



**EUROPEAN UNION – COST ADJUSTMENT METHODOLOGIES  
AND CERTAIN ANTI-DUMPING MEASURES ON IMPORTS  
FROM RUSSIA (SECOND COMPLAINT)**

REPORT OF THE PANEL

*Addendum*

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

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS494/R.

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## **ANNEX A**

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## **ANNEX A-1**

### **WORKING PROCEDURES OF THE PANEL**

**Adopted on 8 March 2019**

#### **General**

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.  
  
(2) The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

#### **Confidentiality**

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.  
  
(2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.  
  
(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the written submission in question is presented to the Panel, unless a different due date is established by the Panel upon written request of a party showing good cause.  
  
(4) Either party may request the Panel to adopt Additional Working Procedures Concerning Business Confidential Information. In the event of such a request, the Panel will consider any proposals concerning such procedures submitted by the parties, either jointly or separately, and will consult with the parties before adopting any such procedures. In the event such procedures are adopted by the Panel, the parties shall treat business confidential information in accordance with those procedures.

#### **Submissions**

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.  
  
(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.  
  
(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.  
  
(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

### **Preliminary rulings**

4. (1) If the European Union considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.
  - a. The European Union shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. The Russian Federation shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
  - b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.
  - c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
  - d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.
- (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

### **Evidence**

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.
  - (2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.
  - (2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by the Russian Federation should be numbered RUS-1, RUS-2, etc. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. If the

last exhibit in connection with the first submission was numbered RUS-5, the first exhibit in connection with the next submission thus would be numbered RUS-6.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission, and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit.

### **Editorial Guide**

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

### **Questions**

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.
  - b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

### **Substantive meetings**

10. The Panel shall meet in closed session.
11. The parties shall be present at the meetings only when invited by the Panel to appear before it.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.
13. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) two working days before the first day of each meeting with the Panel.
14. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.
15. The first substantive meeting of the Panel with the parties shall be conducted as follows:
- a. The Panel shall invite the Russian Federation to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters.
  - b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the duration of its opening statement to not more than 75 minutes. If

either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least three days prior to the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions, through the Panel.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the Russian Federation presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

- i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.
- ii. Each party shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
- iii. The Panel shall send in writing, within the timeframe established by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
- iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel before the end of the meeting.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the European Union shall be given the opportunity to present its oral statement first. If the European Union chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00pm (Geneva time) three working days day before the meeting. In that case, the Russian Federation shall present its opening statement first, followed by the European Union. The party that presented its opening statement first shall present its closing statement first.

### **Third party session**

17. The third parties shall be present at the meetings only when invited by the Panel to appear before it.

18. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

19. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

20. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) two working days before the third party session of the meeting with the Panel.

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

- a. All parties and third parties may be present during the entirety of this session.
- b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.
- c. Each third party should limit the duration of its statement to 15 minutes, and avoid repetition of the arguments already in its submission. If a third party considers that it requires more time for its opening statement, it should inform the Panel and the parties at least three days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.
- d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party, through the Panel, for clarification on any matter raised in that third party's submission or statement.
- e. The Panel may subsequently pose questions to any third party.
- f. Following the third-party session:
  - i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.
  - ii. Each party may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.
  - iii. The Panel may send in writing, within the timeframe to be established by the Panel before the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.
  - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel before the end of the meeting.

#### **Descriptive part and executive summaries**

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

23. Each party shall submit two integrated executive summaries. The first integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first written submission, its first oral statement, and if possible, its responses to questions following the first substantive meeting. The second integrated executive summary shall summarize its second written submission, its second oral statement, and if possible, its responses to the second set of questions and comments thereon following the second substantive meeting. The timing of the submission of these two integrated executive summaries shall be indicated in the timetable adopted by the Panel.

24. Each integrated executive summary shall be limited to no more than 15 pages.
25. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.
26. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages. If a third-party submission and/or oral statement does not exceed six pages in total, this may serve as the executive summary of that third party's arguments.

#### **Interim review**

27. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.
28. If no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

#### **Interim and Final Report**

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

#### **Service of documents**

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:
- a. Each party and third party shall submit all documents to the Panel by submitting them with the DS Registry (office No. 2047).
  - b. Each party and third party shall submit [1] paper copy of its submissions and [1] paper copy of its Exhibits to the Panel by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The DS Registrar shall stamp the documents with the date and time of submission. The paper version submitted to the DS Registry shall constitute the official version for the purposes of submission deadlines and the record of the dispute. If any documents are in a format that is impractical to submit as a paper copy, then the party may submit such documents to the DS Registrar by email or on a CD-ROM, DVD or USB key only.
  - c. Each party and third party shall also send an email to the DS Registry, at the same time that it submits the paper versions, attaching an electronic copy of all documents that it submits to the Panel, preferably in both Microsoft Word/Excel and PDF format. All such emails to the Panel shall be addressed to [DSRegistry@wto.org](mailto:DSRegistry@wto.org), and copied to other WTO Secretariat staff whose email addresses have been provided to the parties during the proceeding. If it is not possible to attach all the Exhibits to one email, the submitting party or third party shall provide the DS Registry with four copies of the Exhibits on USB keys, CD-ROMs or DVDs.
  - d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for the submission of the paper versions. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at [DSRegistry@wto.org](mailto:DSRegistry@wto.org).

- e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may serve its documents on another party or third party by email or on a CD-ROM, DVD or USB key only, unless the recipient party or third party has previously requested a paper copy. Each party and third party shall confirm, in writing, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.
- f. Each party and third party shall submit its documents with the DS Registry and serve copies on the other party (and third parties if appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- g. As a general rule, all communications from the Panel to the parties and third parties will be via email. In addition to transmitting them to the parties by email, the Panel shall provide the parties with a paper copy of the Interim Report and the Final Report.

**Correction of clerical errors in submissions**

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

## **ANNEX A-2**

### **ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION**

#### **Adopted on 22 March 2019**

1. These procedures apply to any business confidential information ("BCI") that a party wishes to submit to the Panel. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party submitting the information, that is not available in the public domain, and the release of which would seriously prejudice an essential interest of the person or entity that supplied the information to the party. In this regard, BCI shall include any information that was treated as confidential in the course of the European Commission ("EC") anti-dumping investigations at issue in the Panel process, unless the person that provided the information in the course of the EC's anti-dumping investigations agrees in writing otherwise. These procedures do not apply to information that is available in the public domain.
2. No person may have access to BCI except a member of the Panel or the WTO Secretariat, an employee of a party or third party, and an outside advisor acting on behalf of a party or third party for the purposes of this dispute. However, 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 subject of the investigation at issue in this dispute or an officer or employee of an association of which the enterprise is a member.
3. A party or third-party having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to have access to it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used 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.
4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. In case of exhibits, the party submitting BCI in the form of an Exhibit shall mark it as (BCI) next to the exhibit number (e.g. Exhibit RUS-1 (BCI)). Should the party submit specific BCI within a document which is considered to be public, the specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]".
5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label on the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.
6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.
7. If a party considers that information submitted by the other party should have been designated as BCI and it objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objections, as appropriate, in accordance with the criteria set out in paragraph 1. The same procedure shall be followed if a party considers that information submitted by the other party with the notice "Contains Business Confidential Information" should not be designated as BCI.
8. The parties, third parties, the Panel, the WTO Secretariat, and any others who have access to documents containing BCI under the terms of these Additional Working Procedures shall store all documents containing BCI so as to prevent unauthorized access to such information.

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

10. If (a) pursuant to Article 16.4 of the DSU, the Panel report is adopted by the DSB, or the DSB decides by consensus not to adopt the Panel report, (b) pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapses, or (c) pursuant to Article 3.6 of the DSU, a mutually satisfactory solution is notified to the DSB before the Panel completes its task, within a period to be fixed by the Panel, each party and third party shall return all documents (including electronic material and photocopies) containing BCI to the party that submitted such documents, or certify in writing to the Panel and the other party (or the parties, in the case of a third party returning such documents) that all such documents (including electronic material and photocopies) have been destroyed, consistent with the party's record-keeping obligations under its domestic laws. This obligation is without prejudice to the confidential information separately obtained by the EC and stored in its own record of the anti-dumping investigations at issue in the Panel process. The Panel and the WTO Secretariat shall likewise return all such documents or certify to the parties that all such documents have been destroyed. The WTO Secretariat shall, however, have the right to retain one copy of each of the documents containing BCI for the archives of the WTO or for transmission to the Appellate Body in accordance with paragraph 11 below.

11. If a party formally notifies the DSB of its decision to appeal pursuant to Article 16.4 of the DSU, the WTO Secretariat will inform the Appellate Body of these procedures and will transmit to the Appellate Body any BCI governed by these procedures as part of the record, including any submissions containing information designated as BCI under these working procedures. Such transmission shall occur separately from the rest of the Panel record, to the extent possible. In the event of an appeal, the Panel and the WTO Secretariat shall return all documents (including electronic material and photocopies) containing BCI to the party that submitted such documents or certify to the parties that all such documents (including electronic material and photocopies) have been destroyed, except as otherwise provided above. Following the completion or withdrawal of an appeal, the parties and third parties shall promptly return all such documents or certify to the parties that all such documents have been destroyed, taking account of any applicable procedures adopted by the Appellate Body.

12. At the request of a party, the Panel may apply these working procedures or an amended form of these working procedures to protect information that does not fall within the scope of the information set out in paragraph 1. The Panel may, with the consent of the parties, waive any part of these procedures.

## ANNEX A-3

### INTERIM REVIEW

#### 1 INTRODUCTION

1.1. The Panel issued its Interim Report to the parties on 17 April 2020. Both parties submitted written requests for review of precise aspects of the Interim Report on 1 May 2020, and written comments on each other's written requests on 15 May 2020. Neither party requested the Panel to hold an interim review meeting.

1.2. In accordance with Article 15.3 of the DSU, this Annex responds to the issues raised by the parties in the context of the interim review. We discuss the parties' requests for substantive modifications below, in sequence, according to the sections and paragraphs of the Interim Report to which the requests pertain. We modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, the Panel has made a number of changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors, certain of which were suggested by the parties.

1.3. In addressing the parties' requests for substantive modifications below, we are mindful of the specific scope, nature and purpose of the interim review. With respect to the scope of our review, we observe that Article 15.2 of the DSU, and paragraph 27 of the Panel's Working Procedures, provide parties with an opportunity to request the Panel "to review precise aspects of the interim report". Previous panels have declined to expand the scope of the interim review beyond that provided for in Article 15.2 of the DSU and have accordingly circumscribed their review to address only those requests related to "precise aspects" of the interim report.<sup>1</sup> With respect to the nature and purpose of our review, it is well-established that the interim review is not an appropriate stage for the parties to raise new arguments or submit new evidence not previously presented before a panel; nor is it an appropriate stage for the parties to re-argue their case on the basis of the arguments already put before a panel.<sup>2</sup>

1.4. In light of the considerations stated above, we have reviewed our Interim Report only in light of the parties' requests that related to its "precise aspects". We have not accepted requests amounting to a party's attempt to re-argue its case.

1.5. Moreover, we are guided by the consideration that the descriptions of the parties' arguments in our Report are not intended to reflect the entirety of the parties' arguments. Rather, they focus on the principal points we considered relevant to the resolution of this dispute. In this respect, we recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".<sup>3</sup> We further note that the integrated executive summaries of the arguments of the parties are set out in Annexes B1-B4. Those summaries have been prepared by the parties themselves and therefore have provided the parties with the full opportunity to reflect their arguments as they see fit.

1.6. As a result of the changes made, the numbering of footnotes in the Final Report has changed from the Interim Report. In the discussion below, we use the numbering in the Interim Report.

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<sup>1</sup> Panel Reports, *Brazil – Taxation*, paras. 6.7-6.8; *Japan – Alcoholic Beverages II*, para. 5.2; *Australia – Salmon*, para. 7.3; *Japan – Apples (Article 21.5 – US)*, para. 7.21; *India – Quantitative Restrictions*, para. 4.2; *Canada – Continued Suspension*, paras. 6.16-6.17; *US – Continued Suspension*, paras. 6.17-6.18; and *India – Agricultural Products*, para. 6.5.

<sup>2</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259. See also Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.

<sup>3</sup> Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

1.7. With these preliminary remarks, we now turn to the substance of the parties' requests for review.

## **2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES**

### **2.1 Treatment of BCI**

2.1. Russia requests that the seventh sentence of paragraph 7.535 of the Interim Report be bracketed as BCI.<sup>4</sup> The European Union disagrees that such extensive BCI treatment is necessary and considers that Russia's request does not correspond to the manner in which similar information was treated during the proceedings.<sup>5</sup>

2.2. We disagree with the European Union that information about the pricing behaviour of individual exporters was not treated confidentially during the proceedings (see, for example, paragraph 7.529 of the Interim Report). In addition, we note that the sentence for which Russia requests BCI treatment is taken from recital 159 of Regulation 999/2014: however, the names of the individual exporters do not appear in this document.

2.3. We have thus decided to grant the BCI treatment requested by Russia.

### **2.2 Russia's claims concerning the Cost Adjustment Methodology**

#### **2.2.1 Russia's requests concerning the terms "alleged"/"allegedly"**

2.4. Russia requests that the Panel add/delete the words "alleged" and "allegedly" to/from several paragraphs and footnotes of the Interim Report. Specifically, Russia asks the Panel: (i) to add, to the first sentence of paragraph 7.13, "allegedly" before "affecting"<sup>6</sup>; and, to the third sentence of paragraph 7.13, "allegedly" before "undistorted"<sup>7</sup>; (ii) to add "alleged" before "distortions" in the second sentence of paragraph 7.13, the first and last sentences of paragraph 7.14, the first sentence of paragraph 7.17, paragraph 7.28(a), the first sentence of paragraph 7.30, the last sentence of paragraph 7.32, the first sentence of paragraph 7.34, the second and third sentences of paragraph 7.68, the third and fourth sentences of paragraph 7.79, the second sentence of paragraph 7.166, and the second sentence of paragraph 7.234<sup>8</sup>; (iii) to add "alleged" before "significant distortions" in the first sentence of paragraph 7.79; (iv) to add "allegedly" before "undistorted" in the third sentence of paragraph 7.153; and (v) to add "allegedly" before "distorted" in the second sentence of paragraph 7.30, the second sentence of footnote 137, the third sentence of paragraph 7.105, and the second and last sentences of paragraph 7.153.<sup>9</sup>

2.5. Furthermore, Russia asks the Panel to delete "alleged" before "Cost Adjustment Methodology" and "methodology" in the first sentence of paragraph 7.13 and the sixth and seventh sentences of footnote 175.<sup>10</sup>

2.6. The European Union objects to Russia's requests, arguing that the use of the words "alleged" and "allegedly" is entirely appropriate when setting out Russia's arguments. However, using these words is not appropriate to refer to findings in the relevant determinations, based on evidence in the particular investigations.<sup>11</sup>

2.7. We have decided to grant Russia's request to add to the first sentence of paragraph 7.13 "allegedly" before "affecting", because paragraph 7.13 describes Russia's arguments in relation to the operation of the Cost Adjustment Methodology. For the same reason, we have decided to grant Russia's request to add "allegedly" before the word "undistorted" in paragraph 7.153 and to delete "alleged" before "Cost Adjustment Methodology" and "methodology" in the first sentence of paragraph 7.13. We have also decided to grant Russia's request to delete the word "alleged" from

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<sup>4</sup> Russia's comments on the Interim Report, para. 437.

<sup>5</sup> European Union's comments on Russia's comments on the Interim Report, para. 72.

<sup>6</sup> Russia's comments on the Interim Report, para. 12.

<sup>7</sup> Russia's comments on the Interim Report, para. 13.

<sup>8</sup> Russia's comments on the Interim Report, para. 23.

<sup>9</sup> Russia's comments on the Interim Report, para. 24.

<sup>10</sup> Russia's comments on the Interim Report, paras. 12 and 27.

<sup>11</sup> European Union's comments on Russia's comments on the Interim Report, paras. 5 and 8.

the sixth and seventh sentences of footnote 175, because in paragraph 7.64 the Panel had already concluded that Russia has established the existence of the Cost Adjustment Methodology.

2.8. We have decided to reject all remaining Russia's requests because the suggested additions are either unnecessary or inappropriate.

2.9. We consider that adding "alleged" before "distortions" or "allegedly" before "distorted" is unnecessary in the case of the second sentence of paragraph 7.13, the first sentence of paragraph 7.14 and paragraph 7.28(a). When referring to "distortions", those sentences already indicate that it is the European Commission who *considers* them as such. Thus, the Panel uses the following language: "considered as 'distortions'" in the second sentence of paragraph 7.13 and paragraph 7.28(a), and "which the European Commission considers ... unaffected by 'distortions'" in the first sentence of paragraph 7.14. Likewise, in the case of the third sentence of paragraph 7.13, the last sentence of paragraph 7.14, the first sentence of paragraph 7.17, the first sentence of paragraph 7.30, the last sentence of paragraph 7.32, the second and third sentences of paragraph 7.68, the second sentence of paragraph 7.166, the second sentence of paragraph 7.30 and the third sentence of paragraph 7.105, adding "alleged" before "distortions" or "allegedly" before "distorted" is unnecessary because those words are already presented within quotation marks.

2.10. As for Russia's requests concerning the first, third and fourth sentences of paragraph 7.79 adding "alleged" before "significant distortions" and "distortions" is inappropriate because in this paragraph the Panel cites Regulation 2017/2321, which governs the issue of "significant distortions". However, to improve accuracy, we have decided to add "significant" before "distortions" in the third and fourth sentences of paragraph 7.79. In the case of Russia's request concerning the second sentence of footnote 137, adding "allegedly" before "distorted" is inappropriate because this footnote quotes recital 36 of Regulation 2019/1688. As for Russia's request concerning the second and last sentences of paragraph 7.153, adding "alleged" before "distorted" is also inappropriate because these sentences, respectively, quote and refer to a statement made by the European Commission to the Council of the European Union in 2002. Finally, as for Russia's request concerning the second sentence of paragraph 7.234, we also find it inappropriate to add "alleged" before "distortions" as this sentence represents an argument of the European Union.

### **2.2.2 Russia's requests concerning the term "surrogate"**

2.11. Russia requests that the Panel change the "text of the Panel Report, including subtitles" by using formulations such as "surrogate input data"<sup>12</sup> or "surrogate input price"<sup>13</sup> when referring to the input price data used by the European Commission to calculate the costs of production of investigated producers pursuant to the Cost Adjustment Methodology. Specifically, Russia requests the Panel: (i) to delete "information" after "out-of-country input price" in the first sentence of paragraph 7.14<sup>14</sup>; (ii) to use "surrogate input price" instead of "out-of-country input cost data" in paragraph 7.28 (b)<sup>15</sup>; (iii) to use "surrogate prices" instead of "out-of-country input price data" in the first sentence of paragraph 7.34<sup>16</sup>; (iv) to use "surrogate prices" instead of "out-of-country input price information" in the last sentence of paragraph 7.34<sup>17</sup>; (v) to delete "out-of-country" before "'surrogate' input prices" in paragraph 7.115<sup>18</sup>; and (vi) to delete "information" after "'surrogate' input price" in the first sentence of paragraph 7.116.

2.12. Russia argues that the European Union replaces the actual cost with that from another market considered by the European Commission as more "representative" in order to remove the alleged distortions.

2.13. Russia further argues that, in *EU – Biodiesel (Argentina)*, the Appellate Body used the term "the surrogate price for soybeans" to refer to the replacement of the actual costs of soya beans recorded by the Argentinean producers under investigation used by the European Commission. Accordingly, for Russia, "it is acceptable and appropriate" to refer to similar replacements by the

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<sup>12</sup> Russia's comments on the Interim Report, para. 21.

<sup>13</sup> Russia's comments on the Interim Report, para. 16.

<sup>14</sup> Russia's comments on the Interim Report, para. 14.

<sup>15</sup> Russia's comments on the Interim Report, para. 16.

<sup>16</sup> Russia's comments on the Interim Report, paras. 33-34.

<sup>17</sup> Russia's comments on the Interim Report, paras. 33-34.

<sup>18</sup> Russia's comments on the Interim Report, para. 44.

European Commission pursuant to the Cost Adjustment Methodology as "surrogate input prices".<sup>19</sup> According to Russia, formulations such as "out-of-country input cost data" do not represent "all seriousness of the challenged measure and business losses by producers and exporters".<sup>20</sup>

2.14. The European Union asks the Panel to reject Russia's requests, arguing that it fails to understand why either "surrogate input price" or "out-of-country input cost data" should or could reflect "seriousness of the challenged measure and business losses by producers and exporters". For the European Union, any suggestions Russia makes are baseless and the words Russia uses do not have the connotation that Russia suggest they have, nor does Russia substantiate this.<sup>21</sup> Finally, the European Union argues that the use of "surrogate prices" was specific to the *EU – Biodiesel (Argentina)* dispute and has not application in the present dispute.<sup>22</sup>

2.15. We note that Russia's requests effectively seek (i) to remove the references to "data" or "information" in relation to what the European Commission uses to calculate the costs of production for investigated producers pursuant to the Cost Adjustment Methodology, asking the Panel to refer to this as "input prices" or "prices"; (ii) to remove the reference to the origin of the information or data used by the European Commission for these purposes; and (iii) to add instead the adjective "surrogate" to describe this information or data.

2.16. We have decided to decline all Russia's requests. As for Russia's request to delete the reference to "data" or "information", we note Russia's argument that this would represent the fact that the European Union actually uses input prices from other countries or markets instead of domestic input prices.<sup>23</sup> We also note the European Union's argument that the word "information" correctly represents Russia's position.<sup>24</sup> In our view, Russia's request is at odds with Russia's own description of the Cost Adjustment Methodology. As noted in paragraph 7.7(b), Russia challenges the replacement or adjustment of the costs recorded in the records of the producer under investigation "using the cost *data* obtained from other sources".<sup>25</sup> Moreover, we note that Russia's request for review considers acceptable to use formulations such as "surrogate input *data*".<sup>26</sup> In light of this, to improve consistency, we have decided to add "information" after "out-of-country input price" in the second sentence of paragraph 7.14.

2.17. As for Russia's requests to delete the references to the origin of the information or data used by the European Commission pursuant to the Cost Adjustment Methodology, we fail to see how maintaining these references would not represent "all seriousness of the challenged measure and business losses by producers and exporters". The fact that, pursuant to this methodology, the European Commission calculates the costs of production of investigated producers on the basis of out-of-country data or information constitutes an essential feature of the challenged measure, as alleged by Russia during the panel proceeding.<sup>27</sup> The adjective "surrogate" suggested by Russia, which focuses on the alleged replacement or substitution of the input prices reflected in the records of the investigated producers with out-of-country input prices, does not describe the origin of the information or data used by the European Commission.

2.18. As for Russia's request to add "surrogate" to paragraphs 7.28 (b) and 7.34, we do not believe it is necessary to add this adjective to the description of the input price data used by the European Commission to calculate the costs of production pursuant to the Cost Adjustment Methodology. Russia's characterization of the out-of-country input price information as "surrogate" is already noted in paragraph 7.14. Moreover, we note that, in *EU – Biodiesel (Argentina)*, the Appellate Body decided to refer, in its report, to the replacement of actual costs by the average of the reference prices of soya beans used by the European Commission in the relevant regulation as the "surrogate price for soybeans".<sup>28</sup> However, we agree with the European Union that this terminology represents the specific facts underlying the biodiesel investigation conducted by the European Commission. As for the Cost Adjustment Methodology, as concluded in paragraph 7.41,

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<sup>19</sup> Russia's comments on the Interim Report, para. 20.

<sup>20</sup> Russia's comments on the Interim Report, para. 16.

<sup>21</sup> European Union's comments on Russia's comments on the Interim Report, para. 6.

<sup>22</sup> European Union's comments on Russia's comments on the Interim Report, para. 7.

<sup>23</sup> Russia's comments on the Interim Report, para. 14.

<sup>24</sup> European Union's comments on Russia's comments on the Interim Report, para. 13.

<sup>25</sup> Russia's first written submission, para. 299. (emphasis added)

<sup>26</sup> Russia's comments on the Interim Report, para. 21. (emphasis added)

<sup>27</sup> See, e.g. Panel Report, paras. 7.41 and 7.124.

<sup>28</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 5.7.

pursuant to this methodology, the European Commission "adjusted" the costs of the producer/exporter under investigation on the basis of out-of-country input price information, in application of the second subparagraph of Article 2(5) of the Basic AD Regulation.

### **2.2.3 Paragraphs 7.7 and 7.8(a) of the Interim Report**

2.19. Paragraphs 7.7 and 7.8(a) of the Interim Report reproduce, respectively, Russia's description of the Cost Adjustment Methodology and its request that we find this measure inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Russia notes that these paragraphs do not reflect Russia's position that, pursuant to the Cost Adjustment Methodology, the European Commission rejects part of the costs reflected in the records, even though the records comply with the two conditions set out in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement (i.e. the records are "in accordance with the GAAP of the exporting country" and "reasonably reflect the costs associated with the production and sale of the product under consideration"). Asserting that compliance with the two above-mentioned conditions constitutes an "important part of the description of the measure", Russia requests the Panel to (i) revise paragraphs 7.7 and 7.8(a); and (ii) "take into account this comment in its considerations and findings".<sup>29</sup> The European Union did not specifically comment on this request.

2.20. We have decided to grant Russia's request to amend paragraphs 7.7 and 7.8(a) in order to properly reflect Russia's description of the Cost Adjustment Methodology and its request for findings under the first sentence of Article 2.2.1.1. Accordingly, we have added to paragraphs 7.7 and 7.8(a) Russia's allegation that the records of the investigated producers examined by the European Commission pursuant to the Cost Adjustment Methodology are "in accordance with the GAAP of the exporting country" and "reasonably reflect the costs associated with the production and sale of the product under consideration". As for Russia's second request, the Interim Report already takes into account Russia's above-mentioned allegation in the Panel's considerations and findings on the Cost Adjustment Methodology: paragraph 7.32 sets out our understanding that, by claiming that the records of the investigated producers are rejected notwithstanding their compliance with the two conditions set out in Article 2.2.1.1 of the Anti-Dumping Agreement, Russia is in fact challenging the rejection of the records of the investigated producers on grounds that are unrelated to compliance with these two conditions. Paragraph 7.32 identifies these grounds to be: the fact that the recorded input prices are significantly low or affected by government regulation, or other situations considered as "distortions" in the country of origin.

### **2.2.4 Paragraphs 7.12, 7.13 and 7.113 of the Interim Report**

2.21. Referring to paragraphs 304 and 427 of its first written submission, Russia asks the Panel: (i) to add "of the product under consideration" after "costs of production" in paragraph 7.12 and the fourth sentence of paragraph 7.13<sup>30</sup>; and (ii) to include "the product under consideration in the country of origin" instead of "a product" in the third sentence of paragraph 7.113.<sup>31</sup> The European Union does not object to Russia's requests.<sup>32</sup> To better reflect Russia's arguments, we have decided to grant Russia's requests.

### **2.2.5 Paragraph 7.13 of the Interim Report**

2.22. Russia requests the Panel to add "and so-called 'representative markets'" after "in other countries" in the second sentence of paragraph 7.13. In the fourth sentence of paragraph 7.13, Russia requests the Panel to add "or markets" after "in other countries".<sup>33</sup>

2.23. We have decided to partially grant Russia's request. Thus, we have added a reference to "markets" in the second and fourth sentences of paragraph 7.13 to reflect Russia's argument that, pursuant to the Cost Adjustment Methodology, the European Commission compares the domestic input prices with those in other countries or "markets". However, we have decided not to grant Russia's request to refer to the other countries or markets used as benchmarks as "representative". To us, this request stands at odds with Russia's description of the challenged measure, in which

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<sup>29</sup> Russia's comments on the Interim Report, para. 5.

<sup>30</sup> Russia's comments on the Interim Report, para. 8.

<sup>31</sup> Russia's comments on the Interim Report, para. 11.

<sup>32</sup> European Union's comments on Russia's comments on the Interim Report, para. 4.

<sup>33</sup> Russia's comments on the Interim Report, para. 13.

Russia uses the terminology "representative markets" to describe the source from which the European Commission obtains the cost data used to perform the adjustment<sup>34</sup>; Russia does not consistently refer to the countries or markets used as benchmarks as "representative". Furthermore, the anti-dumping determinations Russia puts forward in support of the existence of the Cost Adjustment Methodology do not refer to the countries or markets used as benchmarks as "representative".

### 2.2.6 Paragraph 7.34 of the Interim Report

2.24. Russia requests the Panel to change the wording of item (ii) of the last sentence of paragraph 7.34. In item (ii), the Panel sets out its understanding that the second element of the Cost Adjustment Methodology consists in "not adapting the out-of-country input price information used in its calculations in order to reflect the cost of production of the product under consideration 'in the country of origin'". Russia asks the Panel to, instead, state that the second element of the Cost Adjustment Methodology consists in "not mandating to use the cost of production in the country of origin when calculating and constructing normal value".<sup>35</sup> According to Russia, this reflects "a more correct understanding and description of Russia's challenge".<sup>36</sup>

2.25. We have decided not to grant Russia's request. As noted in paragraph 7.34, our understanding of the Cost Adjustment Methodology and the operation of its two elements is based on the description and explanations given by Russia during the panel proceedings. While Russia asserts that the suggested language would better reflect Russia's complaint in relation to the Cost Adjustment Methodology, Russia does not identify any reference to support such an allegation in Russia's submissions. Accordingly, we do not agree with Russia's request to change our understanding of this aspect of the challenged measure and consider that such a request goes beyond the scope of this interim review.

### 2.2.7 Paragraph 7.38 of the Interim Report

2.26. Referring to the European Union's response to Panel question No. 70, the European Union requests the Panel to insert, before the last sentence of paragraph 7.38, a sentence that reflects the following arguments of the European Union, in relation to the anti-dumping determinations Russia advances to demonstrate the precise content of the Cost Adjustment Methodology:

The European Union argued that these determinations concern different countries (Russia, Ukraine, Algeria, Libya, Croatia, Argentina, Indonesia ...); different products (tubes, pipes, urea, ammonium nitrate, potassium chloride, ferro-silicon, biodiesel...); and different reasons for rejection (regulated prices, abnormally low prices, export taxes...) and that there is no indication that the competent authorities could not reach a different conclusion in the future depending on the facts of the case before them.

2.27. According to the European Union, adding the suggested sentence would "fully and correctly reflect the European Union's arguments". The European Union also requests the Panel to add the word "further" between "advanced no" and "evidence" in the last sentence of paragraph 7.38.

2.28. Russia objects to the European Union's requests. As for the European Union's first request, Russia submits that the suggested sentence concerns an *argument* of the European Union, whereas in paragraph 7.38 the Panel describes the *evidence* advanced by Russia to demonstrate the precise content of the Cost Adjustment Methodology (i.e. a set of 17 anti-dumping determinations by the European Commission), and the fact that the European Union advanced no evidence to respond to the specific findings in these anti-dumping determinations. Furthermore, Russia argues that paragraph 7.44 of the Interim Report already takes note of the European Union's arguments. As for the European Union's second request, Russia considers that the addition requested would suggest that the European Union has provided evidence to rebut the anti-dumping determinations put forward by Russia, which is not the case.

2.29. We have decided to grant the European Union's first request. Paragraph 7.44 of the Interim Report does not take note of the European Union's arguments reflected in the suggested

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<sup>34</sup> Russia's first written submission, para. 299.

<sup>35</sup> Russia's comments on the Interim Report, para. 34.

<sup>36</sup> Russia's comments on the Interim Report, para. 35.

sentence. Accordingly, to better reflect the European Union's arguments in relation to the anti-dumping determinations that substantiate Russia's factual assertions regarding the precise content of the Cost Adjustment Methodology, we have added the sentence suggested by the European Union to paragraph 7.38. However, to avoid repetition with the language used in paragraph 7.38, we have slightly modified the wording of the European Union's suggested sentence. A footnote with a reference to the relevant European Union's submission has also been added.

2.30. Moreover, we have decided not to grant the European Union's second request. Indicating that the European Union has provided no "further" evidence would suggest that the European Union has provided *some* evidence to respond to the specific findings in the European Commission's anti-dumping determinations Russia relies upon to support the precise content of the Cost Adjustment Methodology. However, as noted in the last sentence of paragraph 7.38, the European Union has advanced no evidence in this connection during the panel proceeding.

### **2.2.8 Section 7.2.2.3 of the Interim Report**

2.31. Russia requests the Panel to amend section 7.2.2.3 ("Evaluation by the Panel") of the Interim Report, which contains the Panel's assessment and conclusions on whether Russia has demonstrated the existence of the Cost Adjustment Methodology, in order to include "additional findings" in relation to the alleged effect of the challenged measure in dumping margin calculation. Specifically, Russia submits that, in paragraphs 379 to 398 of its first written submission, Russia "demonstrated that, by using the Cost Adjustment Methodology in anti-dumping proceedings, the European Union significantly increases the cost of production in its calculations and corresponding margins of dumping and anti-dumping duties".<sup>37</sup> Moreover, in its comments to paragraph 7.34, Russia asks the Panel to "review the evidence" provided in paragraphs 379 to 386 of Russia's first written submission and "make findings that [the] rejection of actually incurred input cost and substitution ... with ... surrogate prices is a deliberate policy of the European Union" to remove alleged distortions.<sup>38</sup>

2.32. The European Union responds that Russia has not substantiated why the Panel should make any additional findings or what findings the Panel missed, and that Russia does not substantiate why there would be "increases" in the relevant cases.<sup>39</sup> Moreover, the European Union argues that there is no evidence of any "deliberate" intent. Determinations are based on the facts of an investigation and do not involve "deliberate" "policy" choices.<sup>40</sup>

2.33. We have decided to grant Russia's requests and include in Section 7.2.2.3 Russia's above-mentioned allegations, as well as our conclusion on these allegations. Accordingly, we have added to paragraphs 7.16 and 7.17 Russia's arguments that the application of the Cost Adjustment Methodology significantly increases the cost of production to establish normal value and corresponding dumping margin, and that this measure reflects a "deliberate policy" of the European Union to remove alleged distortions. We have added three sentences at the end of paragraph 7.61 with our conclusion on these arguments.

### **2.2.9 Section 7.2.4.1.1 of the Interim Report**

2.34. Russia notes that section 7.2.4.1.2, which describes the European Union's main arguments in response to Russia's claims under Article 2.2.1.1 of the Anti-Dumping Agreement, includes the European Union's arguments concerning the term "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement and the meaning of "normal value" in Article 2.1 of the Anti-Dumping Agreement. Russia also notes that section 7.2.4.1.1, which describes Russia's main arguments, does not include Russia's response to these arguments of the European Union. Suggesting a five-sentence paragraph, Russia thus requests the Panel to amend section 7.2.4.1.1 in order to incorporate Russia's arguments.<sup>41</sup>

2.35. We have decided not to grant Russia's request. Paragraph 7.104 in section 7.2.4.1.3 ("Evaluation by the Panel") already includes Russia's main arguments in response to the

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<sup>37</sup> Russia's comments on the Interim Report, para. 30.

<sup>38</sup> Russia's comments on the Interim Report, para. 37.

<sup>39</sup> European Union's comments on Russia's comments on the Interim Report, para. 9.

<sup>40</sup> European Union's comments on Russia's comments on the Interim Report, para. 11.

<sup>41</sup> Russia's comments on the Interim Report, para. 31.

European Union's arguments concerning the term "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Moreover, we note that the paragraph suggested by Russia focuses on Russia's arguments concerning the meaning of "normal value", which, as section 7.2.4.3 shows, is an issue the Panel does not examine to resolve Russia's challenge under the second sentence of Article 2.2.1.1. We recall that the description of the parties' arguments in our Interim Report is not intended to reflect the entirety of the parties' arguments; rather, it focuses on the principal points we considered relevant to the resolution of this dispute.

#### **2.2.10 Section 7.2.4.2 of the Interim Report**

2.36. Russia makes three separated sets of requests in relation to section 7.2.4.2 of the Interim Report, which set out the legal standard applicable to the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

##### **2.2.10.1 Russia's request for an additional introductory paragraph**

2.37. Russia requests that the Panel add an additional introductory paragraph in section 7.2.4.2, in which some statements of the Appellate Body in *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)* and *EU – Biodiesel (Argentina)* and of the panel in *US – Softwood Lumber V* in relation to the operation of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement are cited.<sup>42</sup> Russia specifically asks the Panel to add this suggested introductory paragraph before paragraph 7.92.

2.38. We have decided not to grant Russia's request. As already noted, section 7.2.4.2 sets out the legal standard applicable for the examination of Russia's claim under the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Russia does not substantiate why the suggested introductory paragraph is necessary or relevant to the Panel's analysis of Russia's claim that is presented in the subsequent section 7.2.4.3, but merely cites to section 6.4.3.1 of Russia's first submission, in which Russia sets its own understanding of the legal standard under Article 2.2.1.1. In fact, we note that Russia's suggested introductory paragraph mirrors paragraph 231 of Russia's first written submission. In our view, Russia's request does not fall under the limited function of the interim review stage, as it does not seek that the Panel review "precise aspects" of the Interim Report but that we modify the manner we present the legal standard applicable to the Panel's analysis of Russia's claims.

##### **2.2.10.2 Paragraph 7.93 of the Interim Report**

2.39. Russia asks the Panel to use the "precise terms" of Article 2.2.1.1 of the Anti-Dumping Agreement. Because Article 2.2.1.1 is already reproduced in paragraph 7.91, we have decided not to grant Russia's request to use again the wording "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation" in paragraph 7.93. However, in order to improve accuracy, we have decided to grant Russia's request to replace, in item (i) of paragraph 7.93, "they are *consistent* with the GAAP of the exporting country" with the language used in Article 2.2.1.1 (i.e. "they are in *accordance* with the GAAP of the exporting country").

2.40. Russia also asks the Panel to add two additional sentences in paragraph 7.93, in order to include some of the Appellate Body's statements in *Ukraine – Ammonium Nitrate* concerning the term "normally" in the first sentence of Article 2.2.1.1, and the fact that the subject of the conditions in the first sentence of Article 2.2.1.1 is the records of the investigated producers. We have decided not to grant Russia's request. As noted in paragraph 7.105, there is no evidence suggesting that the Cost Adjustment Methodology is or has been applied by the European Union in order to give effect to its interpretation of the term "normally" in the first sentence of Article 2.2.1.1. Therefore, the suggested Appellate Body's statements are not relevant to the Panel's resolution of Russia's claim under the first sentence of Article 2.2.1.1. We again recall that the description of the parties' arguments in our Interim Report is not intended to reflect the entirety of the parties' arguments; rather, it focuses on the principal points we considered relevant to the resolution of this dispute. Moreover, paragraph 7.95 already notes that the subject of the second condition in the first sentence of Article 2.2.1.1 is the records of the producer under investigation.

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<sup>42</sup> Russia's comments on the Interim Report, para. 38.

### **2.2.10.3 Paragraphs 7.92 and 7.95 of the Interim Report**

2.41. Russia asks the Panel to add to footnote 213 to paragraph 7.92 a reference to paragraph 6.86 and footnote 303 of the Appellate Body Report, *Ukraine – Ammonium Nitrate*. Russia argues that these references contain "important points on the interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement".<sup>43</sup> We have decided to grant Russia's request to add, to footnote 213, a reference to paragraph 6.86 of the Appellate Body Report, *Ukraine – Ammonium Nitrate* as it adds further support to the Panel's description in paragraph 7.92 of the obligations under the first sentence of Article 2.2.1.1. However, we have decided not to grant Russia's request to add a reference to footnote 303 of the Appellate Body Report, *Ukraine – Ammonium Nitrate*, as it concerns issues that are unaddressed in paragraph 7.92 of the Interim Report.

2.42. Russia also asks the Panel to add, to the third sentence of paragraph 7.95, a reference to paragraph 6.56 of the Appellate Body Report, *EU – Biodiesel (Argentina)*.<sup>44</sup> We have decided to grant Russia's request.

### **2.2.11 Paragraph 7.115 of the Interim Report**

2.43. Russia asks the Panel to delete the word "improperly" in paragraph 7.115. With reference to paragraph 283 of Russia's first written submission, paragraph 7.115 describes Russia's argument that the Cost Adjustment Methodology is inconsistent with Article 2.2 of the Anti-Dumping Agreement by replacing the input prices actually paid by the investigated producers reflected in their records with out-of-country "surrogate" input prices. In addition to noting that Russia does not use the word "improperly", Russia asserts that there is no such thing as a "proper" substitution of the actually incurred input costs in the country of origin with "surrogate" prices.<sup>45</sup>

2.44. The European Union disagrees with Russia's suggestions with respect to the word "proper" and with Russia's request to remove "improperly". According to the European Union, there may be circumstances where the incurred input costs, as set out in the records, must be rejected and therefore there is a need for proper substitution of these costs.<sup>46</sup>

2.45. We have decided to grant Russia's request, in order to better reflect Russia's arguments. Therefore, we have deleted the word "improperly" in paragraph 7.115.

### **2.2.12 Paragraph 7.116 of the Interim Report**

2.46. Russia asks the Panel to convert the first sentence of paragraph 7.116 into two sentences and to delete the terms "even though".<sup>47</sup> Russia does not substantiate why the suggested changes are necessary to improve clarity or accuracy of the Interim Report. We have decided not to grant Russia's requests because we find them unnecessary in order to reflect Russia's arguments. However, we have amended another part of the first sentence of paragraph 7.116 to better reflect Russia's arguments.

### **2.2.13 Section 7.2.6.1.1 of the Interim Report**

2.47. Russia notes that section 7.2.6.1.2, which describes the European Union's main arguments in response to Russia's claim under Article 2.2 of the Anti-Dumping Agreement, includes the European Union's arguments concerning issues such as the meaning of "normal value" in Article 2.1 of the Anti-Dumping Agreement, and the terms "proper comparison" and "fair comparison" in, respectively, Articles 2.2 and 2.4 of the Anti-Dumping Agreement. Russia also notes that section 7.2.6.1.1 does not include Russia's response to these arguments of the European Union. Suggesting a six-sentence paragraph, Russia thus requests the Panel to amend section 7.2.6.1.1 in order to incorporate Russia's arguments.<sup>48</sup>

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<sup>43</sup> Russia's comments on the Interim Report, para. 39.

<sup>44</sup> Russia's comments on the Interim Report, para. 42.

<sup>45</sup> Russia's comments on the Interim Report, para. 44.

<sup>46</sup> European Union's comments on Russia's comments on the Interim Report, para. 12.

<sup>47</sup> Russia's comments on the Interim Report, para. 45.

<sup>48</sup> Russia's comments on the Interim Report, para. 31.

2.48. We have decided not to grant Russia's request. As noted in paragraph 7.130, the Panel does not find the European Union's arguments identified by Russia to be relevant to resolve Russia's claim under Article 2.2. The Panel provides an explanation for this conclusion in the fourth and fifth sentences of paragraph 7.130. We again recall that the description of the parties' arguments in our Report is not intended to reflect the entirety of the parties' arguments; rather, it focuses on the principal points we considered relevant to the resolution of this dispute.

