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

AB-2017-3

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS479/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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**ANNEX A**

NOTICE OF APPEAL AND OTHER APPEAL

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**ANNEX A-1****RUSSIA'S NOTICE OF APPEAL\***

1. Pursuant to Article 16.4 and Article 17.1 of the DSU, the Russian Federation hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy* (WT/DS479) ("Panel Report"). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), the Russian Federation simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

2. For the reasons further elaborated in its submissions to the Appellate Body, the Russian Federation appeals, and requests the Appellate Body to reverse or modify, certain issues of law covered in the Panel Report and legal interpretations developed by the Panel in this dispute.

3. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, the present Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation, without prejudice to the ability of the Russian Federation to refer to other paragraphs of the Panel Report in the context of its appeal.

**I. Appeal of the Panel's legal interpretation of Article 4.1 of the Anti-Dumping Agreement**

4. The Russian Federation seeks review by the Appellate Body of the Panel's interpretation of Article 4.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement").

5. The Panel's interpretation is in error, *inter alia*, because:

- the Panel erred in its legal interpretation of Article 4.1 of the Anti-Dumping Agreement by failing to take into account the requirement of "positive evidence" in the meaning of Article 3.1 of the Anti-Dumping Agreement;
- the Panel erred in its legal interpretation of Article 4.1 of the Anti-Dumping Agreement by not adhering to the principles of harmonious and effective interpretation;
- the Panel erred by finding the risk of material distortion in the injury analysis on the basis of the "sequence of events" concerning the definition of the domestic industry;
- the Panel's findings of violation of Articles 4.1 and 3.1 of the Anti-Dumping Agreement are not in conformity with Article 17.6 (ii) of the Anti-Dumping Agreement.

6. Accordingly, the Russian Federation requests the Appellate Body:

- to reverse or modify the Panel's findings in paragraphs 7.21 (b), 7.21 (c) of its Report, as well as paragraph 7.15 (c) together with the footnote 85 and paragraphs 7.27 and 7.26 (a) of its Report;
- to reverse the Panel's findings in paragraphs 7.15 (a) and 7.21 (d), 8.1 (a) of its Report.

7. If the Appellate Body finds that the Panel erred in its conclusions regarding the interpretation of Article 4.1 of the Anti-Dumping Agreement, the Russian Federation respectfully requests to reverse the findings of the Panel in paragraphs 7.16, 7.22, 7.27 and 8.1 (b) of its Report that refer to consequential violation of Article 3.1 of the Anti-Dumping Agreement.

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\* This notification, dated 20 February 2017, was circulated to Members as document WT/DS479/6

## II. Appeal of the Panel's error in interpreting and applying Articles 3.1 and 3.2 of the Anti-Dumping Agreement

8. The Panel erred in concluding 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 because the Panel erred in its application of the legal standard under Articles 3.1 and 3.2 of the Anti-Dumping Agreement to the facts before it.

9. Accordingly, the Russian Federation respectfully requests the Appellate Body to reverse the Panel's findings in paragraphs 7.64–7.67 and 8.1 (d)(i).

10. If the Appellate Body finds that the Panel erred in its legal findings related to the determination by the DIMD of the rate of return for price suppression analysis, the Russian Federation respectfully requests to reverse the findings of the Panel in paragraphs of 7.181-7.182 and 8.1 (f)(i) of its Report that refer to violation of Article 3.1 and Article 3.2 of the Anti-Dumping Agreement.

## III. Appeal of the Panel's legal interpretation of Articles 6.9 and 6.5 of the Anti-Dumping Agreement and their application to the facts of the case

11. The Panel erred in the legal interpretation and application of Article 6.9 of the Anti-Dumping Agreement in conjunction with Article 6.5 of the Anti-Dumping Agreement by finding a consequential violation of Article 6.9 of the Anti-Dumping Agreement and failing to examine how the investigating authority disclosed the essential facts at issue.

12. Accordingly, the Russian Federation requests the Appellate Body:

- to modify the Panel's legal findings with regard to the relationship between Article 6.9 and Article 6.5 of the Anti-Dumping Agreement;<sup>1</sup>
- to modify the Panel's legal findings relating to the confidential treatment of the actual figures for the actual import volumes and the weighted average import price<sup>2</sup> of LCVs produced by each German exporting producer<sup>3</sup> and find that the DIMD did not act inconsistently with Article 6.9 of the Anti-Dumping Agreement by providing the interested parties with summaries of omitted actual figures<sup>4</sup>;
- to find that the Panel erred when finding that the DIMD acted inconsistently with Article 6.9 by not providing the interested parties with (i) the actual figures for the actual import volumes and the weighted average import price of LCVs produced by each German exporting producer<sup>5</sup>; and (ii) the actual figures that show the domestic consumption and production volumes of LCVs in the CU<sup>6</sup>;
- to reverse the Panel's findings in paragraphs 7.268-7.270, 7.278 and 8.1(h)(ii) of its Report.

13. The Panel violated Article 15.2 of the DSU by adding in the final report a new legal finding in paragraph 7.270 that had not appeared in the Panel's interim report. In addition, the Panel violated Article 7 of the DSU by exceeding its terms of reference by making the legal finding in paragraph 7.270 of its Report because the conformity of confidential treatment of data from the electronic customs database was not specifically challenged by the European Union. The Russian Federation respectfully requests the Appellate Body to reverse this finding of the Panel.

<sup>1</sup> Panel Report, paras. 7.268-7.270 and 7.278.

<sup>2</sup> As well as the weighted average export price for LCVs exported by each German exporting producer into the CU.

<sup>3</sup> Panel Report, paras. 7.270 and 7.278 (including information listed in items (d), (e), (f), (i), (j) of Table 12).

<sup>4</sup> Panel Report, para. 7.278 (information listed in items (d) to (o) of Table 12).

<sup>5</sup> Ibid.

<sup>6</sup> Panel Report, paras. 7.269 and 7.278.

14. 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 because the Panel made an erroneous finding that the data from the electronic customs database were not properly treated as confidential.

15. Accordingly, the Russian Federation respectfully requests the Appellate Body:

- to modify the Panel's legal findings under Article 6.5 of the Anti-Dumping Agreement relating to the requirements to show "good cause" with respect to electronic customs database that was submitted to the DIMD under the national law and the CU law and find that under Article 6.5 of the Anti-Dumping Agreement the requirement of the "good cause" shown by the national customs authorities is fulfilled through the reference to the legislation requiring to treat the information at issue as confidential;
- to modify the Panel's legal finding that the actual import volumes and the weighted average import price of LCVs produced by each German exporting producer<sup>7</sup> were not properly treated as confidential under Article 6.5 of the Anti-Dumping Agreement<sup>8</sup>;
- to find that the Panel erred by not taking into account that the DIMD met the requirements of Article 6.9 of the Anti-Dumping Agreement by providing the interested parties with summaries of omitted actual figures for actual import volumes and the weighted average import price of LCVs produced by each German exporting producer<sup>9</sup>;
- to reverse the Panel's findings in paragraphs 7.241-7.247, insofar as these findings refer to disclosure of essential facts, paragraphs 7.269-7.270, 7.278 and 8.1(h)(ii) of its Report.

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<sup>7</sup> As well as the weighted average export price for LCVs exported by each German exporting producer into the CU.

<sup>8</sup> Including information listed in items (d), (e), (j) of Table 12.

<sup>9</sup> Panel Report, para. 7.278.

**ANNEX A-2****EUROPEAN UNION'S NOTICE OF OTHER APPEAL\***

Pursuant to Article 16.4 and Article 17.1 of the *DSU*, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy* (WT/DS479). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse or declare moot and of no legal effect the findings and conclusions of the Panel with respect to the errors of law and legal interpretations contained in the Panel Report described below, and where indicated to complete the analysis on the basis of the Panel's findings and uncontested facts on the record.<sup>1</sup>

**I. ERRORS RELATING TO THE PANEL'S FINDINGS ON THE DIMD'S INJURY DETERMINATION**

The European Union submits that the legal findings and conclusions of the Panel concerning the DIMD's injury analysis are legally erroneous and requests that the Appellate Body reverse them, specifically with respect to the following:

1. The Panel failed to make an objective assessment of the matter before it in accordance with 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 as provided by Article 17.6 of the *AD Agreement*, by basing its assessment of the EU's claims under Article 3.1 and 3.4 of the *AD Agreement* relating to three mandatory injury factors (return on investments, actual and potential effects on cash flow, and the ability to raise capital or investments) on the alleged confidential version of DIMD's Final Report. As a consequence, the Panel's finding that the EU had not established that the DIMD acted inconsistently with Article 3.1 and 3.4 of the *AD Agreement* with respect to these three injury factors is also in error. Thus, the European Union requests the Appellate Body to reverse paragraphs 7.165-7.172, 7.173(i) and 8.1(e)(x), complete the analysis on the basis of the Panel's findings and uncontested facts on the record and find that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the *AD Agreement* by failing to examine those three mandatory injury factors.

