



**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.

LIST OF ANNEXES**ANNEX A**

NOTICES OF APPEAL AND OTHER APPEAL

Contents		Page
Annex A-1	Russia's Notice of Appeal	A-2
Annex A-2	European Union's Notice of Other Appeal	A-5

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of Russia's appellant's submission	B-2
Annex B-2	Executive summary of the European Union's other appellant's submission	B-4
Annex B-3	Executive summary of the European Union's appellee's submission	B-7
Annex B-4	Executive summary of Russia's appellee's submission	B-10

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS



ANNEX A

NOTICE OF APPEAL AND OTHER APPEAL

Contents		Page
Annex A-1	Russia's Notice of Appeal	A-2
Annex A-2	European Union's Notice of Other.013 Tc [(')-12.6 oAppeal	

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.

* 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;¹
- 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 price² of LCVs produced by each German exporting producer³ 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 figures⁴;
- to find that the Panel erred when finding that the DIMD acted inconsistently with Article 6.9 by not provid[(6s2-(.)108i0 0.298 Tw -41.17 (d (y)11.4 (pg6r)6.3 (3)12.3 (s (p)15t

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 producer⁷ were not properly treated as confidential under Article 6.5 of the Anti-Dumping Agreement⁸;
- 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 producer⁹;
- 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.

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

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

⁹ Panel Report, para. 7.278.

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.² 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.³
2. The Panel incorrectly interpreted Article 6.9 by finding that "not every "essential fact" is required to be disclosed"

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

Contents

Page RR TPae RNT Rb70

ANNEX B-1

EXECUTIVE SUMMARY OF RUSSIA'S APPELLANT SUBMISSION¹

1.

ANNEX B-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION¹

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 on an'

8. The Panel accepted the DITDbpth

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 t

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

ANNEX B-4

EXECUTIVE SUMMARY OF RUSSIA'S APPELLEE'S SUBMISSION¹

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.

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".² 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".³

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 interes.214.6 (e) (m)-1.3 (u0.a)7 (r)6.3 (d)2.-5 (sse)-5(r)19.7 (e)2 (s)7 (.214.6 (el)-4.7 (CL)3 (e)-(s)7

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Brazil's third participant's submission	C-2
Annex C-2	Executive summary of Japan's third participant's submission	C-3
Annex C-3	Executive summary of Ukraine's third participant's submission	C-4
Annex C-4	Executive summary of the United States' third participant's submission	C-5

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION¹

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.

¹ Word count: 235 words.

ANNEX C-4

EXECUTIVE SUMMARY OF THE UNITED STATES THIRD PARTICIPANT'S SUBMISSION

1 ARTICLES 4.1 AND 3.1 OF THE AD AGREEMENT¹

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 a panel is not a violation of Article 3.1 of the AD Agreement. WT/DS479/AB/R/Add.1 (p. 5)

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.

ANNEX D

PROCEDURAL RULINGS

Contents		Page
Annex D-1	Procedural Ruling of 4 March 2017 regarding modification of the dates for the filing of written submissions	D-2

ANNEX D-1

PROCEDURAL RULING OF 4 MARCH 2017
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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

additional protection, as well as the degree of protection that is warranted.⁵ 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.⁶ 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.⁷ 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.⁸ 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.⁹ Similarly, whether such information should be accorded BCI treatment on appeal is to be determined by the Appellate Body.

1.6. When additional procedureO