#### **2.2.14 Section 7.2.6.2 of the Interim Report**

2.49. Russia makes three separated sets of requests in relation to section 7.2.6.2, which sets out the legal standard applicable to Article 2.2 of the Anti-Dumping Agreement.

##### **2.2.14.1 Russia's request for an additional introductory paragraph**

2.50. Russia asks the Panel to add before, paragraph 7.121, an additional introductory paragraph, concerning the operation of Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement.<sup>49</sup> Russia does not substantiate why the suggested introductory paragraph is necessary or relevant to the Panel's analysis of Russia's claim that is presented in the subsequent section 7.2.6.3, but refers to certain paragraphs of Russia's first written submission and of the Appellate Body Report, *EU – Biodiesel (Argentina)*.

2.51. We have decided not to grant Russia's request. Referring to the Appellate Body Report, *EU – Biodiesel (Argentina)*, the suggested introductory paragraph describes (i) the circumstances in which there is no need to determine the normal value on the basis of domestic sales pursuant Article 2.2; (ii) the alternative methods to calculate normal value under Article 2.2; and (iii) that Articles 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement further elaborate on various aspects of Article 2.2. We find it unnecessary to add the suggested paragraph to section 7.2.6.2, as the issues described therein are not relevant to the Panel's resolution of Russia's claim under of Article 2.2.

##### **2.2.14.2 Paragraph 7.121 of the Interim Report**

2.52. In setting out the applicable legal standard, paragraph 7.121 refers to paragraph 6.69 of the Appellate Body Report, *EU – Biodiesel (Argentina)*. Russia asks the Panel to add, to paragraph 7.121, an explicit reference to Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, in order to "mirror the wording" of paragraph 6.69 of the Appellate Body Report, *EU – Biodiesel (Argentina)*.<sup>50</sup>

2.53. We have decided to grant Russia's request to add, to paragraph 7.121, an explicit reference to Article 2.2 of the Anti-Dumping Agreement. However, as Russia does not make a claim under Article VI:1(b)(ii) of the GATT 1994, we have decided not to grant Russia's request to add a reference to this provision of the GATT 1994.

##### **2.2.14.3 Paragraphs 7.122 and 7.123 of the Interim Report**

2.54. Russia asks the Panel to revise paragraphs 7.122 and 7.123, in order to include wording "closer" to "the text of Article 2.2 of the Anti-Dumping Agreement" and "the Appellate Body's interpretations" in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*.<sup>51</sup> Russia does not suggest specific amendments to paragraphs 7.122 and 7.123, but asks the Panel to "reflect" in these paragraphs a number of "interpretations" Russia makes in relation to Article 2.2 based on, *inter alia*, certain Appellate Body's statements in the above-mentioned disputes.<sup>52</sup> Russia further requests the Panel to review its "considerations in light of these interpretations of the Appellate Body and make appropriate changes, if necessary".<sup>53</sup>

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<sup>49</sup> Russia's comments on the Interim Report, para. 49.

<sup>50</sup> Russia's comments on the Interim Report, para. 50.

<sup>51</sup> Russia's comments on the Interim Report, para. 51.

<sup>52</sup> Russia's comments on the Interim Report, para. 55.

<sup>53</sup> Russia's comments on the Interim Report, para. 56.

2.55. We have decided not to grant Russia's request. Russia's request does not fall under the limited function of the interim review stage, as it does not seek that the Panel review "precise aspects" of the Interim Report.

### **2.2.15 Section 7.2.6.3 of the Interim Report**

2.56. Russia requests several changes in section 7.2.6.3 ("Evaluation by the Panel").

#### **2.2.15.1 Paragraph 7.124 of the Interim Report**

2.57. Russia asks the Panel to amend the last sentence of paragraph 7.124 of the Interim Report, which reads:

Russia has further demonstrated that, in applying the Cost Adjustment Methodology, the European Commission does not explain whether or how this adapted out-of-country input price information is capable of representing the costs of production in the country of origin.

2.58. Specifically, Russia requests the Panel to change: (i) "or" for "and"; and (ii) "is capable of representing the costs" for "represents the cost". In relation to the latter request, Russia argues that "an explanation on 'capability' does not turn the surrogate input price into the cost of input for producers of the product under consideration in the country of origin".<sup>54</sup>

2.59. The European Union objects to Russia's suggestions. The European Union argues that the Appellate Body in *EU – Biodiesel* found, and the Panel correctly concludes, that an investigating authority can rely on out-of-country cost of production information, provided this information is apt to arrive at the undistorted cost of production information in the country of origin. This may require adjustments to the information.<sup>55</sup>

2.60. We have decided not to grant Russia's requests. As for Russia's first request, we do not find it appropriate to change "or" for "and", as the last sentence of paragraph 7.124 describes omissions in relation to the Cost Adjustment Methodology. As for Russia's second request, we find it unnecessary because the second sentence of paragraph 7.128, which contains the Panel's finding that the Cost Adjustment Methodology contravenes Article 2.2, explains that the Cost Adjustment Methodology "provides for the calculation of the costs of production of the investigated companies on the basis of out-of-country input price information ... without establishing whether or explaining how the adjusted out-of-country input price information *reflects or represents* the cost of production in the country of origin".<sup>56</sup> However, in order to improve consistency, we have amended the last sentence of paragraph 7.124, albeit not in the specific terms suggested by Russia.

#### **2.2.15.2 Paragraph 7.125 of the Interim Report**

2.61. The first and second sentences of paragraph 7.125 of the Interim Report read:

As already noted, while Article 2.2 of the Anti-Dumping Agreement does not limit the sources of information to be used to calculate the costs of production to only those sources inside the country of origin, an investigating authority remains bound by the obligation to arrive at the cost of production "in the country of origin". This may require it to adapt the out-of-country information in order to ensure that it is suitable to determine a cost of production "in the country of origin".<sup>57</sup>

2.62. Russia asks the Panel (i) to convert the first sentence of paragraph 7.125 into two sentences; (ii) to change "to be used" for "that may be used" in the first sentence of paragraph 7.125; (iii) after the second comma, to finish the first sentence with the following phrase: "it does not mean that an investigating authority may simply substitute the costs from outside the country of origin for 'the cost of production in the country of origin'"; (iv) that the new suggested second sentence starts with

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<sup>54</sup> Russia's comments on the Interim Report, paras. 57-59. (emphasis omitted)

<sup>55</sup> European Union's comments on Russia's comments on the Interim Report, para. 14.

<sup>56</sup> Emphasis added.

<sup>57</sup> Fns omitted.

the following phrase: "An investigating authority remains bound by the obligation"; (v) that the new suggested second sentence ends with the following phrase: "to construct normal value on the basis of the cost of production in the country of origin and thus an investigating authority has to ensure that such information is used to arrive at the cost of production in the country of origin"; and (vi) to change, in the current second sentence, "to ensure that it is suitable to determine a cost of production in the country of origin" for "to ensure that it represents a cost of production in the country of origin".

2.63. According to Russia, the suggested changes will bring the wording in these sentences "closer to the obligations under Article 2.2 of the Anti-Dumping Agreement, taking into account the language used in paragraphs 6.73, 6.74, 6.81, and 6.82 of the Appellate Body Report, *EU – Biodiesel (Argentina)*".<sup>58</sup>

2.64. The European Union objects to Russia's requests. For the European Union, accepting Russia's requests would imply that an investigating authority, once it has found that the cost is distorted and relies on other sources of information, including from outside the country, "still has [to] arrive at the same (distorted) cost level".<sup>59</sup>

2.65. We have decided to grant Russia's second request. Therefore, we have changed "to be used" for "that may be used" in the first sentence of paragraph 7.125.

2.66. However, we have decided not to grant Russia's remaining requests because the suggested additions are either unnecessary or inappropriate. As for Russia's third request, the last sentence of paragraph 7.122, in section 7.2.6.2 ("Legal standard") already includes a reference to the Appellate Body's statement in *EU – Biodiesel (Argentina)*, paragraph 6.73, that "[a]n investigating authority is not allowed to simply substitute the costs from outside the country of origin for the 'cost of production in the country of origin'". As for Russia's fifth request, the suggested language, which focuses on the construction of normal value, would be misplaced in paragraph 7.125, which instead focuses on the obligations related to the calculation of "the cost of production in the country of origin". Finally, as for Russia's sixth request, we note that the language used in paragraph 7.125 ("to ensure that it is suitable to determine a cost of production 'in the country of origin'") mirrors that used in paragraph 7.122, in section 7.2.6.2 ("Legal standard"), which in turn quotes paragraph 6.73 of the Appellate Body Report, *EU – Biodiesel (Argentina)*. As noted in paragraph 7.123, we agree with the Appellate Body's interpretation of the obligation in Article 2.2 to determine "the cost of production in the country of origin". Based on the foregoing, we have also decided not to grant Russia's first and fourth requests.

### **2.2.15.3 Paragraph 7.129 of the Interim Report**

2.67. The third sentence of paragraph 7.129 of the Interim Report reads:

Article 2.2 requires investigating authorities to calculate the costs of production "in the country of origin" and this obligation normally requires the use of the records of the investigated companies.

2.68. Russia argues that the third sentence of paragraph 7.129 improperly combines a reference to the obligation in Article 2.2 with a reference to the obligation in Article 2.2.1.1 of the Anti-Dumping Agreement, even though these provisions contain different obligations. Moreover, Russia argues that the language used to describe both obligations "is not entirely correct".<sup>60</sup> Russia thus requests the Panel to amend the third sentence of paragraph 7.129, as follows: (i) to change "calculate" for "use"; (ii) to add "for construction of normal value" after "'in the country of origin'"; and (iii) to change "this obligation normally requires the use of the records of the investigated companies" with "the obligation in Article 2.2.1.1 provides that costs, including the cost of production, shall normally be calculated on the basis of the records of the investigated companies, provided that both conditions, set out in this provision, are met".

2.69. We have decided not to grant Russia's requests. We disagree with Russia that the third sentence of paragraph 7.129 incorrectly describes the obligations under Articles 2.2 and 2.2.1.1 of

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<sup>58</sup> Russia's comments on the Interim Report, para. 61.

<sup>59</sup> European Union's comments on Russia's comments on the Interim Report, para. 15.

<sup>60</sup> Russia's comments on the Interim Report, para. 63.

the Anti-Dumping Agreement. However, we have included, in the third sentence of paragraph 7.129, a reference to Article 2.2.1.1, albeit not in the specific terms suggested by Russia.

#### **2.2.15.4 Paragraph 7.130 of the Interim Report**

2.70. After concluding that the Cost Adjustment Methodology contravenes Article 2.2, the first sentence of paragraph 7.130 reproduces the European Union's argument that an investigating authority cannot be required to use data that it has already determined is not apt to ensure a "proper" and "fair" comparison. The second sentence of paragraph 7.130 explains that, according to the European Union, that would be incompatible with the purpose of Article 2.2, namely to establish whether dumping takes place by making a "proper comparison" between the normal value and the export price. As we conclude in the third sentence of paragraph 7.130, "[w]e do not find this argument to be relevant" to resolve Russia's claim in relation to the Cost Adjustment Methodology. In the fourth and fifth sentences of paragraph 7.130, we present the reasons for our conclusion.

2.71. Russia asks the Panel to clarify whether the third sentence of paragraph 7.130 responds to the totality of the European Union's arguments described in the first and second sentences of paragraph 7.130. Russia also asks the Panel to reject, "in its substance", the European Union's arguments. According to Russia, to resolve Russia's claim that the Cost Adjustment Methodology is inconsistent with Article 2.2 of the Anti-Dumping Agreement, "it is not enough to decline consideration of these arguments by the European Union".<sup>61</sup> The European Union disagrees that paragraph 7.130 sets out two separate arguments of the European Union.

2.72. We have decided not to grant Russia's requests. As for Russia's first request, as already noted, in the third sentence of paragraph 7.130, we address the European Union's argument, described in the first and second sentences of this paragraph 7.130, that it would be incompatible with the purpose of Article 2.2 if an investigating authority had to use data that it has already determined is not apt to ensure a "proper" and "fair" comparison. As already noted, we find "this argument" irrelevant to resolve Russia's claim under Article 2.2 for the reasons provided in the fourth and fifth sentences of paragraph 7.130. It is apparent that, by referring to "this argument", we refer to the European Union's argument described in the first and second sentences of paragraph 7.130. As for Russia's second request, we recall that the limited function of the interim review stage is to consider the review of "precise aspects" of the interim report. Insofar as Russia is requesting a reconsideration of the Panel's reasoning in disposing of the European Union's argument described in paragraph 7.130, this request amounts to an attempt to re-litigate arguments already put before us, which is not appropriate at the interim review stage.

#### **2.2.15.5 Paragraphs 7.131 and 8.1.a.iv of the Interim Report**

2.73. Paragraph 7.131 of the Interim Report contains the Panel's conclusion on Russia's claim that the Cost Adjustment Methodology is inconsistent with Article 2.2 of the Anti-Dumping Agreement:

[T]he Cost Adjustment Methodology, by providing for the use of out-of-country input price information without explaining why such information is adequate to reflect the costs of production in the country of origin, contravenes Article 2.2 of the Anti-Dumping Agreement.

2.74. Russia requests that, instead of "why such information is adequate to reflect", paragraph 7.131 should read "why out-of-country information is required and how it reflects" the costs of production in the country of origin.<sup>62</sup> Russia also requests the Panel to add to paragraph 7.131 the following phrase: "not mandating to use the cost of production in the country of origin when calculating and constructing normal value".<sup>63</sup> Russia requests the same amendments are made in paragraph 8.1.a.iv, in section 8 ("Conclusions and recommendation").

2.75. The European Union objects to Russia's first request arguing that Russia seeks to introduce a new explanation requirement that is nowhere provided for.<sup>64</sup> The European Union also objects to

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<sup>61</sup> Russia's comments on the Interim Report, para. 68.

<sup>62</sup> Russia's comments on the Interim Report, para. 82.

<sup>63</sup> Russia's comments on the Interim Report, para. 84.

<sup>64</sup> European Union's comments on Russia's comments on the Interim Report, para. 18.

Russia's second request arguing that Russia does not explain why the suggested addition is appropriate.<sup>65</sup>

2.76. We have decided not to grant Russia's requests. The language suggested by Russia does not find support in our considerations or findings but appears to be based on Russia's understanding of the operation of the challenged measure and the legal standard applicable to Article 2.2 of the Anti-Dumping Agreement. As for Russia's requests that the Panel finds that the Cost Adjustment Methodology consists in "not mandating to use the cost of production in the country of origin when calculating and constructing normal value", we have already rejected that request.<sup>66</sup> However, in order to improve consistency, we have amended these paragraphs, albeit not in the specific terms suggested by Russia.

### **2.3 Russia's claim concerning the first subparagraph of Article 2(3) of the Basic AD Regulation**

#### **2.3.1 Paragraph 7.132 of the Interim Report**

2.77. Russia requests the wording of paragraph 7.132 of the Interim Report be modified to more closely reflect the wording of Russia's argumentation with references to Russia's first written submission.<sup>67</sup> The European Union did not specifically comment on this request. We consider that Russia's requested modifications more precisely describe Russia's argumentation, and we have accepted Russia's request with minor editorial changes.

#### **2.3.2 Paragraph 7.137 of the Interim Report**

2.78. Russia requests inclusion of a reference after the second sentence of paragraph 7.137 of the Interim Report. Russia further requests an additional sentence be added to this paragraph to describe an additional step in Russia's argumentation under this claim.<sup>68</sup> The European Union did not specifically comment on these requests. We have granted the request for a reference to Russia's first written submission, but we have declined the request to include the additional sentence as this aspect of Russia's argumentation is not the subject of this paragraph.

#### **2.3.3 Paragraph 7.139 of the Interim Report**

2.79. Russia requests inclusion in the penultimate sentence of paragraph 7.139 of the Interim Report of a more fulsome description of the categories of Russia's argument that are to be addressed in the following paragraphs and a reference to its submissions.<sup>69</sup> The European Union has not specifically commented on this request. We have granted Russia's requested inclusion of more fulsome descriptions. We have declined to add a reference to Russia's submissions here because the purpose of the sentence in question is simply to signal the topics to be addressed in subsequent paragraphs where the appropriate references do appear.

#### **2.3.4 Paragraph 7.141 of the Interim Report**

2.80. For paragraph 7.141, Russia requests (i) a revision of the description of its argument; (ii) deletion of a reference to Russia's response to a Panel question; (iii) revision of footnote reference to dictionary definition of "those" rather than "situation"; (iv) deletion of references to precise dictionary meanings of terms quoted by Russia in its first written submission.<sup>70</sup> The European Union opposes deletion of Russia's response to a Panel question from the description of Russia's position.<sup>71</sup> We have revised the description of Russia's argument to include a more complete quotation of Russia's argument. We decline to delete the description and reference to Russia's response to a Panel question because the original description was accurate. We have revised the footnote to refer to the dictionary definition of "those" rather than "situation" because this was a referencing error in the original footnote in the Interim Report. We decline to remove the precise

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<sup>65</sup> European Union's comments on Russia's comments on the Interim Report, para. 19.

<sup>66</sup> See para. 2.25. above.

<sup>67</sup> Russia's comments on the Interim Report, para. 88.

<sup>68</sup> Russia's comments on the Interim Report, paras. 89-90.

<sup>69</sup> Russia's comments on the Interim Report, para. 91.

<sup>70</sup> Russia's comments on the Interim Report, paras. 92-98.

<sup>71</sup> European Union's comments on Russia's comments on the Interim Report, para. 21.

references to the portions of the dictionary entries that Russia quoted in its first written submission because these references are accurate.

### **2.3.5 Paragraph 7.143 of the Interim Report**

2.81. Russia requests the word "costs" in the footnote to paragraph 7.143 of the Interim Report be changed to "cost" because Article 2.2 of the Anti-Dumping Agreement refers to "the cost of production" where the word "cost" is in singular form.<sup>72</sup> The European Union did not specifically comment on this request. We have revised the footnote as requested for the reason cited by Russia and because the footnote makes no determination in respect of the meanings of the terms "cost" and "costs".

### **2.3.6 Paragraph 7.153 of the Interim Report**

2.82. Russia requests inclusion in paragraph 7.153 of the Interim Report of a reference to its first written submission in relation to the description of its argumentation.<sup>73</sup> The European Union did not specifically comment on this request. We have granted the request because the reference requested is accurate.

### **2.3.7 Paragraph 7.155 of the Interim Report**

2.83. Russia requests additional description of its argumentation and reference to relevant portions of its first written submission and to Exhibit RUS-10.<sup>74</sup> The European Union did not specifically comment on this request. We have granted Russia's request with editorial revision to ensure the description is appropriately concise and accurate. We have declined to include the requested reference to Exhibit RUS-10 in this context because it would be redundant of the reference to this same exhibit in connection with Russia's request for revision in relation to paragraph 7.162 of the Interim Report which is addressed below.

### **2.3.8 Paragraph 7.158 of the Interim Report**

2.84. Russia requests to revise the second sentence of paragraph 7.158 of the Interim Report by altering the quotation of the term "particular market situation" and by deleting the article before the term "normal value".<sup>75</sup> The European Union did not specifically comment on this request. We decline to make the requested changes because we find neither the original quotation nor the use of the article to be inaccurate as Russia suggested.

2.85. Russia further requests to revise the reference in the penultimate sentence to "costs of production" to instead read as "the cost of production" because this is the precise language of Article 2(3) of the Basic AD Regulation.<sup>76</sup> The European Union did not specifically comment on this request. We have revised the language for the reason cited by Russia.

### **2.3.9 Paragraph 7.160 of the Interim Report**

2.86. Russia requests the article be deleted before the term "constructed normal value" in the penultimate sentence of paragraph 7.160 of the Interim Report.<sup>77</sup> The European Union did not specifically comment on this request. We decline to make this revision because we find the use of the article in this context is not inaccurate.

### **2.3.10 Paragraph 7.162 of the Interim Report**

2.87. Russia requests the footnote reference to its arguments as paragraphs 71-72 of its first written submission include a parenthetical reference to Exhibit RUS-10.<sup>78</sup> The European Union did

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<sup>72</sup> Russia's comments on the Interim Report, para. 99.

<sup>73</sup> Russia's comments on the Interim Report, para. 100.

<sup>74</sup> Russia's comments on the Interim Report, para. 101.

<sup>75</sup> Russia's comments on the Interim Report, para. 102.

<sup>76</sup> Russia's comments on the Interim Report, para. 103.

<sup>77</sup> Russia's comments on the Interim Report, para. 104.

<sup>78</sup> Russia's comments on the Interim Report, para. 105.

not specifically comment on this request. We have revised the footnote to include the reference to Exhibit RUS-10 because this more accurately describes Russia's argument.

### **2.3.11 Paragraphs 7.164, 7.165, and 7.166 of the Interim Report**

2.88. Russia requests inclusion of references to the relevant exhibit for the recitals of the regulation quoted in paragraphs 7.164 and 7.165 of the Interim Report.<sup>79</sup> The European Union did not specifically comment on this request. We have included the requested references.

2.89. Russia further requests additional description of its arguments related to the quoted recitals of the regulation quoted in paragraphs 7.164, 7.165 and 7.166 of the Interim Report.<sup>80</sup> The European Union did not specifically comment on this request. We have included brief descriptions of the argumentation requested by Russia with editorial revisions for conciseness.

### **2.3.12 Paragraph 7.168 of the Interim Report**

2.90. Russia requests inclusion of exhibit references for each of the referenced regulations in the first sentence of paragraph 7.168 of the Interim Report.<sup>81</sup> The European Union did not specifically comment on this request. We have included references to the relevant exhibits in the footnote associated with the first sentence of this paragraph.

2.91. Russia further requests additional description of its argumentation in relation to referenced regulations in this paragraph and references to specific recitals within each regulation related to its argumentation.<sup>82</sup> The European Union did not specifically comment on this request. We have included additional description of Russia's argumentation with editorial revision for conciseness, and we have declined to include the references to specific recitals as these are not germane to our analysis in this paragraph.

## **2.4 Russia's claims concerning the second subparagraph of Article 2(3) of the Basic AD Regulation**

### **2.4.1 Scope, content and meaning of the second subparagraph of Article 2(3) of the Basic AD Regulation**

2.92. Russia requests the inclusion in section 7.4 of the Interim Report a more complete description of Russia's arguments and evidence presented in relation to the scope, content and meaning of the second subparagraph of Article 2(3) of the Basic AD Regulation.<sup>83</sup> The European Union considers that an Interim Review is not the place or time to re-argue the case, and recalls that a Panel is not required to respond to each and every single part of an argumentation.<sup>84</sup> Russia further requests the Panel to make additional findings regarding the scope, content and meaning of the second subparagraph of Article 2(3) of the Basic AD Regulation.<sup>85</sup> The European Union recalls that while panels have the obligation to examine the meaning and scope of the municipal law at issue in order to make an objective assessment of the matter before it, it is also understood that a responding Member's measure will be treated as WTO-consistent until sufficient evidence is presented to prove the contrary, and in the view of the European Union, Russia has argued to inappropriately place the burden on the responding Member.<sup>86</sup>

2.93. We decline to alter our analysis of the claim addressed in section 7.4 of the Interim Report. As explained in paragraphs 7.171-7.173 of the Interim Report, we focus our analysis on the matter before us which is the particular claim that Russia has asserted. As explained in paragraph 7.174 we begin our analysis with our examination of Russia's asserted interpretation of Article 2.2 of the Anti-Dumping Agreement that Russia alleges to support its claim of inconsistency in relation to the second subparagraph of Article 2(3) of the Basic Regulation. We also analyse certain additional

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<sup>79</sup> Russia's comments on the Interim Report, para. 106.

<sup>80</sup> Russia's comments on the Interim Report, paras. 107-109.

<sup>81</sup> Russia's comments on the Interim Report, para. 110.

<sup>82</sup> Russia's comments on the Interim Report, paras. 111-112.

<sup>83</sup> Russia's comments on the Interim Report, paras. 113-116.

<sup>84</sup> European Union's comments on Russia's comments on the Interim Report, para. 22.

<sup>85</sup> Russia's comments on the Interim Report, paras. 116-117.

<sup>86</sup> European Union's comments on Russia's comments on the Interim Report, para. 23.

arguments of inconsistency that Russia develops in its written submissions. On the basis of these analyses we conclude that Russia has not discharged its burden of demonstrating that its legal rationale regarding the interpretation of Article 2.2 provides a valid basis for this claim. Accordingly, Russia's asserted claim cannot succeed as a legal matter and we need not proceed with further analysis of the claim.

#### **2.4.2 Paragraph 7.171 of the Interim Report**

2.94. Russia requests modification of this paragraph to "fully reflect Russia's claims as well as Russia's wording in paragraph 112 of its first written submission and in paragraph 127 of its second written submission."<sup>87</sup> Russia also requests a more specific reference to its first written submission in the footnote appearing in this paragraph. The European Union did not specifically comment on this request.

2.95. We consider that the purpose of this introductory paragraph is not to "fully reflect" every aspect of Russia's argumentation in relation to this claim. We recall that the descriptions of the parties' arguments in our Report are not intended to reflect the entirety of the parties' arguments. Rather, they focus on the principal points we considered relevant to the resolution of this dispute. In this respect, we recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".<sup>88</sup> We further note that the integrated executive summaries of the arguments of the parties are set out in Annexes B1-B4. Those summaries have been prepared by the parties themselves and therefore have provided the parties with the full opportunity to reflect their arguments as they see fit. For these reasons, we decline Russia's requested modifications to this paragraph. We have granted Russia's request for a more specific reference in the footnote.

#### **2.4.3 Paragraph 7.174 of the Interim Report**

2.96. Russia requests the second sentence of paragraph 7.174 of the Interim Report be revised to clarify that Russia's interpretive arguments were also developed in its responses to Panel questions.<sup>89</sup> The European Union did not specifically comment on this request. We have made the revision as requested.

#### **2.4.4 Paragraph 7.175 of the Interim Report**

2.97. Russia requests a modification of the first sentence in paragraph 7.175 of the Interim Report to reflect the wording used by Russia in paragraph 152, rather than paragraph 148, of its first written submission, and to adjust the reference in the accompanying footnote accordingly.<sup>90</sup> The European Union opposes the modification, indicating that Russia's objections are unfounded because the original language was unbiased.<sup>91</sup>

2.98. We have modified the first sentence of paragraph 7.175 of the Interim Report to more closely follow the wording of Russia's argumentation in both paragraphs 148 and 152 of its first written submission.

#### **2.4.5 Paragraph 7.177 of the Interim Report**

2.99. Russia requests modification of paragraph 7.177 to more closely replicate the wording of its argumentation and to include additional aspects of Russia's argumentation not mentioned in the original paragraph.<sup>92</sup> The European Union did not specifically comment on this request.

2.100. We have made certain adjustments to the wording of this paragraph to more closely replicate the wording of Russia's argumentation. We have not included a description of additional aspects of Russia's argumentation that are not the focus of this portion of our analysis. We recall that the description of the parties' arguments in our Report are not intended to reflect the entirety of the parties' arguments. Rather, they focus on the principal points we considered relevant to the

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<sup>87</sup> Russia's comments on the Interim Report, paras. 118-119.

<sup>88</sup> Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

<sup>89</sup> Russia's comments on the Interim Report, para. 120.

<sup>90</sup> Russia's comments on the Interim Report, para. 121.

<sup>91</sup> European Union's comments on Russia's comments on the Interim Report, para. 24.

<sup>92</sup> Russia's comments on the Interim Report, paras. 123-125.

resolution of this dispute. In this respect, we recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".<sup>93</sup> We further note that the integrated executive summaries of the arguments of the parties are set out in Annexes B1-B4. Those summaries have been prepared by the parties themselves and therefore have provided the parties with the full opportunity to reflect their arguments as they see fit.

#### **2.4.6 Paragraph 7.178 of the Interim Report**

2.101. Russia requests modification of the third sentence of paragraph 7.178 of the Interim Report to refer to Article 2.1 of the Anti-Dumping Agreement and additional portions of the referenced Appellate Body report.<sup>94</sup> The European Union did not specifically comment on this request. We have declined to make the requested modification because the original language accurately describes this portion of our analysis.

2.102. Russia further requests modifications to the sixth and seventh sentences of paragraph 7.178 of the Interim Report for greater clarity.<sup>95</sup> The European Union did not specifically comment on this request. We have made certain of the requested modifications where we found that clarity was enhanced, and we have declined to make certain requested modification that did not, in our view, enhance the clarity of these passages.

2.103. Russia further requests modification to the footnote connected to the seventh sentence of paragraph 7.178 of the Interim Report to more accurately describe Russia's arguments in relation to the implications of the use of the indefinite article "una" in the Spanish version of Article 2.2 of the Anti-Dumping Agreement.<sup>96</sup> The European Union objects to the requested modification as an attempt to revise the Panel's conclusions.<sup>97</sup> We disagree with the European Union that these requested modifications alter the Panel's conclusions, and we have modified the description of Russia's arguments for enhanced accuracy.

2.104. Russia further requests to replace the word "condition" with the word "term" in the first sentence of the footnote connected to the seventh sentence of paragraph 7.178 of the Interim Report consistent with Russia's argumentation on this point.<sup>98</sup> The European Union did not specifically comment on this request. We note that the first sentence of the footnote in question is not intended as a description of Russia's argumentation, and we, therefore, consider that the requested revision of our analysis is not necessary and not appropriate.

#### **2.4.7 Paragraph 7.180 of the Interim Report**

2.105. Russia requests, in the penultimate sentence of paragraph 7.180 of the Interim Report, to replace the word "position" with the word "interpretation" in describing Russia's argumentation, and to delete the word "condition" as a descriptor of "the particular market situation" in the context of Russia's interpretation.<sup>99</sup> The European Union disagrees with the replacement of "position" with "interpretation" because it considers "position" is an accurate description.<sup>100</sup> We have granted the requested revisions as a more accurate description of Russia's argumentation in question.

#### **2.4.8 Paragraph 7.181 of the Interim Report**

2.106. Russia requests modification of the first sentence of paragraph 7.181 by including a reference to Russia's reliance on certain documents considered by Russia to constitute negotiating history of the second *Ad Note* to Article VI:1 of the GATT 1994, and to clarify the connected footnote to refer to these documents and the associated argumentation.<sup>101</sup> The European Union did not specifically comment on this request.

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<sup>93</sup> Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

<sup>94</sup> Russia's comments on the Interim Report, para. 126.

<sup>95</sup> Russia's comments on the Interim Report, para. 127.

<sup>96</sup> Russia's comments on the Interim Report, paras. 128-131.

<sup>97</sup> European Union's comments on Russia's comments on the Interim Report, para. 25.

<sup>98</sup> Russia's comments on the Interim Report, para. 132.

<sup>99</sup> Russia's comments on the Interim Report, para. 133.

<sup>100</sup> European Union's comments on Russia's comments on the Interim Report, para. 26.

<sup>101</sup> Russia's comments on the Interim Report, paras. 134-135.

2.107. We recall that the description of the parties' arguments in our Report are not intended to reflect the entirety of the parties' arguments. Rather, they focus on the principal points we considered relevant to the resolution of this dispute. We decline to revise the first sentence of the paragraph as requested. However, we have expanded the reference in the footnote to encompass the particular documents and associated argumentation offered by Russia.

2.108. Russia further requests the Panel to consider Russia's argumentation and supporting evidence in Exhibits RUS-26, RUS-27, to make findings in the text of the Report.<sup>102</sup> The European Union did not specifically comment on this request.

2.109. We have considered all of Russia's argumentation and supporting evidence, including the particular argumentation and evidence referenced in Russia's request. We recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".<sup>103</sup> For the reasons set forth in our Report, we do not consider additional findings to be necessary to resolve this claim.

#### **2.4.9 Paragraph 7.183 of the Interim Report**

2.110. Russia requests modification of the first sentence of paragraph 7.183 of the Interim Report to bring the description of Russia's argument closer to the wording used by Russia in paragraph 148 of its first written submission.<sup>104</sup> The European Union did not specifically comment on this request. We have made the requested revisions as they appropriately and accurately describe Russia's argumentation relevant to the analysis in this paragraph.

2.111. Russia further requests, on the basis of arguments set forth in its submissions and new arguments, the Panel to reconsider and to modify its conclusions in the third and fourth sentences in paragraph 7.183 of the Report.<sup>105</sup> The European Union disagrees with Russia's request, commenting that a request for the Panel to reconsider its determinations is inappropriate in the context of an interim review.<sup>106</sup>

2.112. We recall that it is well-established that the interim review is not an appropriate stage for the parties to raise new arguments not previously presented before a panel; nor is it an appropriate stage for the parties to re-argue their case on the basis of the arguments already put before a panel.<sup>107</sup> Accordingly, we decline to reconsider arguments that have been already considered or to address new arguments not previously presented to the Panel.

#### **2.4.10 Paragraph 7.185 of the Interim Report**

2.113. Russia requests modification of the second sentence in paragraph 7.185 of the Interim Report to clarify Russia's argumentation presented in response to Panel question No. 14.<sup>108</sup> The European Union did not specifically comment on this request.

2.114. We have carefully examined Russia's response to Panel question No. 14, and do not consider that Russia's requested modifications to the second sentence of paragraph 7.185 of the Interim Report accurately clarify its arguments. We have revised the sentence to more precisely and accurately describe the response provided by Russia. We have also made conforming modifications to our analysis in paragraphs 7.186 and 7.189 of the Interim Report.

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<sup>102</sup> Russia's comments on the Interim Report, paras. 134-135.

<sup>103</sup> Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

<sup>104</sup> Russia's comments on the Interim Report, para. 137.

<sup>105</sup> Russia's comments on the Interim Report, paras. 138-143.

<sup>106</sup> European Union's comments on Russia's comments on the Interim Report, para. 27.

<sup>107</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259.

See also Panel Reports, *Japan – DRAMS (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.

<sup>108</sup> Russia's comments on the Interim Report, paras. 144-146.

#### **2.4.11 Paragraph 7.186 of the Interim Report**

2.115. The European Union requests inclusion in paragraph 7.186 of the Interim Report of a footnote reference to reflect the European Union's response to Panel question No. 14 after the sentence reading "[w]e understand Article 2.7 as preserving the operation of the second *Ad Note*, and that Article 2 of the Anti-Dumping Agreement should not be construed in a way that negates or restricts the second *Ad Note*."<sup>109</sup> Russia argues the request should be declined because the sentence in question begins with the phrase "[w]e understand" meaning that the Panel understands, which was not an aspect of the European Union's response to Panel question No. 14.

2.116. We have declined to include the requested reference to the European Union's response to Panel question No. 14 because we do not consider this reference is necessary for our analysis and conclusion on this point.

#### **2.4.12 Paragraph 7.187 of the Interim Report**

2.117. Russia requests an unspecified modification in the last sentence of paragraph 7.187 of the Interim Report because of a perceived conflation of Articles 2.2 and 2.4 of the Anti-Dumping Agreement referencing arguments Russia presented in its submissions.<sup>110</sup> The European Union disagrees with Russia's request, commenting that a request for the Panel to reconsider its determinations is inappropriate in the context of an interim review.<sup>111</sup>

2.118. We recall that it is well-established that the interim review is not an appropriate stage for the parties to raise new arguments not previously presented before a panel; nor is it an appropriate stage for the parties to re-argue their case on the basis of the arguments already put before a panel.<sup>112</sup> Accordingly, we decline to reconsider arguments that have been already considered or to address new arguments not previously presented to the Panel. We find there is no basis for a modification of the last sentence of paragraph 7.187 of the Interim Report.

#### **2.4.13 Paragraph 7.188 of the Interim Report**

2.119. Russia requests a modification of the phrase in square brackets in the last sentence of paragraph 7.188 of the Interim Report to clarify that the Panel refers to alternative methods to determine normal value as provided in Article 2.2 of the Anti-Dumping Agreement.<sup>113</sup> The European Union did not specifically comment on this request. We have revised the language in square brackets in the last sentence of paragraph 7.188 of the Interim Report to clarify that the Panel refers to one of two alternative methods to determine normal value as provided in Article 2.2.

#### **2.4.14 Paragraph 7.190 of the Interim Report**

2.120. Russia requests modification of the first sentence of paragraph 7.190 of the Interim Report to provide additional context for its argument.<sup>114</sup> The European Union did not specifically comment on this request. We have made the modification as requested.

#### **2.4.15 Paragraph 7.195 of the Interim Report**

2.121. Russia requests modifications of paragraph 7.195 to include description of additional aspects of Russia's argumentation, and to revise aspects of our analysis.<sup>115</sup> The European Union did not specifically comment on this request.

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<sup>109</sup> European Union's comments on the Interim Report, para. 4.

<sup>110</sup> Russia's comment on the Interim Report, paras. 147-152.

<sup>111</sup> European Union's comments on Russia's comments on the Interim Report, para. 28.

<sup>112</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259. See also Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.

<sup>113</sup> Russia's comments on the Interim Report, para. 153.

<sup>114</sup> Russia's comments on the Interim Report, paras. 154-155.

<sup>115</sup> Russia's comments on the Interim Report, paras. 156-163.

2.122. We recall that the description of the parties' arguments in our Report are not intended to reflect the entirety of the parties' arguments. Rather, they focus on the principal points we considered relevant to the resolution of this dispute. In this respect, we recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".<sup>116</sup> We further note that the integrated executive summaries of the arguments of the parties are set out in Annexes B1-B4. Those summaries have been prepared by the parties themselves and therefore have provided the parties with the full opportunity to reflect their arguments as they see fit. We recall that it is well-established that the interim review is not an appropriate stage for the parties to re-argue their case on the basis of the arguments already put before a panel.<sup>117</sup> Accordingly, we decline to reconsider arguments that have been already considered. We find there is no basis for a modification of paragraph 7.195 of the Interim Report.

2.123. The European Union requests inclusion of a footnote reference to reflect the European Union's comments on Russia's response to Panel question No. 114 after the sentence reading: "[w]e also take into consideration that the term 'market' is functioning as an adjective to indicate that the situation being referenced in the phrase 'the particular market situation' is a situation pertaining to a market and that the relevance of 'the particular market situation' in the context of Article 2.2 turns on whether or not it causes the exporter's sales of the like product in the domestic market to not permit a proper comparison with the export sales of the exporter for which dumping is being determined."<sup>118</sup> Russia opposes the European Union's requested reference, arguing, *inter alia*, that the sentence to which the European Union suggests to add the footnote begins with the phrase "[w]e also take into consideration", i.e. the Panel takes into consideration, and does not contain any reference to the European Union's argument.<sup>119</sup>

2.124. We have declined to include the requested reference to the European Union's comments on Russia's response to Panel question No. 114 because we do not consider this reference is necessary for our analysis and conclusion on this point.

#### **2.4.16 Paragraph 7.197 of the Interim Report**

2.125. Russia requests modifications of paragraph 7.197 to include description of additional aspects of Russia's argumentation, and requests reconsideration and modification of certain of our analysis and conclusions in this paragraph.<sup>120</sup> The European Union opposes Russia's request, claiming that Russia seeks to re-argue its case.<sup>121</sup>

2.126. We recall that the description of the parties' arguments in our Report is not intended to reflect the entirety of the parties' arguments. Rather, it focuses on the principal points we considered relevant to the resolution of this dispute. In this respect, we recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".<sup>122</sup> We further note that the integrated executive summaries of the arguments of the parties are set out in Annexes B1-B4. Those summaries have been prepared by the parties themselves and therefore have provided the parties with the full opportunity to reflect their arguments as they see fit. We recall that it is well-established that the interim review is not an appropriate stage for the parties to re-argue their case on the basis of the arguments already put before a panel.<sup>123</sup> Accordingly, we decline to reconsider arguments that have been already considered. We find there is no basis for a modification of paragraph 7.197 of the Interim Report.

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<sup>116</sup> Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

<sup>117</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259. See also Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.

<sup>118</sup> European Union's comments on the Interim Report, para. 5.

<sup>119</sup> Russia's comments on the European Union's comments on the Interim Report, paras. 11-15.

<sup>120</sup> Russia's comments on the Interim Report, paras. 164-175.

<sup>121</sup> European Union's comments on Russia's comments on the Interim Report, para. 29.

<sup>122</sup> Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

<sup>123</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259. See also Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.

#### 2.4.17 Paragraphs 7.197 and 7.198 of the Interim Report

2.127. The European Union invites the Panel to include in paragraphs 7.197 and 7.198 of the Interim Report references to the Panel Report in *Australia – Anti-Dumping Measures on Paper* pursuant to which the European Union proposes for the Panel to recall certain passages contained in that report.<sup>124</sup> Russia opposes the requested additions, arguing that the text of paragraphs 7.197 and 7.198 of the Interim Report makes clear that the Panel considered Russia's arguments and made its findings regarding those arguments such that reference to the panel's considerations in *Australia – Anti-Dumping Measures on Paper* are not appropriate in these paragraphs, and also referring to the Panel's observations in paragraph 7.200 of the Interim Report about the distinctions between the arguments and records at issue in the present dispute and the dispute in *Australia – Anti-Dumping Measures on Paper*.<sup>125</sup>

2.128. We have declined to make the requested inclusions because we do not consider these references are necessary for our analyses and conclusions on these points.

#### 2.4.18 Paragraph 7.198 of the Interim Report

2.129. Russia requests modification of the description of its arguments presented in the first sentence of paragraph 7.198 of the Interim Report.<sup>126</sup> The European Union did not specifically comment on this request. We consider that Russia's requested modifications accurately describe its arguments under consideration in this paragraph, and we have accepted the modification with slight revision for conciseness.

2.130. Russia further requests reconsideration and modification of certain of our analysis and conclusions in this paragraph.<sup>127</sup> The European Union opposes Russia's request, claiming that Russia seeks to re-argue its case.<sup>128</sup>

2.131. We recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".<sup>129</sup> We recall that it is well-established that the interim review is not an appropriate stage for the parties to raise new arguments not previously presented before a panel; nor is it an appropriate stage for the parties to re-argue their case on the basis of the arguments already put before a panel.<sup>130</sup> Accordingly, we decline to reconsider arguments that have been already considered or to address new arguments not previously presented to the Panel. We find there is no basis for these requested modifications paragraph 7.198 of the Interim Report.

#### 2.4.19 Paragraph 7.199 of the Interim Report

2.132. Russia requests modification of the description of the Appellate Body's finding on the object and purpose of the Anti-Dumping Agreement set forth in the fourth sentence of paragraph 7.199 of the Interim Report.<sup>131</sup> The European Union did not specifically comment on this request. We have declined to make the requested modification because it is not necessary as we consider that the sentence does not purport to quote the Appellate Body findings in their entirety, and we consider the description set forth in the referenced sentence is an accurate and appropriate description in this context.

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<sup>124</sup> European Union's comments on the Interim Report, paras. 6-7.