2. The Panel failed to make an objective assessment of the matter before it in accordance with Article 11 of the *DSU*, by finding that the DIMD properly considered (i) whether the price suppression was the effect of dumped imports ("explanatory force"), as well as (ii) whether the price suppression was "to a significant degree", when the Panel had already found that the DIMD's selection of the very basis of its price suppression analysis – the 2009 rate of return without any adjustments – was inconsistent with Articles 3.1 and 3.2 of the *AD Agreement*. Thus, the European Union requests the Appellate Body to reverse paragraphs 7.77-7.81, footnote 197, paragraphs 7.104-7.107, and paragraphs 8.1(d)(iii) and 8.1(d)(iv) of the Panel Report and declare the Panel's findings and conclusions on the "explanatory force" of subject imports and the "significant degree" of the price suppression moot and of no legal effect.

3. Should the Appellate Body consider that the Panel did not make a reversible error under Article 11 of the *DSU* as described in the previous paragraph, the European Union submits that the Panel failed to properly interpret and apply Articles 3.1 and 3.2 of the *AD Agreement*, when finding that the DIMD's methodology for establishing price suppression – which compares the actual domestic prices to the target domestic prices – will necessarily and automatically show that the dumped imports have "explanatory force" for the suppression of domestic prices. Thus, the

\* This notification, dated 27 February 2017, was circulated to Members as document WT/DS479/7

<sup>1</sup> Pursuant to Rule 23(2)(c)(ii)(C) of the *Working Procedures for Appellate Review* this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

European Union requests the Appellate Body to reverse the Panel's findings and conclusions in paragraphs 7.77-7.78 and 8.1(d)(iii) and complete the analysis on the basis of the Panel's findings and uncontested facts on the record by finding that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement when failing to consider whether the subject imports have "explanatory force" for the occurrence of significant price suppression.

4. The Panel erred in the interpretation and consequent application of Articles 3.1 and 3.2 of the AD Agreement when rejecting the European Union's argument that the DIMD failed to examine whether the market would accept any additional domestic price increases on the basis of a requirement that interested parties must have explicitly questioned the ability of the market to absorb additional price increases, even if there was evidence before the investigating authority of significant price increases in the past as well as significant increases in costs of production. Thus, the European Union requests the Appellate Body to reverse the Panel's findings and conclusions in paragraphs 7.87-7.91 and 8.1(d)(iii) and complete the analysis on the basis of the Panel's findings and uncontested facts on the record by finding that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement by failing to examine whether the market would accept additional domestic price increases.

5. The Panel erred in the interpretation and application of Articles 3.1 and 3.4 of the AD Agreement by finding that the DIMD was not required to examine the information about stocks provided by Turin Auto (Sollers' related trader) as part of the mandatory factors belonging to the state of the domestic industry.<sup>2</sup> The European Union requests the Appellate Body to reverse the Panel's findings in paragraphs 7.122, 7.123, 7.173(b) and 8.1(e)(ii) and declare them moot and with no legal effect.

## **II. ERRORS RELATING TO THE PANEL'S FINDINGS ON THE EU'S CLAIM UNDER ARTICLE 6.9 OF THE AD AGREEMENT**

The European Union submits that the legal findings and conclusions of the Panel concerning the disclosure of essential facts by the DIMD listed below are legally erroneous and requests that the Appellate Body reverse them, specifically with respect to the following:

1. The Panel incorrectly interpreted Article 6.9 by finding, in general terms, that a "methodology" is not a fact, or an essential fact.<sup>3</sup>
2. The Panel incorrectly interpreted Article 6.9 by finding that "not every "essential fact" is required to be disclosed", but rather that Article 6.9 applies only to those essential facts which are additionally shown to be "under consideration".<sup>4</sup>
3. The Panel incorrectly interpreted and applied Article 6.9 by finding that the source of data cannot be an essential fact under consideration, and/or that the source of the data concerning import volumes and values on which the DIMD's dumping and injury analyses were based is not an essential fact under consideration.<sup>5</sup>

With respect to these errors, the European Union requests the Appellate Body to reverse these findings, complete the analysis on the basis of the Panel's findings and uncontested facts on the record 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 AD Agreement.

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<sup>2</sup> Panel Report, paras. 7.122, 7.123, 7.173(b) and 8.1(e)(ii).

<sup>3</sup> Panel Report, para. 7.256.

<sup>4</sup> Panel Report, para. 7.256.

<sup>5</sup> Panel Report, paras. 6.42, 7.256-7.257, 7.278 and 8.1(h).

**ANNEX B**

ARGUMENTS OF THE PARTICIPANTS

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**ANNEX B-1****EXECUTIVE SUMMARY OF RUSSIA'S APPELLANT SUBMISSION<sup>1</sup>**

1. With regard to the definition of the domestic industry, the Russian Federation seeks review of paragraphs 7.15 (a), 7.15 (c) and footnote 85, paragraphs 7.16, 7.21(b), 7.21(c), 7.21(d), 7.22, 7.26(a), 7.27, 8.1(a), 8.1(b) of the Panel Report.
2. The Russian Federation is of the view that Article 4.1 of the Anti-Dumping Agreement, when read together with Article 3.1 of the Anti-Dumping Agreement, should be interpreted pursuant to customary rules of interpretation of public international law as allowing the investigating authority to redefine the domestic industry based on considerations of "objective examination" and "positive evidence" under Article 3.1 of the Anti-Dumping Agreement.
3. The Russian Federation considers that the Panel's interpretation, contrary to the principle of harmonious interpretation, generates a conflict between the obligation to properly define the domestic industry and to base the injury determination on "positive evidence" in the meaning of Article 3.1 of the Anti-Dumping Agreement. The Panel's interpretation also contradicts the principle of effective interpretation, as it appears to reduce the concept of "major proportion of total domestic production" to inutility.
4. The Russian Federation appeals the finding of the risk of material distortion in the injury analysis on the basis of the "sequence of events". First, the Anti-Dumping Agreement does not specify the precise time period when the domestic industry should be defined and when the investigating authority should make a specific determination of the domestic industry. Second, the Panel appears to ignore the fact that there was no alternative to such "sequence of events". Third, the Panel appears to focus on the *fact* of data review and ignore that it is impossible to "ensure a particular outcome", if the data in question is manifestly incorrect and deficient.
5. The Russian Federation is also of the view that the Panel's findings of violation of Articles 4.1 and 3.1 of the Anti-Dumping Agreement are not in conformity with Article 17.6(ii) of the Anti-Dumping Agreement.
6. With regard to price suppression analysis, the Russian Federation submits that the Panel's finding in paragraphs 7.64–7.67, 7.181-7.182, 8.1 (d)(i) and 8.1 (f)(i) of the Panel Report should be reversed on the grounds that the Panel erred in its legal interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The Panel concluded that the DIMD should have considered the financial crisis factor in determining the rate of return in the consideration of price suppression. According to the Panel's reading of Articles 3.1 and 3.2 of the Anti-Dumping Agreement, evidence bringing into question whether the rate of return used for constructing a counterfactual target price could be achieved in the absence of dumped imports may not be ignored by an objective and unbiased investigating authority.
7. The Russian Federation is convinced that an investigating authority does not have the obligation to consider such evidence. Absent any requirements in the Anti-Dumping Agreement to examine any factors in the price suppression analysis the focus on one or several factors in the determination of the *counterfactual* rate of return for the price suppression analysis creates the risk of biased and, consequently, non-objective analysis in breach of Article 3.1 of the Anti-Dumping Agreement. The Russian Federation believes that the rate of return for constructing counterfactual target prices should be the one that the domestic industry could have reasonably expected in the absence of the dumped imports, which should be estimated taking into account the level of profitability in the sector of the product and the economic conditions of the country rather than through the analysis of particular factors.

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<sup>1</sup> Word counts: Total word count of the executive summary (including footnotes): 895.

