysis by not examining inventory information of a dealer related to a domestic producer of the like product, but not itself part of the domestic industry.

## 6.5 Essential facts

6.11. In relation to Russia's appeal, we note that an inconsistency under Article 6.5 of the Anti-Dumping Agreement with respect to the confidential treatment of information that constitutes essential facts may not be presumed to result in an inconsistency with the requirements that apply to essential facts under Article 6.9 of the Anti-Dumping Agreement. The inquiry under Article 6.9 is separate and distinct from the assessment under Article 6.5 of the Anti-Dumping Agreement. Regardless of whether or not the essential facts at issue were properly treated as confidential under Article 6.5, a panel must examine whether any disclosure made – including those made through non-confidential summaries under Article 6.5.1 of the Anti-Dumping Agreement – meets the legal standard under Article 6.9.

- a. We find that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement by considering that, where essential facts are not properly treated as confidential in accordance with Article 6.5, this automatically leads to an inconsistency with Article 6.9. We also find that the Panel erred in finding, in paragraph 7.269 of the Panel Report, that, "to the extent that the DIMD failed to disclose information that was not properly treated as confidential ..., it acted inconsistently with Article 6.9."<sup>559</sup> In addition, with respect to the information from the electronic customs database, we find that the Panel erred in finding, in paragraph 7.270 of the Panel Report, that, "[t]o the extent that the DIMD failed to disclose information that was not properly treated as confidential, it acted inconsistently with Article 6.9" of the Anti-Dumping Agreement.<sup>560</sup>
- b. Consequently, we reverse the Panel's findings, in paragraph 7.268, as read in light of paragraph 7.269, and in paragraphs 7.269, 7.270, and 7.278, Table 12, as well as the Panel's conclusion, in paragraph 8.1.h.ii of the Panel Report, that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of the information listed in items (d) to (o) of Table 12.

6.12. In relation to the European Union's request that we complete the analysis and find that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement, having examined the draft investigation report, we find that the DIMD acted inconsistently with Article 6.9 by failing to disclose the essential facts contained in items (d) and (f) to (o) of Table 12 in paragraph 7.278 of the Panel Report.

6.13. In relation to the European Union's appeal, we consider that not all methodologies used by an investigating authority in a particular investigation can constitute essential facts within the

<sup>559</sup> Panel Report, para. 7.269.

<sup>560</sup> Panel Report, para. 7.270.

meaning of Article 6.9 of the Anti-Dumping Agreement. Rather, only those methodologies the knowledge of which is necessary for the participants to understand the basis of the investigating authority's decision and to defend their interests may be essential facts under Article 6.9 of the Anti-Dumping Agreement. An assessment of whether a particular methodology constitutes an essential fact should therefore be made on a case-by-case basis. Moreover, in certain circumstances, knowledge of the data itself may not be sufficient to enable an interested party to properly defend itself, unless that party is also informed of the source of such data and how it was used by the investigating authority. In particular, knowing the source of information may enable a party to comment on the accuracy or reliability of the relevant information and allow it to propose alternative sources of that information. This may be particularly important in the circumstances where the investigating authority uses data that was not submitted by an interested party, but obtained from other sources (e.g. from a customs or statistical database). Thus, in certain circumstances, the source of the data may be an essential fact under Article 6.9 of the Anti-Dumping Agreement.

- a. We therefore find that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement concerning whether methodologies and sources of information may qualify as essential facts, as set out in paragraphs 7.256.a and 7.257.a of the Panel Report. We also find that the Panel erred in the subsequent application of its general understanding that sources of information do not constitute essential facts to the specifics of this case, as set out in paragraph 7.257.a and b of the Panel Report.
- b. Consequently, we reverse the Panel's findings, in paragraphs 7.256.a and 7.257.a and b, and the Panel's conclusions, in paragraphs 7.278, Table 12, items (a) and (b), and 8.1.h.i of the Panel Report, as they relate to items (a) and (b) of Table 12.

6.14. In relation to the European Union's request that we complete the analysis and find that, by failing to disclose the source of information concerning import volumes and values, the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement, we do not consider that there are sufficient factual findings by the Panel and uncontested evidence on the Panel record that would allow us to complete the analysis.

## 6.6 Recommendation

6.15. The Appellate Body recommends that the DSB request Russia to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement and the GATT 1994 into conformity with those Agreements.

Signed in the original in Geneva this 26th day of January 2018 by:

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Hong Zhao  
Presiding Member

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Shree Baboo Chekitan Servansing  
Member

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Ujal Singh Bhatia  
Member

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