<sup>125</sup> Russia's comments on European Union's comments on the Interim Report, paras. 16-31.

<sup>126</sup> Russia's comments on the Interim Report, paras. 176-178.

<sup>127</sup> Russia's comments on the Interim report, paras. 179-184.

<sup>128</sup> European Union comments on Russia's comments on the Interim Report, para. 30.

<sup>129</sup> Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

<sup>130</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259.

See also Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.

<sup>131</sup> Russia's comments on the Interim Report, para. 185.

#### **2.4.20 Paragraphs 7.182, 7.184, 7.193, 7.194, and 7.196 and section titles 7.4.3 and 7.4.3.1 of the Interim Report**

2.133. Russia requests to add the words "to Article VI:1 of the GATT 1994" after the words "the second *Ad Note*" in paras. 7.182, 7.184, 7.193, 7.194 and 7.196 and in the titles of sections 7.4.3 and 7.4.3.1 of the Interim Report, noting that it considers the reference to the GATT 1994 is significant because the second *Ad Note* does not appear in the Anti-Dumping Agreement.<sup>132</sup> The European Union did not specifically comment on this request. We have made the modifications as requested.

#### **2.5 Russia's claims concerning the final part of the second subparagraph of Article 2(5) of the Basic AD Regulation**

##### **2.5.1 Paragraphs 7.205, 7.213, and 7.218 of the Interim Report**

2.134. Russia requests additional elements be included in the description of the scenario described in the second sentence of paragraph 7.205 of the Interim Report.<sup>133</sup> The European Union disagrees specifically with Russia's request to insert "allegedly" because if it is a determination, it is no longer "alleged".<sup>134</sup> We have made the requested modifications with the exception of the request to include "allegedly" because we understand that it is not accurate to say that a determination that distortions were alleged would be sufficient to reject the costs.

2.135. Russia further requests modification of the penultimate sentence of paragraph 7.205, paragraph 7.213, and paragraph 7.218 of the Interim Report to reflect more closely the wording of its argumentation.<sup>135</sup> The European Union did not specifically comment on this request. We have made the modifications as requested.

##### **2.5.2 Paragraph 7.206 of the Interim Report**

2.136. Russia requests modification of the last sentence paragraph 7.206 of the Interim Report to include additional detail and more closely conform the language to its argumentation.<sup>136</sup> The European Union did not specifically comment on this request. We have made the modifications as requested.

##### **2.5.3 Paragraph 7.207 of the Interim Report**

2.137. Russia requests modification of the second sentence of paragraph 7.207 of the Interim Report to refer to "the cost of production" in the singular form as it is referred in Article 2.2 of the Anti-Dumping Agreement.<sup>137</sup> The European Union does not specifically comment on this request. We have made the modification as requested.

2.138. Russia further requests modification of the findings made in paragraph 7.207 to the effect that there is an obligation "to use the cost of production in the country of origin" in the construction of normal value to determine the margin of dumping, and to refer to "the" cost of production in the country of origin rather than "a" cost of production in the country of origin.<sup>138</sup> The European Union disagrees, arguing that the requested modifications would distort the findings of the Panel and does not correspond to the Appellate Body's findings in *EU – Biodiesel (Argentina)*.<sup>139</sup> We decline to make the requested modifications because we find the original findings were appropriately phrased and we do not consider that revision of our original findings is necessary to resolve the matter.

2.139. Russia further requests modification of the eighth and ninth sentences of paragraph 7.207 of the Interim Report to refer to additional findings of the Appellate Body in *EU – Biodiesel*

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<sup>132</sup> Russia's comments on the Interim Report, para. 186.

<sup>133</sup> Russia's comments on the Interim Report, paras. 187-188.

<sup>134</sup> European Union comments on Russia's comments on the Interim Report, para. 31.

<sup>135</sup> Russia's comments on the Interim Report, paras. 189-191, 206, and 208.

<sup>136</sup> Russia's comments on the Interim Report, para. 192.

<sup>137</sup> Russia's comments on the Interim Report, para. 194.

<sup>138</sup> Russia's comments on the Interim Report, para. 195.

<sup>139</sup> European Union comments on Russia's comments on the Interim Report, para. 32.

(Argentina) and Ukraine – Ammonium Nitrate.<sup>140</sup> The European Union objects to the modification, arguing that the original description adequately reflects the findings by the panels and the Appellate Body and that Russia seeks to distort the original findings.<sup>141</sup> We have declined to make the requested modifications because the original descriptions identify the findings that are relevant to the analysis undertaken and findings made in this paragraph.

2.140. Russia further requests inclusion of the word "the" before the term "cost of production".<sup>142</sup> The European Union did not specifically comment on this request. We have made the inclusion as requested.

#### **2.5.4 Title of section 7.5.3 and Paragraph 7.209 of the Interim Report**

2.141. Russia requests that the word "the" be used in connection with "cost", "cost of production" and "investigated exporter or producer" in the title of section 7.5.3 and the last sentence of paragraph 7.209 of the Interim Report.<sup>143</sup> The European Union did not specifically comment on this request. We have made the modifications as requested, although we consider that these modifications have no impact on the meaning of the associated terms in the context of the title and sentence affected.

#### **2.5.5 Paragraphs 7.211 and 7.214 of the Interim Report**

2.142. Russia requests modification of the last sentence of paragraph 7.211 of the Interim Report to replace "suitable to determine a 'cost of production in the country of origin'" with "used to arrive at 'the cost of production in the country of origin'". Russia further requests references to additional portions of the Appellate Body report in *EU – Biodiesel (Argentina)*.<sup>144</sup> The European Union argues that there is no reason to make the modification and considers that the original formulation was entirely appropriate.<sup>145</sup>

2.143. We have declined to make the requested modification as we consider that the original sentence properly conveys the intended meaning, and the references cite to the relevant portions of the report.

#### **2.5.6 Paragraph 7.219 of the Interim Report**

2.144. Russia requests modifications of paragraph 7.219 to include a description of additional aspects of Russia's argumentation and to merge into this paragraph the quotation of Russia's argumentation from paragraph 7.220 of the Interim Report.<sup>146</sup> The European Union disagrees with these modifications, arguing that the statements do not add anything to a correct representation of Russia's arguments.<sup>147</sup>

2.145. We recall that that the description of the parties' arguments in our Report are not intended to reflect the entirety of the parties' arguments. Rather, they focus on the principal points we considered relevant to the resolution of this dispute. In this respect, we recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".<sup>148</sup> We have modified the quotation of Russia's argument in paragraph 7.219 to include additional description as appropriate context for the original quotation. We have declined to make the remaining requested modifications as the original descriptions are accurate and relate to the specific analysis being developed in these paragraphs.

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<sup>140</sup> Russia's comments on the Interim Report, paras. 196-199.

<sup>141</sup> European Union comments on Russia's comments on the Interim Report, paras. 33-34.

<sup>142</sup> Russia's comments on the Interim Report, para. 200.

<sup>143</sup> Russia's comments on the Interim Report, paras. 201-202.

<sup>144</sup> Russia's comments on the Interim Report, paras. 203-205 and 207.

<sup>145</sup> European Union comments on Russia's comments on the Interim Report, paras. 35-36.

<sup>146</sup> Russia's comments on the Interim Report, paras. 209-210.

<sup>147</sup> European Union comments on Russia's comments on the Interim Report, para. 38.

<sup>148</sup> Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

### 2.5.7 Paragraph 7.220 of the Interim Report

2.146. In paragraph 7.220, the European Union requests the Panel to modify the first sentence as follows:

[W]e consider that Russia has demonstrated that the adaptation of out-of-country information to arrive at the cost of production in the country of origin consistent with Article 2.2 is not *explicitly* required by the challenged part of the second subparagraph[.]<sup>149</sup>

The European Union explains that it considers that this corresponds better with the legal interpretation: even if the text of Article 2(5) of the Basic AD Regulation does not explicitly require the adaptation, it does not prevent it.<sup>150</sup> Russia opposes the modification, arguing that such inclusion would contradict the European Union's own arguments and the record of this dispute.<sup>151</sup> We have declined to make the requested revision as we consider that the original formulation is accurate and that a revision is not necessary in relation to our analysis and conclusion on this point.

### 2.5.8 Paragraph 7.221 of the Interim Report

2.147. Russia requests modifications to the third and fourth sentences of paragraph 7.221 of the Interim Report to include additional factual findings regarding the adjustments made by the European Commission in various determinations.<sup>152</sup> The European Union objects to the requested modifications, arguing that they are unsubstantiated arguments rather than facts supported by evidence, and an attempt to modify the conclusions of the Panel.<sup>153</sup> We have declined to make the requested modifications because additional factual findings are not necessary in relation to our conclusions in this paragraph.

### 2.5.9 Paragraphs 7.222 and 7.223 of the Interim Report

2.148. Russia requests modification of the first sentence of paragraph 7.222 of the Interim Report to more closely reflect the argumentation it provided in relation to the issue addressed in this paragraph.<sup>154</sup> The European Union did not specifically comment on this request. We have made the modification as requested.

2.149. Russia further requests modification of the last sentence of paragraph 7.222 and paragraph 7.223 of the Interim Report to include an additional finding on whether the measure at issue prevents the European Union from ensuring that the "adjusted" or "established" cost represents the cost of production in the country of origin in the scenario described by Russia.<sup>155</sup> The European Union argues the request should be rejected as an attempt to modify the conclusions of the Panel, and thus re-arguing an argument it lost.<sup>156</sup>

2.150. We recall that it is well-established that the interim review is not an appropriate stage for the parties to re-argue their case on the basis of the arguments already put before a panel.<sup>157</sup> Accordingly, we decline to reconsider arguments that have been already considered.

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<sup>149</sup> European Union's comments on the Interim Report, para. 8. (emphasis original)

<sup>150</sup> European Union's comments on the Interim Report, para. 9.

<sup>151</sup> Russia's comments on the European Union's comments on the Interim Report, paras. 32-35.

<sup>152</sup> Russia's comments on the Interim Report, paras. 211-218.

<sup>153</sup> European Union comments on Russia's comments on the Interim Report, paras. 39-40.

<sup>154</sup> Russia's comments on the Interim Report, paras. 219-220.

<sup>155</sup> Russia's comments on the Interim Report, para. 221.

<sup>156</sup> European Union comments on Russia's comments on the Interim Report, para. 41.

<sup>157</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259. See also Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.

## **2.6 Russia's claims concerning the anti-dumping measures on imports of certain welded tubes and pipes originating in Russia**

### **2.6.1 Paragraph 7.230 of the Interim Report**

2.151. Russia requests that the Panel add, to the third sentence of paragraph 7.230, the word "allegedly" before "represented only 30% of the Russian export gas price". In Russia's view, this "is necessary to provide [an] accurate description of the facts of the dispute".<sup>158</sup>

2.152. The European Union objects to Russia's request. According to the European Union, Russia's request does not constitute a factual modification, but an appreciation of the facts from the perspective of Russia that must be rejected.<sup>159</sup>

2.153. We have decided not to grant Russia's request. Paragraph 7.230 describes Russia's argument that, in the expiry review concerning certain welded tubes and pipes from Russia, the European Commission discarded domestic gas prices because, *inter alia*, they represented only 30% of the Russian export gas price. That domestic gas prices represented 30% of Russian export gas price is not an alleged fact, but an explicit finding made by the European Commission. Recital 69 of Regulation 2015/110 states that "[i]t was found that the domestic gas price paid by the exporting producers was around 30% of the export price of natural gas from Russia".<sup>160</sup> Therefore, we disagree that Russia's suggested addition is necessary to provide an accurate description of the facts of the dispute.

### **2.6.2 Paragraph 7.251 of the Interim Report**

2.154. Russia requests the Panel to add, in the second sentence of paragraph 7.251, the word "allegedly" before "far below market prices paid in unregulated export markets for Russian natural gas". According to Russia, this addition would accurately reflect the facts of the dispute and avoid any assumptions, not necessary for the effective resolution of this dispute.<sup>161</sup>

2.155. Paragraph 7.251 addresses the European Union's arguments concerning the Working Party Report on Russia's accession to the WTO. Noting that paragraph 132 of the Working Party Report records the statement of the representative of Russia that producers of natural gas in Russia would operate based on normal commercial considerations, the Panel concludes in the second and fifth sentences of paragraph 7.251:

There is, however, no indication in paragraph 132 that this statement was meant to establish the legal basis to disregard domestic gas costs in Russia, pursuant to the second condition in Article 2.2.1.1, for reasons that these costs are regulated or far below market prices paid in unregulated export markets for Russian natural gas ... For these reasons, we disagree that the commitment reflected in paragraph 132 of the Working Party Report on Russia's accession to the WTO justifies the rejection of the cost of natural gas in the expiry review for welded tubes and pipes.

2.156. We have decided not to grant Russia's request as we find it misplaced. As noted in paragraph 7.251, we do not read paragraph 132 of the Working Party Report as establishing the legal basis to disregard domestic gas costs in Russia pursuant to the second condition in Article 2.2.1.1, and disagree that this commitment justifies the rejection of these costs in the expiry review for certain welded tubes and pipes from Russia. Whether it was found, or merely "alleged", that domestic gas costs in Russia were "far below market prices paid in unregulated export markets for Russian natural gas" does not change our conclusion on paragraph 132 of the Working Party Report.<sup>162</sup>

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<sup>158</sup> Russia's comments on the Interim Report, paras. 224-225.

<sup>159</sup> European Union's comments on Russia's comments on the Interim Report, para. 42.

<sup>160</sup> Regulation 2015/110, (Exhibit RUS-21), recital 69.

<sup>161</sup> Russia's comments on the Interim Report, para. 240.

<sup>162</sup> In any event, we find it relevant to mention that as noted in paragraph 7.239 of the Interim Report, in the expiry review for certain welded tubes and pipes from Russia, the European Commission found, based on "all available data", that domestic gas prices were "far below market prices paid in unregulated export markets for Russian natural gas". (Regulation 2015/110, (Exhibit RUS-21), recital 69)

### 2.6.3 Footnote 405 of the Interim Report

2.157. Russia requests that the Panel delete footnote 405 to paragraph 7.243. Footnote 405 states the Panel's "understand[ing] [that] the European Commission did not examine whether the first condition in the first sentence of Article 2.2.1.1 was satisfied" in the expiry review for certain welded tubes and pipes from Russia. According to Russia, this statement "is not accurate". In support of this assertion, Russia quotes paragraph 465 of its first written submission. In this paragraph, Russia states its view that the European Commission "confirmed" that the records of the investigated producer were in accordance with the GAAP of the exporting country by not "alleg[ing]" otherwise and because "no arguments regarding such inconsistency appear in the Definitive Disclosure". Russia also submits that, in the course of the panel proceeding, the European Union has not rebutted Russia's position that the records of the investigated producer were GAAP-consistent.<sup>163</sup>

2.158. The European Union objects to Russia's request arguing that the fact that nothing is said in an anti-dumping determination does not mean that there was a confirmation that the records of the investigated producer were GAAP-consistent.<sup>164</sup>

2.159. We have decided not to grant Russia's request because we are not persuaded that our understanding of Regulation 2015/110 is inaccurate. As noted in footnote 405, Regulation 2015/110 does not address whether the records of the Russian producer under investigation were in accordance with the GAAP of the exporting country. Unlike Russia, we do not consider that this means that, in the expiry review, the records of the Russian producer under investigation were found to be GAAP-consistent. As indicated in footnote 405, the absence of any findings in the determination in this connection suggests to us that the European Commission did not examine this issue and we see nothing in Russia's request that would cause us to question or revise this conclusion. We also disagree with Russia that the fact that the European Union has not rebutted Russia's allegation during the panel proceeding means that the records of the Russian producer were in accordance with the GAAP of the exporting country. Because it is generally for each party asserting a fact to provide proof thereof<sup>165</sup>, Russia bears the burden of demonstrating the factual allegations it makes in support of its claims.

### 2.6.4 Paragraphs 7.247 and 7.248 of the Interim Report

2.160. Paragraph 7.247 reflects the European Union's argument that the rejection of "distorted" gas cost information recorded in the Russian producer's records was justified by two sets of reasons; paragraph 7.248 contains the Panel's disposition of the European Union's argument.

2.161. Russia asks the Panel to include "the European Union argues" between the second and third sentences of paragraph 7.247 to make it clear that "all words in this paragraph belong to the European Union only". Russia also asks that the Panel "complete its findings" in paragraph 7.248. According to Russia, from the context of paragraph 7.248, "it becomes clear" that when using the wording "[w]e do not consider this argument to be relevant", the Panel refers to the European Union's "first argument", concerning the words "normally" and "[f]or the purpose of paragraph 2". For Russia, there is no finding of the Panel with respect to the European Union's "second argument", concerning Article 2. Russia, thus, requests the Panel to reject the European Union's second argument.<sup>166</sup>

2.162. We have decided not to grant Russia's requests. As for Russia's first request, we do not find the suggested addition necessary to make clear that this paragraph reflects an argument of the European Union.

2.163. As for Russia's second request, we note that Russia reads paragraph 7.247 as describing *two* arguments of the European Union: one related to the words "normally" and "[f]or the purpose of paragraph 2", and one related to Article 2 of the Anti-Dumping Agreement. However, paragraph 7.247 sets out *one single* argument of the European Union (i.e. the European Union's argument that the rejection of "distorted" gas cost information recorded in the Russian producer's records was justified), which, as noted in paragraph 7.247, the European Union bases on two

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<sup>163</sup> Russia's comments on the Interim Report, paras. 232-234.

<sup>164</sup> European Union's comments on Russia's comments on the Interim Report, para. 43.

<sup>165</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:1, p. 335.

<sup>166</sup> Russia's comments on the Interim Report, paras. 238-239.

reasons: the operation of (i) the words "normally" and "[f]or the purpose of paragraph 2"; and (ii) Article 2 of the Anti-Dumping Agreement. As already noted, we address the European Union's argument in paragraph 7.248 by stating that we do not consider it to be relevant to the issue underlying Russia's claim, i.e. the application of the second condition in Article 2.2.1.1. It is apparent that, by referring to "this argument", we refer to the argument of the European Union described in paragraph 7.247. We recall that the limited function of the interim review stage is to consider the review of "precise aspects" of the interim report. Insofar as Russia is requesting a reconsideration of the Panel's reasoning in disposing of the European Union's argument described in paragraph 7.247, this request amounts to an attempt to re-litigate arguments already put before us, which is not appropriate at the interim review stage.

### **2.6.5 Paragraph 7.258 of the Interim Report**

2.164. Russia argues that paragraph 7.258, which sets out the legal standard applicable to Article 2.2.1 of the Anti-Dumping Agreement, provides for a "wrong test", and does not reflect the wording of Article 2.2.1 and Appellate Body's "interpretations" on this provision.<sup>167</sup> Russia thus asks the Panel: (i) to delete the second and third sentences of paragraph 7.258; (ii) to change the language of the fourth sentence of paragraph 7.258; and (iii) to add the following two additional sentences at the beginning of paragraph 7.258, including the relevant references to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, and Panel Reports, *EC – Salmon (Norway)* and *Ukraine – Ammonium Nitrate*:

Article 2.2.1 sets forth rules concerning when sales of the like product in the domestic market or to a third country may be treated as not being in the ordinary course of trade and disregarded in determining the normal value for the exporter or producer under investigation.

Article 2.2.1 sets out a single obligation whereby an investigating authority may disregard below-cost sales of the like product only if it determines that "such" below-cost sales display the three specific characteristics mentioned above.

2.165. We have decided not to grant Russia's requests. As for Russia's first request, we find it inappropriate to delete the second and third sentences of paragraph 7.258, as these sentences are relevant to the Panel's analysis that is presented in section 7.6.3.3. Russia does not substantiate why these sentences reflect an incorrect legal standard under Article 2.2.1 of the Anti-Dumping Agreement. As for Russia's second request, we find it inappropriate to change the language of the fourth sentence as it reproduces the panels' considerations in *EC – Salmon (Norway)* and *Ukraine – Ammonium Nitrate*. As for Russia's third request, we find it unnecessary to add the sentences suggested by Russia because the first sentence of paragraph 7.258 already addresses, albeit in different terms, the topics that are addressed in the two sentences suggested by Russia.

## **2.7 Russia's claims concerning the anti-dumping measures imposed by the European Union on imports of ammonium nitrate from Russia and the underlying investigations and reviews**

### **2.7.1 Paragraph 7.282 of the Interim Report**

2.166. The European Union requests that the Panel include, after paragraph 7.282, a reference to the findings of the Appellate Body in *Brazil – Desiccated Coconut* that Article 32.3 of the SCM Agreement, and thus also the identical Article 18.3 of the Anti-Dumping Agreement, sets a temporal dividing line not just with respect to those agreements, but also with respect to the GATT 1994, including Article VI.<sup>168</sup>

2.167. Russia objects to the European Union's request because it conflates the disciplines of the SCM Agreement and the Anti-Dumping Agreement. Further, for Russia, Article 18.3 of the Anti-Dumping Agreement does not contain any reference to Article VI of the GATT 1994 or any other provision of the GATT 1994. Article 18.3 explicitly states "the provisions of this Agreement [i.e. the Anti-Dumping Agreement] shall apply". Thus, Article 18.3 concerns only the application of the

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<sup>167</sup> Russia's comments on the Interim Report, paras. 242-244.

<sup>168</sup> European Union's comments on the Interim Report, para. 10.

Anti-Dumping Agreement and does not address the issue of the temporal applicability of the GATT 1994. Russia also argues that in section 7.7.1 of the Interim Report, the Panel dealt only with the applicability of the Anti-Dumping Agreement to Russia's claims. In addition, Russia argues that the Appellate Body Report in *Brazil – Desiccated Coconut* does not contain the phrase quoted by the European Union.<sup>169</sup>

2.168. We agree with Russia that the Appellate Body Report in *Brazil – Desiccated Coconut* does not contain the exact words which the European Union asks us to include after paragraph 7.282 of the Interim Report. The Appellate Body however does establish a parallel between Article 32.3 of the SCM Agreement and Article 18.3 of the Anti-Dumping Agreement.<sup>170</sup> It also states that it sees: "Article 32.3 of the SCM Agreement as a clear statement that for countervailing duty investigations or reviews, *the dividing line* between the application of the GATT 1947 system of agreements and the WTO Agreement is to be determined by the date on which the application was made for the countervailing duty investigation or review".<sup>171</sup> This statement coincides with the argument made by the European Union in its first written submission that:

Article 32.3 provides a temporal "dividing line" for countervailing duty investigations or reviews not just with respect to the SCM Agreement and Article VI of the GATT 1994, but with respect to the WTO Agreement *as a whole*. This dividing line is "determined by the date on which the application was made for the countervailing duty investigation or review".<sup>172</sup>

2.169. We have thus decided to grant the European Union's request and we have added a reference to Article VI of the GATT 1994 in paragraph 7.278 of the Interim Report, as well as a reference to the relevant paragraphs of the European Union's first written submission in the relevant footnote. This paragraph now reads, in relevant part:

The European Union submits that, by virtue of Article 18.3, the provisions of the Anti-Dumping Agreement and Article VI of the GATT 1994 apply only to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.

## 2.7.2 Paragraph 7.290 of the Interim Report

2.170. Russia asks the Panel to set out more clearly in its Final Report its reasons for rejecting Russia's argument that the term "a Member" found in Article 18.3 of the Anti-Dumping Agreement exclusively refers to an importing Member.<sup>173</sup>

2.171. We have decided to grant Russia's request and we have modified paragraph 7.290 accordingly. This paragraph now reads:

The second reason why we cannot agree with Russia's argument is that Russia's understanding would result in an asymmetry between the relevant rights and the relevant obligations contained in the Anti-Dumping Agreement. We consider that the provisions of Article 18.3 of the Anti-Dumping Agreement apply equally to all Members of the WTO from the date of their accession.

2.172. The European Union asks the Panel to include in the Report its response (which appears in paragraph 64 of its second written submission) to Russia's interpretation of Article 18.3 of the Anti-Dumping Agreement.<sup>174</sup>

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<sup>169</sup> Russia's comments on the European Union's comments on the Interim Report, paras. 36-45.

<sup>170</sup> "There is an identical provision to Article 32.3 of the SCM Agreement contained in Article 18.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the 'Anti-Dumping Agreement')." (Appellate Body Report, *Brazil – Desiccated Coconut*, DSR 1997:I, fn 23).

<sup>171</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, DSR 1997:I, p. 182. (emphasis added)

<sup>172</sup> European Union's first written submission, para. 149. (emphasis original)

<sup>173</sup> Russia's comments on the Interim Report, para. 246.

<sup>174</sup> European Union's comments on the Interim Report, para. 11.

2.173. We have decided to grant the European Union's request and we have inserted in the Report a paragraph and a footnote reflecting the content of paragraph 64 of the European Union's second written submission. Paragraph 7.289 of the Final Report now reads:

The European Union responds that Russia's interpretation would create an imbalance between the rights and obligations provided in the Anti-Dumping Agreement, such that rights would somehow begin to apply before the corresponding obligations. For the European Union, it would, in effect, apply the Anti-Dumping Agreement retroactively to the extent that it creates rights for Russia to invoke, which would be contrary to the non-retroactivity rule in Article 28 of the Vienna Convention. Russia's interpretation would "contradict the rather elementary notion that, when a new Member accedes, the WTO agreements – including both the rights and obligations therein - enter into force *for that Member*."<sup>175</sup>

### 2.7.3 Section 7.7.2.2 of the Interim Report

2.174. With regard to its claim #1, Russia argues that the Panel failed to address Russia's claims under Articles I, VI:1 and VI:2 of the GATT 1994 and treated Russia's claim under Article II of the GATT 1994 as consequential, although this provision contains separate obligations whose violation is not consequential to a violation of the Anti-Dumping Agreement.<sup>176</sup>

2.175. We disagree with Russia that we failed to address claims under the GATT 1994 in our analysis of its claim #1.

2.176. First, we found that "there has been no re-examination, and consequently no extension, of the product scope in the 2014, 'post WTO' third expiry review".<sup>177</sup> We thus rejected this aspect of Russia's claim #1 because we disagreed that the product scope had been extended to IGAN in the context of the third expiry review.

2.177. Second, we found that, by virtue of Article 18.3 of the Anti-Dumping Agreement, Russia was precluded from challenging a non-re-examined aspect of a determination made in investigations initiated before Russia's accession to the WTO: this finding concerned the alleged extension of the product scope to stabilized AN in Regulation 945/2005.<sup>178</sup> As a consequence, we rejected Russia's claim #1 under Articles 1 and 18.1 of the Anti-Dumping Agreement that the European Union imposed anti-dumping duties on stabilized AN and IGAN in the absence of dumping determinations for these products.

2.178. For us, Russia's claims on the basis of Articles 2, 3, 4, and 9 of the Anti-Dumping Agreement and Articles I, II and VI of the GATT 1994 are consequential to a finding that the European Union imposed anti-dumping duties on stabilized AN and IGAN in the absence of dumping determinations for these products. As we have declined to make such a finding, we also reject these consequential claims. The consequential nature of Russia's additional claims is clear in particular from sections 9.3.1.1.3 and 9.3.1.1.5 of Russia's first written submission, which state that these violations "*resulted*" from [t]he EU's imposition and levy of anti-dumping duties on Stabilized AN and IGAN "*in the absence*" of dumping determinations for these products. Similarly, section 9.3.1.1.6 challenges the "*imposition and levy of anti-dumping duties on IGAN and Stabilized AN, in the absence of an original anti-dumping investigation*".<sup>179</sup>

2.179. We have however partially granted Russia's request by modifying paragraph 7.299 of the Interim Report to reflect fully the content of Russia's claims, including under Article I of the GATT 1994. We have also modified our conclusion (at paragraph 7.319) to reflect more clearly that we consider Russia's claims under Articles I, II, and VI of the GATT 1994, as well as under Articles 2, 3, 4, and 9 of the Anti-Dumping Agreement to be consequential to a finding that the European Union imposed anti-dumping duties on stabilized AN and IGAN in the absence of dumping determinations for these products. Our conclusion now reads:

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<sup>175</sup> Fn omitted; emphasis original.

<sup>176</sup> Russia's comments on the Interim Report, paras. 364-368.

<sup>177</sup> Interim Report, para. 7.316.

<sup>178</sup> Interim Report, para. 7.317.

<sup>179</sup> Emphasis added.

For these reasons, we reject Russia's claim #1 that the European Union "violated Articles 1 and 18.1 of the Anti-Dumping Agreement because it imposed the anti-dumping measures on import of IGAN and Stabilized AN for which no anti-dumping investigation was ever conducted and no dumping and injury determinations were ever made". As the part of Russia's claim #1 that is raised on the basis of Articles 2, 3, 4, and 9 of the Anti-Dumping Agreement and Articles I, II and VI of the GATT 1994 is consequential to a finding that the European Union imposed anti-dumping duties on stabilized AN and IGAN in the absence of dumping determinations for these products, we also reject these claims.<sup>180</sup>

2.180. Russia also argues that our conclusion, reached in paragraphs 7.310 and 7.318 of the Interim Report that there was no re-examination of the inclusion of stabilized AN within the product scope after Russia's WTO accession is not based on the record of the Panel proceedings. Russia thus requests the Panel to review the entire factual record of claim #1 and modify its analysis and findings accordingly.<sup>181</sup>

2.181. We recall our extensive analysis of the evolution of the product scope in section 7.7.2.2.1 of the Interim Report. We also recall our conclusion that no re-examination of the product scope took place after Russia's accession to the WTO. On this basis, we decline Russia's request to modify our conclusion in paragraphs 7.310 and 7.318. Nevertheless, we added a footnote at paragraph 7.307 of the Interim Report to note that the events reflected at recitals 20 to 22 of Regulation 999/2014 did not amount, in our view, to a re-examination of the product scope in the context of the third expiry review.

#### **2.7.4 Section 7.7.2.2.1 of the Interim Report**

2.182. Russia asks the Panel to insert in its Final Report a new subsection reflecting the facts that Russian exporters asked the European Commission to exclude stabilised AN from the scope of the measure and expiry review and that the European Commission refused to grant this request. According to Russia, these facts are "highly relevant for Russia's claim that a re-examination of the product scope actually took place in the third expiry review".<sup>182</sup>

2.183. We have decided to grant Russia's request and we have reflected Russia's argument in a footnote affixed to paragraph 7.309 of the Final Report.

2.184. In relation to the same section of the Interim Report, Russia also requests that the Final Report "should summarize Russia's and EU's arguments on the fact that the [European Union] never conducted anti-dumping investigations into Stabilized AN and IGAN".<sup>183</sup> We consider that the history of the measures on imports of ammonium nitrate has been described in detail in this section of the Interim Report and we therefore decline to grant Russia's request.

#### **2.7.5 Section 7.7.2.2.1(d) of the Interim Report**

2.185. Russia asks the Panel to include a subsection called "Findings" at the end of this section.<sup>184</sup> We consider that the findings made by the Panel in this section are set out sufficiently clearly at the end of section 7.7.2.2.1 and we therefore decline to grant Russia's request.

#### **2.7.6 Paragraph 7.301 of the Interim Report**

2.186. The European Union asks us to replace the phrase "makes claims #1 inadmissible" in this paragraph with "means that claim #1 must be rejected because the relevant provisions of the

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<sup>180</sup> Fn omitted.

<sup>181</sup> Russia's comments on the Interim Report, para. 371.

<sup>182</sup> Russia's comments on the Interim Report, paras. 247-248. Russia's arguments on this issue appear at para. 744 of its second written submission.

<sup>183</sup> Russia's comments on the Interim Report, para. 249.

<sup>184</sup> Russia's comments on the Interim Report, paras. 250-251.

Anti-Dumping Agreement and the GATT 1994 do not apply."<sup>185</sup> The European Union makes a similar request with respect to paragraphs 7.318, 7.319, and paragraph 8.1(g)(i) of the Interim Report.<sup>186</sup>

2.187. Similarly, in paragraph 7.317 of the Interim Report, the European Union asks us to replace the words "outside the scope of this proceeding" with "not subject to the Anti-Dumping Agreement".<sup>187</sup>

2.188. Russia objects to the proposed changes. It notes that the paragraphs at issue contain the Panel's own wording, considerations and findings and not the European Union's arguments.<sup>188</sup>

2.189. We have decided to grant the European Union's request and we have modified paragraphs 7.301, 7.317, 7.318 and 8.1(g)(i) of the Interim Report accordingly.

### **2.7.7 Paragraph 7.314 of the Interim Report**

2.190. The European Union asks the Panel to reflect its argument in response to Panel question No. 33, that: "[t]he European Union further argues that the fact that Chapter 31 of the Harmonized System Code, an element that should be taken into account when interpreting both WTO and EU law, is entitled 'Fertilizers', suggests that describing a group of products as 'fertilizers' does not exclude that at least some among those products can be, or are, used for industrial purposes."<sup>189</sup>

2.191. Russia objects to the European Union's request because the argument in question does not provide any reference to the European Commission's finding in the context of the third expiry review, and, therefore, constitutes an "*ex post facto* rationalization".<sup>190</sup>

2.192. We agree with Russia and we thus decline to grant the European Union's request.

### **2.7.8 Paragraph 7.320(a) of the Interim Report**

2.193. Russia asks the Panel to revise its description of Russia's claim #2 in order to reflect paragraph 43 of Russia's First integrated executive summary.<sup>191</sup>

2.194. We recall that Russia described its claim in section 7.1.4.2 of its second written submission as follows: "[t]he EU erred when it accepted the expiry review request of the domestic industry which covered imports of Stabilized AN and IGAN for which no anti-dumping investigation was ever conducted and no dumping and injury determinations were ever made *in accordance with the AD Agreement*".<sup>192</sup> We consider that the description contained in paragraph 7.320(a) of the Interim Report is consistent with Russia's description of its claim.

2.195. We therefore decline to grant Russia's request.

### **2.7.9 Paragraph 7.329 of the Interim Report**

2.196. The European Union asks the Panel to insert a reference to its argument in response to Panel question No. 88, paragraph 55, that: "[i]n order to 'duly substantiate' an expiry review request, the applicant must put forward facts and evidence, not limited to any particular 'type or quality', that make it *plausible* that dumping and injury will continue or recur in the future, should measures lapse."<sup>193</sup>

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<sup>185</sup> European Union's comments on the Interim Report, para. 12.

<sup>186</sup> European Union's comments on the Interim Report, paras. 15-16 and 37.

<sup>187</sup> European Union's comments on the Interim Report, para. 14.

<sup>188</sup> Russia's comments on the European Union's comments on the Interim Report, para. 54.

<sup>189</sup> European Union's comments on the Interim Report, para. 13.

<sup>190</sup> Russia's comments on the European Union's comment on the Interim Report, paras. 59-60.

<sup>191</sup> Russia's comments on the Interim Report, para. 252.

<sup>192</sup> Emphasis added.

<sup>193</sup> European Union's comments on the Interim Report, para. 17.

2.197. We consider that paragraph 7.329 of the Interim Report sufficiently reflects the arguments made by the European Union on this issue, but we have decided to include a reference to the relevant paragraph of the European Union's response to question No. 88 in the corresponding footnote.

#### **2.7.10 Paragraphs 7.334, 7.336, and 7.337 of the Interim Report**

2.198. Russia asks the Panel to reflect in its Final Report that "Fertilizers Europe sought an expiry review of the measure with respect to the same product scope that was set previously in the 2005 review by means of the Regulation 945/2005, and not in 2008 review".<sup>194</sup> Russia also asks the Panel to modify footnote 512 to paragraph 7.334 of the Interim Report to remove the reference to recital 44 of Regulation 999/2014. Finally, Russia asks the Panel to modify the last sentence of paragraph 7.336 of the Interim Report because it is "not factually correct to suggest, as is done in the last sentence of [paragraph] 7.336, that the decision to initiate the third expiry review was taken on the basis of the same product scope as the one defined before Russia's accession to the WTO".<sup>195</sup> The European Union objects to these requests because Russia attempts to "modify the factual findings of the Panel, which is not the purpose of interim review".<sup>196</sup>

2.199. We agree that paragraph 7.334 should be modified to reflect that "Fertilizers Europe sought an expiry review of the measure with respect to the same product scope that was set previously in the 2005 review". However, in view of the content of paragraph 7.336 of the Interim Report, which is a citation of recital 44 of Regulation 999/2014, it is appropriate for footnote 512 of the Interim Report to cite both the notice of initiation and the recital of Regulation 999/2014 which indicates that "[t]he product concerned by this review is the same as the product defined in Regulation (EC) No 661/2008".<sup>197</sup>

2.200. Finally, we consider that the factual description in the last sentence of paragraph 7.336 of the Interim Report (that the product scope was defined before Russia's accession to the WTO and was not re-examined in the context of the third expiry review) is correct.

2.201. We therefore decline to grant Russia's request and we see no reason to modify our conclusion in paragraph 7.336 of the Interim Report. In another section of its comments on the Interim Report (paragraph 372), Russia repeats its objections against our finding in paragraph 7.337. Russia states in particular that:

[T]he initiation of an expiry review was based on the outdated 2008 product scope definition, and thus on a request that was not duly substantiated, contrary to Article 11.3 of the Anti-Dumping Agreement. Russia respectfully requests that the Panel should revise its findings in para. 7.337 of the Report and grant Russia's claim.<sup>198</sup>

2.202. We consider that Russia's request in paragraph 372 of its comments is essentially the same as the request made in paragraph 258 of its comments on the Interim Report. In addition, we note that Russia does not indicate in these paragraphs in which section of its written submissions this argument was made during the proceedings. For these reasons, we also reject Russia's request in paragraph 372 of its comments on the Interim Report.

2.203. In relation to the same paragraph 7.334 of the Interim Report, the European Union requests the Panel to replace "sought an extension" in the first sentence of paragraph 7.334 of the Interim Report with the following text: "sought, whether by expressly requesting or otherwise aiming to obtain, an extension".<sup>199</sup>

2.204. We consider that the evolution of Russia's position during the proceedings is sufficiently reflected at paragraph 7.333 of the Interim Report and we do not think that the addition requested

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<sup>194</sup> Russia's comments on the Interim Report, para. 253.

<sup>195</sup> Russia's comments on the Interim Report, para. 257.

<sup>196</sup> European Union's comments on Russia's comments on the Interim Report, para. 49.

<sup>197</sup> Regulation 999/2014, (Exhibit RUS-66), recital 44.

<sup>198</sup> Russia's comments on the Interim Report, para. 372.

<sup>199</sup> European Union's comments on the Interim Report, para. 18.

by the European Union is necessary. We also note that Russia objects to the change requested by the European Union.<sup>200</sup>

2.205. We have thus decided not to grant the European Union's request.

2.206. Finally, Russia argues that the Panel failed to address Russia's claim that the European Union erred when it accepted a request for an expiry review of "anti-dumping duties" on stabilized AN and IGAN.<sup>201</sup> The European Union objects to this request and argues that "Russia is attempting to modify its claims based on the content of the Interim Report."<sup>202</sup>

2.207. We agree with the European Union. Russia's first written submission clearly states at paragraph 590 that:

The EU accepted the expiry review request of Fertilizers Europe in which the industry requested to extend the anti-dumping measures on imports, *inter alia*, of Stabilized AN and IGAN. However, the EU authorities never conducted an original anti-dumping investigation with regard to Stabilized AN and IGAN.

2.208. We consider that section 7.7.2.3.3 correctly describes ground #1 of Russia's claim #2. In particular, we noted at paragraph 7.333 of the Interim Report that:

Russia clarifies that it does not argue that the petitioner actually requested the extension of the product scope of the measure in the expiry review request, but, rather, that the European Union "wrongfully accepted a request for review *that was aimed at extending anti-dumping measures* on stabilized AN and IGAN."<sup>203</sup>

2.209. We thus decline to grant Russia's request at paragraph 373 of its comments on the Interim Report.

#### **2.7.11 Paragraph 7.339 of the Interim Report**

2.210. The European Union asks the Panel to refer to the arguments made by the European Union in paragraph 61 of its response to Panel question No. 90, by inserting the following text: "[t]he European Union also argues that, from the point of view of the petitioner, such exports could have been indirectly relevant evidence, for example demonstrating Kirovo's production capacity that could be redirected to products that are covered by the product concerned."<sup>204</sup>

2.211. We consider that the European Union's arguments are sufficiently reflected at paragraph 7.339 of the Interim Report. We also note that Russia objects to the change requested by the European Union.<sup>205</sup>

2.212. We have thus decided not to grant the European Union's request.

#### **2.7.12 Paragraph 7.340 of the Interim Report**

2.213. The European Union requests the Panel to insert the following after the penultimate sentence of paragraph 7.340: "[t]he European Union adds that the quantity of Russian exports to the [European Union] during or preceding the RIP was in any event not the basis for the Commission's finding of the likelihood of recurrence of dumping and injury", with a reference to the European Union's response to Panel question No. 90, para. 69.<sup>206</sup>

2.214. Russia objects to the European Union's request arguing that this argument is irrelevant to ground #2 of Russia's claim #2 discussed in paragraphs 7.338-7.341, which challenges the European Union's acceptance of the expiry review request. Russia also highlights that

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<sup>200</sup> Russia's comments on the European Union's comments on the Interim Report, para. 64.

<sup>201</sup> Russia's comments on the Interim Review, para. 373.

<sup>202</sup> European Union's comments on Russia's comments on the Interim Report, para. 67.

<sup>203</sup> Emphasis original; fn omitted.

<sup>204</sup> European Union's comments on the Interim Report, para. 19.

<sup>205</sup> Russia's comments on the European Union's comments on the Interim Report, para. 70

<sup>206</sup> European Union's comments on the Interim Report, para. 20.

paragraph 7.340 contains the Panel's analysis and not the European Union's arguments. The relevant parts of the latter are reflected by the Panel in paragraph 7.339.<sup>207</sup>

2.215. We agree with Russia that the addition requested by the European Union pertains to the European Commission's finding on likelihood of recurrence of dumping and injury and not to the expiry review request. The former is discussed in other parts of the report.

2.216. We therefore reject the European Union's request.

2.217. In the same paragraph, Russia asks the Panel to reflect the fact that the notice of initiation uses the phrase "product under review" rather than the phrase "product concerned", because the notice of initiation allegedly defines the "product under review" as including imports of stabilized AN from Kirovo. In addition, Russia argues that, contrary to what paragraph 7.340 suggests, the notice of initiation considered not only the likely increase in imports, but also the current level of imports, as reflected in the review request, as a basis for the initiation.<sup>208</sup>

2.218. We disagree that the use of the phrase "product under review" or "product concerned" has any impact on whether imports of stabilized AN from Kirovo were, in fact, included in the scope of the expiry review. Further, having carefully considered the evidence on the record and the arguments made by the parties, the Panel is not convinced by Russia's arguments that the European Commission initiated the third expiry review on the basis of imports statistics which included imports of stabilized AN from Kirovo. The use of such phrases as "the current import level of the product under review" and "the flow of imports of the product under review" does not suffice to demonstrate that the level of imports used by the European Commission as a basis to initiate the third expiry review included imports which should have been excluded from the scope of the expiry review.