8. With regard to essential facts, the Russian Federation appeals the Panel's findings regarding the disclosure of essential facts in paragraphs 7.268—7.270, 7.278, 8.1(h)(ii) of the Panel Report.
9. The Russian Federation submits that the Panel erred in its interpretation of Articles 6.9 and 6.5 of the Anti-Dumping Agreement by finding a consequential violation of Article 6.9 of the Anti-Dumping Agreement and failing to examine how the investigating authority disclosed the essential facts at issue.
10. The Russian Federation considers that the Panel violated Article 15.2 of the DSU by adding in the final report a new legal finding in paragraph 7.270 that had not appeared in the Panel's interim report. The Russian Federation notes that the Panel extrapolated its legal finding made with regard to data contained in Table 11 to data from the electronic customs database without specifically reviewing whether the "good cause" was shown with respect to information from the electronic customs database.
11. In addition, the Panel exceeded its terms of reference by making the legal finding in paragraph 7.270 of its Report because the issue of conformity of confidential treatment of data from the electronic customs database was not specifically challenged by the European Union. In doing so, the Panel violated Article 7 of the DSU.
12. In any event, 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 because the Panel made an erroneous finding that the data from the electronic customs database were not properly treated as confidential. Therefore, the Russian Federation seeks review of the Panel's findings in paragraphs 7.241-7.247, insofar as these findings refer to disclosure of essential facts, paragraphs 7.269-7.270, 7.278 and 8.1 (h)(ii) of its Report.

**ANNEX B-2****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION<sup>1</sup>**

1. The European Union submits that the Panel made several reversible errors when examining the EU's claims concerning the DIMD's injury analysis and the DIMD's failure to disclose certain essential facts.
2. First, the Panel failed to make an objective assessment of the matter before it in accordance with 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 as provided by Article 17.6 of the AD Agreement, by basing its assessment of the EU's claims under Article 3.1 and 3.4 of the AD Agreement relating to three mandatory injury factors (return on investments, actual and potential effects on cash flow and the ability to raise capital or investments) on the alleged confidential Final Report. As a consequence, the Panel's finding that the EU had not established that the DIMD acted inconsistently with Article 3.1 and 3.4 of the AD Agreement with respect to its analysis of three mandatory injury factors is also in error.
3. In *Thailand - H-Beams* and *EC – Pipe or Tube Fittings*, the Appellate Body made clear that panels cannot simply accept the respondent's mere assertion that the entire content of confidential documents that emerged for the first time during WTO proceedings actually formed part of the investigation record. They must assess, and require the submitting party to show, whether that was indeed the case, through relevant explanations or evidence.
4. In this case, it was for Russia as the asserting party to demonstrate that the confidential record contained an analysis of the missing injury factors. Nevertheless, even though it should not have been required to do so, the EU put forward to the Panel a *prima facie* case that the analysis of the three injury factors may not have formed part of the investigation record. The Panel made no attempt to properly establish the facts regarding this issue. Instead, the Panel made clear that it would accept any document submitted by a WTO respondent as having formed part of the investigation record, unless the complainant positively showed that the document is not genuine. In this way, the Panel ignored the Appellate Body's guidance that a panel's assessment can only be based on facts and reasoning that formed part of the investigation record, and it created an incentive for respondents to bolster their WTO cases with new facts and reasoning *ex post*.
5. The European Union therefore requests the Appellate Body to reverse the Panel's intermediate finding that it may base its assessment of the EU's claims on the three injury factors on the alleged confidential Final Report, as well as its associated conclusion that the EU had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4, and to complete the analysis.
6. Second, the EU appeals the Panel's findings (i) on whether the price suppression was the effect of dumped imports ("explanatory force"), as well as (ii) on whether the price suppression was "to a significant degree", as inconsistent with the Panel's obligation in Article 11 of the DSU to make "an objective assessment of the facts of the case and conformity with the relevant covered agreements".
7. The Panel's findings in this respect lack consistent and coherent reasoning. Once the Panel had found that the DIMD had acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement when wrongly taking the 2009 domestic industry's profit rate as the basis to establish the domestic target price without any adjustments, the Panel could not have concluded that the DIMD's following determinations about "the explanatory force of the effects of the dumped imports" and "the significant degree of price suppression" found were appropriate.

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<sup>1</sup> Total number of words (including footnotes but excluding executive summary) = 23 921; total number of words of the executive summary = 2 142.

8. The Panel accepted the DIMD's methodology in the price suppression analysis, which was based on the gap between the actual prices and the erroneously determined target prices of domestic goods. According to the Panel, when an investigating authority constructs a target price that otherwise would have occurred in the absence of 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 dumped imports". However, the Panel erred in dismissing the European Union's arguments regarding the DIMD's failure to consider evidence pertaining to other factors on the basis of a formula that does not take into account the existence of any other factors than the actual and constructed domestic prices. This is erroneous because any application of such methodology is necessarily affected by the illegal profit rate chosen to construct the target domestic prices. Furthermore, the Panel concluded that the DIMD objectively considered whether the price suppression was "to a significant degree", referring to Table 5.2.2 of the Investigation Report that sets out both the actual and target domestic prices. Without knowing the edges of the target price, however, it was not possible for the Panel to determine whether the gap between domestic prices and any targeted price was small or big enough for Sollers to actually sell its products at a non-injurious price in view of the specific market conditions.
9. Therefore, the European Union respectfully asks the Appellate Body to reverse these findings and conclusions and declare them moot and without any legal effect.
10. Third, should the Appellate Body consider that the Panel did not make a reversible error under Article 11 of the DSU with respect to whether the price suppression was the effect of dumped imports, as well as whether the price suppression was "to a significant degree", the EU appeals the Panel's interpretation and consequent application of Articles 3.1 and 3.2 of the AD Agreement when finding that the DIMD's methodology for establishing price suppression will necessarily show that the dumped imports have "explanatory" force for the suppression of domestic prices. The Panel wrongly interprets and applies Articles 3.1 and 3.2 when approving a methodology that limits the comparison of actual domestic prices with calculated target domestic prices without any possible consideration of other factors, even though these provisions require investigating authorities to consider whether the subject imports have "explanatory force" for the price suppression. The Panel thus ignores the Appellate Body's guidance that an investigating authority is required to consider whether subject imports have explanatory force for significant suppression of domestic prices.
11. The EU argued before the Panel that the fact that the prices of dumped imports were higher than domestic prices suggests that other factors, unrelated to the dumped imports, do not support the conclusion of price suppression. The DIMD should at least have examined whether such factors put into question the "explanatory force" of the imports. Instead, it rejected the EU's arguments merely on the basis that the DIMD's methodology of comparing the actual domestic prices with the calculated domestic prices would automatically demonstrate that the imports have "explanatory force" for the domestic price effects. The European Union respectfully asks the Appellate Body to reverse these findings and conclusions of the Panel and complete the analysis, finding that the DIMD failed to examine whether the dumped imports had "explanatory force".
12. Fourth, the EU appeals the Panel's rejection of the EU's argument that the DIMD failed to examine whether the market would accept any additional domestic price increases, even if faced with evidence on the producer's very high cost of production.
13. The Panel erred in the interpretation and consequent application of Articles 3.1 and 3.2 of the AD Agreement by reading into those provisions a requirement that the interested parties must have explicitly questioned the ability of the market to absorb additional price increases. Such a requirement goes directly against the objective assessment based on positive evidence that an investigating authority is required to undertake also in the context of the price suppression analysis. When there is evidence on the record of significant price increases in the past as well as significant increases in the costs of production, the investigating authority, making an objective assessment of the facts before it, must consider whether the market will be willing to absorb further price increases. The term "evidence on the record" in this context is not limited to comments made by the interested parties. It refers to all evidence collected by the investigating authority from the exporting producers, the domestic producers and all other interested parties.