2.219. We therefore decline to grant Russia's request and we see no reason to modify paragraph 7.340 of the interim report.<sup>209</sup>

### **2.7.13 Paragraph 7.341 of the Interim Report**

2.220. The European Union observes that paragraph 7.341 appears to have been inserted in error or is incomplete. It requests the Panel to replace it with the following text: "[w]e therefore find that Russia has failed to demonstrate that the third expiry review was initiated on the basis of a request which was not duly substantiated as a result of the alleged inclusion of data concerning Kirovo in the request."<sup>210</sup>

2.221. Russia asks the Panel to insert instead the following paragraph:

We agree with Russia that requirements such as 'positive evidence' and 'objective examination' are relevant to likelihood determinations under Article 11.3 of the Anti-Dumping Agreement. We find that Russia demonstrated that the third expiry review was initiated on the basis of a request which was not duly substantiated as a result of the alleged inclusion of imports of stabilized AN from Kirovo in the request and therefore that the EU failed to objectively examine positive evidence on the record, contrary to Article 11.3.<sup>211</sup>

2.222. We agree that paragraph 7.341 of the Interim Report was inserted by error. We have decided to grant the European Union's request and we have modified this paragraph accordingly.

### **2.7.14 Paragraph 7.352 of the Interim Report**

2.223. The European Union asks the Panel to insert the following, after the second sentence: "[t]he European Union argues that it is factually incorrect that the expiry review request was only supported

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<sup>207</sup> Russia's comments on the European Union's comments on the Interim Report, paras. 72-73.

<sup>208</sup> Russia's comments on the Interim Report, paras. 262-265.

<sup>209</sup> We note that Russia repeats at para. 374 of its comments on the Interim Report the same arguments made at paras. 264-265. For the reasons stated in this section, we reject Russia's request to modify our conclusion in paragraph 7.340 of the Interim Report.

<sup>210</sup> European Union's comments on the Interim Report, para. 21.

<sup>211</sup> Russia's comments on European Union's comments on the Interim Report, para. 75.

by producers of FGAN, and that neither the data on the product under consideration nor the data on the domestic like product were, or needed to be, assessed or reported separately for the three sub-categories (FGAN, IGAN, Stabilised AN)".<sup>212</sup>

2.224. We consider that the European Union's arguments are sufficiently reflected at paragraphs 7.351 and 7.352 of the Interim Report.

2.225. We therefore decline to grant the European Union's request.

#### **2.7.15 Paragraphs 7.353 and 7.354 of the Interim Report**

2.226. Russia argues that the Panel's analysis of the record insufficiently took into account evidence that the review request was based on FGAN data only.<sup>213</sup> Russia re-states the arguments and evidence presented to the Panel on this issue at paragraph 267 of its comments on the Interim Report and asks us to "include them into the 'evidence on the record' referred to in [paragraph] 7.353 of the Report and analyze [them] accordingly."<sup>214</sup>

2.227. We have decided to grant Russia's request partially and to include in a footnote to paragraph 7.348 some of the references requested by Russia, which we found relevant for the analysis of this claim. The relevant footnote now reads:

Russia's first written submission, paras. 606 and 608. See also Russia's second written submission, paras. 757-761 and 860; response to Panel question No. 103, para. 165; question No. 95, paras. 126-133. See also Russia's second written submission, para. 840; response to Panel question No. 95, paras. 135-137.

2.228. We recall however that the descriptions of the parties' arguments in our Report are not intended to reflect the entirety of the parties' arguments. Rather, they focus on the principal points we considered relevant to the resolution of this dispute. In this respect, we recall that "a panel ha[s] the discretion to address only those arguments it deems necessary to resolve a particular claim".<sup>215</sup>

2.229. Our analysis of Russia's claim #2 considered all the relevant arguments made by the parties and all the relevant evidence on the record of these proceedings. We thus decline to modify our analysis of Russia's claim #2 and our conclusion that the European Union did not violate Article 11.3 of the Anti-Dumping Agreement by initiating the third expiry review based on a request that analysed indicators of the domestic industry manufacturing FGAN on the one hand and imports of FGAN, stabilized AN and IGAN on the other hand.

2.230. In addition, Russia asks the Panel to revise paragraphs 7.353 and 7.354 by deleting the Panel's "suggestion that the letter from the Russian AN producers dated 4 March 2014 confirms that the request for the expiry review in fact included FGAN and Stabilized AN".<sup>216</sup>

2.231. We disagree that this is what paragraphs 7.353 and 7.354 suggest. In fact, the actual wording of paragraph 7.354 of the Interim Report is that the content of the 4 March 2014 letter "seems to indicate that the applicant did not distinguish between different types of AN in its questionnaire response". The Panel did not reach a conclusion on whether the review request included data on IGAN and stabilized AN: it concluded that Russia had failed to demonstrate that the third expiry review had been initiated on the basis of a review request which reported only FGAN data.

2.232. We thus decline to grant Russia's request.

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<sup>212</sup> European Union's comments on the Interim Report, para. 23.

<sup>213</sup> Russia's comments on the Interim Report, para. 266.

<sup>214</sup> Russia's comments on the Interim Report, paras. 267-268.

<sup>215</sup> Appellate Body Reports, *EC – Poultry*, para. 135; *US – COOL*, para. 414.

<sup>216</sup> Russia's comments on the Interim Report, para. 272.

#### **2.7.16 Paragraph 7.375 of the Interim Report**

2.233. Russia asks the Panel to remove the reference to Article 4.1 of the Anti-Dumping Agreement arguing that section 7.7.3.3 of the Interim Report "is solely concerned with the application of Article 3 of the Anti-Dumping Agreement to expiry reviews".<sup>217</sup>

2.234. This section of the Interim Report is entitled "The relevant legal standard for the Panel's examination of Russia's claims relating to the likelihood of recurrence of injury determination". Since claim #6 concerns the likelihood of recurrence of injury determination made by the European Commission and since it includes claims under Articles 3, 4.1, and 11.3 of the Anti-Dumping Agreement, we fail to see why a reference to Article 4.1 should not appear in this paragraph.

2.235. We thus decline to grant Russia's request.

#### **2.7.17 Paragraph 7.381 of the Interim Report**

2.236. Russia asks the Panel to modify this paragraph to indicate that requirements such as "positive evidence" and "objective examination" *are* (rather than *may be*) relevant to an examination under Article 11.3 of the Anti-Dumping Agreement.

2.237. We agree with Russia that these principles are relevant to an examination under Article 11.3 of the Anti-Dumping Agreement and we have modified paragraph 7.381 accordingly. In the Final Report, this paragraph now reads, in relevant part:

Therefore, while the fundamental requirement of Article 3.1 that an injury determination be based on "positive evidence" and an "objective examination" are equally relevant to likelihood determinations under Article 11.3, we take the view that an investigating authority is not obliged to comply with the provisions of Article 3 in making a likelihood-of-injury determination, unless that determination is based on a finding of material injury.

#### **2.7.18 Paragraph 7.383 of the Interim Report**

2.238. Russia requests the Panel to revise paragraph 7.383 to "reflect the link established by Russia between the undercutting calculations referred in [paragraph] 7.382 and the conclusions drawn by the [European] Commission, as referred in [paragraph] 7.383".<sup>218</sup> In particular, Russia asks us to refer to the following finding of the European Commission: "it is likely that the price levels at which Russian exports will enter the Union in the absence of measures would be below the Union cost of manufacturing plus a reasonable profit margin and therefore be injurious".<sup>219</sup>

2.239. We note that this quote, which is actually taken from recital 162 of Regulation 999/2014 already appears in the consideration of Russia's arguments at paragraph 7.390 of the Interim Report. Therefore, we do not consider it necessary to include an additional reference to this finding in paragraph 7.383 of the Interim Report.

2.240. We thus decline to grant Russia's request.

#### **2.7.19 Paragraphs 7.384, 7.385, and 7.390 of the Interim Report**

2.241. Russia asks the Panel to revise paragraphs 7.384 and 7.385 because they "mischaracterize Russia's claims"<sup>220</sup> by suggesting that Russia challenges deficiencies in the European Commission's undercutting calculations *as such*. Russia recalls that what it actually argues is the European Commission's failure "to satisfy the requirement that the likelihood-of-injury determination rests on a 'sufficient factual basis', resulting from an objective examination based on

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<sup>217</sup> Russia's comments on the Interim Report, para. 273.

<sup>218</sup> Russia's comments on the Interim Report, para. 279.

<sup>219</sup> Russia's comments on the Interim Report, para. 280.

<sup>220</sup> Russia's comments on the Interim Report, para. 283.

positive evidence, because it disregarded the evidence on Russian import prices into the [European Union], which evidenced an absence of undercutting".<sup>221</sup>

2.242. We disagree with Russia that the Panel mischaracterized its claim #5 by failing to consider whether the likelihood-of-injury determination reached by the European Commission rests on a "sufficient factual basis", resulting from an objective examination based on positive evidence. In fact, we note that, after examining whether the European Commission had carried out undercutting calculations (paragraphs 7.397 to 7.403), we examined "Russia's claim that 'the EU failed to satisfy the requirement that the likelihood-of-injury determination rests on a 'sufficient factual basis' that allows the investigating authority to arrive at a reasoned conclusion under Article 11.3 of the Anti-Dumping Agreement".<sup>222</sup>

2.243. In addition, we note that the footnotes to the paragraphs mentioned by Russia (paragraphs 7.384(d), 7.385 and 7.390) do quote accurately the arguments Russia made in its submissions to the Panel in support of its claim #5.

2.244. We thus decline to grant Russia's request.

#### **2.7.20 Russia's request concerning the Panel's analysis of Russia's claim #5**

2.245. Russia asks the Panel to modify its analysis of claim #5 and to conclude that the European Commission calculated the price effect of future dumped imports through undercutting calculations and, in so doing, should have complied with Articles 3.1, 3.2 and 11.3 of the Anti-Dumping Agreement.<sup>223</sup> In particular, Russia argues that the Panel failed to review the evidence provided and did not explain how and to what extent the calculations made by the European Union differ from an undercutting calculation.

2.246. We recall that the Interim Review is not an appropriate stage for the parties to re-argue their case on the basis of the arguments already put before a panel.<sup>224</sup> We consider that, by asking us to reverse our finding that the European Commission did not undertake undercutting calculations as part of its likelihood of recurrence of injury determination, Russia attempts to re-argue its case on the basis of the arguments already analysed by the Panel.

2.247. We thus decline to grant Russia's request.

#### **2.7.21 Paragraphs 7.416 and 7.417 of the Interim Report**

2.248. Russia asks the Panel to modify paragraphs 7.416 and 7.417 in order to acknowledge the fact that "[Kirovo's Stabilized AN] imports are within the product scope of the measures", as defined by the European Commission.<sup>225</sup>

2.249. In support of this request, Russia quotes paragraph 1141 of its second written submission, which contradicts what Russia asks the Panel to acknowledge: this paragraph states in particular that "imports from Kirovo correspond to imports of Stabilized AN from Russia that are not subject to anti-dumping measures" and that "Stabilized AN is not subject to anti-dumping measures for Kirovo".

2.250. We also note that paragraph 1141 of Russia's second written submission does not contain any reference to recital 149 of Regulation 2018/722. We thus consider that Russia is making a new argument in support of its claim, which we cannot accept at this stage of the proceedings.

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<sup>221</sup> Russia's comments on the Interim Report, para. 284.

<sup>222</sup> Interim Report, para. 7.404.

<sup>223</sup> Russia's comments on the Interim Report, paras. 378-393.

<sup>224</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259. See also Panel Reports, *Japan – DRAMs (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.

<sup>225</sup> Russia's comments on the Interim Report, para. 292. Russia reiterates its arguments at paragraph 395 of its comments on the Interim Report.

2.251. We thus decline to grant Russia's request.

#### **2.7.22 Paragraph 7.419 of the Interim Report**

2.252. The European Union asks the Panel to reflect the argument made at paragraph 155 of its second written submission that "the Commission was unable to carry out any of the level of trade adjustments claimed by RFPA during the investigation. Indeed, ... the Commission could not make such adjustments, given that the sampled companies, except for Acron, only partially cooperated and did not provide sufficiently detailed data, in particular transaction by transaction (including by product type) listings."<sup>226</sup>

2.253. Russia considers this reference "unnecessary and unwarranted" because "[t]he question to be addressed relates to whether – in the first place – the [European Commission] should have made such adjustments and whether sufficient evidence was presented to justify these adjustments".<sup>227</sup>

2.254. We agree with the European Union that the proposed change – which concerns whether sufficient evidence was presented to justify the adjustments allegedly requested – is useful to understand the European Union's position.

2.255. We have thus decided to grant the European Union's request and we have amended paragraph 7.419 accordingly.

#### **2.7.23 Paragraphs 7.422 and 7.423 of the Interim Report**

2.256. Russia asks the Panel to reconsider its finding in paragraph 7.422 that "the comments made by RFPA on the definitive disclosure refer to a request for adjustments for Russian export prices to the European Union, rather than to Russian export prices to third countries" and in paragraph 7.423 that "the record does not show 'where, in the investigation, the interested parties would have made a request for adjustments' to the price of Russian exports to third countries".<sup>228</sup>

2.257. Russia explains that paragraph 1150 of its second written submission points to evidence which actually refers to "the findings in the Disclosure relating to the comparison of Russian export prices to third countries with the price of the sampled Union producers".<sup>229</sup> Russia also argues that the contested finding at paragraph 7.422 is "contradicted by the reference to Recital 161 of Regulation 999/2014 in paragraph 7.420 of the [Interim] Report"<sup>230</sup>, which refers to the RFPA having requested adjustments to the "Russian export prices to third countries".

2.258. We disagree with Russia that section V.E.1 of Comments by the RFPA on the Definitive Disclosure dated 8 July 2014, cited at paragraph 1150 of Russia's second written submission demonstrates that the RFPA requested adjustments to Russian export prices *to third countries*. We have, once again, reviewed page 33 of Exhibit RUS-79 (BCI) and we are not convinced that the adjustments requested by the RFPA in this exhibit concern the export price of Russian exports to third countries: in fact, the first sentence of section V.E.1 states "[t]o ensure comparability between the Russian and EU prices, as in the past reviews, adjustments should be implemented to price undercutting and underselling calculations" and refers to adjustments reflected in Regulations 658/2002 and 661/2008. We note that the three recitals from these regulations cited in footnote 67 of Exhibit RUS-79 (BCI) actually refer to adjustments to export prices *to the European Union*.

2.259. We also disagree with Russia that our findings in paragraphs 7.422 and 7.423 of the Interim Report are contradicted by our reference to recital 161 of Regulation 999/2014 in paragraph 7.420 of the Interim Report. In this paragraph, we found that "there is evidence on the record that representatives of Russian producers/exporters requested *certain adjustments*".<sup>231</sup> This is based on recital 161 of Regulation 999/2014, which states that:

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<sup>226</sup> European Union's comments on the Interim Report, para. 24.

<sup>227</sup> Russia's comments on the European Union's comments on the Interim Report, para. 80.

<sup>228</sup> Russia's comments on the Interim Report, paras. 293 and 298.

<sup>229</sup> Russia's comments on the Interim Report, para. 295.

<sup>230</sup> Russia's comments on the Interim Report, para. 296.

<sup>231</sup> Emphasis added.

Following disclosure, RPFA claimed that the comparison between Russian export prices to third countries and the Union prices is meaningless, since a comparison should be made between sales to the same markets and with proper adjustments for duties, level of trade, etc.

2.260. However, neither our finding nor recital 161 indicates which adjustments were asked and whether they were justified.

2.261. We thus decline to grant Russia's request.

#### **2.7.24 Paragraphs 7.439-7.443 of the Interim Report**

2.262. Russia asks the Panel to complete its findings in relation to Russia's claim #6, by including findings on Russia's argument that the likelihood of recurrence of injury determination reached by the European Commission in the context of the third expiry review was based on micro-economic data provided by the domestic industry which did not cover stabilized AN.<sup>232</sup>

2.263. The Panel disagrees with Russia that its findings on claim #6 are limited to the alleged lack of data concerning IGAN. In fact, at paragraph 7.442, we explain that: "we are not convinced by Russia's evidence that domestic producers systematically failed to report economic indicators related to IGAN *and stabilized AN*".<sup>233</sup> At paragraph 7.438, we also note that, in its comments on the initiation of an expiry review<sup>234</sup>, "RFPFA criticized the methodology chosen to establish the sample ... and the *inclusion* of stabilized AN in the product concerned". We reviewed carefully Russia's arguments with respect to the alleged lack of micro-economic data concerning stabilized AN and IGAN in the data sets which served as a basis for the European Commission's analysis.<sup>235</sup> We note that these arguments focus on IGAN<sup>236</sup> or concern the alleged discrepancy between data related to all product types (IGAN, FGAN, and stabilized AN) and the indicators set out in Regulation 999/2014.<sup>237</sup> We have responded to these arguments in paragraphs 7.439 to 7.443 of the Interim Report.

2.264. In its comments on the Interim Report, Russia references its second written submission and its response to Panel question No. 95(a) as containing "extensive evidence to the effect that the Union industry's micro-data and resulting EU's likelihood of injury analysis failed to cover Stabilized AN".<sup>238</sup> We disagree. Russia's second written submission merely refers to the European Union's alleged "admission" that "Stabilized AN is not produced in the EU" (although the European Union has denied having made such an admission), while Russia's response to Panel question 95(b) indicates that "had the EU included data of the domestic industry manufacturing *IGAN and Stabilized AN* in its likelihood-of-injury determination it would have found a much higher profitability of the EU domestic industry".<sup>239</sup>

2.265. Finally, concerning Russia's argument that the European Union "does not deny that micro-indicators of the domestic industry do not cover production and sales of Stabilized AN"<sup>240</sup>, we note that this is, in fact, incorrect.<sup>241</sup>

2.266. We thus decline to grant Russia's request.

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<sup>232</sup> Russia's comments on the Interim Report, paras. 300-302.

<sup>233</sup> Emphasis added.

<sup>234</sup> Interim Report, para. 7.438 (referring to Comments by RFPFA on the initiation of an expiry review, (Exhibit RUS-85 (BCI)), pp. 41-45).

<sup>235</sup> Russia's first written submission, paras. 974-980; second written submission paras. 1163-1168.

<sup>236</sup> See, for example, Russia's second written submission, paras 1165-1168.

<sup>237</sup> See, for example, Russia's first written submission, paras. 976-977.

<sup>238</sup> Russia's comments on the Interim Report, para. 301 (referring to Russia's second written submission, paras. 1156 and 1164; Russia's response to Panel question No. 95a, paras. 132-133).

<sup>239</sup> Emphasis added.

<sup>240</sup> Russia's second written submission, para. 1164.

<sup>241</sup> See, for example, European Union's second written submission, para. 89.

2.267. Russia further argues that our analysis only addresses Russia's claims and arguments regarding the alleged incompleteness of micro-indicators, while failing to respond to Russia's claims and arguments regarding macro-economic indicators.<sup>242</sup>

2.268. We disagree. Russia's arguments concerning macro-indicators focus on the allegation that macro-indicators in Regulation 999/2014 were not based on data representing the entire domestic industry producing all three types of AN.<sup>243</sup> We described in detail the data collection of the European Commission and the alleged content of the April and May 2014 datasets (including macro-economic indicators in paragraphs 7.431 to 7.437 and 7.444 of the Interim Report). In paragraphs 7.442 and 7.443, we explained why we disagreed with Russia that the European Commission "excluded a whole category of producers of the like product". We have reviewed carefully Russia's arguments regarding the alleged content of the April and May datasets but we see no reason to change our conclusion, reflected in paragraph 7.448, that Russia's claim #6 is not sufficiently supported by the evidence on the record, for the Panel to find a violation of Article 11.3 of the Anti-Dumping Agreement.

2.269. We thus decline to grant Russia's request. Nevertheless, we modified paragraph 7.435 of the Interim Report to reflect the fact that the reference to "all relevant macro and micro indicators covering all known Union producers of the like product" in this paragraph, is a quotation from a communication by Fertilizers Europe (Exhibit RUS-83 (BCI)).

2.270. In addition, Russia asks the Panel to modify footnote 684 of the Interim Report and to find that Exhibit RUS-154, in its Annex B-4, evidences that GrowHow provided information on FGAN only (a product called Nitram and described as a "fertilizer" in the exhibit). As we explained in footnote 684 of the Interim Report, we are unable to resolve the technical question whether a particular product should be classified as FGAN or IGAN. This is especially true in view of the statement, by a representative of GrowHow, which appears on the record of these proceedings, that its sales data included data on "all ... AN sales, whether straight fertilizer or industrial".<sup>244</sup>

2.271. We thus decline to grant Russia's request.

2.272. Finally, Russia asks the Panel to modify paragraph 7.443 of the Interim Report to reflect that Russia did provide evidence that Yara France did not provide data for its Pardies plant solely manufacturing IGAN.<sup>245</sup> We modified paragraph 7.443 of the Interim Report and we reflected in a footnote to paragraph 7.443, Russia's response to Panel question No. 46, which shows that Yara's response to the European Commission's questionnaire covered only its plants in Montoir and Ambes, but did not cover its plant in Pardies. This paragraph now reads:

In relation to Yara France, we note Russia's statement that "Yara did not provide a response for its Pardies plant solely manufacturing IGAN."<sup>708</sup> This statement is supported by evidence that Yara's response to the injury questionnaire contained data related to two of its plants (in Montoir and Ambes).<sup>709</sup>

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<sup>708</sup> Russia's first written submission, para. 966; RFP submission (4 March 2014), (Exhibit RUS-82 (BCI)). See also Russia's response to Panel question No. 46.

<sup>709</sup> RFP submission (4 March 2014), (Exhibit RUS-82 (BCI)), p. 3.

2.273. Nevertheless, having considered the totality of the evidence on the record we decline to modify our conclusion with regard to Russia's claim #6.

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<sup>242</sup> Russia's comments on the Interim Report, para. 303.

<sup>243</sup> Russia's first written submission, para. 967.

<sup>244</sup> Interim Report, para. 7.442.

<sup>245</sup> Russia's comments on the Interim Report, para. 311.

### **2.7.25 Paragraph 7.448 of the Interim Report**

2.274. Russia asks the Panel to consider certain arguments made in support of claim #6 which, Russia argues, were not considered by the Panel, and to revise its conclusion with respect to claim #6 accordingly.<sup>246</sup>

2.275. We consider that Russia's request with regard to paragraph 7.448 is essentially the same as the request made at paragraphs 300 to 311 of its comments on the Interim Report, which we analysed above. We thus decline to examine them separately and we decline to grant Russia's request to modify our findings in relation to claim #6.

### **2.7.26 Section 7.7.3.6.1 of the Interim Report**

2.276. Russia asks us to acknowledge that Regulation 999/2014 expressly states that the Union industry was in a healthy situation.<sup>247</sup> We note that paragraphs 7.449 and 7.450 of the Interim Report describe in detail the arguments made by Russia in its written submissions, including the fact that Regulation 999/2014 found the EU industry to be in a non-injurious situation.

2.277. We thus decline to grant Russia's request.

2.278. Russia also asks us to consider its arguments in section 9.3.4.3.3 of its first written submission that the European Commission "downplayed the current state of the Union industry in relation to the likelihood of recurrence of injury and erroneously attributed the non-injurious situation of domestic industry to the anti-dumping measures".<sup>248</sup>

2.279. We disagree that the Panel failed to address Russia's arguments in section 9.3.4.3.3. of its first written submission. This section presents a series of arguments demonstrating the non-injurious state of the domestic industry during the period of investigation.<sup>249</sup> In fact, paragraph 7.474 of the Interim Report contains a reference to paragraph 1018 of Russia's first written submission and introduces the analysis of Russia's claim. We went on to find that, while recognizing the healthy state of the domestic industry during the period of investigation (as reflected in the indicators cited by Russia in paragraph 1019 of its first written submission), the European Commission actually based its determination on the following elements:

- i. the price level on the Union market compared to third country markets<sup>250</sup>;
- ii. existing limits to Russian exports to third countries<sup>251</sup>; and
- iii. the geographical proximity of the Union market to Russia and the existence of well-established distribution channels.<sup>252</sup>

2.280. We therefore see no reason to modify our reasoning and our conclusion with regard to Russia's claim #7.

2.281. We thus decline to grant Russia's request.

2.282. In addition, Russia asks the Panel to find that the determinations reached in Regulation 999/2014 were factually rebutted by Russia, based on the evidence in the record of the investigation. Russia's request concerns the following factual aspects:

- a. evidence on the evolution of consumption<sup>253</sup>;

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<sup>246</sup> Russia's comments on the Interim Report, paras. 396-397.

<sup>247</sup> Russia's comments on the Interim Report, para. 312.

<sup>248</sup> Russia's comments on the Interim Report, para. 313.

<sup>249</sup> Russia's first written submission, paras. 1018-1019.

<sup>250</sup> Regulation 999/2014, (Exhibit RUS-66), recital 153.

<sup>251</sup> Regulation 999/2014, (Exhibit RUS-66), recital 154.

<sup>252</sup> Regulation 999/2014, (Exhibit RUS-66), recital 155.

<sup>253</sup> Russia's comments on the Interim Report, paras. 315-320.

- b. the evolution of AN prices in the European Union<sup>254</sup>;
- c. the evolution of gas prices in the European Union<sup>255</sup>;
- d. the performance of the EU domestic industry on export markets evidenced its ability to compete with Russian producers<sup>256</sup>; and
- e. the impact of future Russian imports on the profitability of the EU domestic industry.<sup>257</sup>

2.283. We note that the five issues listed above were addressed by the Panel in section 7.7.3.6.2 of its Interim Report. On each one of these issues, the Panel carefully reviewed the evidence on the record and the arguments of the parties. We wish to stress once again that our task is not to undertake a *de novo* review of the evidence or substitute our judgement for that of the investigating authority. Our task is to assess whether, in view of the evidence on the record, the investigating authority conducted an objective examination based on positive evidence and therefore whether its likelihood-of-injury determination was reasoned and adequate.

2.284. Our examination of the evidence on the record led us to the conclusion that the European Union did not breach Article 11.3 of the Anti-Dumping Agreement by concluding that there were no indications on the record that the non-injurious situation of the EU domestic industry would be sustainable. Having considered Russia's interim comments, we see no reason to change our conclusion regarding Russia's claim #7.

#### **2.7.27 Paragraph 7.474 of the Interim Report**

2.285. The European Union asks the Panel to reflect the argument made at paragraph 188 of its second written submission that:

The European Union explained that WTO jurisprudence confirmed that during the investigated period in the review, the domestic industry would not be suffering injury cannot be a reason for concluding that there could be not likelihood of recurrence of injury. (FN to Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.143.) Indeed, the desired effect of an anti-dumping duty is improvement in the condition of the domestic industry. If a finding that imports would likely have an adverse impact an industry whose condition is generally good were precluded, there would be no basis for continuation of an anti-dumping measure based on likely "recurrence" of injury, which is specifically provided for in Article 11.3.<sup>258</sup>

2.286. Russia objects because "the wording proposed by the European Union is general; however, paragraph 7.474 of the Report is very specific as it describes the European Union's response to Russia's argument regarding Regulation 999/2014".<sup>259</sup>

2.287. We agree with Russia in this respect. Section 7.7.3.6.2.4 specifically focuses on the list of evidence that the RFPA had brought to demonstrate the non-injurious situation of the EU domestic industry. The text that the European Union suggests pertains to the general legal standards and is unnecessary in this section as we have already established in section 7.7.3.3 that a likelihood-of-injury determination in an expiry review is different from a determination of injury in an original investigation. We also recall that our findings do not aim to fully reproduce the parties' arguments as presented in their submissions but summarize such arguments to the extent necessary to facilitate our own analysis and assessment.

2.288. We therefore do not consider it necessary to insert the text requested by the European Union.

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<sup>254</sup> Russia's comments on the Interim Report, paras. 321-326.

<sup>255</sup> Russia's comments on the Interim Report, paras. 327-333.

<sup>256</sup> Russia's comments on the Interim Report, para. 335.

<sup>257</sup> Russia's comments on the Interim Report, para. 336.

<sup>258</sup> European Union's comments on the Interim Report, para. 25.

<sup>259</sup> Russia's comments on the European Union's comments on the Interim Report, para. 89.

### 2.7.28 Paragraphs 7.483-7.486 of the Interim Report

2.289. Russia asks us<sup>260</sup> to delete or revise the phrase in paragraph 7.484 which states: "the European Commission's evaluation of the production capacity of Russian producers [was] to determine the volume of AN which could be exported to the Union market should the measures lapse". Russia argues that there is no factual basis for the Panel's finding. We disagree and refer to recitals 84 and 94 of Regulation 999/2014 which state respectively:

The Commission considers that, if the current measures were to be removed, at least part of this spare capacity is likely to be used and directed to the Union markets for the following reasons.

The Commission therefore concludes that the Russian producers dispose of significant spare capacity which is very likely to be used for substantial additional exports to the Union, should the measures lapse.

2.290. We have decided to add a footnote to paragraph 7.484 of the Interim Report referring to these two recitals.

2.291. In addition, Russia requests the Panel to consider certain arguments provided in support of claim #8 regarding the methodology for evaluating the spare capacity of Russian producers: (a) the lack of a single and coherent methodology that would apply in case of each producer in Russia, which according to Russia means that the European Union did not objectively examine the positive evidence on the level of spare production capacities<sup>261</sup>; (b) the European Union's alleged inflation of production capacities at Berezniki, which does not amount to an objective examination of the positive evidence<sup>262</sup>; and (c) the "result-oriented exercise" aimed at establishing "maximum spare capacities" rather than objectively establishing the level of spare capacities.<sup>263</sup>

2.292. We disagree that Russia's arguments on these issues were not considered by the Panel.

2.293. For instance, with regard to the alleged lack of a single and coherent methodology, the Interim Report states at paragraph 7.481 that "Russia criticizes the fact that, for some Russian producers, the European Commission used nameplate capacities, while for others, it referred to actual production figures". We considered this argument by stating at paragraph 7.484 of the Interim Report that "[w]hile nameplate capacity is in principle an important piece of evidence of any investigation, we find it reasonable for an investigating authority that notes a gap between the theoretical capacity and the actual capacity to use the figure which is the most relevant to its analysis."

2.294. With regard to the European Union's alleged inflation of production capacities at Berezniki, we note that Russia's second written submission states at paragraphs 1246 and 1247, that the "EU's determination of the level of production capacities at Berezniki is a *perfect example* of the result-oriented and biased approach that the EU incorrectly followed"<sup>264</sup> because the European Union "calculated Berezniki production capacity by multiplying average theoretical production in winter and in summer by 355 days". While we do not think that the Panel needs to address every example used by the parties in support of their arguments, we note that we responded to Russia's argument regarding the alleged "result-oriented approach" taken by the European Commission in the analysis of spare capacities. After carefully considering all arguments and evidence on the record, we disagreed with Russia's argument that the European Union's findings on the actual production capacity of Russian exporting producers and on the spare capacity in the Russian Federation were not based on an objective examination of positive evidence on the record.<sup>265</sup>

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<sup>260</sup> Russia's comments on the Interim Report, para. 343.

<sup>261</sup> Russia's comments on the Interim Report, para. 339.

<sup>262</sup> Russia's comments on the Interim Report, para. 340.

<sup>263</sup> Russia's comments on the Interim Report, para. 341.

<sup>264</sup> Emphasis added.

<sup>265</sup> Interim Report, para. 7.489.

2.295. We thus decline to modify our conclusion on Russia's claim #8.<sup>266</sup>

### **2.7.29 Paragraph 7.488 of the Interim Report**

2.296. Russia asks us to revise paragraph 7.488 of the Interim Report which states that "[the Panel] is unable to understand how the investigating authority could have concluded from the documentation obtained that the capacity expansion was [[\*\*\*]] ktpa instead of [[\*\*\*]] ktpa". For Russia, "the only fact that clearly follows from Exhibit EU-9 is that the production capacity of AN subject to the anti-dumping measures at NAK is [[\*\*\*]] ktpa".<sup>267</sup> Russia refers us to paragraph 1255 of its second written submission, which states:

In the course of the review the EU alleged that the production at NAK plant in Russia was set to increase by [[\*\*\*]] tons. This allegation is incorrect since from the underlying documentation it explicitly follows that the new installation had a capacity to produce [[\*\*\*]] tons of prilled AN. Net of the production capacity of the old installation of [[\*\*\*]] tons - that the new installation replaced - the expansion amounted solely to the 75 thousand tons of additional capacity, and not to [[\*\*\*]] tons, as erroneously found by the EU.<sup>268</sup>

2.297. The European Union disagrees and refers us to paragraphs 111 and 112 of its opening statement at the second meeting with the Panel. We reproduce paragraph 111 of the European Union's opening statement below:

Finally, with regard to the calculation of NAK's production capacity before expansion, Russia's arguments are of no avail. We have explained that the RFPA indeed submitted a report for EuroChem NAK after the disclosure (Annex VI-D-7-1) that contradicts the documents collected by the Commission on the spot. The documents that the Commission collected do not in any way distinguish between AN and Calcium Ammonium Nitrate ("CAN"). The Commission had every reason to question the report submitted by the RFPA after disclosure since it was almost identical to the original submitted at the verification visit. It came from the RFPA rather than from the company actually concerned, EuroChem NAK.<sup>269</sup>

2.298. While we agree that Russia's explanations in its comments are useful to understand page 41 of Exhibit EU-9 (BCI) (the document obtained during the verification visit by the European Commission), we note that this explanation does not appear in paragraph 1255 of its second written submission. In particular, the distinction between what is the product concerned and what is not does not appear in that paragraph.

2.299. We thus decline to grant Russia's request and we decline to modify paragraph 7.488 of the Interim Report.

### **2.7.30 Paragraphs 7.499 and 7.500 of the Interim Report**

2.300. Russia asks the Panel to modify paragraph 7.499(a) of the Interim Report because it allegedly incorrectly describes Russia's claims under Articles 2.1 and 2.3 of the Anti-Dumping Agreement by stating that the European Union "carried out dumping calculations on the sole basis of a comparison between domestic prices and export prices to third countries, while rejecting the data provided by Russian exporters".<sup>270</sup>

2.301. In its first written submission Russia argues that "the [European Union] failed to comply with Article 2.1 of the Anti-Dumping Agreement because it found allegedly dumped prices based on a comparison between the domestic prices and the export prices to third countries, rather than the

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<sup>266</sup> Russia reiterates the same arguments and requests that the Panel modify its finding with regard to claim #8. (Russia's comments on the Interim Report, para. 398). We decline to examine this request separately.

<sup>267</sup> Russia's comments on the Interim Report, paras. 344-345. The relevant document is Exhibit EU-9 (BCI).

<sup>268</sup> Russia's second written submission, para. 1255.

<sup>269</sup> Fns omitted.

<sup>270</sup> Russia's comments on the Interim Report, para. 346.

export prices to the [European Union]" and that "Article 2.3 does not allow an investigating authority to disregard export prices for the purpose of a dumping margin calculation for the reason that such export prices are being charged at the time of a price undertaking".<sup>271</sup>

2.302. We have decided to modify paragraph 7.499(a) to reflect more accurately Russia's claims. This paragraph now reads as follows:

Article 2.1 of the Anti-Dumping Agreement, because the investigating authority carried out dumping calculations on the sole basis of a comparison between domestic prices and export prices to third countries, while rejecting the data on export prices to the EU provided by Russian exporters; and Article 2.3 of the Anti-Dumping Agreement, because investigating authorities disregarded export prices for the purpose of a dumping margin calculation for the reason that such export prices are being charged at the time of a price undertaking.

2.303. We have also modified the footnotes in paragraph 7.499 of the Interim Report.

2.304. Regarding paragraph 7.500, Russia argues that the Panel did not reflect all its arguments in relation to claim #11 and requests the Panel to revise paragraph 7.500 of the Interim Report.<sup>272</sup>

2.305. We disagree. While paragraph 7.500 summarizes the arguments presented by Russia in support of claim #11, all violations claimed by Russia are explained in detail at paragraph 7.547 of the Interim Report, including a reference, in the footnote, to paragraph 991 of Russia's second written submission.

2.306. We thus decline to grant Russia's request regarding para. 7.500.

### **2.7.31 Paragraph 7.518 of the Interim Report**

2.307. The European Union asks<sup>273</sup> the Panel to add a new final sentence quoting paragraph 97 of its second written submission:

The European Union adds that it is undisputed that the Commission conducted a "price-to-price comparison", i.e. a comparison of weighted average domestic prices and weighted average export prices to third countries at the same level of trade, which shows, as per the findings of the panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, that the Commission's findings had a "sufficient factual basis".

2.308. Russia objects to this request and argues that the proposed change is factually flawed, as it is not undisputed that the European Commission's finding had a "sufficient factual basis". Instead, this finding was challenged in Russia's claims #9 and #11.<sup>274</sup>

2.309. We agree with Russia on this point and we have decided to reject the European Union's request.

### **2.7.32 Paragraph 7.535 of the Interim Report**

2.310. Russia asks the Panel to remove the final sentence of paragraph 7.535, which describes the pricing behaviour of Acron and EuroChem under the price undertaking, because "[t]he Panel provides no reference for this finding which in any case is incorrect and irrelevant".<sup>275</sup>

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<sup>271</sup> Russia's first written submission, paras. 695-696.

<sup>272</sup> Russia's comments on the Interim Report, para. 349.

<sup>273</sup> European Union's comments on the Interim Report, para. 26.

<sup>274</sup> Russia's comments on the European Union's comments on the Interim Report, para. 95

<sup>275</sup> Russia's comments on the Interim Report, para. 352.

2.311. We refer to recital 159 of Regulation 999/2014, which states:

The Commission notes that one of the two Russian exporting producers subject to a price undertaking during the RIP sold the product concerned at a price above the minimum import price under the undertaking. On the other hand, the second exporting producer – who was subject to the undertaking only for a limited period of time during the RIP – sold below the minimum import price. In these circumstances, it is unclear how they would set their prices if the undertakings lapse together with the anti-dumping duties.

2.312. We disagree with Russia that this finding is irrelevant. Nevertheless, we have modified the corresponding footnote and added a reference to recital 159 of Regulation 999/2014.

2.313. Russia also requests that this information should be treated as BCI, as stated in section 2.1 above, and the Panel has agreed with this request.

### **2.7.33 Paragraph 7.539 of the Interim Report**

2.314. Russia asks the Panel to correct the description of Russia's claim under Article 6.10 of the Anti-Dumping Agreement, arguing that Russia "never alleged that a likelihood-of-dumping determination must be established for each individual exporting producers".<sup>276</sup>

2.315. We recall that paragraph 7.539 states:

Russia claims that since the European Union based its likelihood of recurrence of dumping determination on a finding of "dumped" prices and since the European Union relied on a sample of Russian exporting producers, it should have determined individual dumping margins for the Russian sampled producers in line with Article 6.10.

2.316. We disagree that the content of paragraph 7.539 does not reflect accurately the arguments presented by Russia in its first written submission. We note in particular that Russia argued:

[S]ince the [European Union] based its likelihood of recurrence of dumping determination on a finding of "dumped" prices and since the [European Union] formally constituted for the purpose of determining dumping a sample of Russian exporting producers – which it never dissolved – the [European Union] *should have determined individual dumping margins* for the Russian sampled producers in line with Article 6.10 of the Anti-Dumping Agreement.<sup>277</sup>

2.317. We thus decline to grant Russia's request.

### **2.7.34 Section 7.7.5.1 of the Interim Report**

2.318. Russia asks the Panel to modify paragraphs 7.582 and 7.583 of the Interim Report, to reflect the fact that Russia's claims #12 to #15 concern the continuous imposition and levy of anti-dumping duties on Russian AN imports, rather than the calculation of anti-dumping duties.<sup>278</sup>

2.319. We have decided to grant Russia's request and we have modified paragraphs 7.582 and 7.583 accordingly.

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<sup>276</sup> Russia's comments on the Interim Report, para. 353.

<sup>277</sup> Russia's first written submission, para. 702. (emphasis added)

<sup>278</sup> Russia's comments on the Interim Report, paras. 355-359.

### **2.7.35 Paragraph 7.571 of the Interim Report**

2.320. The European Union requests the Panel to add, at the end of the last sentence of paragraph 7.571 the words "as well as stabilized AN ("AN28"), with reference to paragraph 89 of the European Union's second written submission.<sup>279</sup> Russia asks the Panel to reject this request.<sup>280</sup>

2.321. We consider that the last sentence of paragraph 7.571 correctly describes the content of paragraphs 272 and 273 of the European Union's first written submission, which we have referenced in the footnote to this paragraph.

2.322. We have thus decided to reject the request of the European Union.

### **2.7.36 Paragraph 7.582(a) of the Interim Report**

2.323. Russia asks the Panel to clarify that the duties currently applied on imports of AN from EuroChem were set in 2008, extended in 2014 and are currently applied by virtue of Regulation 1722/2018.<sup>281</sup>

2.324. We have decided to grant Russia's request and we have modified paragraph 7.582(a) accordingly.

### **2.7.37 Russia's request concerning claims #9 and #11 and #12 to #15 and Article 6.8 of the Anti-Dumping Agreement**

2.325. Russia asks the Panel to review the factual record and its analysis of claims #9 and #11 and #12 to #15.<sup>282</sup>

2.326. We recall that the interim review is not an appropriate stage for the parties to re-argue their case on the basis of the arguments already put before a panel.<sup>283</sup> We consider that this is precisely what Russia attempts to do in this section of its comments, by asking us to reconsider the factual record, its arguments and our findings with regard to claims #9 and #11 and #12 to #15.

2.327. We thus decline to grant Russia's request to modify our findings and conclusions in relation to these claims.

### **2.7.38 Paragraph 7.627 of the Interim Report**

2.328. The European Union asks the Panel to add, at the end of paragraph 7.627, with reference to Russia's response to Panel question No. 55, the following sentence: "[i]n the same response, Russia refers to several additional instances in which good cause was allegedly not shown."<sup>284</sup>

2.329. We consider that paragraph 7.627 of the Interim Report, in particular its citation of Russia's response to Panel question No. 55, correctly summarizes the argument made by Russia.

2.330. We therefore decline to grant the change requested by the European Union.

### **2.7.39 Paragraphs 7.629, 7.642 and paragraph 8.1(g)(xiv) of the Interim Report**

2.331. The European Union asks<sup>285</sup> the Panel to add at the end of the first sentence of paragraph 7.629 the following phrase: ", at least where the additional instances of alleged

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<sup>279</sup> European Union's comments on the Interim Report, para. 28.

<sup>280</sup> Russia's comments on the European Union's comments on the Interim Report, para. 98.

<sup>281</sup> Russia's comments on the Interim Report, paras. 360-361.

<sup>282</sup> Russia's comments on the Interim Report, paras. 418 and 426.