14. In any event, in the present case, without the need of this being raised specifically by interested parties during the investigation, there was ample evidence on the record questioning the ability of the market to absorb further price increases. An investigating authority cannot assume, without more, that domestic prices are able to rise to the same extent as the domestic costs. Consequently, the Panel should have concluded that the DIMD failed to examine whether the market could absorb a further increase in domestic prices, contrary to what is required under Articles 3.1 and 3.2 of the AD Agreement. By failing to do so, the Panel consequently erred in the application of Articles 3.1 and 3.2 of the AD Agreement.
15. Therefore, the European Union respectfully asks the Appellate Body to reverse these findings and conclusions and complete the analysis by finding that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement in failing to examine whether the market would accept additional domestic price increases.
16. Fifth, the European Union submits that the Panel erred in the interpretation and application of Articles 3.1 and 3.4 of the AD Agreement by finding that the DIMD was not required to examine the information about stocks provided by Turin Auto (Sollers' related trader) as part of the mandatory factors belonging to the state of the domestic industry. Indeed, the Panel adopted a very narrow interpretation of the meaning of the term "domestic industry" in Article 3.4 of the AD Agreement by excluding information relating to entities which belong to the same economic group and that had submitted the relevant Questionnaire Response. Disregarding data about the domestic industry understood as a single economic entity may risk distorting the injury analysis. Thus, the European Union requests the Appellate Body to reverse the Panel's findings in paragraphs 7.122, 7.123, 7.173(b) and 8.1(e)(ii) and declare them moot and with no legal effect.
17. Sixth, the European Union submits that the Panel incorrectly interpreted and applied Article 6.9 of the AD Agreement, and that it incorrectly concluded that the source of data is not an essential fact under consideration (both as a general proposition and, in the specific circumstances of this dispute, with respect to the source of the information concerning import volumes and values on which the dumping and injury analyses were based).
18. The Panel incorrectly interpreted Article 6.9 by finding, in general terms, that a "methodology" is not a fact, or an essential fact, as well as by finding that "not every "essential fact" is required to be "disclosed", but rather that Article 6.9 applies only to those essential facts which are additionally shown to be "under consideration".
19. Furthermore, the Panel incorrectly interpreted and applied Article 6.9 by considering that sources of data can never be essential facts under consideration, and by consequently failing to make specific findings in respect of the sources of data referred to by the EU.
20. The effective protection of interested parties' rights requires not only that they know the raw data that is used to find dumping or injury, but also *which* data was used, i.e. from which source. If the source of data is not disclosed, it may be difficult or impossible for the interested parties to comment on, contest or correct that data. In this case, Volkswagen AG and Daimler AG needed to know the source of data on import volumes and values in order to assess the data's suitability and accuracy, especially since the record of the investigation indicates, and the parties agree, that interested parties raised concerns with respect to the source and scope of that data.
21. The source of the data was an essential fact under consideration because it was a fact 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". If the investigating authority did not take the source of data into account, it could not objectively assess the data.
22. The EU requests the Appellate Body to reverse these findings and conclusions of the Panel, and to complete the analysis by finding 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 AD Agreement.

**ANNEX B-3****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION<sup>1</sup>**

1. Russia appeals the Panel's findings that the **DIMD acted inconsistently with Article 4.1 of the AD Agreement in its definition of "domestic industry" and, that, consequently, the DIMD acted inconsistently with Article 3.1 of the AD Agreement.** The European Union considers that Russia's appeal is without merit.
2. Russia's appeal under Article 4.1 does not contest any findings of fact by the Panel. Yet, Russia appeals various legal interpretations made by the Panel that are based on alternative factual findings and at times mixes the alternative findings of law and fact together as if the Panel's primary and alternative findings would be part of a single analysis. This makes responding to Russia's arguments particularly challenging.
3. Although Russia presents four overlapping arguments to challenge the findings of the Panel, the key to Russia's appeal appears to be its argument that the requirement of "positive evidence" in Article 3.1 of the AD Agreement applies as such also under Article 4.1.
4. The Panel correctly rejected Russia's "positive evidence" argument by reiterating that: (i) definition of domestic industry and the collection and use of data from that domestic industry are separate issues; (ii) data collection concerns cannot be a consideration for determining which specific producers are included in the domestic industry and which are not (iii) data collection problems can always arise in the course of an investigation, but nothing justifies the use of data problems of the kind identified by Russia as a basis for defining (or redefining) domestic industry; and (iv) assessing the data collected from domestic producers before defining the domestic industry "in itself gives rise to a risk of material distortion in the ensuing injury analysis".
5. Russia's other arguments also fail. The Panel did not fail to apply the principle of effective interpretation because the Panel correctly applied the qualitative aspect in Article 4.1 of the AD Agreement taking into account that there were only two domestic producers. Defining or redefining the domestic industry to include only the petitioner after having seen the data from the other producer cannot be compatible with Article 4.1. Further, the Panel correctly found that the sequence of events in the investigation brought about an appearance of selecting among the domestic producers based on their data and therefore there was an obvious risk of material distortion in the subsequent injury analysis. Finally, Russia argument based on Article 17.6(ii) equally fails because Russia has failed to demonstrate that its interpretation is permissible.
6. Russia appeals the Panel's conclusion that the **DIMD acted inconsistently with Articles 3.1 and 3.2 of the AD Agreement by relying on the 2009 profit rate as a basis for its calculations when examining price suppression.** If there is evidence before the investigating authority of market conditions during the selected year from which the profit rate is taken that bring into question whether that rate of return could be achieved in subsequent years under normal conditions of competition and in the absence of dumped imports, the authority may not ignore such evidence. In this case, the DIMD relied on the 2009 profit rate, a year for which it had recognised that the conditions of competition were affected by the financial crisis, during which consumers preferred the cheaper domestic light commercial vehicles.
7. First, Russia argues that, under Articles 3.1 and 3.2, the authority is not obliged to consider any evidence that questions the reasonableness of the profit rate on which it basis itself to construct the target prices.

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<sup>1</sup> Total number of words (including footnotes but excluding executive summary) = 22 548; total number of words of the executive summary = 1 905.

8. However, according to Articles 3.1 and 3.2, the investigating authority cannot make an objective examination of the price suppression effect, and conclude in an unbiased manner that there is price suppression, if the authority chose a profit rate that does not correspond to what a domestic producer can realistically and reasonably obtain in the absence of dumped imports. During the financial crisis, there was essentially no competition in the market, which enabled Sollers to get the very high profit rate in 2009. These are not "normal conditions of competition". The DIMD could not base its price suppression analysis on a profit rate that was affected by such abnormal conditions without making any adjustments.
9. Second, Russia argues that examining evidence relating to the reasonableness of the profit rate should not be part of the examination under Articles 3.1 and 3.2, but falls rather under Article 3.5.
10. However, the obligation for an investigating authority to give due account to evidence showing exceptional circumstances surrounding the high profit rate used to construct target prices does not concern alternative causes for the alleged injury. It concerns the components of the constructed prices to assess price suppression itself. Moreover, the Appellate Body has already confirmed that an authority making an objective assessment of the facts may not disregard evidence that calls into question the existence of significant price suppression, as well as evidence questioning whether subject imports have "explanatory force" for the occurrence of significant suppression of domestic prices. Hence, when there is evidence before the authority that questions the reasonableness of the components on which it bases itself to construct the target price, such a reasonable and objective investigating authority may not ignore such evidence and proceed without making any adjustments.
11. Moving on to the disclosure of essential facts, the Panel found that, **to the extent that the DIMD failed to disclose information that was not properly treated as confidential (and which amounted to essential facts), the DIMD acted inconsistently with Article 6.9.** The central argument of Russia's appeal is that there is no requirement of *proper* confidential treatment in Article 6.9. According to Russia, investigating authorities can withhold essential facts as confidential, even if no good cause is shown for confidentiality. Russia does not dispute that the facts at issue are, indeed, "essential facts". Nor does it argue that the DIMD actually disclosed those facts.
12. The Panel was correct to find that essential facts can only be withheld on confidentiality grounds if they were treated as confidential *properly*. The Panel did so by interpreting Articles 6.5 and 6.9 harmoniously, without stating that any breach of Article 6.5 will automatically entail a breach of Article 6.9. Rather, if confidential treatment cannot properly be extended to an essential fact, then that fact must be disclosed. As the Appellate Body has already found, investigating authorities' reliance on confidentiality to limit the scope of their disclosure obligations is circumscribed by the requirements of proper confidential treatment, including good cause as well as meaningful non-confidential summaries.
13. The Panel did not err by referring to its previous findings under Article 6.5 when finding that the DIMD acted inconsistently with Article 6.9. Another permissible way for a panel to proceed would be to make the factual finding that no good cause was shown when applying Article 6.9 itself, without explicitly referring back to a finding under Article 6.5.
14. Russia also argues that the Panel erred by failing to consider the summaries of "redacted actual figures" that were allegedly provided by the DIMD. The Panel did not need to make specific findings on this issue, since the absence of good cause means that there is no legal basis to properly treat essential facts confidentially. In any event, Russia's appellant submission fails to identify a single part of the Draft Report where the DIMD is supposed to have provided a meaningful summary. Moreover, the Panel implicitly found that non-confidential summaries were not provided (e.g. finding that "many of the explanations linking confidential information to alleged "summaries" in the Investigation Report were set out in the Russian Federation's submissions to the Panel, rather than having been in the submitted documents or found elsewhere in the record of the investigation"), and it is also clear on the face of the Draft Report that summaries are either totally absent or not meaningful. With respect to import volumes, weighted average import prices, domestic consumption and production values, Russia's argument that the facts at issue are confidential is irrelevant, because the Panel's findings are based on the failure to show good cause.