<sup>283</sup> Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259. See also Panel Reports, *Japan – DRAMS (Korea)*, para. 6.2; *US – Poultry (China)*, para. 6.32; *India – Agricultural Products*, para. 6.5; *India – Solar Cells*, para. 6.24; *Russia – Pigs*, paras. 6.6-6.7; *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26; and *Brazil – Taxation*, para. 6.7.

<sup>284</sup> European Union's comments on the Interim Report, para. 30.

<sup>285</sup> European Union's comments on the Interim Report, para. 31.

WTO-inconsistency could have been identified already in Russia's first written submission" and to insert a reference to paragraphs 207 to 212 of its second written submission in the footnote.

2.332. We agree that the required change would better reflect the argument made by the European Union and we have added a reference to paragraph 211 of its second written submission in the footnote.

2.333. The footnote now reads:

European Union's second written submission, para. 207. The European Union adds that: "there is no reason why Russia could not have identified all of the additional instances of alleged WTO-inconsistency already in its first written submission (or even in its panel request): they all refer to documents that were provided to Russian interested parties during the expiry review, as Russia concedes". (See *ibid.* para. 211).

2.334. The European Union also asks us to clarify in paragraph 7.642 of the Interim Report that our finding of violation is limited to "the identity of the author of the export report in Annex I", rather than to the Annex I in its entirety.

2.335. We consider that the requested addition helps to clarify our finding and we have decided to grant the European Union's request by amending paragraphs 7.642 and 8.1(g)(xiv) of the Interim Report.

#### **2.7.40 Paragraph 7.653 of the Interim Report**

2.336. The European Union asks the Panel to insert a reference to the panel report in *EU – Footwear (China)*, paragraph 7.458 (finding, as the European Union explained in paragraph 644 of its first written submission, that an assessment of injury "*must* be made with respect to the domestic industry as a *whole*", and that investigating authorities are "not required to assess the situation of individual companies in the domestic industry... to determine whether they, individually, show signs of injury.").<sup>286</sup>

2.337. Russia notes that the argument has already been reflected by the Panel in paragraphs 7.646 to 7.647. Russia also notes that, in paragraph 7.652, the Panel includes a quote from the Panel Report, *EU – Footwear (China)*.<sup>287</sup>

2.338. We agree with Russia that the argument made by the European Union that "the analysis of likelihood of injury is only meant to assess the domestic industry as a whole" already appears at paragraph 7.646 of the Interim Report.

2.339. We thus reject the European Union's request.

#### **2.7.41 Paragraph 7.671 of the Interim Report**

2.340. The European Union asks<sup>288</sup> the Panel to insert, in paragraph 7.671, a reference to paragraph 1367 of Russia's second written submission, where Russia provides the list of information the Panel refers to.

2.341. Russia requests that the Panel insert references to both: Russia's first written submission, paragraph 1246, and Russia's second written submission, paragraph 1367.<sup>289</sup>

2.342. We agree with Russia and we have added this reference in a footnote. The footnote now reads: "Russia's first written submission, para. 1246; second written submission, para. 1367".

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<sup>286</sup> European Union's comments on the Interim Report, para. 33. (emphasis original)

<sup>287</sup> Russia's comments on the European Union's comments on the Interim Report, para. 104.

<sup>288</sup> European Union's comments on the Interim Report, para. 35.

<sup>289</sup> Russia's comments on the European Union's comments on the Interim Report, para. 112.

#### **2.7.42 Paragraph 7.680 of the Interim Report**

2.343. Russia argues that, in paragraph 7.680, the Panel "incorrectly analyzed" claim #21 because Russia was not challenging that the "source" of certain information was not provided, but that the aforementioned information was not provided altogether.<sup>290</sup>

2.344. We disagree with Russia. In fact, our description of Russia's claim makes clear that:

We understand that, according to Russia, the European Commission did not disclose the data which served as a basis for the determination of the apparent Union consumption, nor the data which served for the establishment of the volume of imports from third countries. In addition, the European Commission did not provide the basis for its dumping margin and underselling/undercutting calculations.<sup>291</sup>

2.345. We then concluded that "[t]he information contained in sections E(1) to E(3) of the disclosure does set out the figures on which the European Commission relied to reach its determination of likelihood of recurrence of dumping, *and* indicates the source of this information".<sup>292</sup>

2.346. We thus decline to grant Russia's request.

#### **2.7.43 Paragraph 7.685 of the Interim Report**

2.347. The European Union asks<sup>293</sup> the Panel to add the words "in detail" at the end of the first sentence of paragraph 7.685, and to insert the words "has failed to properly explain its arguments and" before the words "meet its burden of proof" in the second sentence of paragraph 7.685. Russia objects to this change.<sup>294</sup>

2.348. We consider that paragraph 7.685 of the Interim Report sufficiently sets out the content of the parties' arguments and we have decided to reject the European Union's request.

### **2.8 Russia's request concerning certain exhibits attached to its submissions**

2.349. Russia argues that 39 exhibits attached to its submissions to the Panel, including in relation to the dictionary meaning proposed by Russia in support of some of its claims, "have not been included" in the Interim Report or identified in the table of exhibits of the Interim Report. Thus, Russia asks the Panel "to consider [these exhibits], make findings and include them" in the Final Report "in order to correctly reflect Russia's argumentation and substantiating evidence".<sup>295</sup>

2.350. We recall that a panel is not required to refer explicitly to every argument made, or each piece of evidence adduced, by the parties.<sup>296</sup> In this connection, the list of exhibits included at the beginning of the Panel Report describes the exhibits submitted by the parties that are explicitly referred to in the Report, and assigns to each of them a short name to facilitate their reference. Moreover, as a result of the parties' comments and our revision of the Interim Report, we have added to the list of exhibits some of the exhibits identified by Russia in its request.<sup>297</sup> For these reasons, we have decided not to grant Russia's request to explicitly list in the Final Report the remaining exhibits identified by Russia.

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<sup>290</sup> Russia's comments on the Interim Report, paras. 362-363.

<sup>291</sup> Interim Report, para. 7.672.

<sup>292</sup> Interim Report, para. 7.680. (emphasis added)

<sup>293</sup> European Union's comments on the Interim Report, para. 36.

<sup>294</sup> Russia's comments on the European Union's comments on the Interim Report, paras. 114-115.

<sup>295</sup> Russia's comments on the Interim Report, paras. 2-3.

<sup>296</sup> Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 6.6.

<sup>297</sup> Council Resolution of 8 June 1993, (Exhibit RUS-10); GATT, CONTRACTING PARTIES – Ninth Session – Review Working Party II on Tariffs, Schedules and Customs Administration – Article VI – Proposal by the Czechoslovak Delegation – Revision, W.9/86/Rev.1 (21 December 1954), (Exhibit RUS-26); and GATT, CONTRACTING PARTIES – Ninth Session – Report of Review Working Party III on Barriers to Trade Other Than Restrictions or Tariffs, L/334 (1 March 1955), (Exhibit RUS-27).

**ANNEX B**

ARGUMENTS OF THE PARTIES

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## ANNEX B-1

### FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

#### 1 INTRODUCTION

1. In this dispute, the Russian Federation challenges the cost adjustment methodology and several provisions of the EU's anti-dumping legislation. The Russian Federation submits that these measures are inconsistent with the EU's obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement").

2. The Russian Federation is also challenging certain anti-dumping measures imposed by the EU on imports of ammonium nitrate and imports of certain welded tubes and pipes of iron or non-alloy steel originating in the Russian Federation. These measures are inconsistent with the EU's obligations under the AD Agreement and the General Agreement on Tariffs and Trade 1994 ("GATT").

#### 2 THE FIRST SUBPARAGRAPH OF ARTICLE 2(3) OF THE BASIC REGULATION IS INCONSISTENT WITH ARTICLE 2.2 OF THE AD AGREEMENT

3. The Russian Federation challenges the following part of the first subparagraph of Article 2(3) of the Basic Regulation: "provided that those prices are representative". The first subparagraph of Article 2(3) of the Basic Regulation requires to use only "representative prices" for both alternative methods of determination of normal value, including for the construction of normal value.

4. This flows from the use of the pronoun "those" that is wider than pronoun "these" and the change of the wording: **from the term "these prices"** in the phrase "provided that these prices are representative" in Regulation (EC) No 3283/94 of 22 December 1994 **to the term "those prices"** in the same phrase in Council Regulation (EC) No 384/96 of 22 December 1995. It also flows from the meaning of the term "representative prices" used in the last phrase of the first subparagraph of Article 2(3) of the Basic Regulation. The examination of the whole phrase "provided that those prices are representative", including its position in the sentence and its context, is necessary in order to understand its correct meaning.

5. As illustrated by several provisions of the Basic Regulation, recitals 3 and 4 of Council Regulation No 1972/2002, recitals 5 and 6 of Regulation (EU) 2017/2321, application of the relevant norms by the EU authorities and judgments by the General Court of the EU, the EU authorities interpret the term "representative" prices as prices that are unaffected by so called "distortions" or "market impediments" under which the EU authorities consider government regulation. Accordingly, the prices that are viewed by the EU authorities as being not "in line with world-market prices or prices in other representative markets" and "distorted" due to government regulation are treated as non-representative.

6. The Russian Federation submits that a condition that requires that in the construction of normal value of the like product only so called "representative" prices (as interpreted by the EU authorities) shall be used is inconsistent "as such" with Article 2.2 of the AD Agreement. The text of Article 2.2 of the AD Agreement does not permit the extension of price "representativeness" requirement to normal value construction. Article 2.2 of the AD Agreement unequivocally states that the basis for construction of normal value is "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits". There is no textual basis to conclude that the cost of production on which the normal value is constructed should meet an additional requirement – be "representative", *i.e.* free of government regulation.

7. As a result of the examination of whether prices are "representative", *i.e.* undistorted, to satisfy the requirement in the first subparagraph of Article 2(3) of the Basic Regulation, the EU authorities disregard those prices in "the cost of production in the country of origin" that they consider as non-representative. Thus, the first subparagraph of Article 2(3) prevents the EU authorities from constructing normal value on the basis of "the cost of production [of the product]

in the country of origin" plus a reasonable amount for administrative, selling and general costs and for profits in accordance with Article 2.2 of the AD Agreement.

**3 THE SECOND SUBPARAGRAPH OF ARTICLE 2(3) OF THE BASIC REGULATION IS INCONSISTENT WITH ARTICLE 2.2 OF THE AD AGREEMENT**

8. The Russian Federation challenges the second subparagraph of Article 2(3) of the Basic Regulation to the extent it provides that "a particular market situation for the product concerned" exists "when prices are artificially low" and thus introduces an additional circumstance for determining normal value via alternative methods under the first subparagraph of Article 2(3).

9. The circumstance described as "**a particular market situation for the product concerned**" is different from "**the particular market situation**" for the country **as a whole**. The term "the product concerned" applies, in particular, to an input used to produce the product under consideration in a specific anti-dumping proceeding. Furthermore, the list of circumstances which fall into the category of "**a particular market situation for the product concerned**" is open and includes the situation "when prices are [viewed by the EU authorities as] artificially low" due to government regulation. According to recital 3 of the Council Regulation No 1972/2002, the criteria for determining the existence of "a particular market situation for the product concerned" include a presence of alleged "distortions" that impact on relevant costs and prices, in particular input prices, and also result in domestic prices "being out of line with world-market prices or prices in other representative markets".

10. In contrast, the wording "the particular market situation" in Article 2.2 of the AD Agreement is applied only with respect to a country which meets the description of the second Supplementary Provision to Article VI:1 of the GATT. It follows that "the particular market situation" is a reference to the specific condition in a country as a whole.

11. First, the second subparagraph of Article 2(3) of the Basic Regulation provides that the EU authorities have to resort to alternative methods of determination of normal value on the ground of the existence of "a particular market situation for the product concerned". However, Article 2.2 of the AD Agreement does not contain the phrase "a particular market situation for the product concerned". Instead, it mentions "the particular market situation" that is the particular situation in a country' as a whole.

12. Second, the use of an indefinite article "a" in the phrase "a particular market situation for the product concerned" and words "*inter alia*" in the second subparagraph of Article 2(3) of the Basic Regulation indicates a potential multitude of such "situations". Since Article 2.2 of the AD Agreement provides for only one situation described as "the particular market situation", the second subparagraph of Article 2(3) of the Basic Regulation is inconsistent with Article 2.2 of the AD Agreement.

13. Third, the reference to "artificially low prices" in the second subparagraph of Article 2(3) of the Basic Regulation as one of the circumstances of "a particular market situation for the product concerned" does not meet the requirements of the term "the particular market situation" used in Article 2.2 of the AD Agreement and described in the second Supplementary Provision to paragraph 1 of Article VI in Annex 1 to GATT.

14. In addition, to determine whether prices are "artificially low", the EU authorities need to examine whether "market signals" properly reflect supply and demand, whether distortions impact "the relevant costs and prices" and to compare the recorded costs for the product concerned, including its inputs, "with world-market prices or prices in other representative markets". However, Article 2.2 of the AD Agreement does not provide a legal basis for such an analysis and comparison.

**4 THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION IS INCONSISTENT WITH ARTICLES 2.2 AND 2.2.1.1 OF THE AD AGREEMENT**

15. The Russian Federation challenges the following part of the second subparagraph of Article 2(5) of the Basic Regulation: "or, where such information cannot be used, on any other reasonable basis, including information from other representative markets". The second subparagraph of Article 2(5) of the Basic Regulation:

(i) concerns, in particular, calculation of the cost of production of the product under consideration. The EU authorities accept those manufacturing input prices that are "the result of market forces";

(ii) requires the EU authorities to adjust or establish the cost of production on the bases provided in this provision "if costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned". The recorded manufacturing input price can be disregarded as not "reasonably reflected" if it is considered as allegedly "distorted" due to government regulation. The term "adjust" covers situations when the recorded input price is disregarded and replaced with the surrogate input price;

(iii) provides two bases that the EU authorities can use for the adjustment or the establishment of costs, and requires to use the second basis only when the costs of other producers or exporters in the same country are "not available or cannot be used". The input price in the country of origin of the product under consideration "cannot be used" when it is allegedly "distorted" due to government regulation;

(iv) provides that the second basis is "any other reasonable basis, including information from other representative markets". Under the term "representative markets" the EU authorities understand third countries and markets that are unaffected by "distortions". The input price adjusted on this basis needs to be without "distortion";

(v) does not require to adapt the surrogate input price or cost of production which resulted from the adjustment or establishment on "any other reasonable basis, including information from other representative markets" to ensure that such price or cost represents the cost of production, including the cost of input, for producers or exporters of the product under consideration in the country of its origin.

16. When the cost of production in the country of origin of the product under consideration "cannot be used" due to the alleged "distortions", the challenged part of the second subparagraph of Article 2(5) of the Basic Regulation prevents the EU authorities from: (i) calculation of the cost of production on the basis of the cost "associated with the production" of the product under consideration as required by Article 2.2.1.1 of the AD Agreement; and (ii) construction of normal value on the basis of "the cost of production [of the product] in the country of origin" as required by Article 2.2 of the AD Agreement. Thus, the challenged measure is inconsistent with Article 2.2.1.1 and Article 2.2 of the AD Agreement.

17. The panel's and the Appellate Body's examination of the text of the second subparagraph of Article 2(5) of the Basic Regulation in *EU – Biodiesel (Argentina)* was made in light of the measure at issue as identified by Argentina and arguments advanced by Argentina. The Russian Federation's participation in the *EU – Biodiesel (Argentina)* dispute was limited to the role of the third party. In any way, contrary to the EU's assertions,<sup>1</sup> the DSU does not permit a panel to blindly rely on the previous reasoning or findings made by another panel or the Appellate Body in another dispute. Thus, the reasoning and findings made in *EU – Biodiesel (Argentina)* as well in any other dispute in no way can restrict Russia's own right to protect its benefits accruing from the WTO Agreement by means of its participation as a complainant in dispute settlement procedures.

18. The principle position of the Russian Federation is that every dispute submitted by a WTO Member to the DSB should be resolved on its own merits. This is a fundamental right guaranteed to WTO Members by the DSU. It means that in each case a panel is required to properly discharge its functions as prescribed by the DSU. The Panel in this dispute should: (i) make factual and legal findings based on its own objective examination of the totality of the arguments and evidence submitted by parties in this dispute, and (ii) interpret and apply the relevant provisions of the covered agreements in accordance with customary rules of interpretation of public international law.

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<sup>1</sup> EU's FWS, paras. 76-82.

**5 THE COST ADJUSTMENT METHODOLOGY IS INCONSISTENT WITH ARTICLES 2.2.1.1 AND 2.2 OF THE AD AGREEMENT**

19. The Russian Federation challenges the EU cost adjustment methodology<sup>2</sup> that the EU authorities apply in anti-dumping proceedings to calculate the cost of production in determination of normal value. The EU considers government regulation of raw materials (for example, price regulation and export duties) as "distortions" and "market impediments", and uses the cost adjustment methodology to remove the alleged "distortion" in input prices incurred by the investigated producer or exporter in the domestic market of the country of origin of the product under consideration.

20. When examining the records, kept by the exporter or producer under investigation, under the second condition of the first subparagraph Article 2(5) of the Basic Regulation and calculating the cost of production of the product under consideration, the EU rejects the raw material cost, which has been actually incurred by the investigated producer in manufacturing the product under consideration and which has been reasonably reflected in its records in accordance with the GAAP of the exporting country. The rejected input cost is replaced by the EU with an input price in a selected other country or market, *i.e.* a surrogate price, with reference to the second subparagraph of Article 2(5) of the Basic Regulation. Such other country or market as well as surrogate prices are viewed by the EU as unaffected by government regulation and, therefore, "representative", *i.e.* "undistorted". The EU authorities use such surrogate prices *precisely because they do not* represent the cost of production in the country of origin of products under consideration in specific anti-dumping proceedings.

21. The cost of production of the product under consideration calculated with the surrogate input price is subsequently used by the EU to conduct the ordinary course of trade test by reason of price pursuant to Article 2(4) of the Basic Regulation and to determine normal value, including via its construction under Article 2(3) of the Basic Regulation. By using the cost adjustment methodology, the EU significantly increases the cost of production in its calculation, hence normal value, dumping margin and consequently anti-dumping duties. This negative material effect of the cost adjustment methodology is clearly demonstrated in panel's and Appellate Body's reports in *EU – Biodiesel (Argentina)*.

22. The Russian Federation provided extensive evidence that demonstrates the existence of the challenged measure, including its precise content, attribution to the EU and specific characteristics. The Russian Federation referred to: (i) multiple Regulations (EU) in which the EU authorities applied or considered the application of the cost adjustment methodology and which demonstrate specific determinations and actions taken by the EU authorities in the application of this methodology; (ii) judgments of the General Court of the EU which confirm the existence of the EU cost adjustment methodology, describe its elements, and show how the General Court understands the methodology; (iii) relevant provisions and recitals of the EU anti-dumping legislation which inform, confirm and clarify the cost adjustment methodology; (iv) the European Commission's Communication and Explanatory Memorandum for the Proposed Regulation; (v) statements by the European Commissioner for Trade; (vi) statements about dumping calculation methodology on the web-site of the European Commission; (vii) several WTO cases in which the panels and the Appellate Body have considered the measures that are examples of the application of the cost adjustment methodology; (viii) opinions of legal experts; (ix) Notices of initiation that demonstrates that Fertilizers Europe has used the cost adjustment methodology to substantiate its requests for reviews of the anti-dumping measures; (x) Fertilizers Europe's publication of 2012 overview which also mentions the methodology.

23. The EU cost adjustment methodology is part of the EU's deliberate defensive trade policy, in particular its effort to strengthen anti-dumping instruments. This conclusion is based, *inter alia*, on the legal framework created by provisions of Articles 2(3) and 2(5) of the Basic Regulation, recitals 3 and 4 of Council Regulation (EC) No 1972/2002, interpretation and guidance provided by the General Court in several cases, and by several recitals and provisions of Regulations (EU) No 2017/2321 and 2018/825 which added, *inter alia*, Articles 2(6a) and 7(2a) to the Basic Regulation. The EU uses this methodology to eliminate price differences between inputs used for production of the product under consideration in other Members and inputs in the EU market.

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<sup>2</sup> Described in Section D of the Panel Request (WT/DS494/4) and in para. 299 of Russia's FWS.

24. With reference to Article 17.3 of the AD Agreement, the Russian Federation submits that the EU cost adjustment methodology nullifies or impairs benefits accruing to Russia under the AD Agreement. As a result of the cost adjustment methodology, the EU authorities deny certain legitimate commercial benefits that Russian exporters and producers would otherwise have under the AD Agreement. The Russian Federation challenges the EU cost adjustment methodology in WTO dispute settlement as a measure that has certain characteristics and will be applied or is likely to be applied in the future until and unless this methodology is repealed.

25. The legal test described by the Appellate Body in *US – Zeroing (EC)* for challenging the US zeroing methodology is irrelevant for the examination of the EU cost adjustment methodology. The legal test in *US – Zeroing (EC)* "cannot be considered as setting forth a general legal standard for proving the existence of any unwritten measure that is challenged in WTO dispute settlement".<sup>3</sup> Moreover, the application of this test in the current dispute will not provide an objective assessment of the matter which is required by Article 11 of the DSU.

26. The cost adjustment methodology has normative value which has been strengthened over time. The Council of the EU explained that "the General Court established in the *Acron* case **the principle of law** that if the costs associated with the production of the product under investigation are not reasonably reflected in the records of the companies, they do not serve as a basis for calculating normal value and that **such costs could be replaced with costs reflecting a price set by market forces** pursuant to Article 2(5) of the basic Regulation".<sup>4</sup> The recorded costs are considered as not reasonably reflected in the records because the input price is "regulated by the State" or because of "other forms of State intervention that distorts, directly or indirectly, a particular market by depressing prices to an artificially low level".<sup>5</sup>

27. The EU's deliberate efforts to strengthen its anti-dumping instruments resulted in adoption of new legislation – Regulation (EU) No 2017/2321 and 2018/825 – which amended the Basic Regulation. The substance and effect of Articles 2(6a) and 7(2a) of the Basic Regulation as well as recitals 3, 5, 7 of Regulation (EU) No 2017/2321 and recital 8 of Regulation (EU) No 2018/825 strongly indicate that the EU has confirmed the existence of the cost adjustment methodology and clarified some of its aspects. Thus, the normative value of the cost adjustment methodology has been further strengthened.

28. The cost adjustment methodology is designed by the EU to have general and prospective application as it has been applied in various anti-dumping proceedings (as demonstrated in Table 1 of Russia's FWS) and it will be applied or is likely to be applied in a specific set of circumstances to eliminate the alleged distortions in WTO Members, in particular the Russian Federation, in the future. The Russian Federation considers that the EU cost adjustment methodology is inconsistent with Articles 2.2.1.1 and 2.2 of the AD Agreement and therefore its application in anti-dumping proceedings on imports of Russian products in the future anti-dumping proceedings will be WTO-inconsistent as well.

29. As it is clear from the explanation by the Council of the EU in Council Implementing Regulation (EU) No 1194/2013 and also from other evidence on the record, the cost adjustment methodology will be applied or is likely to be applied by the EU authorities in future anti-dumping proceedings on imports of various products, specifically energy-intensive ones, manufactured in WTO Members in which governments regulate energy prices, apply export duties or use other measures considered by the EU as "distortions on raw materials", and "significant distortions". For example, on its web-site the European Commission explained that, "if state interference significantly distorts the economy of the exporting country", Commission will ... use undistorted benchmarks to determine the 'normal value' of the product" and that "[t]his can apply to all WTO Members where significant market distortions are found".<sup>6</sup>

30. EU companies, producing energy-intensive goods in the EU, know about the cost adjustment methodology and use it in their calculations of alleged dumping to advance their competitive

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<sup>3</sup> Appellate Body Report, *Argentina – Import Measures*, para. 5.107.

<sup>4</sup> Council Implementing Regulation (EU) No 1194/2013, Exhibit RUS-23, recitals 72 and 42 (emphasis added)

<sup>5</sup> Ibid.

<sup>6</sup> See "Recent changes to dumping calculation methodologies" in web page of the European Commission on anti-dumping, Exhibit RUS-156, p. 1.

interests. Russian companies, producing energy-intensive goods in Russia and exporting them to the EU, are also aware that the EU authorities have applied and intend to apply the cost adjustment methodology in the future until and unless this methodology is repealed. The Russian Federation provided sufficient evidence confirming that the EU authorities apply the cost adjustment methodology irrespective of trade behavior of the investigated exporters and producers.

31. The Russian Federation submits that the EU cost adjustment methodology is inconsistent with Articles 2.2.1.1 and 2.2 of the AD Agreement.

32. The EU cost adjustment methodology is inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement because: (i) the EU rejects some of the costs reflected in the records that are kept by the exporter or producer under investigation in accordance with the generally accepted accounting principles of the exporting country and that reasonably reflect the costs associated with the production and sale of the product under consideration; and (ii) the EU uses costs other than "costs associated with the production and sale of the product under consideration" reasonably reflected in the records kept by the exporter or producer under investigation in accordance with the generally accepted accounting principles of the exporting country. The Russian Federation respectfully requests the Panel to examine each of these claims and find for each of them that the EU cost adjustment methodology is inconsistent with Article 2.2.1.1 of the AD Agreement.

33. In rejecting the recorded input costs incurred by the investigated producers or exporters, the EU authorities rely on the second condition of Article 2.2.1.1 of the AD Agreement. Through comparison of the recorded input costs with input prices in the EU, other WTO Members or with international prices, the EU authorities examine "reasonableness" of the reported costs themselves. However, "there is no additional or abstract standard of 'reasonableness' that governs the meaning of 'costs' in the second condition in the first sentence of Article 2.2.1.1".<sup>7</sup> Investigating authorities are not permitted to reject the recorded costs because the costs do not pertain to the production and sale of the product under consideration in what the authorities consider to be "normal circumstances".<sup>8</sup> As a result, the EU cost adjustment methodology violates Article 2.2.1.1 of the AD Agreement.

34. The EU cost adjustment methodology is also inconsistent with Article 2.2 of the AD Agreement because in applying this methodology for construction of normal value the EU uses surrogate input price which is other than "the cost of production in the country of origin". As a result, the constructed normal value is not based on "the cost of production in the country of origin".

35. Claiming that input prices in a WTO Member, like Argentina, Indonesia or the Russian Federation, are "artificially lower" than international prices or prices in "undistorted" and thus more "representative" countries/markets, the EU authorities, under the cost adjustment methodology, replace the input costs actually incurred by the investigated companies with input prices at which they "would have purchased" these inputs in the absence of alleged distortions. The EU authorities *deliberately select and use surrogate prices to remove perceived "distortions"* in domestic prices of inputs. In other words, the cost adjustment methodology reflects the EU's intention and deliberate policy objective to use surrogate input price because it is *not* the cost of input in the country of origin of the product under consideration. It is clear that the EU costs adjustment methodology violates Article 2.2 of the AD Agreement.

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<sup>7</sup> Appellate Body Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 6.102 (referring to. Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37 and 6.56).

<sup>8</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.30. In that case, the European Union had argued that the EU authorities were permitted to consider whether costs in the records pertained to the product and sale of biodiesel in normal circumstances, i.e. in the absence of the alleged distortion caused by Argentina's export tax system. The Appellate Body disagreed and explained that "such interpretation would add words to the condition at issue that are not present in Article 2.2.1.1, namely, the costs that "would pertain" and "in normal circumstances".

**6 ANTI-DUMPING MEASURES IMPOSED BY THE EU ON IMPORTS OF RUSSIAN WELDED TUBES AND PIPES ARE INCONSISTENT WITH ARTICLES 2.2.1.1, 2.2.1 AND 11.3 OF THE AD AGREEMENT**

36. The Russian Federation also challenges the EU's decision to extend the anti-dumping measures on imports of certain welded tubes and pipes of iron or non-alloy steel originating in the Russian Federation ("Russian tubes and pipes") as a result of the expiry review.

37. When conducting the ordinary course of trade test in the expiry review for anti-dumping measures on imports of Russian tubes and pipes, the EU failed to calculate the cost of production of tubes and pipes on the basis of the records kept by the investigated producer. Accordingly, the EU rejected the prices of natural gas paid by the investigated Russian producer because: (i) they reflected only 30% of the Russian export gas price and are far below market prices paid in unregulated export markets, and (ii) the domestic gas prices in Russia are regulated. For these reasons, the EU concluded that "gas costs were not reasonably reflected in the exporting producer's records", and then disregarded the recorded gas costs with reference to the second condition of the first sentence of Article 2.2.1.1 of the AD Agreement.

38. The assertions made by the EU regarding gas prices in Russia in comparison with "*market prices paid in unregulated export markets* for Russian natural gas "*are not in itself a sufficient basis* to conclude that "gas costs were not reasonably reflected in the exporting producer's records". This rejection of Russian producer's recorded gas cost on such grounds is in violation of Article 2.2.1.1 of the AD Agreement. This understanding is supported by findings of the Appellate Body in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate (Russia)* that are relevant for the present dispute.

39. The EU also acted inconsistently with Article 2.2.1.1 of the AD Agreement, when it replaced the actual gas prices paid by the investigated producer by the surrogate gas price from outside the country of origin. It replaced the cost actually incurred by the investigated Russian producer precisely because the Waidhaus price, adjusted for local distribution costs, was not the cost associated with the production and sale of the product under consideration. Regardless of the reasons underlying this decision, the fact is that the surrogate gas price taken outside Russia has no genuine relationship with the production and sale of the specific product, *i.e.* production of tubes and pipes in the Russian Federation, produced by the specific investigated Russian producer. Thus, the EU used the surrogate gas price which is other than "costs associated with the production and sale of the product under consideration" reasonably reflected in the records kept by the producer under investigation in accordance with the generally accepted accounting principles of the exporting country.

40. Since the adjusted costs were used for the purpose of conducting the ordinary course of trade test by reason of price, the EU also violated Article 2.2.1 of the AD Agreement. The provisions of Article 2 of the AD Agreement should be adhered to in the expiry reviews. Thus, by determining the likelihood of recurrence of dumping based on costs calculated in violation of Articles 2.2.1.1 and 2.2.1 of the AD Agreement, the EU also acted inconsistently with Article 11.3 of the AD Agreement.

**7 ANTI-DUMPING MEASURES IMPOSED BY THE EU ON IMPORTS OF AN IS INCONSISTENT WITH AD AGREEMENT AND GATT**

*7.1 ARTICLE 18.3 OF THE AD AGREEMENT DOES NOT APPLY IN THIS DISPUTE*

41. Article 18.3 of the AD Agreement is not relevant to this dispute. **First**, Article 18.3 is only a transitional provision that regulates transition from the Tokyo Round AD Code to the Uruguay Round AD Agreement. This provision does not concern accession to the WTO Agreement. **Second**, Article 18.3 applies to the importing Member, and therefore imposes obligations on the EU, as an original WTO Member conducting an anti-dumping investigation. Accordingly, Article 18.3 does not apply to Russia. **Third**, without prejudice to the position that Article 18.3 is not applicable in this dispute, Russia also notes that it challenges the continuous levy of anti-dumping duties on Russian AN. Article VI of the GATT and the AD Agreement, including Article 18.3, do not set any temporal scope of applicability of the GATT and the AD Agreement respectively to a "levy" of anti-dumping duties.

7.2 CLAIMS WITH RESPECT TO THE SCOPE OF THE APPLICABLE MEASURES

42. Under Claim 1, Russia argues that the EU never conducted an original anti-dumping investigation on Stabilized AN and on IGAN. FGAN, Stabilized AN and IGAN are different products which are not like each other. Yet, the EU never established dumping, injury and a causal link in relation to imports of Stabilized AN and IGAN. Therefore, by making likelihood of dumping and injury determinations, by extending the anti-dumping measures and by levying anti-dumping duties on imports of Stabilized AN, as well as IGAN, the EU violated Articles 1, 2.1, 2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 9.1, 9.3 and 18.1 of the AD Agreement and Articles I:1, II:1 (a) and (b), VI:1 and VI:2 of the GATT.

43. Under Claim 2, the EU first, wrongfully accepted a request for review that was aimed at extending anti-dumping measures on Stabilized AN and IGAN for another five years, while the EU never conducted an original investigation or made dumping and injury determinations for these two products.

44. Second, the request to extend anti-dumping measures on imports of AN manufactured by Kirovo is incompatible with Article 11.3 of the AD Agreement since the request asks for extension of such measures on Kirovo for another five years based on allegations that cover imports of AN from Russia, including imports of Stabilized AN, while Stabilized AN was excluded from the product scope for Kirovo.

45. Third, the EU acted contrary to Article 11.3 of the AD Agreement by accepting evidence of alleged dumping in the expiry review request that was based on illegal energy cost adjustment.

46. Fourth, the EU initiated an expiry review based on an unduly justified request, which, on the one hand, contained allegations on the likelihood of recurrence of dumping with regard to Russian imports of FGAN, IGAN and Stabilized AN, while, on the other hand, assessed the likelihood of recurrence of injury based on the Union industry's performance with regard to FGAN only. In so doing, the EU did not initiate the expiry based on a "duly substantiated" request, in breach of Article 11.3 of the AD Agreement.

47. Under Claim 3, Russia argues that the EU extended antidumping measure on AN manufactured by Kirovo, excluding Stabilized AN, whereas the likelihood of dumping and injury determinations were made for AN, including Stabilized AN. This violates Articles 11.3, 3.1, 11.1, 1 and 18.1 of the AD Agreement.

48. Under Claim 4, Russia argues that the EU extended the antidumping measure on Russian FGAN, IGAN and Stabilized AN based on a likelihood of injury determination for the EU's FGAN industry only. This follows from the comparison of the figures used in Regulation 999/2014 and the domestic industry's dataset that covered FGAN only. This violates Articles 11.3, 2.6, 3.1, 3.2, 3.4 and 4.1 of the AD Agreement to the extent that antidumping duties are levied on imports of FGAN, IGAN and Stabilized AN.

7.3 CLAIMS WITH RESPECT TO THE DETERMINATION OF LIKELIHOOD OF DUMPING

49. Russia argues that the EU relied on a determination of dumping in its likelihood-of-dumping determination. Indeed, Regulation 999/2014 makes several findings that Russian imports were "dumped".<sup>9</sup> In fact, the EU does not dispute that it performed a price-to-price comparison of domestic and export prices,<sup>10</sup> which is "the core principle of dumping".<sup>11</sup> The EU does not dispute either that it relied on such "price-to-price comparison", *i.e.*, on this dumping determination, in its likelihood-of-dumping determination.<sup>12</sup>

50. The phrase "[f]or the purpose of this Agreement" in Article 2.1 indicates that this provision describes the circumstances in which a product is to be considered as being dumped for purposes of

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<sup>9</sup> Commission Implementing Regulation 999/2014, Exhibit RUS-66, recitals 57, 58 and 63.

<sup>10</sup> EU's FWS, para. 299.

<sup>11</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.77.

<sup>12</sup> EU's FWS, para. 304. This was also acknowledged in Commission Implementing Regulation 999/2014, Exhibit RUS-66, recital 66.

the *entire* AD Agreement, including expiry review under Article 11.3.<sup>13</sup> Thus, the terms "dumping", as well as "dumped imports", "margin of dumping" have the same meaning throughout the AD Agreement.<sup>14</sup> In its likelihood-of-dumping determination the EU relied on its "dumping" determination, but failed to ensure the consistency of its determination with provisions of Article 2 of the AD Agreement and Article VI:1 of the GATT. From context of Article 11.3 and WTO jurisprudence, it is clear that the prospective likelihood determination shall inevitably rest on a factual foundation relating to the past and present and the investigating authority must evaluate this factual foundation and come to a reasoned conclusion about likely future developments.<sup>15</sup>

51. Moreover, findings in an expiry review must comply with Article 11.3 of the AD Agreement. This means that any likelihood-of-dumping determination must consist in "reasoned and adequate conclusions", based on "positive evidence" and a "sufficient factual basis".<sup>16</sup>

52. Under Claim #9, Russia challenged the EU's failure to examine the impact of the absence of dumping by the largest Russian exporters, notably by disregarding their actual export prices to the EU. **First**, the EU failed to establish dumping on the basis of a comparison of normal value with export price in accordance with Articles 2.1 and 2.3 of the AD Agreement. **Second**, the EU ignored information provided by Russian producers on exports to the EU and instead relied on alternative information outside the conditions set forth in Article 6.8 of the AD Agreement. **Third**, the EU did not determine individual margins of dumping for Russian sampled producers, as required under Article 6.10 of the AD Agreement. **Finally**, the EU: (i) relied on dumping determinations inconsistent with Article 2 of the AD Agreement and (ii) did not consider the evidence on absence of dumping provided by Russian producers, in breach of Article 11.3 of the AD Agreement. It is clear that in its determinations the EU failed to reach "reasoned and adequate conclusions", based on "positive evidence" and a "sufficient factual basis". Thus, the EU breached the aforementioned provisions.

53. Under Claim 11, Russia challenged the EU's likelihood-of-dumping determination that was based on its findings of the alleged "dumping" as a result of the comparison of average domestic ex-works price with weighted average ex-works export price to third countries markets. **First**, the EU made determination on the alleged "dumping" by Russian exporting producers to third countries and thus violated Articles 2.1 and 11.3 of the AD Agreement and Article VI:1 of the GATT. **Second**, while implying the continuation of dumping to the EU, the EU failed to properly determine the dumping margins and thus violated Articles 11.3, 2.1 and 2.2 of the AD Agreement and Article VI:1 of the GATT. **Third**, the EU also failed to perform a fair comparison between normal value and the export price to the EU and thus violated Articles 11.3 and 2.4 of the AD Agreement. It is clear that in its determinations the EU failed to reach "reasoned and adequate conclusions", based on "positive evidence" and a "sufficient factual basis". Thus, the EU breached the aforementioned provisions.

#### 7.4 CLAIMS WITH RESPECT TO THE CONTINUOUS LEVYING OF THE ANTI-DUMPING DUTIES

54. The anti-dumping duties currently levied pursuant to Regulation 999/2014, as amended by Regulation 2018/1722, are based on dumping margins determinations reflected in Regulation 661/2008 and Regulation 658/2002. These dumping determinations are not in line with the EU's WTO obligations, in particular with several provisions of the AD Agreement and GATT 1994. Regulation 2018/1722 does not change this situation.

55. In fact, Regulation 2018/1722 shows that the EU compared the revised injury margin with the previously established dumping margins in determining whether the lesser duty rule should apply and, correspondingly, at what level to impose the anti-dumping duties.<sup>17</sup> The current rates of the anti-dumping duties are therefore still based on these WTO-inconsistent dumping margins.

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<sup>13</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 109.

<sup>14</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96.

<sup>15</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.279. (referring to Panel Report, *US – Carbon Steel*, para. 8.94; Panel Report, *US – Hot-Rolled Steel*, para. 7.55). See also Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

<sup>16</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 182. See also Appellate Body Report, *US – Corrosion-Resistant Steel*, para. 127, which confirms that relying on WTO-inconsistent dumping margins in the context of an expiry review violates Article 11.3 of the AD Agreement.

<sup>17</sup> Commission Implementing Regulation (EU) 2018/1722, Exhibit RUS-96, recitals 173 and 185.

56. Under Claim 12, the Russian Federation challenges the levying of anti-dumping duties on AN of EuroChem, which were set with the use of the WTO-inconsistent cost adjustment for natural gas in Regulation 661/2008, and maintained under Regulation 999/2014, and currently applied in the amended amounts.

57. The EU's calculation of the cost of production of EuroChem with the use of gas cost adjustment results in the EU's violation of several provisions of the AD Agreement and Article VI of the GATT. The EU: (i) rejected EuroChem's natural gas cost and used the surrogate gas price in breach of Article 2.2.1.1 of the AD Agreement,<sup>18</sup> (ii) conducted its ordinary-course-of trade test on the basis of costs calculated inconsistently with Article 2.2.1.1. of the AD Agreement, in breach of Article 2.2.1 of the AD Agreement,<sup>19</sup> and (iii) failed to construct normal value on the basis of "the cost of production in the country of origin" in breach of Article 2.2 of the AD Agreement and Article VI:1:(b)(ii) of the GATT. The EU specifically selected the surrogate price for natural gas to remove alleged "distortion" in the cost of natural gas in the Russian Federation. Thus, the EU used the surrogate gas price precisely because it does not represent the cost of production in the Russian Federation.<sup>20</sup>

58. The EU breaches Article 9.3 of the AD Agreement and Article VI:2 of the GATT because the amount of the anti-dumping duties, that continues to be levied to this date, exceeds the dumping margin that would have been established under Article 2 of the AD Agreement. The EU breaches Article 11.1 of the AD Agreement, because the continuous levying of an anti-dumping duty in excess of the dumping margin that would have been established consistently with Article 2 results in the application of anti-dumping duties to an extent higher than necessary to counteract dumping which is causing injury. The EU breaches Article 1 of the AD Agreement because the EU continuous to apply in its determination of the dumping margin, imposition, extension and application of anti-dumping duties on imports of AN of EuroChem, the EU violated provisions of the AD Agreement.

59. Under Claim 13, Russia challenges the levying of the anti-dumping duties on Russian AN the duration of which was extended on the basis of calculations in the 2008 expiry review in which the EU used the surrogate gas prices and which were then maintained by Regulation 999/2014. The EU relied on dumping margins calculated inconsistently with Articles 2.2.1.1, 2.2.1, and 2.2 (as described above in Claim 12) to make their determination of the likelihood of dumping and extended the anti-dumping in the second and third expiry reviews. These violations in turn infected conclusions made under Article 11.3 of the AD Agreement, resulting in breach of all these provisions.

60. Under Claim 14, Russia challenges the levying of country-wide anti-dumping duties on AN of Russian producers other than EuroChem, which were set with the use of the methodology applied by the EU to non-market economy countries in Regulation 658/2002, extended in the 2002, 2008, 2014 expiry reviews and currently applied in the amended amounts. Since the EU imposed, maintained and levies the anti-dumping duties calculated through the use of the methodology for a non-market economy, which shall not be applied with respect to imports of Russian products, the EU violates Articles 2.1, 2.2, 9.3, 11.3 of the AD Agreement and Articles VI:1, the second Supplementary provision to Article VI:1 of the GATT, Articles I and VI:2 of the GATT. Furthermore, the EU fails to extend to imports of Russian products an advantage of dumping calculation methodology which is granted by the EU to WTO Members considered as market economies, and thus the EU violates Article I:1 of the GATT.

61. Under claim 15, Russia submits that the methodology for non-market economy countries and the surrogate gas price used by the EU in previous reviews infected currently applied anti-dumping measures. In addition, in its third expiry review, in its determination with respect to the likelihood-of-dumping the EU relied on unlawfully determined alleged "dumping" to third countries and, thus, failed to ensure compliance of its analysis related to "dumping" with Article VI:1 of the GATT 1994, as interpreted by the AD Agreement, including Articles 2.1, and 11.3 of the AD Agreement.

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<sup>18</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.26 and 6.56.