15. The European Union considers Russia's appeal with respect to disclosure to be without merit. Nevertheless, were the Appellate Body to agree with Russia that the Panel made a reversible error by finding that proper confidential treatment (including good cause) is a condition for relying on confidentiality in order not to disclose essential facts, the European Union conditionally requests the Appellate Body to complete the analysis and find a violation of Article 6.9 of the AD Agreement by basing itself on the absence of meaningful non-confidential summaries of the essential facts at issue.
16. With respect to Russia's appeal under Article 7.1 of the DSU, the European Union fails to see why its Article 6.9 claim against information originating in the customs database would somehow not be a part of the matter before the Panel. Even if there were flaws in the Panel's reasoning or assessment of the facts, *quod non*, this could not have the effect of removing the EU's claim against this information from the Panel's terms of reference.
17. Russia further claims that the Panel violated Article 15.2 of the DSU by inserting a paragraph that Russia itself requested in interim review. This already shows why the Appellate Body should dispense with this claim. Article 15.2 does not allow Russia to undo its interim review request, and it does not prevent a panel from modifying certain aspects of its reasoning or of its findings when requested to do so by a party (rather, it requires it to do so).
18. In any event, there is nothing objectionable with paragraph 7.270 of the Report, in which the Panel makes the straightforward finding that, with respect to the information at issue, there is no showing of good cause for confidentiality anywhere on the record, leading ultimately to an inconsistency with Article 6.9 in failing to disclose it. This information was clearly covered by the European Union's Article 6.9 claim and open for the Panel to consider.
19. Finally, Russia "seeks review", without invoking any particular provision of the covered agreements, of the Panel's finding that certain information originating in customs databases was not properly treated as confidential. This appeal fails to satisfy the requirements of Rule 20(2)(d)(ii) and Rule 21(2)(b)(i) of the Working Procedures for Appellate Review, and the European Union requests the Appellate Body to find that it is not properly before it. In the alternative, even if the Appellate Body were to examine Russia's arguments at all, it would see that this is, in all but name, an appeal under Article 11 of the DSU. Given that Russia failed to refer to Article 11 of the DSU either in its Notice of Appeal or in its Appellant Submission, the Appellate Body should refuse to rule on this part of Russia's appeal.
20. In any event, even if there was a valid appeal under Article 11, Russia has failed to show any lack of an objective assessment by the Panel. First, whether or not undisclosed essential facts at issue were confidential and why was irrelevant to the Panel's findings. Second, Russia's explanations on good cause fail to specify where the Panel (or the interested parties) could have found "references to legislation" on the record; before the Panel, Russia similarly only sought to provide *ex post* explanations; and Russia has not shown that the so-called additional disclosure letter provides good cause for confidentiality.

**ANNEX B-4****EXECUTIVE SUMMARY OF RUSSIA'S APPELLEE'S SUBMISSION<sup>1</sup>****A. ARTICLE 11 OF THE DSU AND ARTICLE 17.6 OF THE ANTI-DUMPING AGREEMENT****1. The Panel did not violate Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by relying on the confidential Report with respect to the DIMD's analysis of three mandatory injury factors**

1. The Russian Federation submits that the Panel did not violate Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by relying on the confidential version of the Report with respect to the DIMD's analysis of the three mandatory injury factors.
2. First, the European Union misrepresents its arguments during the Panel proceedings. In light of the arguments actually made by the European Union before the Panel, the threshold issue to be examined by the Panel was whether the absence of indications in the published Report that a certain analysis was made could preclude the Panel from considering certain parts of the confidential version of the Report in its analysis of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.
3. Second, since Article 3.1 contains a *substantive* requirement and there are specific provisions of the Anti-Dumping Agreement designed to address the concerns regarding the absence of certain indications in the published report, the Panel was correct to conclude that there was no basis for the proposition that it may not base its assessment of the European Union's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the confidential version of the Report.
4. Third, the European Union is wrong in arguing that in *EC — Tube or Pipe Fittings* the Appellate Body set a standard as to how WTO panels must proceed in cases where respondents submit confidential documents as part of the investigation record during the panel proceedings.
5. Fourth, it was at the discretion of the Panel whether to ask questions to the Russian Federation in respect of the confidential version of the Report. In light of the arguments put forward by the parties and the discussion that took place during the Panel proceedings, there were no reasons for the Panel to seek clarifications from the Russian Federation.
6. As regards the European Union's request for completion of the analysis, the undisputed facts on the panel record, even if considered sufficient to complete the analysis, provide no basis to question whether the confidential version of the Report formed part of the investigation record.

**2. The Panel did not violate Article 11 of the DSU in its findings regarding price suppression analysis**

7. The Russian Federation is convinced that the Panel did not violate Article 11 of the DSU in its findings regarding the "explanatory force" of the dumped imports for price suppression, and the "significant degree" of price suppression. The Panel decided that the European Union did not *establish* that: a) the DIMD's consideration of whether the subject imports have "explanatory force" for the occurrence of price suppression of domestic prices was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and b) the DIMD did not demonstrate that the alleged price suppression was "to a significant degree" because the DIMD did not compare the estimated prices and the actual prices for the domestic like product. Therefore, the European Union did not comply with the standard of the burden of proof which is on the complaining party. The European Union did not show in its Other Appellant Submission why and where the assessment of facts by the Panel was not

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<sup>1</sup> Word counts: Total word count of the executive summary (including footnotes): 1670.

objective and, consequently, why, in its own view and contrary to the Panel's findings, the European Union did *establish* that the DIMD was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in its consideration of explanatory force and significance of price suppression. The arguments of the European Union are based on the wrong interpretation of the Panel's finding with regard to the determination of appropriate rate of return for the price suppression analysis because, first, the Panel did not decide that 2009 rate of return is WTO-inconsistent and should be rejected as a benchmark for the target domestic prices and, second, the reasoning of the Panel did not rely on the target domestic prices calculated by the DIMD.

**B. THE PANEL DID NOT ERR IN ITS INTERPRETATION AND APPLICATION OF ARTICLES 3.1 AND 3.2 OF THE ANTI-DUMPING AGREEMENT**

8. The Russian Federation believes that the Panel did not err in its legal interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement by finding that price undercutting does not preclude the finding of the price suppression and that in accordance with Article 3.2 of the Anti-Dumping Agreement 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. The European Union gives misleading interpretation of the Panel's findings by stating that, according to the Panel, there is no further need to examine whether the subject imports have "explanatory force" for the price suppression because the methodology of the DIMD itself establishes that the price suppression is the effect of the dumped imports.
9. The Russian Federation maintains that the Panel did not err in its legal interpretation and application of Article 3.1 and Article 3.2 of the Anti-Dumping Agreement by finding 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. The European Union provides perverse interpretation of the Panel's findings by stating that the Panel rejected the European Union's arguments on the basis of a requirement that interested parties would have had to explicitly question the ability of the market to absorb additional price increases and that the Panel ignored the evidence before the investigating authority of significant price increases in the past as well as significant increases in costs of production.

**C. THE PANEL DID NOT ERR IN ITS INTERPRETATION AND APPLICATION OF ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT**

10. The Russian Federation submits that the Panel did not err in its legal interpretation and application of Article 3.4 of the Anti-Dumping Agreement since it correctly interpreted the obligations of the investigating authority under Articles 3.1 and 3.4 of the Anti-Dumping Agreement in accordance with the customary rules of interpretation of public international law. The ordinary meaning of the terms constituting Articles 3.1 and 3.4 of the Anti-Dumping Agreement in their context demonstrates that the domestic industry refers only to "domestic producers of the like product" that "bring into existence the like product".<sup>2</sup> Indeed, Article 3 of the Anti-Dumping Agreement explicitly limits the injury determination to the domestic industry, as defined. Therefore, nothing in Article 3 of the Anti-Dumping Agreement may support a proposition of the European Union that the investigating authority is generally required under Articles 3.1 and 3.4 of the Anti-Dumping Agreement to analyse data of entities that do not "bring into existence the like product" and, consequently, cannot form part of the domestic industry, as defined under Article 4.1 of the Anti-Dumping Agreement.
11. In addition, the Panel's interpretation cannot be considered as a narrow interpretation that excludes the possibility of examination of inventories pertaining to a related trader. Rather, the Panel indicated that "in certain circumstances, evidence pertaining to such a related trader may constitute evidence pertaining to "a relevant economic factor[]" having a bearing on the state of the industry such that an investigating authority is required to evaluate it".<sup>3</sup>

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<sup>2</sup> See Panel Report, *Mexico — Olive Oil*, para. 7.192.