<sup>19</sup> Panel Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 7.118, 8.2c.

<sup>20</sup> See Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.81-6.82.

62. Therefore, the EU breached Articles 1 and 18.1 of the AD Agreement, because its anti-dumping measures in respect of AN from Russia are not in conformity with the provisions of Articles VI:1 and VI:2 of the GATT, as interpreted by the AD Agreement.

*7.5 CLAIMS WITH RESPECT TO THE ESTABLISHMENT OF THE LIKELIHOOD OF RECURRENCE OF INJURY*

63. The focus of these claims is on the likelihood-of-injury determination conducted by the EU in the expiry review and reflected in Regulation 999/2014. The fact is that on the basis of this determination, and not Regulation 2018/1722, the EU extended the duration of the anti-dumping measures on Russian AN for the following five years. This determination is WTO-inconsistent.

64. Under claim 5, Russia challenges the undercutting calculations performed by the EU. Regulation 999/2014 compared the prices of Russian exports to third-countries with the prices of EU producers and found that Russian imports were made at "undercutting" prices or at "injurious price level".<sup>21</sup> Russia argues that if an investigating authority attempts to calculate the price effect of future dumped imports, such calculations must comply with Article 3 of the AD Agreement.<sup>22</sup> The EU does acknowledge that it compared the export prices from Russia to the EU and, in parallel, the evolution of prices in the EU market.<sup>23</sup> In other words, the EU analyzed "whether subject imports have explanatory force for the occurrence of significant depression or suppression of domestic prices", which is the core feature of an undercutting calculation.<sup>24</sup> **First**, the EU violated Articles 3.1 and 3.2 of the AD Agreement by failing to consider the prices of Russian imports into the EU and by failing to make necessary adjustments to such prices to ensure comparability with domestic prices. **Second**, the EU violated Article 11.3 of the AD Agreement, because: (i) it relied on inconsistent undercutting calculations in its likelihood-of-injury determination and (ii) it relied on unadjusted Russian export prices, which cannot result in an "objective examination", based on "positive evidence".

65. Under Claim 6, Russia argues<sup>25</sup> that the EU based its likelihood-of-injury determination on: (i) data relating to a non-representative sample of the domestic industry; (ii) the incomplete, non-representative and erroneous data provided by the sampled EU companies, and failed to examine and explain the significantly divergent economic performance between the sampled and non-sampled EU domestic producers. **First**, the EU failed to base its likelihood-of-injury determination on an "objective examination" of the "positive evidence" on the record, in violation of Article 3.1 of the AD Agreement. **Second**, the EU failed to evaluate all relevant economic factors and indices having a bearing on the state of the industry that includes not only FGAN, but also IGAN and Stabilized AN producers, in breach of Article 3.4 of the AD Agreement. **Third**, the EU failed to interpret the term "domestic industry" as including producers not only of FGAN, but also of IGAN and Stabilized AN, in violation of Article 4.1 of the AD Agreement. **Finally**, and as a result, the EU failed to base its likelihood-of-injury determination on "reasoned and adequate conclusions", in violation of Article 11.3 of the AD Agreement.

66. Under Claims 7 and 8, Russia submits that certain conclusions of the EU fail to take into account the evidence on the record. Thus, the EU did not carry out an "objective examination" based on "positive evidence", as required under Article 3.1 and equally relevant under Article 11.3 of the AD Agreement.<sup>26</sup> **First**, under Claim 7, Russia targets the EU's conclusion that the non-injurious situation of the EU industry was not sustainable did not rest on a sufficient factual basis. **Second**, under Claim 8, Russia targets the EU's assessment of the level of production capacities available in Russia and the ability of third country markets to absorb Russian exports.

*7.6 CLAIMS WITH RESPECT TO THE CONDUCT OF THE EXPIRY REVIEW*

67. Under Claim 16, Russia argues that, on four occasions, access to the file was significantly delayed. **First**, as information submitted in writing by interested parties was not "made available promptly", this violates Articles 6.1.2 and 11.4 of the AD Agreement. **Second**, such delays prevented Russian producers from having "timely opportunities" to: (i) see information they

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<sup>21</sup> Commission Implementing Regulation 999/2014, Exhibit RUS-66, recitals 112, 160 and 169.

<sup>22</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.274.

<sup>23</sup> EU's FWS, paras. 460-461.

<sup>24</sup> Appellate Body Report, *China – X-Ray Equipment*, para. 138.

<sup>25</sup> Without prejudice to claims on product coverage.

<sup>26</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

considered relevant and (ii) prepare presentations on that basis, in violation of Articles 6.4 and 11.4 of the AD Agreement. Such delays cannot be justified by confidentiality or other concerns, as submissions made by Russian producers were immediately added to the non-confidential file.

68. Under Claim 17, Russia challenges the EU's failure to provide the original expiry review request, as lodged on 28 March 2013. **First**, this violates Articles 6.1.3 and 11.4 of the AD Agreement, which require the disclosure of the full text of the "duly substantiated request made by or on behalf of the domestic industry" on the basis of which the investigating authority decided to initiate the expiry review investigation. **Second**, this violates Articles 6.4 and 11.4 of the AD Agreement because, despite numerous requests, the EU failed to disclose a document which Russian producers considered relevant, used by the investigated authority and could be disclosed in a non-confidential way. **Third**, this violates Article 6.4 and 11.4 of the AD Agreement because, as a result, Russian producers did not have a "full opportunity for the defence of their interests".

69. Under Claim 18, Russia challenges the EU's confidential treatment of information for which no "good cause" was shown, and in particular two expert reports submitted by Fertilizers Europe on 24 March and 14 May 2014. Either "good cause" was simply not shown, or the alleged "good cause" did not constitute a reason sufficient to justify withholding the information for which confidential treatment was sought. This violates Articles 6.5 and 11.4 of the AD Agreement.

70. Under Claim 19, Russia challenges the EU's failure to require the domestic industry to furnish sufficiently detailed non-confidential summaries. Submissions on injury indicators made by Fertilizers Europe on 10 March, 5 May, 12 May and 3 June 2014 only provided aggregated injury indicators. Despite the importance of these issues in the investigation, these non-confidential summaries notably omitted important information on: (i) the product scope, and (ii) the company scope of aggregated injury indicators. The provision of aggregated figures as a non-confidential summary did not permit a "reasonable understanding of the substance of the information submitted in confidence". This violates Articles 6.5.1 and 11.4 of the AD Agreement.

71. Under Claim 20, Russia challenges the EU's refusal to rely on information provided by Russian exporters with a view to establish spare capacity in Russia. **First**, the EU disregarded the primary source information provided by Russian exporters in response to specific inquiries from the investigating authority, and instead relied on alternative information, without any demonstration that the primary source information was not verifiable, could not be used without undue difficulties or was not provided in a timely manner. This breaches Article 6.8 and paragraphs 3 and 5 of Annex II of the AD Agreement. **Second**, the EU never informed Russian producers of its intention to apply facts available, nor provided them with an opportunity to comment on such application. This breaches paragraph 6 of Annex II of the AD Agreement. **Finally**, the EU picked and chose the information that fit best a finding that Russian producers had spare capacities, thereby failing to consider the "best facts available". This breaches paragraph 7 of Annex II of the AD Agreement.

72. Under Claim 21, Russia challenges the EU's failure to disclose certain information and calculations on which it relied in its likelihood-of-dumping and likelihood-of-injury determinations. Such information was part of the "essential facts under consideration which form the basis for the decision whether to [extend the anti-dumping measures]". Failure to disclose this information violates Articles 6.9 and 11.4 of the AD Agreement.

73. Under Claim 22, Russia explains that Regulation 999/2014 does not sufficiently detail its findings and conclusions on: (i) dumping, (ii) undercutting and underselling and (iii) product scope and does not address certain requests made by Russian producers. This violates Articles 12.2 and 12.2.2 of the AD Agreement because: (i) Regulation 999/2014 does not include the relevant information on matters of fact and law that were essential to the determinations of likelihood-of-dumping and likelihood-of-injury and (ii) fails to contain "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters".

## ANNEX B-2

### FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

#### **1 INTRODUCTION**

1. Pursuant to paragraph 23 of the Panel's Working Procedures, the European Union now provides an integrated executive summary of the facts and arguments presented in the European Union's (i) first written submission, (ii) first opening oral statement, (iii) first closing oral statement, and (iv) responses to questions following the first substantive meeting.

#### **2 REQUEST FOR A PRELIMINARY RULING**

2. The European Union requested the Panel to rule that several of the claims in Russia's panel request and first written submission are not properly before the Panel. Russia's claims #1 as well as all claims relating to product scope (to the extent that they refer to "industrial-grade ammonium nitrate"), #9 (to the extent it refers to Articles 2.3, 6.8 and 6.10 of the AD Agreement), #16-#21 (to the extent that they refer to Article 11.4 of the AD Agreement) and #17 (to the extent it refers to Article 6.2 of the AD Agreement) are outside the scope of the Consultations Request and impermissibly expand the scope of the dispute, in violation of Articles 4 and 6 of the DSU, and in particular of Articles 4.4 and 6.2 of the DSU. Claims #2, #18, #19 and #21 are not properly before the Panel because Russia's Panel Request fails to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, in violation of Article 6.2 of the DSU. Claim #11, to the extent that it relates to the likelihood of recurrence of dumping, goes beyond the scope of Russia's Panel Request, in violation of Articles 6.2 and 7.1 of the DSU. Because Russia failed to "identify" precisely Regulation 1722/2018 as a measure at issue, claims #12, #13, #14 and #15 on the continuous levying of AD duties on AN from Russia that Russia bases on this Regulation fail to meet Article 6.2 of the DSU. Claim #14 fails to meet the requirements under Article 6.2 of the DSU.

#### **3 "AS SUCH" CLAIMS ON CERTAIN PARTS OF ARTICLE 2(3) AND ARTICLE 2(5) OF THE BASIC REGULATION AND AN ALLEGED "COST ADJUSTMENT METHODOLOGY"**

##### **3.1 FIRST SUBPARAGRAPH OF ARTICLE 2(3) OF THE BASIC REGULATION**

3. With regard to the "as such" claims, the EU disagrees with Russia's argument that the first subparagraph of Article 2(3) of the Basic Regulation would be inconsistent with Article 2.2 of the AD Agreement. Russia is unable to demonstrate that the phrase "provided that those prices are representative" in Article 2(3) refers to anything other than the "export prices". This is the only instance in the first subparagraph of Article 2(3) where the term "prices" is used. Contrary to what Russia suggests, the phrase does not refer to the "cost of production". Russia's references to the term "representative" in other provisions of the Basic Regulation do not alter this. Indeed, neither Article 2(2) nor the second subparagraph of Article 2(5) support Russia's affirmations with regard to the final phrase of the first subparagraph of Article 2(3). The EU also explained that the change of the words "those prices" into "these prices" – on which Russia also seeks to rely – was the result of a linguistic review in 1995 without any legal consequences whatsoever. Russia's arguments are thus grounded on an erroneous understanding of this final phrase.

##### **3.2 SECOND SUBPARAGRAPH OF ARTICLE 2(3) OF THE BASIC REGULATION**

4. Russia next argues that the second subparagraph of Article 2(3) of the Basic Regulation would be inconsistent with Article 2.2 of the AD Agreement because it would extend the concept of "a particular market situation for the product concerned" beyond the situation described in the second Supplementary Provision to paragraph 1 of Article VI of the GATT 1994. The EU notes that the second subparagraph in Article 2(3) does *not oblige* the Commission to find that a particular market situation exists when prices are artificially low. Such

determinations are case-specific, as is demonstrated by the use of the words "*may* be deemed to exist" in Article 2(3). When a measure is not mandatory, but rather discretionary, a panel should conclude that it is not "as such" inconsistent with the covered agreements.<sup>1</sup>

5. The phrase "particular market situation" in Article 2.2 of the AD Agreement must not be interpreted as solely referring the market of the exporting Member as a whole. Indeed, under Article 2.2, it is clear that an investigating authority makes a dumping determination based on an investigation with respect to the price of a particular exported product and a normal value established in respect of a particular like product. Hence, the investigation need not necessarily focus on the market as a whole, but may pertain to a particular product.
6. Furthermore, Russia errs when asserting that the phrase "the particular market situation" in Article 2.2 refers solely to a situation covered by the Second Ad Note to Article VI:1 of the GATT 1994. The alternative approach to determining normal value provided for under the Ad Note exists *in addition to* the situations covered by Article 2.2. That these situations exist in parallel is clear from Article 2.7, which provides that Article 2 "is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994". It simply makes it clear that, in the event of a conflict (and it does not necessarily mean or suggest that there is a conflict), the Second Ad Note would prevail to the extent of the conflict. This simply means that nothing in Article 2 of the AD Agreement could ever be construed in such a way so as to negate the proper operation of the Second Ad Note.

### 3.3 SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION

7. Russia's third "as such" claim concerns the second subparagraph of Article 2(5). Here, Russia makes a claim that the Appellate Body already rejected in *EU – Biodiesel (Argentina)*. Russia argues that, because this second subparagraph permits the Commission to use costs other than cost of production in the country of origin as evidence for constructing the normal value, it would be "as such" inconsistent with Articles 2.2.1.1 and 2.2 of the AD Agreement.
8. The Appellate Body has examined the meaning of the phrase "cost of production in the country of origin" in Article 2.2. The Appellate Body noted that the definition of "cost" refers to the expenses paid or to be paid for something. Given that the word "cost" in that provision is followed by "of production" and then by "in the country of origin", it concerns a "price paid or to be paid to produce something within the country of origin".<sup>2</sup>
9. The Appellate Body stressed that this definition "does not include a reference to information or evidence".<sup>3</sup> It indeed does not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence only to those sources inside the country of origin. Investigating authorities are thus permitted to look for such information on cost of production from sources outside the country, provided it is apt to or capable of yielding a cost of production in the country of origin.<sup>4</sup> Information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin".<sup>5</sup>
10. The Appellate Body also examined Article 2.2.1.1 of the AD Agreement. It noted that even if that provision identifies the "records kept by the exporter or producer under investigation" as the preferred source for cost of production data to be used, it did not "*preclude[]* information or evidence from other sources from being used in certain circumstances", such as evidence from outside the country of origin.<sup>6</sup> The Appellate Body clarified that the fact that the second sentence of Article 2.2.1.1 provides that the authorities "shall consider all available evidence on the proper allocation of costs" demonstrates that the "evidence" used to establish a "cost" can be different from that cost itself.<sup>7</sup>

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<sup>1</sup> Appellate Body Report, *US – Carbon Steel*, paras. 4.477, 4.478 and 4.483.

<sup>2</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.69.

<sup>3</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.69.

<sup>4</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

<sup>5</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

<sup>6</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.71.

<sup>7</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.72.

11. Indeed, in circumstances where the obligation in the first sentence of Article 2.2.1.1 to normally calculate the costs on the basis of records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to *alternative bases to calculate some or all such costs*. Article 2.2 does not specify to what evidence an authority may resort. Hence, it is "not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence".<sup>8</sup> However, because Article 2.2 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production [...] in the country of origin", the authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". This may require it to adapt the information.<sup>9</sup>
12. Therefore, nothing in the second subparagraph of Article 2(5) of the Basic Regulation prevents the investigating authority from ensuring that adjusted or established costs represent the cost of production in the country of origin. Russia thus errs in claiming that this second subparagraph is "as such" inconsistent with the AD Agreement.

#### 3.4 ALLEGED "COST ADJUSTMENT METHODOLOGY"

13. Russia further challenges what it calls "the cost adjustment methodology", allegedly used by the European Union in anti-dumping proceedings. However, such a "cost adjustment methodology" simply does not exist, and Russia is unable to demonstrate otherwise.
14. The Appellate Body has clarified the standard of evidence for an "unwritten norm of general and prospective application" in *US – Zeroing (EC)*<sup>10</sup>: Russia must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and its general and prospective application, which must go beyond simply showing a string of cases.
15. Russia relies on a number of provisions in the Basic Regulation that it has not challenged or cannot challenge successfully separately. Further, the application of each of these provisions is highly fact-dependent and one cannot make generalizations about their prospective application. First, the circumstances in which data or information in the records of the firm may be rejected are highly fact-dependent. This may arise from the failure to respect either of the two express conditions set out in Article 2.2.1.1, but also in other circumstances, notably those captured by the terms "For the purpose of paragraph 2" and "normally" that appear in the first sentence of Article 2.2.1.1. Second, the process of having recourse to information from other representative markets is also highly fact dependent. An investigating authority will consider and weigh all available relevant evidence to establish the normal value. Third, and related, whether or not an adjustment to the data relied upon is necessary and has been substantiated depends also the substantive facts and the procedural context at hand. Such determinations, which are case-specific, cannot be simply mixed together to claim the existence of a "methodology". Russia is thus unable to demonstrate the precise content; or the general and prospective application of the alleged methodology.

#### **4 CLAIMS CONCERNING THE EXPIRY REVIEW AND THE DECISION ON EXTENSION OF ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF WELDED TUBES AND PIPES ORIGINATING IN THE RUSSIAN FEDERATION**

16. With regard to Russia's "as applied" claims in respect of welded tubes and pipes, the European Union disagrees that it acted inconsistently with the AD Agreement in finding that the available data on gas prices in Russia could not be used for determining the cost of production.
17. The Appellate Body in *EU – Biodiesel (Argentina)* did not exclude that there are circumstances where data on the cost of production reported by the exporter or producer could not be used. It also did not disagree that there are circumstances – beyond the two instances expressly

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<sup>8</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73

<sup>9</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

<sup>10</sup> Appellate Body Report, *US – Zeroing (EC)*, paras. 198-204.

mentioned in Article 2.2.1.1 – where an investigating authority needs to rely on other evidence that the data reported in the exporter or producer's records to establish normal value.<sup>11</sup> The Appellate Body in *Ukraine – Ammonium Nitrate* confirmed this.<sup>12</sup> In Regulation 2015/110 – the expiry review for welded tubes and pipes – the Commission found that, due to the fact that "domestic gas prices in Russia are regulated prices", these prices were "far below market prices paid in unregulated export market for Russian natural gas".<sup>13</sup> The Commission thus went to look for other reliable data to establish the gas costs in Russia, since the government's direct interference in the domestic gas prices – much more direct than in case of the export taxes for soybeans in Argentina – did not allow the forces of supply and demand to play at all. Such a process of evidence-gathering and use is perfectly reasonable, since an investigating authority cannot be expected to make use of "unrepresentative" information. It is also perfectly consistent with Article 2 of the AD Agreement, which requires the establishment of a normal value based on price or cost data that permits the establishment of a value that is "normal", as opposed to price or cost data that is distorted and unreliable.

18. Given that the Commission found that the domestic gas price in Russia was distorted, it based its normal value determination on "information from other representative markets", namely the "average price of Russian gas when sold for export at the German/Czech border (Waidhaus).<sup>14</sup> Again, this is consistent with the AD Agreement, as the Appellate Body found in *EU – Biodiesel (Argentina)* that investigating authorities are permitted to look for cost of production information from sources outside the country, provided it is apt to or capable of yielding a cost of production in the country of origin.<sup>15</sup> The Commission also adapted the Waidhaus price in order to ensure that it is suitable to determine a "cost of production" "in the country of origin"<sup>16</sup> and adjusted it for local distribution costs.<sup>17</sup> This is entirely consistent with WTO law.

## **5 CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF AMMONIUM NITRATE FROM THE RUSSIAN FEDERATION AND THE UNDERLYING INVESTIGATIONS**

### **5.1 CLAIMS WITH RESPECT TO THE PRODUCT SCOPE OF THE APPLICABLE MEASURES**

19. Russia's product scope claims fail because all relevant product scope determinations were made before Russia was a WTO Member, and were not re-examined, modified or affected by any post-WTO reviews; because all products to which the measure applies were in fact subject to the findings of an anti-dumping investigation; and for several reasons of a legal nature.
20. The anti-dumping duties on AN from Russia were put in place by Regulation 2022/95, long before Russia's WTO accession. All of the subsequent interim reviews, expiry reviews and amendments preceding Regulation 999/2014 were completed before Russia's accession. In Regulation 999/2014, there is no re-examination, new determination, or modification of product scope. It simply takes over the product scope that was defined by earlier determinations, to which WTO law does not apply.
21. The WTO agreements govern only trade relations *between* Members. Article 18.3, which sets the temporal scope of the AD Agreement (including its application to measures in existence when Russia acceded to the WTO), determines when the *obligations* on the imposing member kick in, but also when the *rights* of the exporting member kick in. It is not just because a measure continues after WTO accession that WTO law will apply.<sup>18</sup> It *only* applies to post-WTO investigations and reviews. Unless a post-WTO review re-does or modifies them, to subject pre-WTO assessments or determinations to the ADA would mean to violate Article 18.3 and to apply WTO law retroactively. The issue of product scope in this case is "an aspect governed solely by a pre-WTO determination,"<sup>19</sup> which is outside the scope of the post-WTO review, and

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<sup>11</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.18 (footnote 120).

<sup>12</sup> Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.87.

<sup>13</sup> Commission Implementing Regulation (EU) 2015/110, recital 69.

<sup>14</sup> Commission Implementing Regulation (EU) 2015/110, recital 69.

<sup>15</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

<sup>16</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

<sup>17</sup> Commission Implementing Regulation (EU) 2015/110, recital 69.

<sup>18</sup> Panel Report, *US – DRAMS*, para. 6.14.

<sup>19</sup> Panel Report, *US – DRAMS*, para. 6.16.

therefore, under Article 18.3 of the AD Agreement, not subject to any of the disciplines of the AD Agreement.<sup>20</sup> By analogy with the Appellate Body's findings in *Brazil – Desiccated Coconut*, the same is true for all provisions of the covered agreements, in particular Articles I, II and VI of the GATT 1994.

22. Even if the provisions cited by Russia applied, *quod non*, Russia's claims would fail because they are premised on the incorrect assertion that the European Union's investigations, dumping and injury determinations on imports of AN were not conducted with respect to "IGAN" and "stabilised AN". Neither the review leading up to Regulation 999/2014 nor any other review "extended" the measure to AN used for industrial purposes. IGAN was always equally covered by the definition of the product scope. The end-use was never a defining criterion for product scope. Indeed, "IGAN" can be used for agricultural purposes. Regarding stabilised AN, Regulation 999/2014 applies only to that part of its content which corresponds to the product concerned (i.e. AN content together with marginal substances and nutrients). The original investigation, all subsequent reviews, and all relevant dumping and injury determinations, covered the product concerned (ammonium nitrate), and hence also the part of the content of the "new product types" referred to in Regulation 945/2005 which corresponds to that product concerned.

5.2 FIRST CLAIM: APPLICATION OF MEASURES ON IGAN AND STABILISED AN

23. First, even if certain WTO disciplines apply to the original product scope determination, they are not directly relevant to an expiry review. Second, even with respect to original investigations, the AD Agreement contains limited obligations with respect to the definition of the product concerned.<sup>21</sup> Russia's claims under Articles 1 and 18 of the AD Agreement, and under Article VI of the GATT, are, in essence, consequential, and the Panel should either dismiss them. With respect to Article 2 of the AD Agreement, Russia fails to explain any inconsistency with the specific subparagraphs of that provision. With respect to injury, Russia similarly lists a number of subparagraphs of Articles 3 and 4 without specifically explaining where it sees inconsistencies. Russia's claims under Articles 9.1 and 9.3 follow a similar pattern. Article 9.1 does not concern product scope, nor any obligation to conduct an investigation or make dumping or injury determinations. Finally, Russia's claims under Articles I and II of the GATT 1994 are entirely consequential, and based on the assumption that there is a violation of Article VI of the GATT 1994, which is in turn allegedly also a consequence of inconsistencies with certain provisions of the AD Agreement, which have not been shown.

5.3 SECOND CLAIM: INITIATION OF THE EXPIRY REVIEW THAT LED TO REGULATION 999/2014

24. Russia's reading of Articles 11.3, 12.3, 12.3, 12.1.1 and 5.3 of the AD Agreement incorrectly conflates the requirements for original investigations with the requirements for expiry reviews, and the requirements for expiry review determinations with the requirements for initiation requests by the interested parties. As the Appellate Body explained, the nature of the determination to be made in a sunset review differs from the nature of the determination to be made in an original investigation. Those determinations are prospective in nature.<sup>22</sup> In addition, a clear distinction must be drawn between merely *initiating* an expiry review and *concluding* it with a positive determination. It is only through the expiry review itself, and certainly not prior to *initiation*, that the authority can properly assess the relevant information and evidence to the standard expected for concluding a determination.
25. Article 5, including Article 5.3, does not apply to requests for an expiry review.<sup>23</sup> Expiry reviews and original determinations are distinct processes with distinct purposes.<sup>24</sup> The Article 11.3 requirement that review requests must be "duly substantiated" entails a less demanding standard than the "sufficient evidence" standard in Article 5.6. It requires merely the provision of evidence in support of a finding of likelihood of recurrence or continuation of

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<sup>20</sup> Panel Report, *US – DRAMs*, para. 6.17.

<sup>21</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.48. See also Panel Reports, *US – Softwood Lumber V*, para. 7.157.; *Korea – Certain Paper*, para. 7.219.

<sup>22</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 341.

<sup>23</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.27.

<sup>24</sup> See Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

dumping and injury, in accordance with proper procedural requirements. This interpretation also finds support in the text of Article 11.2 of the AD Agreement, referring to requests by interested parties which merely "submit positive information substantiating the need for a review". Moreover, unlike Articles 11.2 and 5.3, Article 11.3 only requires requests to be "duly substantiated" with respect to the issue dealt with in an expiry review: whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

26. Article 12 does not concern evidentiary standards, but merely the public notice of various measures taken by the investigating authority.<sup>25</sup> Neither Article 12, nor Article 5, nor Article 11.3 impose any obligation that the evidence contained in a request to initiate an expiry review must be *sufficient* to support the allegation that the expiry of the duty would be likely to result in continuation or recurrence of dumping and injury.
27. The assertion that the EU accepted an expiry review request of Fertilizers Europe in which the industry requested to extend the anti-dumping measures on imports of Stabilised AN and IGAN is factually incorrect. The expiry review request that it simply refers to the same "product concerned" as defined in existing anti-dumping measures. Russia has not shown that the expiry review request relied on "Stabilised AN data" related to Kirovo, but even if Russia was correct, the fact that certain additional data were included in the expiry review request does not show any WTO-inconsistency.
28. Regarding the claim that the EU acted inconsistently with Article 11.3 by initiating an expiry review, because the expiry review request included data on the state of the domestic industry manufacturing FGAN and data on Russian imports of FGAN, IGAN and Stabilized AN, first, Article 11.3 imposes no requirement that expiry review requests must be "even-handed" or "sufficient" to justify the initiation. The alleged limitation of the data on the domestic industry to "FGAN" is factually incorrect and unsupported by the evidence. Even if there were differences in the product ranges of the domestic and exporting industries, this would not mean that the expiry review request or the mere decision to initiate an expiry review are WTO-inconsistent. Neither Article 11.3, nor any other provision of the AD Agreement, require the make-up of the product concerned and the like product to be identical.<sup>26</sup>

5.4 THIRD CLAIM: THE EUROPEAN UNION DID NOT ERR BY FAILING TO CONDUCT A SEPARATE EXPIRY REVIEW FOR THE IMPORTS OF KIROVO

29. Regulation 999/2014 assesses the likelihood that the dumping and injury will recur, with the same product scope as defined previously. There was no reason to conduct separate likelihood determinations for Kirovo and for other producers. The Appellate Body has found that there is no such requirement.<sup>27</sup> Article 11.1 "does not impose independent obligations upon Members"<sup>28</sup> and is disconnected from the specific concern for "single" or "separate" expiry reviews. Russia has failed to show that the European Union somehow flouted the evidentiary requirements of Article 11.3. Regarding Article 3, the Appellate Body found that "the obligations set out in Article 3 do not apply to likelihood-of injury determinations in sunset review."<sup>29</sup> The claims under Articles 1 and 18.1 of the AD Agreement appear to be purely consequential.

5.5 FOURTH CLAIM: THE EUROPEAN UNION DID NOT ERR BY FAILING TO CORRECTLY DEFINE THE DOMESTIC INDUSTRY AND DID NOT RELY ON ERRONEOUS OR INCOMPLETE DATA

30. From the very beginning, the Union industry was defined as all known producers of AN in the Union during the period considered.<sup>30</sup> It is incorrect that the Commission defined the domestic industry as consisting solely of producers of FGAN. Even the request to initiate the expiry review was supported by Union producers of ammonium nitrate both for agricultural and

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<sup>25</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.33.

<sup>26</sup> Panel Reports, *EU – Footwear (China)*, para. 7.314; *EC – Bed Linen (Article 21.5 – India)*, para. 6.176.

<sup>27</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 155.

<sup>28</sup> Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.363.

<sup>29</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 285.

<sup>30</sup> Regulation 999/2014 (Exhibit RUS-66), recital 98.

industrial uses, and a number of the producers that did form part of the EU domestic industry produced "IGAN".

31. The Commission used the evidence contained both in the April 2014 and in the May 2014 submissions, depending on how reliable, complete and relevant it was. In any event, both sets of data included all product types produced by the Union industry. Finally, Article 2.6 does not require the make-up of the product concerned and the like product to be identical in every respect and in every sub-category. Russia's consequential claim that the Commission's analysis was not based on an objective examination of the positive evidence on the record, contrary to Articles 3.1, 3.2, 3.4 and 11.3 should thus also be rejected. As to sampling, the EU domestic industry was defined as all known producers of the like product in the EU during the period under consideration. All companies in the sample were part of the domestic industry so defined prior to the selection of the sample, and were supporters of the expiry review request. Russia's Article 4.1 claim must be rejected because the definition of the domestic industry took into account all known EU producers of the like product, including in particular a number of EU producers of "IGAN". Russia has not shown why any of the alleged errors gave rise to any risk of distortion of the Commission's assessment of the likelihood of recurrence of injury. Russia fails to explain why the May 2014 dataset is "internally incoherent and erroneous", or what data it omits.

5.6 CLAIMS WITH RESPECT TO THE DETERMINATION OF THE LIKELIHOOD OF RECURRENCE OF DUMPING

32. There is no obligation to calculate or rely on dumping margins in making a determination of likelihood of continuation or recurrence of dumping, and Articles 2 and 3 of the AD Agreement are not directly applicable to a determination under Article 11.3.<sup>31</sup> In the context of a determination of the likelihood of recurrence of dumping in expiry review, it would not make sense to require investigating authorities to find that dumping existed or continued since the imposition of the measure. In an expiry review, the disciplines of Articles 2 are relevant only when the authority actually "*relied upon* [a WTO-inconsistent dumping margin calculation methodology] to support its likelihood-of-dumping or likelihood-of-injury determination."<sup>32</sup> Otherwise, in expiry reviews, authorities can rely on evidence relating to dumping since the imposition of the order drawn from a variety of sources, including "evidence of the existence of dumping in another jurisdiction."<sup>33</sup> In a recurrence determination, a finding of present dumping may be relevant but is by no means required. It is possible to find the absence of present dumping in the importing Member's market, for example when imports take place under a price undertaking, as in this case.

33. The Commission was not required, when engaging in a likelihood determination, to engage in any dumping margin calculations, and it did not purport to do so, as clearly and repeatedly explained in Regulation 999/2014. The Commission compared the weighted average ex-works price of Russian producers' exports to certain third countries with the actual average domestic ex-works prices.<sup>34</sup> It is clear that this is not meant to be a determination of dumping as foreseen by Article 2 of the AD Agreement. It is, however, pertinent evidence related to dumping in the context of a likelihood analysis.

5.7 NINTH CLAIM: THE EUROPEAN UNION DID NOT ERR BY FAILING TO EXAMINE THE IMPACT OF THE ALLEGED ABSENCE OF DUMPING BY THE LARGEST RUSSIAN EXPORTERS

34. Regulation 999/2014 clearly explains why the analysis of the likelihood of recurrence of dumping was not based on the export prices of the Russian producers to the European Union market, or on any determination of dumping with respect to those prices. In the period under review, they either did not make any sales to the EU, or were subject to a price undertaking which set a minimum price. In this case, sales made under the price undertaking were not a reliable element in assessing whether dumping would be likely to continue or recur. The price undertakings are part of the very measures whose possible expiry is examined in the review. Acron's sales were considered unreliable also because, for a part of the period under review,

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<sup>31</sup> Panel Report, *EU – Footwear (China)*, para. 7.157; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

<sup>32</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 181.

<sup>33</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.180.

<sup>34</sup> Regulation 999/2014 (Exhibit RUS-66), recitals 57-58.

it was the sole Russian supplier to the EU market. Moreover, out of the sampled producers, only Acron was found to have fully cooperated. This was another reason why the Commission was not in a position to rely on their export prices.<sup>35</sup> Russia's claim #9, as well as all the specific arguments it raises in support thereof, must be rejected.

5.8 ELEVENTH CLAIM: THE EUROPEAN UNION DID NOT ERR BY FAILING TO CONDUCT DUMPING MARGIN CALCULATIONS ACCORDING TO ARTICLE 2 OF THE AD AGREEMENT

35. The eleventh claim seems to be limited to whether the EU acted inconsistently with the AD Agreement when allegedly determining the existence of dumping of Russian AN imports into *third* countries. The EU was not required to conduct any dumping margin calculations, and it did not engage in any affirmative determination of dumping. Despite the references to sales at "dumped prices", there was no attempt to make an affirmative determination of (present) dumping in third country markets, but merely a reliance on evidence related to dumping: the difference between average ex-works domestic prices and average ex-works export prices.
36. Even assuming that Articles 2.1, 2.2 and 2.4 applied (*quod non*), Russia does not spell out what exactly the specific inconsistency with those provisions consists in. Russia's claim under Article VI:1 of the GATT 1994 is, in essence, consequential.<sup>36</sup>

5.9 CLAIMS WITH RESPECT TO THE CONTINUOUS LEVYING OF THE ANTI-DUMPING DUTIES

37. Russia makes three claims with regard to the levying of antidumping duties on AN from Russia. It first claims that the levying of anti-dumping duties for EuroChem is inconsistent with WTO law. Yet, the level of anti-dumping duties is based on Regulation 2018/1722, which based the duty level on the injury margin calculated in the 2018 interim review and not on a dumping margin. Since the duty levied on the imports of AN of EuroChem is not based on the dumping margin, it is not affected by an alleged inconsistency in the manner in which such dumping margin would be calculated.
38. The preceding regulations on which Russia seeks to rely do not support Russia's claim. Regulation 999/2014 did not involve a dumping margin determination. At no point in that Regulation did the Commission make a "cost adjustment" that Russia now seeks to challenge. Further, the 2008 partial interim review in Regulation 661/2008 was made before Russia was a WTO Member, and thus before the WTO obligations applied in the relations between the EU and Russia.<sup>37</sup> What is more, even if the WTO obligations would apply to this determination, it was entirely reasonable and WTO-consistent for an investigating authority to reject unreliable gas cost information and make use of the adjusted Waidhaus price to construct the normal value of AN. The Commission relied on the average price of Russian gas when sold for export at the German/Czech border, adjusted for transport costs as the source of information to determine what the undistorted gas prices would be if the forces of offer and demand were able to play in Russia.<sup>38</sup>
39. Second, Russia claims that the "extension" of the duration of the anti-dumping duties on imports of AN from Russia, done by the third expiry review of 2014, is inconsistent with Article 11.3 of the AD Agreement. Yet, the level of duties imposed on AN from Russia is not based on the 2014 expiry review, but rather the 2018 interim review in Regulation 2018/1722.<sup>39</sup> Russia has not claimed any WTO inconsistency with regard to this Regulation. Moreover, the third expiry review in Regulation 999/2014 did not contain any dumping determination. Given the distinct nature of an expiry review, the obligations in the AD Agreement that apply in respect of original investigations do not simply transpose.<sup>40</sup> There is no obligation to calculate or rely on dumping margins in an expiry review.<sup>41</sup> It can thus not

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<sup>35</sup> Regulation 999/2014 (Exhibit RUS-66), recital 53.

<sup>36</sup> See, for example, Panel Reports, *US – Zeroing (Japan)*, paras. 7.171-7.175; *US – Zeroing (EC)*, paras. 7.34 and 7.109.

<sup>37</sup> Panel Report, *US – DRAMs*, para. 6.14.

<sup>38</sup> Council Regulation (EC) No 661/2008, recital 35.

<sup>39</sup> See Articles 1 and 2 of Commission Implementing Regulation (EU) 2018/1722.

<sup>40</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.8.

<sup>41</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123. See also Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.34.

be affected by an alleged inconsistency in the manner in which such dumping margin would be calculated. The only measure in which a dumping margin was calculated was the 2008 second expiry review in Regulation 661/2008. This measure could not be WTO inconsistent because it pre-dates the time when the WTO obligations apply between the EU and Russia, and, in any event, contains a WTO-consistent use of reliable evidence by the Commission to determine normal value.

40. Third, Russia also makes a claim with respect to the levying of the country-wide anti-dumping duties, challenging (i) the no longer applicable AD duties calculated in the 2002 Regulation 658/2002 on the basis of the non-market-economy ("NME") provisions that existed at the time in the Basic Regulation, as well as (ii) the AD duties currently applied pursuant to Regulation 1722/2018. Yet, when the Commission made the dumping margin determination in 2002, Russia was not a WTO Member. The AD Agreement thus did not apply between the EU and Russia. Therefore, the approach for determining the normal value in 2002 cannot be WTO-inconsistent. Since this determination was not inconsistent with WTO law in 2002, no WTO-inconsistency could be "prolonged" or "exist" in 2018. In any event, since Russia's WTO accession, the EU did not apply the NME provisions in the Basic Regulation to it at any given point of time.
41. The Commission only assessed injury in the 2018 interim review, and made no determination of dumping. The Commission was indeed not obliged to do so.<sup>42</sup> In Regulation 1722/2018, the Commission calculated the injury margin and set the level of the duties on that basis, at 32,71 EUR for normal AN.<sup>43</sup> Hence, it did not involve the use of the NME provisions that applied to Russia in 2002. Even if it would be permissible to subject an aspect of a pre-WTO measure that is not covered by the scope of post-WTO review to scrutiny under WTO law, Russia has not demonstrated that the 2018 duties are imposed at a rate that is higher than the dumping margin that would have been established had the authority acted – in Russia's view – consistently with Article 2 of the AD Agreement.

#### 5.10 LIKELIHOOD OF RECURRENCE OF INJURY

42. With respect to injury, the EU explained that the likelihood of recurrence of injury analysis that supports the levying of AD today is contained in the partial interim review made in Regulation 2018/1722. Therefore, to the extent Russia has misgivings about the likelihood of injury determination in the 2014 Regulation, these concern a past likelihood of injury determination that is no longer in existence or relevant. The Panel must not make any recommendations with regard to that determination.<sup>44</sup> The likelihood of recurrence of injury determination was updated in the 2018 Regulation. Given that Russia has not made any claims or arguments with regard to the conduct of the likelihood of recurrence of injury determination in Regulation 2018, the Panel cannot make findings or recommendations with regard to that determination either.
43. In any event, the EU has shown that no price undercutting calculations were made, or were even obliged to be made under WTO law<sup>45</sup>, as part of the likelihood of recurrence of injury determination in Regulation 999/2014. Russia's claims based on alleged price undercutting calculations are thus baseless in fact and law.
44. The likelihood of recurrence of injury analysis made in the 2014 Regulation is different from an undercutting analysis under Article 3 of the AD Agreement. In the 2014 expiry review, the Commission determined what would likely happen if the measures would lapse. This is a "forward-looking" analysis<sup>46</sup> based on reliable evidence about pricing, together with data on consumption, spare capacity, trade flows and attractiveness of the Union market. Given that the analysis is about what "likely" will happen in the future, it cannot have the same degree of precision as an injury analysis in an original determination. Moreover, given that the

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<sup>42</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123.

<sup>43</sup> Commission Implementing Regulation (EU) 2018/1722, recital 173.

<sup>44</sup> See Appellate Body Report, *US – Certain EC Products*, paras. 81 and 129.

<sup>45</sup> See Panel Report *US – Oil Country Tubular Goods Sunset Review*, para. 7.273, referring to Appellate Body Report, *US – Corrosion-resistant Steel Sunset Review*, para. 123. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, paras. 281, 284.

<sup>46</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 341.

Commission found that the domestic industry was, during the investigated period, not in an injurious position (thanks to the measures in place), it could not make a price undercutting determination. The Commission did not examine – and was not required to examine – whether price undercutting was taking place or what its exact degree would be.

45. Furthermore, the Commission's conduct in the likelihood of recurrence of injury determination shows no inconsistencies with WTO law. Its determination was based on a representative sample composed of producers representing around 42% of the Union production and 41% of Union sales, producing FGAN as well as other AN products, including IGAN and ensuring a differentiated geographic location. This determination rested on reliable data, verified by means of on-the-spot investigations and by cross-checking. There was also no significantly divergent economic performance between sampled and non-sampled producers.
46. The Commission also correctly found that the non-injurious state of the EU domestic industry was not sustainable. Indeed, on the basis of positive evidence, the Commission found decreasing EU consumption; a business circle that was projected to decline and stable or further increasing production costs. The EU demonstrated that none of the alleged "evidence" that Russia purports to rely on undermines this.
47. The EU demonstrated that there was positive evidence supporting the Commission's conclusions regarding spare capacities, the ability of third country markets to absorb additional Russian exports and the incentives for redirecting Russian exports to the EU in case the measures would be removed. The Commission did establish the required nexus between the expiry of the duty and the likelihood of recurrence of injury based on an objective analysis of the positive evidence before it.