<sup>3</sup> Panel Report, para. 7.122.

**D. THE PANEL DID NOT ERR IN ITS INTERPRETATION AND APPLICATION OF ARTICLE 6.9 OF THE ANTI-DUMPING AGREEMENT**

12. With regard to essential facts, the Russian Federation considers that the Appellate Body should uphold the Panel's finding that the source of the information concerning import volumes and values is not an essential fact under consideration and it must not be disclosed to interested parties in accordance with Article 6.9 of the Anti-Dumping Agreement.
13. The Russian Federation notes that arguments raised by the European Union in its Other Appellant Submission are beyond the scope of the appellate review under Article 6.9 because they were not made before the Panel. The Russian Federation states that in order to assess new arguments of the European Union, the Appellate Body would have to solicit, receive and review new facts and evidence from the parties.
14. In the Russian Federation's view, the Panel's interpretation of Article 6.9 does not contradict to the Appellate Body's interpretation in *China — GOES* because the Panel stated that the source of data was a fact under consideration, but was not an *essential fact* under consideration. The Russian Federation considers that, in itself, the source of data in the present case (i) does not form the basis for the decision to apply definitive measure and is not salient for a contrary outcome, (ii) does not ensure the ability of interested parties to defend their interest and (iii) was not an obstacle for an interested party to comment on the completeness and correctness of the investigating authorities' conclusions.
15. The Russian Federation underlines that the European Union mischaracterizes the Panel's finding under Article 6.9 concerning methodologies. In the Russian Federation's view, the Panel did not find that a methodology can in no case constitute an essential fact under consideration. Therefore, the European Union's claim that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement lacks merit.

**E. CONCLUSION**

16. The Russian Federation submits that the European Union has failed to establish that the Panel violated Article 11 of the DSU and erred in its interpretation and application of the Anti-Dumping Agreement, as challenged by the European Union.
  17. In light of the preceding observations, the Russian Federation requests the Appellate Body to reject in their entirety the European Union's claims in its Other Appellant Submission and Notification of an Other Appeal and uphold the Panel's findings covered by the European Union's claims.
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**ANNEX C**

ARGUMENTS OF THE THIRD PARTICIPANTS

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## ANNEX C-1

### EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION<sup>1</sup>

Brazil will focus on two specific findings of the Panel Report related to the following aspects: (i) price suppression under Article 3.2 of the Anti-dumping Agreement; and (ii) the definition of domestic industry.

I. With regard to the first issue, Brazil would like first to address the Panel's decision regarding the requirements set forth in Articles 3.1 and 3.2 of the AD Agreement, concerning the methodology for establishing whether subject imports have "explanatory force" for the occurrence of significant price suppression of domestic prices. An authority shall not restrict its consideration to the comparison between actual domestic price and target domestic price, therefore, an investigating authority is exempt from the responsibility to derive an understanding of the impact of subject imports on the domestic prices when considering the occurrence of price suppression under Article 3.2.

II. With regard to the second, Brazil would like to express its concern regarding manner in which an investigating authority defines its domestic industry will have a profound impact in the injury analysis set forth by Article 3. Brazil understands that an investigating authority needs to inspect questionnaire replies in order to ensure that it can work with such data in terms of formal aspects, completeness and accuracy. The requirement that the domestic industry data be reliable and trustworthy can only be met *after* assessing the questionnaire. Therefore, this practice cannot be considered to be biased by this sole reason.

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<sup>1</sup> Word count: 235 words.

**ANNEX C-2**

**EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION<sup>1</sup>**

1. As indicated by the phrases "the effect of the dumped imports" and "which otherwise would have occurred" in Article 3.2, and pursuant to the obligation to objectively examine injury under Article 3.1, an investigating authority must examine factors other than subject imports that may explain the observed price suppression for considering whether the dumped imports have "explanatory force" for the price suppression.
2. The phrase "a major proportion" in Article 4.1 requires that the producers included in the domestic industry definition "substantially reflect[] the total domestic production", so that the injury determination is not distorted or skewed. Moreover, an investigating authority must not cherry-pick evidence in defining the domestic industry, in light of its obligation to objectively examine injury under Article 3.1. In a case where there are only two known domestic producers of the like product, an investigating authority should be very careful in defining the domestic industry as consisting of only one of them, because it may give rise to a material risk of distortion.
3. A panel's examination of an investigating authority's conclusions "must be critical and searching and be based on the information contained in the record and the explanations given by the authority in its published report". Thus, should there be a question as to whether a particular document submitted during the panel proceedings formed part of the investigation record, the panel must take steps to ensure the validity of evidence under Article 11 of the DSU and Article 17.6 of the AD Agreement.

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<sup>1</sup> Total number of words = 250 words.

### ANNEX C-3

#### EXECUTIVE SUMMARY OF UKRAINE'S THIRD PARTICIPANT'S SUBMISSION

1. Ukraine focused its participation in these proceedings on main aspects considered in its Third Party Submission and therefore appreciates the opportunity to provide its views on the facts and arguments as a third party in this dispute.
2. The findings referred in the Panel report in this dispute will have important impact for the proper way in which the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter "the Anti-Dumping Agreement") is interpreted and applied in further disputes. Thus, in Ukraine's written submissions, we addressed certain issues of systemic concern regarding the interpretation and application of the Anti-Dumping Agreement.
3. Ukraine considers that one of the main issues stressed in this dispute is the correct interpretation of definition of the domestic industry under Articles 3.1 and 4.1 of the Anti-Dumping Agreement.
4. Therefore, the interpretation of definition of the domestic industry must be in the way that it enables the authority to make an objective examination of the impact of the dumped imports 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.
5. Obligations of Article 3.1 shall include the analysis of the domestic industry under Article 4.1. Therefore Article 3.1 should be read in conjunction with Article 4.1 of the Anti-Dumping Agreement.
6. Ukraine agreed with conclusion referred in the Panel report that when an investigating authority makes injury and causation determination on the basis of information related to an improperly defined domestic industry, it acts inconsistently with various provisions of Article 3 of the Anti-Dumping Agreement.
7. We appreciate attention of the Appellate body and look forward to further resolve of this dispute.

## ANNEX C-4

### EXECUTIVE SUMMARY OF THE UNITED STATES THIRD PARTICIPANT'S SUBMISSION

#### 1 ARTICLES 4.1 AND 3.1 OF THE AD AGREEMENT<sup>1</sup>

1. Article 4.1 is subject to only two exceptions. There is no basis for inferring an additional exception to Article 4.1 based on the quality of the data submitted by certain producers. Article 3.1 does not support the exclusion of producers from the domestic industry based on such deficiencies. Article 3.1 sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. Article 4.1 should be read in context with Article 3.1, but Article 3.1 does not set out an exception to Article 4.1.

2. Nor does Article 3.1 suggest that the definition of the domestic industry hinges on the quality of the evidence submitted by domestic producers. If a producer submits deficient data, the authority could disregard the data in its injury analysis, on the basis that the data does not constitute positive evidence.

3. Neither Article 4.1 nor Article 3.1 of the AD Agreement mandates the precise order of analysis suggested by the Panel. Article 3.1 does not address timing and sequencing with respect to the definition of the domestic industry. In establishing the timing and sequencing of the investigation, an authority must not compromise the objectivity of the injury determination.

4. In some cases, an authority's decision to collect and assess evidence before defining the domestic industry may be relevant in determining whether the authority complied with Article 3.1. But the United States is not persuaded that collecting and reviewing data before defining the domestic industry is *per se* contrary to Article 3.1. Likewise, an authority may "redefine" the domestic industry after collecting and analyzing evidence.

#### 2 ARTICLE 3.2 OF THE AD AGREEMENT

5. Article 3.2 must be considered in conjunction with the overarching obligations of Article 3.1. Article 3.2 requires that an authority "consider" the volume and price effects of the relevant imports. Article 3.2 does not prescribe a particular methodology or set of factors that must apply in a price effects analysis. In some cases, constructing a hypothetical target price may be a useful analytic tool. But the text of Articles 3.2 and 3.1 does not suggest that authorities are required to construct hypothetical prices in every case.

6. The United States does not view the Panel as having conflated the price effects analysis under Article 3.2 with the causation inquiry under Article 3.5. In conducting its determination under Article 3, an authority may find that certain facts or events are relevant at multiple stages of the injury analysis.

#### 3 ARTICLE 3.4 OF THE AD AGREEMENT

7. The inquiry under Article 3.4 is not limited to an evaluation of factors such as "inventories" that are expressly enumerated. The list of enumerated factors is not exhaustive, and no one factor is necessarily decisive. In an appropriate case, an authority may need to evaluate additional factors in its analysis under Article 3.4. Such factors could include information pertaining to entities that are related to producers within the domestic industry. The manner in which an authority chooses to articulate the evaluation of these economic factors may vary.