#### 5.11 CLAIMS WITH RESPECT TO THE CONDUCT OF THE EXPIRY REVIEW INVESTIGATION

48. In claim #16, Russia refers to certain occasions on which the Commission allegedly failed to make available non-confidential written evidence to Russian exporters in a timely manner. Some time was needed to process and prepare documents, as well as to assess whether to accord confidential treatment. Russia either overinflates the alleged delays, misattributes them to the Commission, or challenges reasonable delays of several days. In some instances, Russia does not even refer to any particular piece of evidence or information. In any event, Russia does not explain why RFPA's ability to defend its interests or prepare presentations was circumscribed. For all these reasons, Russia's claims under Articles 6.1.2 and 6.4 must be rejected.
49. As to claim 17 (essentially based on Articles 6.4 and 6.1.3), all of the information contained in the expiry review request, together with additional information, was available to the interested parties as of the date of initiation. Articles 6.1.3 and 6.4 refer to "information" and "text", and not to particular submissions or documents. Moreover, even if there were any material changes between the original request and consolidated request, such that certain information was omitted (*quod non*), this would simply mean that the omitted information was not used. The consolidated request was compiled in response to the Commission's request for clarifications, and it was the consolidated version of the request which was used for the purposes of the expiry review.
50. In claim #18, Russia identifies two instances of alleged improper confidential treatment of the source, or authors, of certain reports. However, the record shows that the Commission required and assessed good cause, both in general and with respect to the specific information at issue. Claim #19, under Article 6.5.1, is largely unrelated to confidentiality, but rather to whether or not the document contains certain information that Russia, or RFPA, would like it to contain. Other information is either clearly available to RFPA, or is treated as confidential to avoid harming the companies' competitive position and appropriately summarised into groups of companies to which the information relates. For injury indicators, Russia fails to specify which data the claim relates to; in any event, the cited submissions provide information

in a summarized form (aggregate figures) that is meaningful, especially since the injury assessment is made with respect to the industry as a whole.<sup>47</sup>

51. Claim #20 concerns the use of facts available. However, neither Article 6.8 nor Annex II of the AD Agreement apply, because the Commission did not base itself on "facts available". All the determinations Russia cites are based on facts and evidence received from the Russian interested parties.
52. Claim #21 under Article 6.9 should be rejected, first, because Russia does not specify which specific information is at issue. Regarding the source of some (unspecified), information Russia has not even attempted to show why the source is an essential fact.<sup>48</sup> In any event, the Definitive Disclosure explains all relevant sources.<sup>49</sup>
53. Claim #22 should be rejected because, first, the majority of Russia's complaints do not concern the Commission's public notice, but disclosure of information *during* the review proceedings; second, because Russia fails to make a single specific reference to any "calculation", "figure", or finding related to product scope contained in Regulation 999/2014, or explain why interested parties or the public were "unable to understand" something; third, because Russia appears to be simply recycling its substantive claims.<sup>50</sup>

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<sup>47</sup> Panel Reports, *Argentina – Ceramic Tiles*, para. 6.48; *EU – Footwear (China)*, paras. 7.730 and 7.779; 7.458.

<sup>48</sup> Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.220.

<sup>49</sup> Exhibit RUS-78 (BCI), recital 66 and fn 25; Tables 1-3.

<sup>50</sup> Panel Reports, *EC – Salmon (Norway)*, para. 7.831; *EC – Bed Linen*, para. 6.259.

## ANNEX B-3

### SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

#### 1 INTRODUCTION

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

#### 2 THE FIRST SUBPARAGRAPH OF ARTICLE 2(3) OF THE BASIC REGULATION IS INCONSISTENT WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT (AD AGREEMENT)

2. First, contrary to the EU's assertions, Russia has provided arguments and supporting evidence which clearly demonstrate that the phrase "provided that those prices are representative" in the first subparagraph of Article 2(3) of the Basic Regulation applies to both alternative methods of normal value determination, including its construction on the basis of "the cost of production in the country of origin". This has been confirmed by the text of the challenged measure, its structure and architecture, as well as its context and evidence, including multiple examples of the EU anti-dumping investigations.

3. The evidence provided by Russia clearly demonstrates that, when the EU authorities are tasked to determine normal value, they, initially, calculate costs. When the EU authorities refer to the construction of normal value and calculate the cost of production, they assess costs and prices for inputs as to whether these costs or prices are "distorted". The EU authorities accept only those prices and costs which are considered as not "distorted", *i.e.* "representative". The terminology used by the EU in specific anti-dumping investigations provides a clear indication regarding the applied provisions of the Basic Regulation, including the first subparagraph of Article 2(3). In this regard, contrary to the EU's allegations, all evidence provided by Russia is **relevant** for the Panel's examination of the challenged measure and determination on its inconsistency with Article 2.2 of the AD Agreement.

4. Second, the EU's assertions regarding irrelevance of the 2002 European Commission's statement (Statement) are manifestly wrong. It is relevant for interpretation of the Basic Regulation and the EU cannot rely on its municipal law to degrade the relevance of this Statement in this proceeding. In any event, references provided by the EU to its Court decisions do not support its position as they do not even address the circumstances, where the European Commission, being an initiator of a proposal to the Council, provided comments on its proposal with respect to draft provisions of the EU's legislation that it would subsequently apply once they enter into force. Also, the Statement should not be read in isolation from the first subparagraph of Article 2(3). The Statement clarifies that the requirement of "not being distorted" covers both "prices and costs". It refers to Article 2(3), second subparagraph where "a particular market situation" is determined through "artificially low prices" and also refers to Article 2(5), second subparagraph, where the term "costs" is used in the phrase "costs associated with the production and sale of the product under investigation".

5. Accordingly, to make its determination of whether the challenged measure is WTO-inconsistent, the Panel is required under Article 11 of the DSU to conduct an objective assessment of all arguments and evidence, including the detailed examination of the first subparagraph of Article 2(3) of the Basic Regulation.

6. Third, to establish the scope of application of the phrase "provided that those prices are representative" in the first subparagraph of Article 2(3), it is necessary, first, to analyze the whole text of the challenged measure and **all** words in it, including terms "representative". Only after that exercise conclusions on the scope of application of the first subparagraph of Article 2(3) **can** be made.

7. Fourth, the change of the pronoun "these" to pronoun "those" in Article 2(3) in Council Regulation (EC) No 384/96 of 22 December 1995 was **not** purely a linguistic change or purely a linguistic improvement. It was **substantive legal amendment** to the text of the first subparagraph of Article 2(3) of the Basic Regulation. Further, the placement of the words "provided that those prices are representative" both after the words "the export prices" and "the cost of production" indicates that this phrase applies to both methods of determination of normal value.

8. Fifth, the term "representative" in the first subparagraph of Article 2(3) of the Basic Regulation is different from the term "representative" in Article 2.2 of the AD Agreement. The same terms used both in the municipal law and WTO Agreements do not necessarily have the same meaning.<sup>1</sup> The meaning of the term "representative" in the Basic Regulation includes "undistorted". However, in Article 2.2 of the AD Agreement the term "representative" means as typical export price that is charged by the exporter under investigation for the like product exported to an appropriate country.

### **3 THE SECOND SUBPARAGRAPH OF ARTICLE 2(3) OF THE BASIC REGULATION IS INCONSISTENT WITH ARTICLE 2.2 OF THE AD AGREEMENT**

9. Russia strongly objects to the EU's request for the application of the concept of the mandatory/discretionary distinction in this dispute. Russia disagrees with the use of this analytical tool by the Panel. The DSU does not require panels and the Appellate Body to use the mandatory/discretionary distinction in their examination of the challenged legislation. Despite the fact that the concept of the mandatory/discretionary distinction was developed prior to the adoption of the WTO Agreement, drafters did not include in Article 6 or Article 7 of the DSU a provision that would confirm their intention to use this distinction as a preliminary jurisdictional matter or as an analytical tool in determining whether the challenged legislation is WTO-inconsistent.

10. Irrespective of whether the measure is mandatory or discretionary, its existence means that it was adopted in order to be applied and it will be applied in the future. The existence of the WTO-inconsistent measure has an impact on the market participants engaging in international trade because such a measure reduces security and predictability of the business environment and, thus, affects market participants' plans for future trade. In addition, drafting a legislative provision by using language that creates the appearance of a "discretionary" provision could be used as a strategic approach to circumvent WTO obligations and to avoid scrutiny of such legislation by panels and the Appellate Body in WTO dispute settlement system. The Panel should not allow the EU to avoid scrutiny of its measures. Without prejudice to this principal position, Russia has substantiated that the second subparagraph of Article 2(3) of the Basic Regulation is not discretionary in spite of its appearance, but of mandatory nature.

11. The EU again disregards the evidence provided by Russia. This evidence confirms that the second subparagraph of Article 2(3) of the Basic Regulation directly addresses a situation in which the price of "inputs" which is deemed by the EU investigating authorities "artificially low" results in the construction of normal value. Russia explained in details that Article 2 of the AD Agreement concerns *only* "the product under consideration" or "the like product", not its input. All circumstances entitling an investigating authority to resort to the construction of normal value under Article 2.2 of the AD Agreement are directly related to the *like product*, and not its input. Russia recalls that conditions under Article 2.2 of the AD Agreement permit neither an analysis of whether market signals properly reflect supply and demand, nor a comparison of the price of the product concerned, including its inputs, with prices in other countries or with world-market prices. If drafters intended to describe a condition requiring such an analysis or a comparison, they would have explicitly reflected that in the text of the provision. Thus, there is no legal basis for such an analysis or comparison under Article 2.2 of the AD Agreement. Russia has substantiated with reference to the Vienna Convention that the word "distorted" does not exist in the legal text of the AD Agreement. Neither Article 2.2, nor Article 2.2.1.1 of the AD Agreement contain a test that permit an investigating authority to examine conditions on the market of the exporting country and determine whether "distortions" exist. This provision concerns only the calculation of costs of the investigated producers or exporters and examination of their records. The EU fails to rebut Russia's arguments and substantiating evidence in this regard. Therefore, the EU's position that "Article 2.2 of the Anti-Dumping Agreement permits the rejection of domestic prices on the grounds that a cost

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<sup>1</sup> Panel Report, *US – Section 301 Trade Act*, para. 7.20.

underpinning such domestic price is not consistent with a relevant provision of Article 2.2" must be rejected in its totality.

12. Russia provided its interpretation of the term "the particular market situation" in accordance with Article 31 of the Vienna Convention and demonstrated that this term refers to the special situation in a market of a WTO Member as a whole. The text of Article 2.2 of the AD Agreement strongly indicates that there is only one "particular market situation", it is not "concept", and that drafters of the AD Agreement knew exactly to what particular situation this term refers. This is the only interpretation which results from the proper application of the customary rules of interpretation of public international law in accordance with the first sentence of Article 17.6(ii) of the AD Agreement, and thus the second sentence of Article 17.6(ii) of the AD Agreement does not apply. The EU's failure to interpret the term "the particular market situation" in accordance with Articles 31 and 32 of the Vienna Convention results in its failure to rely on a "permissible interpretation" under the second sentence of Article 17.6(ii) of the AD Agreement. It follows that the EU's arguments must fail.

#### **4 THE SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION IS INCONSISTENT WITH ARTICLES 2.2 AND 2.2.1.1 OF THE AD AGREEMENT**

13. Russia reiterates its **principal position** that according to the legal text of the DSU every dispute before a panel must be resolved on its own merits. Each and every dispute submitted to the DSB is **unique**. The fact that a Member has previously tried to prove nullification or impairment of its benefits accruing from the AD Agreement and did not succeed in **no way** can predetermine the outcome of a dispute initiated by another WTO Member. This is a fundamental right guaranteed to WTO Members by the DSU. The EU **fails** to rebut Russia's position.

14. Without prejudice to this principal position and for the sake of completeness Russia submits that contrary to the EU's allegation that "Russia has not identified any difference or any relevant difference between the two cases"<sup>2</sup>, Russia provided extensive arguments and evidence substantiating that there are differences between the dispute before this Panel and EU – *Biodiesel (Argentina)*.

15. Russia has substantiated that (1) the challenged provision of the second subparagraph of Article 2(5) of the Basic Regulation requires the **specific order** of "bases" for the "adjustment" or "establishment" of the costs; (2) alleged "distortions" due to government regulation in the country of origin of the product under consideration are **disqualifications** for the use of both (i) recorded input prices of the investigated producers and (ii) available cost data of other producers or exporters in the same country; (3) when the correctly recorded input cost data is "adjusted" or "established" by the EU authorities to eliminate the alleged "distortion" due to government regulation in the country of origin of the product under consideration, the second requirement to "adjust" the input cost data of the third representative country or market downward to reflect the cost of production in the country of origin would have made the first "adjustment" or "establishment" **meaningless** since **the very reason** of rejecting of domestic prices and costs are the alleged "distortions"; (4) the measure at issue **prevents** the EU authorities from compliance with Articles 2.2.1.1 and 2.2 of the AD Agreement; (5) the measure at issue **does not require to adapt** the surrogate input price or the cost of production which resulted from the adjustment or establishment on "any other reasonable basis, including information from other representative markets" **to ensure** that such price or cost represents the cost of production for producers or exporters of the product under consideration in the country of its origin; (6) the EU authorities **recognize** the lack of authority to adapt the adjusted or established input prices and costs of production to the level of the cost of production of the product in the country of origin; (7) the EU authorities resort to information from "other representative markets" **because it is not the cost of production in the country of origin**; (8) even where an investigating authority is justified in not calculating production costs on the basis of the exporter's or producer's records under the first sentence of Article 2.2.1.1, it **remains subject to the disciplines set out in Article 2.2 irrespective** of the reason for which normal value cannot be determined on the basis of domestic sales under Article 2.2 of the AD Agreement. These are just *some* of the multiple differences between the two disputes which have been already explained by Russia in its submissions.

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<sup>2</sup> EU's SWS, para. 28.

16. In sum, Russia has provided detailed arguments and sufficient evidence substantiating that the challenged provision of the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent with Articles 2.2.1.1 and 2.2 of the AD Agreement.

**5 THE COST ADJUSTMENT METHODOLOGY IS INCONSISTENT WITH ARTICLES 2.2.1.1 AND 2.2 OF THE AD AGREEMENT**

17. In the course of this panel proceeding, Russia demonstrated the existence of the EU cost adjustment methodology<sup>3</sup>, including its precise content, attribution and specific characteristics, and its inconsistencies with Articles 2.2.1.1 and 2.2 of the AD Agreement.

18. Instead of considering and rebutting each Russia's argument and presented piece of evidence, the EU simply denied the existence of this measure.

19. Russia disagrees with the EU that, in order to be challenged in WTO dispute settlement, the EU cost adjustment methodology needs to reach the "as such" level in the sense that it should be the rule or norm of general and prospective application which apply "in an entirely mechanistic and mathematical manner" in all future cases.<sup>4</sup> Similarly, Russia disagrees with the EU's position that only two types of complaints are admissible to WTO dispute settlement: the described "as such" claims and "as applied" claims with respect to a particular instance that has occurred. The EU is wrong.

20. With reference to the DSU, Articles 17.3 and 18.4 of the AD Agreement, and WTO jurisprudence, Russia explained that a broad range of measures can be challenged in the WTO.<sup>5</sup> According to the Appellate Body, "[a] complainant seeking to prove the existence of an unwritten measure will invariably be required to prove the attribution of that measure to a Member and its precise content. Depending on the specific measure challenged and how it is described or characterised by **a complainant**, however, other elements may need to be proven".<sup>6</sup>

21. However, the EU disregards how Russia framed the challenged measure, described its elements, attribution and specific characteristics. As a result, the EU fails to rebut Russia's arguments and evidence.

22. Russia disagrees with EU's suggestion to use the test in *US – Zeroing (EC)* for the examination of the EU cost adjustment methodology. Contrary to the EU allegation, there is *no one* general legal standard that fits *all* varieties of unwritten measures challenged in WTO dispute settlement.<sup>7</sup> The Panel is **not** required to examine Russia's arguments and evidence against the legal test employed in *US – Zeroing (EC)*.<sup>8</sup>

23. The SCM Agreement and the Appellate Body's interpretation of Article 3(4) and footnote 4 of the SCM Agreement in *Canada – Aircraft* and *Canada – Aircraft (Article 21.5 – Brazil)* are *irrelevant* for this dispute. The SCM Agreement and the AD Agreement regulate different subject matters, and a sharp line between these Agreements must not be blurred.

24. Russia disagrees with the EU's suggestion to examine Article 2(5) of the Basic Regulation instead of the EU cost adjustment methodology. Part of the Panel's mandate is to examine whether *the EU cost adjustment methodology* is consistent with Articles 2.2.1.1 and 2.2 of the AD Agreement.

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<sup>3</sup> The term "the cost adjustment methodology" is based on the terminology that the EU authorities use in its determinations: for example, "an energy cost adjustment" (Council Regulation (EC) No 172/2008, Exhibit RUS-37, recital 35); "methodology applied for the gas adjustment" (Council Implementing Regulation (EU) No 1251/2009, Exhibit RUS-33, subheading to Section 2.1.1.2).

<sup>4</sup> EU's FWS, paras. 86, 87, 88, 96, 101, 102, 103.

<sup>5</sup> Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.125; Appellate Body Report, *Argentina – Import Measures*, para. 5.109

<sup>6</sup> Appellate Body Report, *Argentina – Import Measures*, para. 5.110. (emphasis added)

<sup>7</sup> Appellate Body Report, *Argentina – Import Measures*, para. 5.107.

<sup>8</sup> Russia's FWS, para. 297 and ft 263 thereto (referring to the Appellate Body Report, *Argentina – Import Measures*, para. 5.118). Russia's SWS, para. 546.

25. Russia disagrees with the EU's argument on a "highly fact dependent" application of Article 2(5) of the Basic Regulation and the EU's suggestion to examine various circumstances for various adjustments instead of the EU cost adjustment methodology. Contrary to the EU's suggestion, the Panel does not need to examine the universe of "circumstances" and adjustments in order to resolve the dispute on the EU cost adjustment methodology.

26. The EU's arguments on the Provisions of Annex No. 8 to the Treaty on the Eurasian Economic Union and the EU's suggestion to assess plausibility and reasonableness of Russia's claims should be rejected. First, this dispute is not an appropriate forum for raising any questions on the Annex as the present dispute is not about this Treaty.<sup>9</sup> Second, the EU is wrong in its suggestion to assess whether complainant's claims are "plausible" and "reasonable". There is no legal basis for such an assessment in the DSU or the AD Agreement.

27. Russia disagrees with the EU's alternative line of argument in which the EU requests the Panel to conduct the two-step analysis: (i) to examine whether the EU cost adjustment methodology "corresponds" to two provisions of the Basic Regulation; and (ii) to examine whether these provisions of the Basic Regulation "correspond" to particular provisions of the AD Agreement. However, to fulfill its mandate under Articles 7.1 and 11 of the DSU, the Panel needs to compare the EU cost adjustment methodology *directly* with Article 2.2.1.1 and with Article 2.2 of the AD Agreement. Only such an examination will provide the most accurate and objective result.

28. Russia also disagrees with the EU's request to the Panel not to consider recitals 3, 5, 7 of Regulation (EU) 2017/2321, recital 8 of Regulation (EU) 2018/825 and Articles 2(6a) and 7(2a) of the Basic Regulation which were introduced by Regulations (EU) 2017/2321 and 2018/825 and entered in force in 2017 and 2018 respectively. The broad coverage of the Panel Request (see Section IV) allows the Panel to examine these recitals of Regulations (EU) 2017/2321 and 2018/825 and new provisions of the Basic Regulation. To the extent these recitals and provisions have similar substance and effects as the EU cost adjustment methodology, they have close relationship and thus relevant for the Panel's examination.

29. Russia highlighted the similarities between the EU cost adjustment methodology and so-called "new methodology" (which is actually a clarified and strengthened version of the challenged measure) introduced by Regulations (EU) 2017/2321 to the Basic Regulation. These methodologies are part of the EU's deliberate defensive trade policy to strengthen anti-dumping instruments.<sup>10</sup> In particular, both of them: (i) concern calculations of the cost of production and determination of normal value; (ii) target the alleged "significant distortions" and "raw material distortions" in input prices in connection with government regulation; (iii) call for replacement of allegedly "distorted" recorded input prices with surrogate input prices. Russia demonstrated that the EU cost adjustment methodology significantly increases dumping margins and consequently anti-dumping duties. Due to close relationship and similarities with the EU cost adjustment methodology, so-called "new methodology" also increases dumping margins and anti-dumping duties. The EU authorities use such "undistorted" surrogate prices precisely *because they do not* represent the cost of production in the country of origin of products under consideration in specific anti-dumping proceedings.<sup>11</sup> Both methodologies are WTO-inconsistent.

30. Furthermore, Russia disagrees with the EU's interpretation of several terms and provisions in Articles 2.1, 2.2 and 2.2.1.1 of the AD Agreement. First, the EU is wrong in its interpretation of the term "normal value" as "a value that is normal, or a normal value".<sup>12</sup> However, Articles 2.1 and 2.2 do not include any test to examine the "operation of the market forces of supply and demand", or "normal commercial circumstances", or determination of "value that is normal". The term "normal value" in the AD Agreement refers to typical, usual value of the product in the exporting country. Articles 2.1 and 2.2 set forth how normal value shall be determined. Russia also stresses that the AD Agreement does not regulate domestic prices of inputs as this Agreement provides the legal basis and procedure to address only international price discrimination concerning *the product under consideration*.

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<sup>9</sup> The EU recognized that "the measures at issue in this case are EU measures". EU's FWS, para. 105.

<sup>10</sup> See Russia's FWS, paras. 363-378.

<sup>11</sup> See Section 7 of Russia's FWS.

<sup>12</sup> See Russia's SWS, paras. 87-88, 166, 199, 388-389, 678.

31. Second, the EU fails to recognize the Appellate Body's interpretation of Article 2.2.1.1.<sup>13</sup> The determination of whether the records "reasonably reflect the costs..." within the meaning of Article 2.2.1.1 does not involve an examination of the "reasonableness" of the reported costs themselves.<sup>14</sup> However, the essence of the EU's the assessment of "reliability" of recorded costs is the examination of the recorded costs themselves and their comparison with prices in other countries, markets or international benchmark prices viewed as "undistorted".<sup>15</sup> The EU's attempts to disguise and relabel the standard of "reasonableness" to the standard of "reliability" must be rejected.

32. Third, the Russian Federation disagrees with the EU's characterization of the regulated input prices as "distortion", "unreliable" or "distorted prices", consideration of the allegedly "distorted" costs as "unreliable" and their rejection in the calculation of costs. Article 2.2.1.1 does not permit to reject the recorded input costs on the grounds that domestic input prices are regulated and lower in comparison with "undistorted" input prices in other countries or markets or an international benchmark price.<sup>16</sup> Similarly, this provision does not permit investigating authorities "to establish" what costs would have been incurred by the investigated producers or exporters in "normal commercial circumstances" and "undistorted" market conditions and to use surrogate prices in the calculation of costs. Furthermore, a mere explanation of actions and determinations by an investigating authority, as the EU suggest, would **not** justify a derogation from a WTO obligation.

33. The fact is that the AD Agreement does not contain such words as "distortion", "government regulation", "forces of supply and demand" and "normal commercial consideration", "non-arms-length transactions" and "other practices"<sup>17</sup>. Only words that are actually used in the legal provision provide the basis for an interpretation that must give meaning and effect to all its terms.<sup>18</sup> Thus, there is no legal basis for the EU's interpretation of Articles 2.2.1.1 and 2.2 of the AD Agreement.

34. Fourth, contrary to the EU's allegation, the phrase "[f]or the purpose of paragraph 2" in the first sentence of Article 2.2.1.1 does not provide a legal basis for the derogation from the obligation in this provision. This phrase only indicates that calculated costs are to be used in the ordinary course of trade test under Article 2.2.1 and in the determination of normal value.

35. Fifth, the term "normally" in the first sentence of Article 2.2.1.1 also does not provide a legal basis for the derogation from the obligation. This term *indicates* that the rule in the first sentence of Article 2.2.1.1 admits derogation under certain circumstances. The Appellate Body explained that "provisions of the Anti-Dumping Agreement are **explicit** regarding the permissibility of disregarding certain matters."<sup>19</sup> The term "normally" is **not** an explicit provision containing the permissibility of disregarding the correctly recorded costs incurred by the investigated companies. Thus, an investigating authority cannot simply "rely on" the term "normally" to disregard the recorded costs.

36. The panel in EU – *Biodiesel (Argentina)* made it clear that the list of provisions with the explicit permission to use prices or costs other than those in the country of origin of the product under consideration is very limited: the Second AD Note to Article VI:1 of the GATT 1994 incorporated by Article 2.7 and the specific commitments on price comparability in anti-dumping proceedings which are reflected in the protocols of accession of certain Members.<sup>20</sup> Neither of these provisions apply to Russia. In particular, Russia did not take a specific commitment on price comparability in anti-dumping proceedings, and thus the EU's reference to the Working Party Report on Russia's accession to the WTO must be rejected.

37. Sixth, the EU fails to recognize that Article 2.2 of the AD Agreement requires to construct normal value on the basis of "the cost of production in the country of origin" and that the burden is

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<sup>13</sup> See Appellate Body Report, EU – *Biodiesel (Argentina)*, para. 6.56.

<sup>14</sup> Appellate Body Report, EU – *Biodiesel (Argentina)*, paras. 6.37, 6.56; Appellate Body Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 6.102.

<sup>15</sup> See Russia's SWS, para.635.

<sup>16</sup> See Appellate Body Report, EU – *Biodiesel (Argentina)*, para. 6.30; Panel Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 7.69.

<sup>17</sup> The Appellate Body has already recognized that the terms "non-arms-length transactions" and "other practices" are not found in Article 2.2.1.1 or elsewhere in the AD Agreement. (Appellate Body Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 6.94)

<sup>18</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 37.

<sup>19</sup> Appellate Body Report, *US – Continued Zeroing*, para. 286.

<sup>20</sup> Panel Report, EU – *Biodiesel (Argentina)*, para. 7.241.

on investigating authorities to ensure compliance with this obligation. In this panel proceeding, the EU stated, in essence, that it does not see any sense in adjusting the surrogate price back to the price in the country of origin which it rejected as "distorted". Thus, it is clear that the EU does **not** intend to ensure the construction of normal value on the basis of "the cost of production in the country of origin".

38. Seventh, in its argument on "a proper comparison", the EU attempts to conflate Article 2.2 and Article 2.4 of the AD Agreement which are two different provisions with different obligations. The Appellate Body explained that the obligation in Article 2.4 "presupposes that the component elements of the comparison – i.e. the normal value and the export price – have already been established".<sup>21</sup> Thus, EU's attempt should be rejected. In addition, the EU's references to the Appellate Body's statements in *EC – Fasteners (China) (Article 21.5)* and *China – HP-SSST* are misplaced and should be rejected as well.

39. In sum, Russia has made a *prima facie* case that the EU cost adjustment methodology is inconsistent with Articles 2.2.1.1 and 2.2 of the AD Agreement.

**6 THE EU HAS FAILED TO REBUT RUSSIA'S ARGUMENTS AND EVIDENCE. ANTI-DUMPING MEASURES IMPOSED BY THE EU ON IMPORTS OF RUSSIAN WELDED TUBES AND PIPES ARE INCONSISTENT WITH ARTICLES 2.2.1.1, 2.2.1 AND 11.3 OF THE AD AGREEMENT**

40. The EU's response to Russia's claims with respect to the anti-dumping measures on import of welded tubes and pipes from Russia **confirms in very clear terms** the operation of the challenged provisions of the Basic Regulation as well as the existence of the cost-adjustment methodology. The EU **confirms** that if recorded input prices used in the production of the product under consideration are regulated by government, the EU authorities consider these prices as "distorted", "not reasonably reflected in the exporting producer's records as provided for in Article 2(5) of the basic Regulation"<sup>22</sup>, "unreliable", and rejects them, despite the fact that the records kept by the investigated Russian producer met the both conditions of the first sentence of Article 2.2.1.1 of the AD Agreement. The EU also **confirms** that the EU investigating authorities have to "consider cost of production information from sources outside the country [of origin] **instead of** domestic cost information". The EU **confirms** that it assesses the **reasonableness** of the recorded costs themselves. All elements of the EU's approach strongly contradict to its obligations under the AD Agreement

41. Russia has substantiated that all EU's arguments based on erroneous interpretations of Articles 2.2.1.1, 2.2, 2.4 of the AD Agreement are legally flawed and shall be rejected.<sup>23</sup> The construction of the cost of production is **not allowed** under the AD Agreement.

42. Without prejudice to Russia's position that the rejection of costs, incurred by the Russian investigated producer and exporter and correctly recorded in its records, is WTO-inconsistent, Russia would like to comment on the EU's statements with respect to the adaptation of the surrogate cost data. The EU did not adjust the surrogate gas price to gas price paid by the Russian producer of tubes and pipes in Russia, *i.e.* to "the cost of production in the country of origin". The adjustment for local distribution costs made by the EU does **not** ensure that the adjusted or established costs represent the cost of production in the country of origin. It clearly follows from the recital 69 of Commission Implementing Regulation (EU) No 2015/110 that the EU authorities **specifically** selected the surrogate gas price precisely because it was **not** the cost of production in the country of origin and substituted gas prices actually paid by the investigated Russian producer and correctly recorded in its records by this surrogate data. Accordingly, it was not the EU's intention to adapt this surrogate data to the cost of gas in the country of origin and the EU did not do that. The lack of such intention was also confirmed in the course of this proceeding.

43. Also, contrary to the EU's assertions, Russia makes **independent claims** under Articles 2.2.1 and 11.3 of the AD Agreement: (i) in conducting its ordinary-course-of-trade test under Article 2.2.1

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<sup>21</sup> Appellate Body Report, *Ukraine – Ammonium Nitrate (Russia)*, ft 419 to para. 6.122 (referring to the Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.21). (emphasis added) See also Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.48.

<sup>22</sup> Regulation 2015/110, Exhibit RUS-21, recital 69.

<sup>23</sup> See paras. 27-35 of this summary.

of the AD Agreement, the European Commission used a cost of production that was calculated inconsistently with Article 2.2.1.1 of the AD Agreement; (ii) the European Commission relied on dumping margin calculated inconsistently with Articles 2.2.1.1 and 2.2.1 to make its likelihood-of-dumping determination in the course of the expiry review. Thus, for the settlement of the matter with respect to the anti-dumping measure on imports of tubes and pipes, the Panel should examine all Russia's claims, including those under Articles 2.2.1 and 11.3 of the AD Agreement.

## **7 ANTI-DUMPING MEASURES IMPOSED BY THE EU ON IMPORTS OF AN IS INCONSISTENT WITH AD AGREEMENT AND GATT 1994**

### *7.1 CLAIMS WITH RESPECT TO THE SCOPE OF THE APPLICABLE MEASURES*

44. Russia maintains that the imposition of anti-dumping measures and a levy of anti-dumping duties on imports of IGAN and Stabilized AN from Russia is contrary to the EU's obligations under the GATT 1994 and the AD Agreement since the EU never conducted an original anti-dumping investigation, nor made injury and dumping determinations for these two products.

45. Russia maintains that Article 18.3 of the AD Agreement does not apply in this dispute. Contrary to the EU, Article 28 of the Vienna Convention indicates that the AD Agreement applies to this situation. A situation that have arisen before Russia's accession continues to exist: the EU continuously applies the anti-dumping measures and levies the anti-dumping duties on Russian AN. In addition, there is an obligation under GATT Article VI to ensure that a levy of anti-dumping duties should be underpinned by a WTO-consistent dumping and injury determination throughout the life of the anti-dumping measure.

46. Russia has demonstrated that the Russian exporting producers requested a modification of the product scope prior to and in the course of the 2014 expiry review and that the EU made a product scope determination in Regulation 999/2014. The EU for the first time requested the domestic industry to provide IGAN data towards the end of the 2014 expiry review, i.e. almost 20 years after the anti-dumping duties were in place. And even so, the EU producers failed to submit such data so that the EU's likelihood determinations in any case do not cover IGAN. With respect to Stabilized AN, it is undisputed that the EU did not conduct an original investigation for this product and did not make dumping and injury determinations as confirmed by the EU Court's decision.<sup>24</sup> The EU failed to point to a single instance in the record where Stabilized AN was part of the original investigation and respective injury and dumping determinations.

47. Russia also stresses that the proportional application of the anti-dumping duties on imports of Stabilized AN, which was not the product under consideration in the original investigation, is inconsistent with Articles 1, 2.1, 2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 9.1, 9.3 and 18.1 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994, irrespective of whether AN is a component of the Stabilized AN. In addition, and without prejudice to this principle position, Russia notes that the EU's arguments amount to *ex post facto* rationalization. On that basis, Russia made a *prima facie* case with respect to Claim #1

48. With regard to Claim #2, Russia disagrees that an expiry review could be initiated based on a mere standard of "plausibility", with no requirement as to the "accuracy and adequacy" of evidence. Russia considers that not only the "accuracy and adequacy", but also the "sufficiency" and "quality" of evidence are equally relevant for an investigating authority to consider that a request is "duly substantiated". Further, taking into account that "future facts do not exist"<sup>25</sup> and Article 11.1 of the AD Agreement which states that an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury, the request for the initiation of an expiry review shall provide sufficient evidence. When the request is based on WTO-inconsistent calculation of dumping margins in support of a likelihood of continuation of dumping, such request cannot be considered "duly substantiated".

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<sup>24</sup> Judgment in T-348/05 of 10 September 2008, Exhibit RUS-73, paras. 61-64.

<sup>25</sup> See Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.279.

7.2 CLAIMS WITH RESPECT TO THE DETERMINATION OF LIKELIHOOD OF DUMPING

49. With respect to Claims #9 and #11 the EU itself acknowledges that it "compared average ex-works domestic prices with ex-works export prices based on data reported by sampled companies". On the basis of this comparison, the EU concluded that Russian exports were "dumped".<sup>26</sup> This means that the EU made a dumping determination. Such determination should have complied with Article 2 of the AD Agreement.

50. In addition, with respect to Claim #9, Russia has substantiated that the EU illegally disregarded Russian export prices to the EU under price undertakings. There is no basis under the legal text of the AD Agreement to disregard in anti-dumping investigations, including expiry reviews, prices under price undertakings.

7.3 CLAIMS WITH RESPECT TO THE CONTINUOUS LEVYING OF THE ANTI-DUMPING DUTIES

51. Russia has substantiated that Article 18.3 of the AD Agreement does not apply in this dispute. This is because (i) Article 18.3 is a transitional provision which does not apply to Russia in the case at hand and (ii) there is no temporal scope for the application of WTO discipline to the "levy" of anti-dumping duties, which has not ceased to exist following Russia's WTO accession. Furthermore, under Article 28 of the Vienna Convention the applicability of a treaty does not arise in respect of "any situation which ceased to exist before the date of the entry into force of the treaty". Thus, a treaty, *i.e.* AD Agreement, **does apply** to a situation which did not cease to exist before the date of entry into force of that treaty. Furthermore, the dumping determinations at issue were considered in the scope of the reviews that led to the adoption of Regulation 999/2014 and Regulation 2018/1722.

52. Russia also submits that in order to set the level of the anti-dumping duty, the injury margin established in the 2018 review was compared with the 2002 and 2008 dumping margins. Thus, the anti-dumping duty is still based on the dumping margins calculated in a WTO-inconsistent manner.

53. Contrary to the EU's allegations, Russia has satisfied its burden of proof by establishing that a WTO-consistent dumping margin for EuroChem in 2008 was lower than the most recent injury margin established in the 2018 partial interim review. Russia has also provided evidence demonstrating that a dumping margin in 2002 if calculated consistently with Article 2 of the AD Agreement would be below the injury margin on the basis of which the anti-dumping duties are currently being applied.

54. With respect to Claim #12, Russia challenges the levying of anti-dumping duties on AN of EuroChem, which were set with the use of the WTO-inconsistent cost adjustment for natural gas in Regulation 661/2008, maintained under Regulation 999/2014, and currently applied in the amended amounts. Russia has substantiated that the dumping determination in Council Regulation 661/2008 was WTO-inconsistent, as it breached Articles 2.2.1.1, 2.2.1 and 2.2 of the AD Agreement and Article VI:I (b)(ii) the GATT 1994. Russia's claims under Articles 1, 9.3 and 11.1 of the AD Agreement and Article VI:2 of the GATT 1994 are not consequential. Findings on violation of each of them are important for the resolution of this dispute.

55. With respect to Claim #13, Russia submits that the continuous levying of the anti-dumping duties through Regulation 999/2014 and Regulation 1722/2018 is based on dumping margin calculated in Regulation 661/2008 for EuroChem in a WTO-inconsistent manner. Commission Implementing Regulation 999/2014 extended the anti-dumping measures for EuroChem that were based on WTO-inconsistent dumping determinations. This is true regardless of whether the duty was levied based on a dumping or injury margin: absent a dumping determination, even if there was an injury margin, no duty could be levied. The logical consequence of the extension of WTO-inconsistent measures is that the extended measures remain WTO-inconsistent. Indeed, under Article 11.3 of the AD Agreement, an investigating authority must establish that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury". Such a determination must be based on "reasoned and adequate conclusions" supported by "positive evidence" and a "sufficient factual basis". The factual basis and evidence on which the EU's determination that a likelihood-of-dumping existed in the expiry review that led to the adoption of Commission Implementing

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<sup>26</sup> Commission Implementing Regulation 999/2014, Exhibit RUS-66, recitals 57, 58.

Regulation 999/2014 is tainted by the WTO-inconsistent dumping determinations in Council Regulation 661/2008.

56. With respect to claim #14 Russia notes that the EU is not challenging the fact that the application of the non-market methodology against Russian exporting producers would be inconsistent with Articles 2.1 and 2.2 of the AD Agreement, Article VI:1 and the second Supplementary Provision to Article VI:1 of the GATT 1994. Russia has provided arguments and substantiating evidence that the anti-dumping duties on AN are based on the country-wide dumping margin for all Russian exporting producers, except EuroChem, this dumping margin was maintained, extended and relied on in Commission Implementing Regulations 999/2014 and 2018/1722, and thus its consistency with the AD Agreement and GATT 1994 is subject to WTO review. Correspondingly, the EU violates Article 11.3 of the AD Agreement through the continued application of country-wide anti-dumping duties for all Russian exporting producers, except EuroChem, that are determined based on dumping determinations inconsistent with the mentioned Articles.

57. In its position and allegations, the EU attempts to "navigate" through the WTO jurisprudence to avoid the Panel's finding on a violation of Article I:1 of the GATT 1994. Contrary to the EU's allegation, Article I:1 of the GATT 1994 does not differentiate between market and non-market economies. The GATT does not contain a definition of "non-market economy". The EU erroneously disregards the fact that Article I:1 sets out a fundamental non-discrimination obligation under the GATT and covers both de jure and de facto discriminations. If conditions for access to the "advantage" are formulated in a way that only certain Members can qualify, then even if this "advantage" is "unconditionally" extended to other Members, certain Members will still be excluded from access to this "advantage".

#### 7.4 CLAIMS WITH RESPECT TO THE ESTABLISHMENT OF THE LIKELIHOOD OF RECURRENCE OF INJURY

58. Claims #5 to #8 relate to the likelihood-of-injury determination made in Regulation 999/2014. This is the only likelihood-of-injury determination within the meaning of Article 11.3 of the AD Agreement. In contrast, Regulation 2018/1722 followed an interim review pursuant to Article 11.2 of the AD Agreement. Therefore, the only determination that measures should be extended as the injury would likely continue or recur absent the anti-dumping measure is contained in Regulation 999/2014, This Regulation is still the legal basis for the application of the anti-dumping duties on Russian AN.

59. With respect to Claim #5, Russia has substantiated that on the basis of the undercutting calculation, the EU concluded that import prices from Russia were likely, absent the anti-dumping measures, to be injurious.<sup>27</sup> Russia has substantiated that the EU violated Articles 3.1 and 3.2 of the AD Agreement by performing the undercutting calculation without conforming with the required standard for such analysis. The EU failed to use the export prices of Russian producers to the EU and failed to make the necessary adjustments to ensure that the prices of Russian imports and sales of the domestic industry were comparable. As a result, the likelihood-of-injury determination which is based on these flawed undercutting calculations is equally biased and inconsistent with Article 11.3 of the AD Agreement. Moreover, the EU also committed a stand-alone violation of Article 11.3 of the AD Agreement by selectively using the lowest Russian prices available on the file, thus failing to make an "objective examination" based on "positive evidence".

60. With respect to Claim #6, Russia has demonstrated that macro and micro data of the domestic industry that the EU used in its likelihood analysis did not cover IGAN and Stabilized AN. In particular, the complainants did not include IGAN and Stabilized AN producers and their data when preparing a request for the expiry review; the EU did not include IGAN and Stabilized AN producers in the domestic industry and in the sample and otherwise failed to collect data on IGAN and Stabilized AN and to use such data for the likelihood of injury determination.

61. The EU in its defense ventures in self-serving allegations to the effect that it did not treat as the domestic industry only EU producers of FGAN or that the EU did in fact consider EU industry data on all FGAN, IGAN and Stabilized AN. These allegations are not supported by evidence and should be rejected. In addition, on two crucial factual issues the EU has completely reversed its position in the course of this dispute settlement proceeding. While initially the EU made a surprising allegation that Stabilized AN is not produced in the EU at all, it later alleges that Stabilized AN is produced and

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<sup>27</sup> Commission Implementing Regulation 999/2014, Exhibit RUS-66, recital 160.

sold in the EU and that data Stabilized AN was reflected in column of the April 2014 dataset. On the issue of the product coverage of the April 2014 dataset that appears to be the basis for macro-indicators in the Regulation 999/2014, the EU went from alleging that the respective column in that dataset covered IGAN to now alleging that it covers Stabilized AN. The EU however fails to provide any evidence in support of its allegations.

62. Concerning the sample of EU producers whose data was used to set the micro-indicators, the EU again fails to provide any evidence that such data covered IGAN and Stabilized AN. For example, the EU alleges that the EU industry provided data on Stabilized AN in respective column of April 2014 dataset. However, it clearly follows from the Panel record that data in that column was submitted by three companies, two of which were not sampled. It is not contested by the EU that the third company only filed data for FGAN and not Stabilized AN. Thus, micro-indicators do not cover Stabilized AN either.

63. Russia submits that omission of IGAN and Stabilized AN from the analysis of macro and micro indicators of the domestic industry entirely taints the EU's likelihood of injury determination which was made for FGAN only. The EU does not contest that by failing to consider data relating to IGAN and Stabilized AN the EU failed to account for the data of close to 50% of the EU production and consumption of AN under the antidumping duties. On that basis Russia maintains that the EU acted in breach of Articles 11.3, 3.1, 3.4 and 4.1 of the AD Agreement.

64. With respect to Claim #7, Russia has substantiated that the likelihood-of-injury analysis must rest on a "sufficient factual basis" allowing to draw "reasoned and adequate conclusions", pursuant to Article 11.3 of the AD Agreement. In that context, the requirements of "positive evidence", "objective examination" and "firm evidentiary foundation" enshrined in Article 3.1 of the AD Agreement are equally relevant in the context of an expiry review.<sup>28</sup>

65. Russia has provided detailed arguments that the EU's conclusion that the non-injurious situation of the EU domestic industry was not sustainable is inconsistent with Articles 3.1 and 11.3 of the AD Agreement. The EU cherry-picked the information that best suited a finding of likelihood-of-injury, without having due regard to the "positive evidence" submitted by interested parties and thereby failing to conduct an "objective examination" that rests on a sufficiently "firm evidentiary foundation". Thus, the likelihood-of-injury determination made by the EU is inconsistent with Articles 11.3 and 3.1 of the AD Agreement.

66. With respect to Claim #8, Russia has demonstrated that the EU's calculation of spare production capacities is not objective and does not rest on positive evidence in violation of Articles 11.3 and 3.1 of the AD Agreement. Russia has provided detailed arguments and supporting evidence that the determination of Russia's AN spare production capacities is not objective and does not rest on positive evidence due to: (a) the lack of a single, coherent methodology to set the level of spare production capacities in Russia; (b) rejection of nameplate production capacity; (c) rejection of production capacity in Russia as reported by reputed industry sources; (d) manifestly erroneous determination of the level of the production capacity and (e) erroneous exaggeration of the level of capacity expansion plans.