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<sup>1</sup> Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 833 words (including footnotes), and the U.S. Third Participant Submission contains 8,346 words (including footnotes).

#### **4 ARTICLES 6.5 AND 6.9 OF THE AD AGREEMENT**

8. The Panel's apparent attempt to distinguish "essential facts" from "essential facts under consideration" misconstrues the nature of the inquiry under Article 6.9. The term "essential" implies that a subset of the facts before the investigating authority needs to be disclosed under Article 6.9. The term "essential facts under consideration" is properly understood in relation to the other terms of Article 6.9.

9. The Panel erred in finding that a source of data cannot constitute an "essential fact" for purposes of Article 6.9. The assessment of what qualifies for disclosure depends on the facts of a given case. Without a full disclosure of the essential facts under consideration, it would not be possible for a party to identify mathematical or clerical errors or even whether the investigating authority collected probative evidence. In a given case, the source of data may be an important fact that a party needs to defend its interests.

10. Articles 6.5 and 6.9 are distinct obligations. Article 6 of the AD Agreement balances the protection of confidential information with the right of parties to be given a full and fair opportunity to see relevant information and defend their interests. Article 6.5 requires that investigating authorities ensure the confidential treatment of information. By contrast, Article 6.9 imposes a disclosure obligation. Articles 6.5 and 6.9 have a different scope of application, such that failure to comply with the requirements of Article 6.5 need not always trigger a breach of Article 6.9.

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**ANNEX D**

PROCEDURAL RULINGS

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**ANNEX D-1****PROCEDURAL RULING OF 4 MARCH 2017**

(corrected)

1. On Friday, 24 February 2017, the Chair of the Appellate Body received a communication from the United States requesting that the Division hearing this appeal modify the deadline for the filing of third participants' submissions in this appeal. In its letter, the United States noted that the Working Schedule set the date for the submission of appellees' submissions as Friday, 10 March 2017, and the date for the filing of the third participants' submissions as Monday, 13 March 2017. The United States highlighted that this allowed third participants only one working day to consider and react to the appellees' submissions in their third participants' submissions. The United States requested the Division to extend the deadline for the filing of the third participants' submissions to 15 March 2017, and thus to provide third participants with three full working days following the deadline for submission of the appellees' submissions.
2. On 27 February 2017, and on behalf of the Division hearing this appeal, the Chair of the Appellate Body invited Russia and the third participants in this dispute to comment in writing on the communication from the United States by 12:00 noon on Wednesday, 1 March 2017. The European Union and Brazil indicated that they did not object to United States' request.
3. On 1 March 2017, the Appellate Body received a communication from Russia requesting that the Division hearing this appeal extend the deadline of Friday, 10 March 2017 for the filing of the appellees' submissions in this appeal. In its letter, Russia requested that the Division provide the appellees an extra day to file their submissions, given that Wednesday, 8 March 2017 is a public holiday and therefore a non-working day in Russia. Russia added that, because the deadline fell on a Friday, the deadline should be extended until the following working day, i.e. Monday, 13 March 2017. In its letter, Russia further indicated that it did not object to the United States' request of 24 February 2017 requesting an extension of the deadline for filing third participants' submissions. Russia suggested that, if its request were to be granted, the Division could also extend the deadline for filing third participants' submissions to Thursday, 16 March 2017.
4. On 1 March 2017, and on behalf of the Division hearing this appeal, the Chair of the Appellate Body invited the European Union and the third participants in this dispute to comment in writing on the communication from Russia by 12:00 noon on Friday, 3 March 2017.
5. On 3 March 2017, the Appellate Body received a letter from the European Union commenting on Russia's request. Referring to Rule 16(2) of the Working Procedures for Appellate Review (the Working Procedures), the European Union expressed difficulty understanding "how a single public holiday" could constitute an "exceptional circumstance", such that "strict adherence to [the deadline specified in the Working Procedures] would result in a manifest unfairness", within the meaning of Rule 16(2). The European Union considered this to be all the more so given that Russia had itself created the circumstance in question by filing its appeal on a date that, through the operation of the Working Procedures, "necessarily leads to" the period for the preparation of its appellee's submission covering the relevant public holiday. Notwithstanding these comments, the European Union made its own request to extend the deadline for the filing of the appellees' submissions to Tuesday, 14 March 2017. In support of this request, the European Union highlighted constraints in preparing its own appellee's submission "due to significant overlaps between the timetables in several pending cases where members of the EU's legal team are involved".<sup>1</sup> The European Union further suggested a "consequential extension" of the deadline for the filing of the third participants' submissions from Monday, 13 March 2017 to 17 March 2017.
6. On 3 March 2017, the Chair of the Appellate Body received a communication from the United States indicating that the United States had no objection to either the request by Russia or

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<sup>1</sup> The European Union referred, in particular, to its participation in the oral hearing in the appeal in *US – Anti-Dumping Methodologies (China)*(DS471), and in the second panel meeting in *EU – Energy Package* (DS476), as well as to the meetings of the panel with the third parties and the deadlines for the filing of third party submissions in the panel proceedings in *Korea – Pneumatic Valves* (DS504) and *US – Supercalendered Paper* (DS505).

the request by the European Union. Referring to Rule 16(2) of the Working Procedures, the United States expressed the view that "extending a deadline that otherwise falls on a public holiday or over a period that is exceptionally busy for a party would justify modifying a time period in order to avoid manifest unfairness". The United States further noted that no date had yet been set for the oral hearing in this appeal, and that the Appellate Body has informed Members that it expects delays in the issuance of its reports for current and upcoming appeals. Pointing to the 90-day limit specified in Article 17.5 of the DSU, the United States expressed the view that exceptional circumstances would exist if the Appellate Body were to consider that it would not be able to issue its report within that deadline. The United States added that, conversely, if granting the extensions sought by Russia and the European Union were to result in the Appellate Body not being able to comply with the 90-day deadline, then this would provide a basis for declining such requests.

7. We are thus faced with three separate requests for extension of the time-periods set out in the Working Schedule for this appeal. The factors identified as warranting these requests are: (i) the need for the United States, as third participant, to have three full working days in order to consider and react to the positions presented in the appellees' submissions in its third participant's submission; (ii) the fact that 8 March, two days before the deadline for the filing of the appellees' submissions, is a public holiday and non-working day in Russia; and (iii) significant overlaps in a number of panel and appeal proceedings involving the European Union. In reaching our ruling, we take account of these factors, the need for due process, and the interests of orderly procedures in appeal proceedings. We are mindful of Members' need for sufficient time to review other submissions received in an appeal and to take due account of such submissions in preparing their own written submissions, as well as of the burdens associated with involvement in multiple dispute settlement proceedings with overlapping timetables. We take note of the fact that the various requests received are not at odds with each other, and that no explicit objection has been raised to any of the three requests. Lastly, we are of the view that the extensions requested by the United States, Russia, and the European Union are unlikely to have a meaningful impact on the scheduling of the oral hearing in, or the overall duration of, these appeal proceedings.

8. In light of the above considerations, the Division takes the following decision pursuant to Rule 16(2) of the Working Procedures. The Division decides to extend the time-period for Russia and the European Union to file their appellees' submissions, under Rule 23(4) of the Working Procedures, to Tuesday, 14 March 2017. The Division further decides to extend the deadline for filing third participant's submissions and notifications under Rule 24(1) and (2) of the Working Procedures to Friday, 17 March 2017. The revised Working Schedule is attached to this Ruling.

**ANNEX D-2****PROCEDURAL RULING OF 7 NOVEMBER 2017**

1.1. By letter dated 23 October 2017, the Russian Federation (Russia) and the European Union jointly requested that the Appellate Body adopt additional procedures for the protection of business confidential information (BCI) in these appellate proceedings.

1.2. In their joint request, the participants sought BCI protection for any information that was submitted by the participants as BCI in the context of the Panel proceedings, as well as any information that was treated as such by the Panel, including in its Report. The participants explained that their submissions to the Panel, as well as the Panel Report, contain sensitive commercial data, such as sales and production data, financial information, and expenses for the individual companies. According to the participants, any disclosure of such data could reasonably be expected to have an adverse impact on the competitive interests of the companies that submitted the information. The participants also suggested the inclusion, in the additional procedures, of a provision concerning the resolution of any potential disagreement between the participants as regards the BCI designation of any information.<sup>1</sup>

1.3. On 25 October 2017, the Appellate Body Division hearing this appeal 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. The United States asserted that such a provision would have no practical value and, if applied, would only serve to delay these appellate proceedings. The United States also expressed doubts as to the consistency of such a provision with the Appellate Body's mandate to consider issues of law and legal interpretation. The United States noted that there is no appeal of any treatment of BCI by the Panel and no new evidence may be submitted to the Appellate Body. Finally, the United States explained that an interested party may agree to provide BCI to a Member for submission in a WTO panel proceeding based on the understanding that this information would be accorded BCI protection. If the Appellate Body were to disagree with a panel's previous BCI designation, and the information were later disclosed, this would, in the United States' view, prejudice the interests of both the interested party that provided the information and the Member. No other third participant commented on the joint request.

1.4. We recall that the provisions of Articles 17.10 and 18.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), as well as those set out in paragraph VII:1 of the Rules of Conduct for the DSU, apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding.<sup>2</sup> Nonetheless, as the Appellate Body has observed, these confidentiality requirements are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect adequately the confidentiality of that information.<sup>3</sup>

1.5. While it is for the participants to request and justify the need for additional protection of confidential information, it is for the Appellate Body, pursuant to Article 17.9 of the DSU and Rule 16(1) of the Working Procedures for Appellate Review<sup>4</sup> (Working Procedures), to determine on the basis of objective criteria whether the information submitted by the participants deserves

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<sup>1</sup> The joint request proposed the following wording for this provision:

In the event that any participant or the Appellate Body *ex officio* disagrees with the designation as BCI of any information qualified as such by any participant (either before or during the appellate proceedings), the Appellate Body shall decide on whether such information should be treated as BCI after hearing their views.

<sup>2</sup> Appellate Body Reports, *Brazil – Aircraft*, para. 123; *Canada – Aircraft*, para. 145.

<sup>3</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.1; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.315; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8.

<sup>4</sup> WT/AB/WP/6, 16 August 2010.

additional protection, as well as the degree of protection that is warranted.<sup>5</sup> As the Appellate Body stated in *EU – Fatty Alcohols (Indonesia)*, any additional procedures adopted by the Appellate Body to protect sensitive information must conform to the requirement in Rule 16(1) of the Working Procedures that such procedures not be inconsistent with the DSU, the other covered agreements, or the Working Procedures themselves.<sup>6</sup> Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. The measures should go no further than required to guard against a determined risk of harm that could result from disclosure.<sup>7</sup> Moreover, the Appellate Body must ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudicative process, the participants' due process rights, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other hand.<sup>8</sup> In addition, whether information treated as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the WTO panel.<sup>9</sup> Similarly, whether such information should be accorded BCI treatment on appeal is to be determined by the Appellate Body.

1.6. When additional procedures to protect BCI are adopted, the Appellate Body has to adjudicate any dispute that may arise under those procedures regarding the treatment of information as business confidential.<sup>10</sup> In this regard, we recall the Appellate Body's observation that the question of whether information warrants BCI protection may evolve over the course of dispute settlement proceedings. Thus, while the fact that a domestic investigating authority and a panel granted BCI protection to the information at issue is relevant, it is not dispositive as to whether that information still warrants BCI protection at the appellate review stage.<sup>11</sup> Hence, whether information submitted under the confidentiality requirements generally applicable in WTO dispute settlement should receive additional confidential treatment as BCI is to be determined in each case by the WTO adjudicator. The assessment of whether any information warrants additional protection is an issue of legal characterization.

1.7. Turning to the case before us, we note that on 14 January 2016, following consultations with the parties, the Panel adopted Additional Working Procedures Concerning Business Confidential Information (Panel's BCI Procedures).<sup>12</sup> The first paragraph of those procedures defined BCI as:

- a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for

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<sup>5</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.2; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 10 and 15.

<sup>6</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.3; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8.

<sup>7</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.3; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 9.

<sup>8</sup> Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15; *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.3; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3.

<sup>9</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.316.

<sup>10</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.3; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311.

<sup>11</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.10.

<sup>12</sup> Panel Report, para. 1.8.c. The Panel's BCI Procedures are contained in Annex A-2 of the Addendum to the Panel Report.

purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3<sup>13</sup> below.

- b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.<sup>14</sup>

1.8. The Panel's BCI procedures set out how the parties, third parties, and the Panel would treat BCI in the course of the Panel proceedings. Pursuant to those procedures, the Panel redacted certain BCI from the version of its Report that was circulated to WTO Members on 27 January 2017.

1.9. On 20 February 2017, Russia appealed certain issues of law and legal interpretations covered in the Panel Report. On 27 February 2017, the European Union filed the Notice of Other Appeal and other appellant's submission. On 14 March 2017, the European Union and Russia each filed an appellee's submission. On 17 March 2017, Brazil, Japan, Ukraine, and the United States each filed a third participant's submission. We observe that the European Union refers to information that was treated by the Panel as BCI in its other appellant's submission and Russia's appellant's and appellee's submissions refer to Panel exhibits that contain BCI. We are also cognisant that the participants or third participants may refer to the information treated by the Panel as BCI in any further communication, including at the hearing. We note that the participants' joint request is limited to extending the treatment accorded by the Panel to BCI to the appellate stage.

1.10. The participants justify their joint request on the grounds that the information in respect of which they seek additional protection concerns sensitive commercial data from individual companies and that any disclosure of such data could reasonably be expected to have an adverse impact on the competitive interests of the companies submitting the information. The Appellate Body has identified "the degree of potential harm in the event of disclosure", as an objective criterion that may be examined in determining whether the information submitted by participants deserves additional protection.<sup>15</sup> In this regard, we consider it significant that the participants agree that the disclosure of the information in question could harm the competitive interests of the companies that submitted the information. Likewise, we consider it relevant that the information covered by the joint request was treated as BCI in the Panel proceedings.

1.11. With respect to the due process rights of the third participants, we note that the procedures proposed by the participants contemplate providing the third participants with access to all the confidential information. Thus, according additional protection to the information in question would not undermine the rights of the third participants. As regards the systemic interests of the WTO Membership at large, we recognise that all Members have a right to access reasoning that discloses the basis for our findings and conclusions in a manner that is understandable.<sup>16</sup> Any procedures to protect the confidentiality of the sensitive information in this dispute should be

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<sup>13</sup> Paragraph 3 of the Panel's BCI Procedures provided that:

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

<sup>14</sup> The Panel's BCI Procedures are contained in Annex A-2 of the Addendum to the Panel Report.

<sup>15</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.2 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15).

<sup>16</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.8; *Japan – DRAMS (Korea)*, para. 279.

compatible with this right and should go no further than necessary to guard against the potential risk of harm identified by the participants.<sup>17</sup>

1.12. For the above reasons, and in light of the previous rulings by the Appellate Body on the issue of additional protection of BCI, we have decided to accord additional protection to the information that the Panel treated as BCI in its Report and in the Panel record. The additional protection for BCI in these appellate proceedings is provided according to the following terms, bearing in mind that the participants and third participants have already filed their written submissions:

- a. No person may have access to information that qualifies as BCI for purposes of these appellate proceedings, except a member of the Appellate Body or the staff of the Appellate Body Secretariat, an employee of a participant or third participant, or an outside advisor for the purposes of this dispute to a participant or third participant. Nonetheless, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the underlying anti-dumping investigation in this dispute.
- b. A participant or third participant having access to BCI shall treat it as confidential, and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant and third participant shall have responsibility in this regard for its employees as well as for any outside advisors employed for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.
- c. A participant or third participant that submits a document containing BCI to the Appellate Body after the adoption of these BCI procedures shall clearly identify such information in the document filed, placing the BCI within double brackets, as follows: [...]. The participant or third participant shall also mark the cover and/or first page of the document containing BCI. Submissions filed prior to the adoption of these BCI procedures will not be marked retroactively.
- d. A participant or third participant that intends to make an oral statement at the hearing containing BCI shall inform the Division in advance, such that the Division can ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. At the hearing, the participant or third participant shall clearly identify the elements of such oral statement that constitute BCI.
- e. The Appellate Body will not disclose BCI, in its Report or in any other way, to persons not authorized under these procedures to have access to BCI. The Appellate Body may, however, make statements of conclusion drawn from that information.
- f. Before circulating its Report to the Members, the Appellate Body will decide whether to adopt further modalities, for example to verify the treatment of certain information as BCI, and to ensure that both the non-disclosure of BCI in the Report to be circulated and the analysis and findings set out in that Report can be readily understood notwithstanding the redaction of any BCI.

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<sup>17</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.9; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311.