#### 7.5 CLAIMS WITH RESPECT TO THE CONDUCT OF THE EXPIRY REVIEW

67. With respect to Claim #16, Russia argues that delay in accessing non-confidential information submitted by interested parties can violate Articles 6.1.2 or 6.4 of the AD Agreement, even if interested parties were eventually able to make some form of presentations. This is irrelevant under Article 6.1.2 of the AD Agreement and does not demonstrate that Russian producers had "timely opportunities" within the meaning of Article 6.4. Russia maintains that on four occasions, the EU delayed access to non-confidential information for Russian producers in breach of Articles 6.1.2, 6.4 and 11.4 of the AD Agreement. The EU justifies these delays by the need to process documents and ensure that no confidentiality concern arises under Articles 6.5 and 6.5.1 of the AD Agreement. Such an *ex post* justification fails however to the extent, by contrast, submissions made by Russian producers were immediately added to the non-confidential file.

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<sup>28</sup> See Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284 and *US – Corrosion-Resistant Steel Sunset Review*, para. 178.

68. With respect to Claim #17, Russia argues that whether or not the subsequent consolidated request contains all the information contained in the original request is irrelevant. Pursuant to Article 6.1.3 of the AD Agreement, the investigation was not initiated based on the consolidated request, but based on the 28 March 2013 original request, as made clear in the notice of initiation.

69. With respect to Claim #18, Russia challenges the EU's confidential treatment of information for which no "good cause" was shown, and in particular two expert reports submitted by Fertilizers Europe on 24 March and 14 May 2014. Russia considers that "good cause" was simply presumed in relation to the 14 May 2014 report and insufficiently substantiated in relation to the 24 March 2014 report.

70. With respect to Claim #20, the EU's defense rests on the mere allegation that, insofar as it considers that it did not apply "facts available", it did not have to abide by the WTO discipline. The EU however cannot rely on its own qualifications of its actions to determine whether or not such actions should comply with the provisions of the AD Agreement. Russia has demonstrated that the EU's refusal to rely on information provided by Russian exporters with regard to capacities did not conform with Articles 6.8 and 11.4 and paragraphs 3, 5, 6 and 7 of Annex II of the AD Agreement.

71. With respect to Claim 21, Russia challenges the EU's failure to disclose (i) the so-called "article 14(6) database", which it used to determine import statistics, (ii) its dumping calculations and (iii) its undercutting and underselling calculations. This information, and not just the source of that information, has never been disclosed and yet the EU relied on it in its likelihood-of-dumping and likelihood-of-injury determinations. Such information was part of the "essential facts under consideration which form the basis for the decision whether to [extend the anti-dumping measures]". Failure to disclose this information violates Articles 6.9 and 11.4 of the AD Agreement.

## ANNEX B-4

### SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

#### 1 **INTRODUCTION**

1. Pursuant to paragraph 23 of the Panel's Working Procedures, the European Union now provides a second integrated executive summary of the facts and arguments presented in the European Union's (i) second written submission, (ii) second opening oral statement, (iii) second closing oral statement, (iv) responses to questions following the second substantive meeting and (v) comments on the responses to the questions following the second meeting.

#### 2 **"AS SUCH" CLAIMS ON CERTAIN PARTS OF ARTICLE 2(3) AND ARTICLE 2(5) OF THE BASIC REGULATION AND AN ALLEGED "COST ADJUSTMENT METHODOLOGY"**

##### 2.1 FIRST SUBPARAGRAPH OF ARTICLE 2(3) OF THE BASIC REGULATION

2. With regard to the "as such" claims, the EU disagrees with Russia's argument that the first subparagraph of Article 2(3) of the Basic Regulation would be inconsistent with Article 2.2 of the AD Agreement. Russia is unable to demonstrate that the phrase "provided that those prices are representative" in Article 2(3) refers to anything other than the "export prices". This is the only instance in the first subparagraph of Article 2(3) where the term "prices" is used. Contrary to what Russia suggests, the phrase does not refer to the "cost of production". Russia has produced no EU court judgement containing such a statement, no EU administrative act containing such a statement and no other document of any kind containing such a statement.
3. Russia's references to the term "representative" in other provisions of the Basic Regulation do not alter this. Indeed, neither Article 2(2) nor the second subparagraph of Article 2(5) support Russia's affirmations with regard to the final phrase of the first subparagraph of Article 2(3). The EU also explained that the change of the words "those prices" into "these prices" was the result of a linguistic review in 1995 without any legal consequences whatsoever. Russia's arguments are thus grounded on an erroneous understanding of this final phrase. Therefore, its claim must fail.

##### 2.2 SECOND SUBPARAGRAPH OF ARTICLE 2(3) OF THE BASIC REGULATION

4. Russia next argues that the second subparagraph of Article 2(3) of the Basic Regulation would be inconsistent with Article 2.2 of the AD Agreement because it would extend the concept of "a particular market situation for the product concerned" beyond the situation described in the second Supplementary Provision to paragraph 1 of Article VI of the GATT 1994. The EU notes that the second subparagraph in Article 2(3) does not *oblige* the Commission to find that a particular market situation exists when prices are artificially low. Such determinations are case-specific, as is demonstrated by the use of the words "may be deemed to exist" in Article 2(3). When a measure is not mandatory, but rather discretionary, a panel should conclude that it is not "as such" inconsistent with the covered agreements.
5. Russia explained that its argument in respect of Article 2(3) of the basic AD Regulation is not only that "a particular market situation" can – in Russia's view – only relate to the exporting Member's market as a whole, but also that no "particular market situation" can ever arise from a situation where prices are "artificially low". With regard this argument, the European Union has explained that nothing in the terms of Article 2.2 limits its meaning in that way. On the contrary, the whole sense of Article 2.2 is that an investigation is underway with respect to a particular exported product, and that normal value will in principle be established with respect to a particular like product. Therefore, all the indications are that the market in question does not necessarily have to be country-wide, but that it may pertain to a particular product, including the product under investigation. This is also confirmed by the

panel in paragraph 7.32 of the recent panel report in *Australia – Anti-dumping measures on A4 Copy Paper*.

6. In this context, Russia claims that it is possible that authorities find that prices are "artificially low" because of government regulation. Russia suggest that such would be inappropriate because there is no use of the words "government regulation" in Article 2.2 of the AD Agreement. Yet, the absence of these words does not mean that the term "particular market situation" could not arise from a situation where prices are "artificially low", which is the question that the Panel asked. Moreover, Article 2.2 does not impose, nor prohibit, any test for determining whether a "particular market situation" exists.
7. More generally, Russia's argument shows that its approach to interpretation of WTO law is essentially that what is not explicitly allowed, is prohibited. This approach is incompatible with Article 17.6 (ii) of the AD Agreement, which states that when different permissible interpretations are available, "the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations". In fact, in paragraph 7.32 of the panel report in *Australia – Anti-Dumping Measures on A4 Copy Paper*, the panel agreed that a situation of a low-priced input is not necessarily disqualified from constituting a "particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement.

#### 2.3 SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION

8. Russia's third "as such" claim concerns the second subparagraph of Article 2(5). Russia argues that, because this second subparagraph permits the Commission to use costs other than cost of production in the country of origin as evidence for constructing the normal value, it would be "as such" inconsistent with Articles 2.2.1.1 and 2.2 of the AD Agreement.
9. Russia claims that the EU Commission would have relied on the phrase "cannot be used" in the second subparagraph of Article 2(5) of the basic AD Regulation to reject input costs of other producers or exporters in the country of origin. Russia cites a number of paragraphs from certain Council Regulations. However, none of the cited paragraphs concern the application of the second subparagraph of Article 2(5) of the AD Agreement.
10. The European Union recalls that, contrary to Russia's assertion, the second sub-paragraph of Article 2(5) of the Basic Regulation (the measure at issue) does not address the question of whether or not the costs of other producers or exporters in the same country could or could not be used. As the Appellate Body has already found<sup>1</sup>, it neither mandates such a possibility nor precludes it: it simply does not address it.

#### 2.4 ALLEGED "COST ADJUSTMENT METHODOLOGY"

11. Russia further challenges what it calls "the cost adjustment methodology", allegedly used by the European Union in anti-dumping proceedings. However, such a "cost adjustment methodology" simply does not exist, and Russia is unable to demonstrate otherwise.
12. Russia lists a number of determinations in antidumping investigations. The determinations listed are fact-specific and one cannot derive a general rule from them. They concern individual applications of the relevant provisions of the EU's basic AD Regulation. These determinations concern different countries (Russia, Ukraine, Algeria, Croatia, Libya, Croatia, Argentina, Indonesia...); different products (tubes, pipes, urea, ammonium nitrate, potassium chloride, ferro-silicon, biodiesel...); and different reasons for rejection (regulated prices, abnormally low prices, export taxes...).
13. There is no indication that the competent authorities could not reach a different conclusion in the future depending on the facts of the case before them. Russia also has been unable to identify any law, regulation, administrative guidance, or anything of the like that would require the European Commission to make a particular assessment in the future. Such assessment on the reliability of cost data (or any other data that is used to determine whether there is

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<sup>1</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.242-6.244.

dumping, i.e. exporting at a price below the normal value) will crucially depend on the facts of the case.

14. When Russia brings an "as such" challenge against a measure, that means that it makes such a serious challenge in order to seek "to prevent [the European Union] *ex ante* from engaging in certain conduct". That is only possible if the measure has "general and prospective application". In case of a written measure, this means that Russia would seek to remove this rule or norm from the EU's rulebook. In case of a challenge against an unwritten measure, Russia seeks to prevent the European Union from applying the alleged unwritten measure in the future. However, in the latter case, Russia should not only demonstrate that this alleged unwritten measure actually *exists*, but also that it is *attributable* to the European Union and the *precise content* of that measure – something that Russia has failed to do. Russia requests the Panel to simply "divine[] the existence of a measure in the abstract".<sup>2</sup> Russia must also demonstrate its "general and prospective application" in the future. This is something that Russia has not even started to do.

**3 CLAIMS CONCERNING THE EXPIRY REVIEW AND THE DECISION ON EXTENSION OF ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF WELDED TUBES AND PIPES ORIGINATING IN THE RUSSIAN FEDERATION**

15. With regard to Russia's "as applied" claims in respect of welded tubes and pipes, the EU disagrees that it acted inconsistently with the AD Agreement in finding that the available data on gas prices in Russia could not be used for determining the cost of production.
16. The European Commission rejected the gas costs in Russia because they are regulated prices far below the market prices paid in unregulated export markets for Russian natural gas. The European Commission rejected these costs in accordance with Article 2(5) of the Basic Regulation.
17. This provision is entirely consistent with Article 2.2.1.1 of the AD Agreement. Indeed, the circumstances in which data or information in the records of the firm may be rejected are highly fact dependent. This may arise from the failure to respect either of the two express conditions set out in Article 2.2.1.1 of the AD Agreement. It may also arise in other circumstances, notably those captured by the terms "For the purpose of paragraph 2" and "normally" that appear in the first sentence of Article 2.2.1.1. That includes, for example, the existence of a "particular market situation" within the meaning of Article 2.2 of the AD Agreement. It also includes, the existence of an association or compensatory arrangement rendering the relevant data unreliable.
18. Russia claims that the "adjustment for local distribution costs made by the EU does not ensure that the adjusted or established costs represent the cost of production in the country of origin". Rather than explaining with facts and evidence why this would not be the case, Russia refers to an explanation that the European Union made in its second written submission. The European Union explained, with reference to WTO case-law, that the "adjustment" required when an investigating authority relies on a proxy to establish the cost of production in the country of origin when it has rejected the recorded costs not suitable for its normal value determination, cannot be such that the investigating authority arrives again at the distorted price.
19. Yet, that does not mean that the EU does not make adjustments, when necessary and substantiated, to ensure that the appropriate proxy data used represents the "cost of production in the country of origin". The Commission does make the appropriate adjustments to ensure that the costs used correspond to those of the producer in the country of origin (but necessarily unaffected by the distortion that was identified). Whether or not an adjustment to such data is necessary and has been substantiated depends on substantive facts, such as the existence or absence of taxation in the other representative market. But it will also depend on the procedural context, such as whether or not the justification for and

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<sup>2</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 204.

amount of any adjustment claimed has been duly substantiated by the interested party making the claim.

20. In the welded pipes and tubes determination, the Commission made an adjustment for local distribution costs, ensuring that the costs represent the cost of production in the country of origin.

**4 CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF AMMONIUM NITRATE FROM THE RUSSIAN FEDERATION AND THE UNDERLYING INVESTIGATIONS**

**4.1 CLAIMS WITH RESPECT TO THE PRODUCT SCOPE OF THE APPLICABLE MEASURES**

**4.1.1 First Claim: application of measures on IGAN and stabilised AN**

21. Claim #1 should be rejected, first, because under Article 18.3 of the AD Agreement, WTO law does not apply to the product scope determinations at issue. Article 18.3 does not just govern the transition from the Tokyo Round Code to the current AD Agreement, as Russia claims. In *Brazil - Desiccated Coconut*,<sup>3</sup> the Appellate Body did not state that Article 18.3 of the AD Agreement does not govern newly acceding WTO Members.
22. Article 18.3 of the AD Agreement determines the temporal application not just of the obligations of the Members imposing measures, but also of the *rights* of other Members. Russia's argument that the temporal scope of the AD Agreement is irrelevant because it is challenging the "continuous levy of anti-dumping duties", should be rejected because it would read Article 18.3 out of the AD Agreement and improperly allow Russia to retroactively rely on the AD Agreement. As for Article VI.6(a) of the GATT 1994, it explicitly assumes that there is a WTO Member, or contracting party to the GATT 1994, on *both* sides. Its reference to "levying" cannot change the fact that WTO law does not apply to a pre-WTO product scope determination just because there was a post-WTO expiry review.
23. Russia has not shown that any impermissible "extension" or change of the product scope took place in the expiry review. Also, there was an original investigation into all relevant imports. The product concerned was defined, ever since the original measure, as simply "ammonium nitrate", regardless of use. Hence, data for IGAN was not collected separately from data for other sub-types. As for Stabilised AN, the measures only ever applied proportionally to the content of Stabilised AN which corresponds to the product concerned, with respect to which dumping margin calculations were performed, starting from the original determination in 1995 and most recently in Regulation (EC) No 661/2008.
24. Russia refers to the alleged failure of certain submissions by EU interested parties to include certain data regarding IGAN and Stabilised AN. This is irrelevant. In any anti-dumping investigation or review, certain domestic producers will not be known, and there may be issues with the completeness of the data. This does not bear out the sweeping claims made by Russia. In any event, the EU has shown that data concerning producers of both IGAN and Stabilised AN was taken into account in the expiry review. The 2014 Regulation defined the domestic industry as all domestic producers of the like product, and not in terms of three distinct sub-categories of products that would need to be assessed separately. It is not legally required that all sub-categories of the product under consideration or of the like product must be "like" each other, and Russia's arguments on the alleged absence of likeness are anyway *ex post*. The EU has also shown that AD duties were levied on IGAN before 2014. Moreover, during the review, RFPA understood and argued IGAN should always have been considered as falling under the products described internationally, in the HS System, as "fertilizers".

**4.1.2 Second claim: initiation of the expiry review that led to Regulation 999/2014**

25. A mere decision to initiate, or an expiry review request on which it is based, are not required to follow a particular "methodology", examine specific "factors", or contain a specific "type or

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<sup>3</sup> Russia's SWS, para. 737.

quality" of evidence, in all cases. The Panel in *Guatemala – Cement II* explained that, even with respect to original investigations to which Articles 2 and 3 of the AD Agreement fully apply, the decision to initiate cannot be subject to the same evidentiary standards as a final determination.<sup>4</sup>

26. In an expiry review, the standard for the final likelihood determination is that of probability.<sup>5</sup> The standard for initiation must be lower. In order to "duly substantiate" an expiry review request, the applicant must put forward facts and evidence, not limited to any particular "type or quality", that make it *plausible* that dumping and injury will continue or recur in the future, should measures lapse. It is then for the authority, after a contradictory process of "reconsideration and examination", to assess if all the facts and evidence make it *probable* that dumping and injury will recur in the future, should measures lapse. The standard proposed by Russia is incorrect, because it would require an expiry review request to demonstrate, with certainty, present dumping and injury in the importing country's market.
27. Russia now seems to accept that the petitioner did not request any extension of the product scope. The petitioners simply claimed that the measure, as in force at the time, should be extended *in time*. Indeed, there is no reason to require either the petitioner or the authority, at the stage of initiating an expiry review, to revisit the product scope of the existing measure. It is therefore unclear if claim #2 has any independent content left. In any case, the EU has shown that request was supported by producers of IGAN, some of which were included in the sample as well. Neither the data on the product under consideration nor the data on the domestic like product needed to be assessed separately for FGAN, IGAN and Stabilised AN, whether in the expiry review request or in subsequent submissions and evidence.
28. In an expiry review, an anti-dumping measure is already in place, and what must be "duly substantiated" is, at best, whether dumping and injury are *likely* to continue or recur. Thus, an expiry review request may still contain certain deficiencies or gaps, which can be subsequently corrected or completed on the basis of evidence collected during the proceedings. Learning of such deficiencies later on and correcting them is precisely the purpose of the expiry review, and it does not make the expiry review request retroactively, even if the expiry review request did not include certain domestic production unlawful. Therefore data on IGAN and Stabilised AN, this would not in and of itself show that the request was not "duly substantiated."
29. Similarly, any inconsistency of the dumping margin calculation presented in the expiry review request with Article 2 could not make the decision to initiate (and hence the determination as a whole) WTO-inconsistent. The EU disagrees with Russia that any request for expiry review must calculate a dumping margin and demonstrate present dumping in accordance with the requirements of Article 2 of the AD Agreement.
30. Just as the expiry review request is not required to conclusively demonstrate probable continuation or recurrence of dumping, so are authorities not bound by the type of evidence relied upon, the methodology used, or the specific allegations presented in the expiry review request. The differences between the request and the final determination do not show that the expiry review request was not duly substantiated. The petitioners presented a plausible case of likelihood or continuation of dumping. Then, upon conducting contradictory review proceedings and assessing all the facts and evidence before it, the authority came to the conclusion that there was a likelihood of recurrence, but not of continuation. It did not follow the same methodology as the petitioners, as it was not required to do.

#### **4.1.3 Third claim: the European Union did not err by failing to conduct a separate expiry review for the imports of Kirovo**

31. Russia's claim is that a separate company-specific likelihood determination should have been made for Kirovo. The EU disagrees that such a determination should, or could, have been made. Fertilizers Europe was unable to separate Kirovo's confidential import data out of the customs statistics. The Commission could do so during the proceedings. Indeed, the measure was not actually based on Kirovo's data, as is clear from Regulation 999/2014. The quantity

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<sup>4</sup> Panel Report, *Guatemala – Cement II*, para. 8.35.

<sup>5</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111.

of Russian exports to the EU during or preceding the RIP was in any event not the basis for the Commission's finding of the likelihood of recurrence of dumping and injury. Kirovo's Stabilised AN exports were not within the product concerned. Nevertheless, it is conceivable that such exports could be indirectly relevant evidence that could be taken into account for other purposes, such as assessing Kirovo's production capacity that could be redirected.

32. The EU also recalls that the applicant is not required to show *probable* recurrence of dumping and injury, and it is not required that every piece of evidence contained in its request is relevant to the authority's ultimate likelihood determination. The inclusion of a piece of superfluous evidence cannot, in itself, mean that the request is not "duly substantiated".

**4.1.4 Fourth claim: the European Union did not err by failing to correctly define the domestic industry and did not rely on erroneous or incomplete data**

33. From the very beginning, the Union industry was defined as all known producers of AN in the Union during the period considered.<sup>6</sup> The alleged incompleteness of certain datasets provided by the interested parties cannot in itself show an error in the definition of the like product or the domestic industry. Indeed, when receiving data from EU interested parties, the Commission considered that this covered all relevant injury indicators (including production) for the like product as originally defined,<sup>7</sup> including IGAN. When the opposite was suggested, the Commission went back to the industry, requested corrections, and reflected them in its determination.
34. The evidence (such as the April and May 2014 datasets) irrefutably shows that data concerning IGAN and Stabilised AN producers was considered when assessing the state of the domestic industry, including in the sample. Moreover, the alleged discrepancies between the April and May datasets would have made no difference whatsoever. Both sets of figures suggest the same thing: injury indicators during the RIP were stable, and there was a non-injurious situation.
35. Even if this was relevant or necessary, it would be Russia's burden to show that none of the producers in the domestic industry or in the injury sample were producers of Stabilized AN. Russia cannot make that showing by attempting to shift the burden on the EU, or by alleging that an individual producer's *data* was not fully provided in a particular submission.

**4.2 CLAIMS WITH RESPECT TO THE DETERMINATION OF THE LIKELIHOOD OF RECURRENCE OF DUMPING**

36. The requirement for an investigating authority to arrive at a "reasoned conclusion" as to the likelihood of continuation or recurrence does not have to be satisfied through a specific methodology or the consideration of particular factors in every case. What is important is that the factors provide a sufficient factual basis for a conclusion of likely future recurrence of dumping. In the 2014 Regulation, the Commission relied upon three such factors: prices of exports from Russia to other destinations; spare capacities of Russian producers; and incentives to redirect sales volumes to the EU.
37. Russia bends the 2014 Regulation out of shape to make it look like something it is not (a dumping margin determination) in order to then subject it to disciplines that do not apply (Article 2). The Commission was not required to, and did not in fact, engage in a dumping margin calculation. It compared certain Russian prices with certain export prices to third countries, as only one part of the evidence relevant to whether or not dumping is likely to recur. There are several reasons why the Commission did not calculate a dumping margin on the basis of Russian exports to the EU, and one of them is the fact that all Russian exports during the period under review were made under a price undertaking. The EU does not claim that prices recorded under price undertakings can never be used to establish an export price. However, in this particular case, such prices were not probative for several reasons. As the Commission found, for example, Acron's export prices were, in fact, "determined by that price undertaking". To show otherwise, Russia would have to explain that the price undertaking had

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<sup>6</sup> Regulation 999/2014 (Exhibit RUS-66), recital 98.

<sup>7</sup> Of note, Russia's SWS, para. 820, points out that already "the Request itself covered IGAN and Stabilized AN".

no impact on the exporters' prices. This showing has not been made, and could not have been made.

38. Russia is incorrect that, whenever an investigating authority assesses the likelihood of recurrence of dumping, Article 2 applies.<sup>8</sup> An investigating authority engaged in a determination of likely future dumping may rely on methodologies that do not involve the calculation of dumping margins, other types of evidence related to dumping, or to the "general concept of dumping." This can also involve a "price-to-price" comparison of Russian domestic prices and export prices to third countries. This is not a determination of dumping. As the Appellate Body explained in *US – Corrosion Resistant Steel Sunset Review*, dumping is the introduction of product at less than normal value "into the commerce of the importing country,"<sup>9</sup> and not an analysis of sales that are *not* to the importing country but to a *third* country.
39. The panel in *US - Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* similarly distinguished "determination[s] of dumping subject to the full requirements set out in Article 2" and mere "analys[es] relating to the concept of dumping". For the latter, the requirement is merely that they must have a "sufficient factual basis", which means that they may not be contrary to the "core principle of dumping as a price-to-price comparison".<sup>10</sup> In this case, it is undisputed that the Commission conducted a "price-to-price comparison", which means there is a "sufficient factual basis". Because "future "facts" do not exist,"<sup>11</sup> a likelihood determination can be based on evidence from the past and the present, even though it is prospective. Authorities are allowed to rely on evidence that is indirect or to some extent removed from the actual future dumping at issue. The evidence can, for example, be removed in time (because it refers to an earlier or current time period), or geographically (because it refers to another jurisdiction).
40. Finally, concerning domestic production capacity, the evidence shows that Commission verified and adjusted the reported capacities, notably on the basis of actual production data. Thus, the same approach was used for calculating the production capacity of Russian and EU producers.

#### 4.3 CLAIMS WITH RESPECT TO THE CONTINUOUS LEVYING OF THE ANTI-DUMPING DUTIES

41. In making its claims with respect to the continuous levying of AD duties on AN from Russia, Russia seeks to apply WTO law *retroactively* to determinations made by the Commission *before* Russia was a Member of the WTO. Yet, there does not exist in the AD Agreement an obligation to revisit each and every aspect of AD determinations made before the WTO obligations applied between two WTO Members.
42. In line with Article 18.3 of the AD Agreement, the AD Agreement applies to Regulation 2018/1722 as well as Regulation 999/2014. These are reviews of existing measures, initiated pursuant to applications, which have been made *after* the date of entry into force between Russia and the European Union of the WTO Agreement.
43. Conversely, the AD Agreement does *not* apply to pre-WTO determinations, such as Regulation 661/2008 or Regulation 658/2002. Any other approach would mean the WTO-law is applied retroactively to determinations made at a time when the investigating authorities were not faced with goods coming from a WTO Member.
44. In this particular case, the aspects of the pre-WTO Regulations 661/2008 and 658/2002 that Russia claims are WTO-inconsistent are *not* covered by the scope of the post-WTO review in Regulations 2018/1722 and 999/2014.

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<sup>8</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127; Panel Report, *EU – Footwear (China)*, para. 7.157.

<sup>9</sup> Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 109.

<sup>10</sup> Panel Report, *US - Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 7.75 and 7.77.

<sup>11</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.279.

45. Russia claims that "the rate of the anti-dumping duty [set in Regulation 2018/1722] is based on dumping margins that were established either in 2008 or 2002 with the use of the gas cost adjustment and the methodology for non-market economy". Russia errs. The EU has demonstrated that the AD duties are *not* "based on dumping margins" but on the *injury margin*. In fact, Russia acknowledges this explicitly, stating that "[t]hese dumping margins [calculated in 2008 and 2002] resulted in the imposition of currently applied anti-dumping duties *based on injury margin*".
46. More specifically, with regard to EuroChem, the duties levied on imports of AN of EuroChem are based on Regulation 2018/1722. This Regulation does not contain a dumping determination. It only contains a likelihood of recurrence of injury determination and sets an injury margin as part of the interim review. It provides that the level of the duty imposed on imports of AN of EuroChem is not based on the dumping margin, but rather on the *injury margin* calculated in the third partial interim review of 2018. Hence, the duty levied on the imports of AN of EuroChem is not based on the dumping margin, and thus not affected by an alleged inconsistency in the manner in which such dumping margin would have been calculated for AN.
47. Next, with regard to the country-wide AD duties on AN from Russia, there is no aspect of the pre-WTO Regulation 658/2002 that Russia claims is WTO-inconsistent that is covered by the post-WTO Regulation 2018/1722.
48. The AD duties that are currently levied on AN products from Russia are based on Regulation 2018/1722. In this 2018 Regulation, the Commission did not rely on a dumping margin to set the level of the duties. Rather, it set the duty based on the injury margin determined in the 2018 interim review.
49. The 2002 interim and expiry review did not base the duty level on the dumping margin either. Indeed, the 2002 interim and expiry review applied the lesser duty rule in Articles 7(2) and 9(4) of the Basic Regulation and based the duty on the injury margin.

#### 4.4 LIKELIHOOD OF RECURRENCE OF INJURY

##### **4.4.1. Claim #5: The EU did not make price undercutting calculations and was not obliged to make such calculations**

50. With respect to injury, the EU recalls that no price undercutting calculations were made, or were even obliged to be made under WTO law, as part of the likelihood of recurrence of injury determination in Regulation 999/2014. Russia's claims based on alleged price undercutting calculations are thus baseless in fact and law. In Russia's view, the likelihood-of-injury determination can rest on a sufficient factual basis and can be regarded as a reasoned conclusion *only* after undertaking all the analyses detailed in the paragraphs of Article 3. The Appellate Body has explicitly rejected such an approach to likelihood of recurrence of injury determinations in reviews.
51. Contrary to what Russia argues, the Commission could not consider prices of Russian imports in its likelihood of recurrence of injury analysis. In fact, Russia thereby claims that the Commission should have based its analysis on unreliable information. However, the Commission needed to arrive at reasoned conclusions on the basis of positive evidence of the likelihood of recurrence of injury in its analysis under Article 11.3. The Russian import prices to the EU during the investigated period could not serve as positive evidence to reach such reasoned conclusions.
52. The export prices of the relevant Russian producers to the EU were subject to a price undertaking, which involves a minimum price and a cap on quantity. Such prices are typically not reliable indicators of future price movements in the absence of a price undertaking. A price undertaking is, of course, a part of the very same measures that are under expiry review. To use such export prices, therefore, is to assume that the export prices *without* the measure would be exactly the same as the export prices *with* the measure, i.e. that the price undertaking has no impact on the price. The underlying record does not support any such assumption.

53. Moreover, the Commission also considered, and explained, the fact that Acron was the sole supplier to the EU for a significant part of the review investigation period, making its prices even less reliable. Further, EuroChem's prices could not be taken into account because of a failure to cooperate in the expiry review.
54. Therefore, given the specific circumstances of this case, the Commission reached the adequate and well-reasoned conclusion that export prices to the EU were not a reliable indicator on which to base its likelihood of recurrence of injury analysis.
55. Export prices to third countries were the most reliable basis available for determining whether the likely prices of additional Russian exports to the Union would be at such level that it would be attractive for the Russian producers to redirect their exports from third countries to the Union in case the AD measures would lapse and whether injury to the domestic industry would likely reoccur.

**4.4.2. Claim #6: The EU made use of a representative sample of the domestic industry and used representative and correct data**

56. Russia also argues that that the European Commission would have based its likelihood of recurrence of injury determination on data relating to a non-representative sample of the domestic industry. Russia is mistaken.
57. The EU recalls that the Commission defined the Union industry as "the known producers of AN in the Union during the period considered". The Union industry was composed of more than 25 companies. Russia argues that none of these producers "is a major producer of IGAN". Nonetheless, the EU has explained that the product concerned was AN, be it used for industrial or agricultural purposes. Regulation 999/2014 explicitly confirms that AN used for agricultural and industrial purposes "have the same technical and chemical characteristics, can easily be interchangeable and are considered as the product concerned". Therefore, the Commission correctly defined the domestic industry as the "known producers of AN in the Union during the period concerned". In any event, the known producers included producers of IGAN, for instance Yara France and GrowHow. The European Union thus did not act inconsistently with Article 4.1 of the AD Agreement since it did not treat as the domestic industry "only EU producers of FGAN", contrary to what Russia suggest.
58. Russia claims that no IGAN data was examined by the Commission. However, the category "AN" in the April and May submissions refers simply to AN, regardless of use. This means that the EU domestic industry would have reported its production of both FGAN and IGAN under that heading (which is in line with the understanding, confirmed by Russia, that IGAN was always included as part of the product concerned and the like product, under the same CN codes). The category "AN28", on the other hand, comprises what the EU industry describes as "dirty AN", which appears to be what Russia describes as "stabilised AN". Hence, the Commission did consider EU data on all three of the sub-categories identified by Russia during the expiry review. This concerns both macro and micro indicators, which were used for the total product, i.e. AN, not for each product type. So far as IGAN data was provided by the sampled companies, that data was integrated into the aggregate micro indicators. Russia is wrong to claim that IGAN data was only included in the macro data.

**4.4.3. Claim #7: The EU correctly concluded that there were no indications that the non-injurious situation of the EU domestic industry would be sustainable**

59. Russia further argues that the European Union's conclusion that the non-injurious state of the EU domestic industry was not sustainable does not rest on a sufficient factual basis.
60. However, the Commission found that consumption of the product concerned had decreased by 11% in the investigation period compared to previous years. The Commission examined all available verified evidence and based its reasoned conclusions on positive evidence, making an objective assessment. The consumption was established on the volume of sales of the Union industry in the Union market based on data provided by the applicant as well as on

imports from third countries based on actual data from the customs authorities of the Member States.

61. Russia continues challenging the Commission's finding, which was based on market analysis, that the "business cycle, as well as prices ... [were] projected to decline". Russia can only refer to another study with a 2013 outlook that in fact showed that prices were set to decline compared to 2008 or 2011 and were projected to decrease from 2013 to 2015. Russia's study is not able to rebut the Commission's conclusions, and Russia does not dispute the validity of the data that the Commission relied upon.
62. Further, with regard to the Commission's rejection of the argument that gas costs would be declining in the Union, Russia suggest that the Commission overlooked findings in the economic study of the farmers' associations. Yet, that study precisely demonstrated that the gas prices in the Union were higher than in other regions and were expected to rise. The Commission took the farmers' opinions further into account as part of the Union interest assessment.
63. Russia recalls its "most important point" being that the quotas under the price undertaking were not filled. In Russia's view, this would qualify the Commission's findings regarding the attractiveness of the EU market. The EU has explained that the market share of imports was of course influenced by the presence of AD duties and the price undertaking. The attractiveness must be considered in a forward-looking manner, if the measures were allowed to lapse. Russia takes a backwards-looking perspective, focusing on elements (in particular the price undertaking) that would precisely not be there anymore if the AD measures would be removed. The presence of a price undertaking, setting minimum import prices of AN into the EU, means that the normal functioning of supply and demand is annulled. The prices and volumes in the presence of such undertaking and AD measures can thus not be the basis for a conclusion whether Russian producers would redirect exports to the EU market.
64. The Commission also pointed to existing limits to additional Russian exports to third countries, which would remain in place, as well as the geographical proximity and established distribution chains in the Union. This further explains why Russian producers would prefer exporting to the EU market.

**4.4.4. Claim #8: The EU's conclusion that there was a likelihood of recurrence of dumping and injury was based on positive evidence, including the level of production capacities available**

65. Russia takes issue with the manner in which the Commission established the spare production capacities that were available in Russia.
66. Russia argues that "the EU's calculation of spare production capacities is not objective and does not rest on positive evidence". Russia argues that the methodology that the Commission used was to "inflate the level of Russia's AN production capacities".
67. However, rather than "inflat[ing]" the level of production capacities, the EU merely established, in an objective manner, what the AN production capacity of the Russian industry was and that could be used to address the EU market in case the AD measures would be removed. The Commission did this on an entirely objective basis: looking at the positive evidence on nameplate capacities and maximum production levels that was before it. There is nothing "biased" in such an approach.
68. Russia suggests that the fact that chemical plants can operate at more than 100% capacity utilization would show that the Commission was wrong to rely on evidence of higher than reported nameplate capacity. The EU fails to understand why that is the case. How can it not be permissible to adjust the declared capacity if evidence shows that the plant operated at a higher capacity? The EU also recalls that the Commission had evidence that companies had upgraded their capacities. Why should an investigating authority be obliged to ignore such evidence?

4.5 CLAIMS WITH RESPECT TO THE CONDUCT OF THE EXPIRY REVIEW INVESTIGATION

69. Russia's claims #18, #19, #21 and #22 should be rejected outright as insufficiently specified. At the very least, they should be rejected to the extent that Russia seeks to add new "instances" of alleged WTO-inconsistent conduct only in its responses to Panel Questions.
70. Regarding claim #16, the fact that interested parties actually made presentations shortly after receiving the evidence at issue is relevant both under Article 6.1.2 and 6.4. It sheds light on whether such evidence was "made available promptly". The fact that the information was provided "in sufficient time to allow the interested parties seeing the information to prepare presentations based on it" also shows that the authority acted in line with Article 6.4. At the very least, it would be Russia's burden to show why, even despite the fact that the alleged delays did not impede the interested parties from making presentations, the opportunities for access to information granted by the Commission were not timely. Moreover, Article 6.1.2 and Article 6.4 only apply to specific "information" and "evidence" identified by the complainant, and not to "access to the file" in the abstract.
71. Russia tries to stretch the duration of the alleged delays. It disregards the time necessary for processing documents, including for confidentiality reasons, and seeks to attribute to the EU delays that depended on the interested party (e.g. the period between the insertion into the non-confidential file and the company's actual access to the document). Many of the submissions referred to by Russia did not yet exist, or were not yet received by the Commission when the relevant access requests were made. Certain delays of several days are due to holiday periods during which the Commission was closed. Finally, Russia fails to substantiate its claim that, due to some alleged delays, there was no time for the Commission to take RFPA's presentations into account.
72. Regarding claim #17, the "request" which needs to be disclosed under Article 6.1.3 (read in light of Article 5.1 and Article 11.4), and which constitutes the "relevant" information that was actually "used" by the authority within the meaning of Article 6.4, is the request on the basis of which the expiry review was initiated. In this case, that is the consolidated request of 8 May. In any event, the extent to which the consolidated request contains the same information as the 28 March submission would clearly be relevant. The single difference between the documents of 28 March and 8 May identified by Russia (the omission of Yara GmbH) is marginal and unavailing.
73. Regarding claim #18, for all of the new instances of alleged failure to show good cause, good cause was provided by several explanations and specifications on the record. Especially for information that is confidential by nature, describing the nature of the information at issue and noting that the supplier would suffer adverse consequences if it was freely disclosed is sufficient. With respect to the claims made in Russia's first written submission, they are limited to the confidential treatment of the *source* of the expert reports. It was sufficient for the expert to show good cause for confidential treatment of their identity once, with respect to both reports. Good cause may be shown in respect of general categories of information.
74. Regarding claim #19, Russia has not demonstrated why the summaries would be inadequate. Injury indicators were summarised in aggregate form, which corresponds to the fact that the assessment of injury is performed with respect to the domestic industry as a whole. Given that the domestic industry was always defined as all EU producers of the like product, neither the Commission nor any interested parties were required to separately assess or report information with respect to sub-categories of the like product, individual producers or individual plants. Article 6.5.1 is not concerned with requests for additional explanations or for a different presentation of information, or, for example, with documents prepared by the investigating authority.
75. Regarding claim #20, the Commission did not use facts available, as it did not disregard any information provided by the interested parties. Indeed, had the Commission decided to base its conclusions solely on the nameplate capacity, it could be accused of improperly disregarding the *production* information provided by the interested parties. As the Appellate Body explained in *US – Steel Plate*, an investigating authority is required to do no

more than "consider" information submitted by a party, and is not bound by the submitting party's conclusions.

76. Regarding claim #21 (Article 6.9), Russia's SWS attempts to improperly expand the scope of its claim. In any case, Russia's allegations are not specific enough for the Panel to make any findings. Russia fails to specify *a single fact*, much less explain why it is essential.
  77. Regarding claim #22, Russia's allegations are not specific enough for the Panel to make any findings. They amount to highly abstract assertions about the quality of analysis in the 2014 Regulation (e.g. alleging that the Commission did not "appropriately address" product scope), or to re-statements of Russia's substantive claims.
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## ANNEX C

### ARGUMENTS OF THE THIRD PARTIES

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## ANNEX C-1

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA

#### I. INTRODUCTION

1. Argentina welcomes the opportunity to present its views to the Panel in the current proceedings.

2. As a third party, we have a systemic interest in the proper interpretation of certain provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter "Anti-Dumping Agreement") and of the General Agreement on Tariffs and Trade 1994 (hereinafter "GATT 1994"), which we consider fundamental for ensuring that anti-dumping duties are imposed in conformity with the Agreements of the World Trade Organization (WTO).

3. The current dispute addresses issues of paramount importance regarding the interpretation of Article 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. In particular, it addresses whether, when normal value is being determined, the said provisions of the Anti-Dumping Agreement allow WTO Members to:

(1) disregard actual costs incurred by exporters simply because the investigating authority finds that they are allegedly affected by government intervention;

(2) replace those costs with the costs of a third country that is unaffected by the alleged distortion;

(3) determine the existence of dumping and impose consequent duties on a basis other than the pricing conduct of the exporter under investigation.

4. In Argentina's opinion, the answers to these questions should be negative. Any claims to the contrary in this regard should not prevail, not only because there is no basis for them in any existing provision of the WTO Agreements but also because they have already been rejected by previous jurisprudence, as described below.

#### II. LEGAL STANDARD APPLICABLE TO THE DETERMINATION OF NORMAL VALUE

5. In its first written submission, Russia challenges the cost adjustment methodology used by the European Union (EU) in anti-dumping proceedings, since it considers that the said methodology violates Article 2.2.1.1 and 2.2 of the Anti-Dumping Agreement, inasmuch as the EU investigating authorities<sup>1</sup>:

(a) reject the costs reflected in the records kept by the exporter under investigation, when they view input costs and/or prices as "artificially or abnormally low" owing to alleged "distortions" or "market impediments" like government price regulation or the application of export duties in the country of origin; and

(b) replace and/or adjust such recorded cost data using the cost data obtained from other sources, including so-called "representative markets", which the EU authorities consider as being unaffected by such "distortions" or "market impediments", without ensuring that such adjusted or established costs represent the cost of production in the country of origin.

6. The EU, for its part, argues that the alleged cost adjustment methodology does not exist as a norm of general and prospective application and that Russia has been unable to demonstrate the existence or the precise content of the said methodology.<sup>2</sup>

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<sup>1</sup> Russia's first written submission, paras. 85 and 299.

<sup>2</sup> European Union's first written submission, para. 86.

7. As a third party, Argentina takes no position on the facts of this dispute. However, should the Panel find it necessary to assess the merits of the Russian complaint, Argentina puts forward the following considerations regarding the correct interpretation of Article 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

**II.1. Claim relating to the inconsistency of the adjustment methodology and the use of information from a third country in accordance with Article 2.2 of the Anti-Dumping Agreement.**

8. Firstly, Argentina recalls that the relevant part of Article 2.2 of the Anti-Dumping Agreement provides that: "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation (...) such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, (...) or with the cost of production in the country of origin (...)".

9. In interpreting this provision in **EU – Biodiesel (Argentina)**, the Appellate Body concluded that, in accordance with Article 2.2 of the Anti-Dumping Agreement, in calculating the cost of production, the investigating authority may not substitute the costs of a third country unaffected by the alleged distortion for the costs in the country of origin.

10. Specifically, in the above-mentioned dispute, the Appellate Body found and concluded that although "Article 2.2 does not specify precisely to what evidence an authority may resort", "[t]his (...) does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the 'cost of production in the country of origin'", and that "[i]ndeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the 'cost of production [...] in the country of origin'. Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin'".<sup>3</sup>

11. Argentina recalls that the Appellate Body's conclusions in **EU – Biodiesel (Argentina)** were recently reaffirmed by the Panel in **Ukraine – Ammonium Nitrate (Russia)**<sup>4</sup>, and that the Panel in **EU – Biodiesel (Indonesia)** also found no grounds for deviating from the said conclusions and findings of case DS473.<sup>5</sup>

12. Hence Argentina disagrees with the interpretation proposed by other third parties that appear to suggest that the reference to a "comparable price in the ordinary course of trade" or the need to use a suitable "proxy" in the absence of such operations empowers the authority: (a) to evaluate how government interference affects a "proper comparison"; and (b) to disregard even the costs of all the origin investigated, after the said authority has concluded that it would not be appropriate to establish a normal value based on those costs under such circumstances.<sup>6</sup>

13. In Argentina's view, a reading of Article 2.2 of the Anti-Dumping Agreement as put forward by these third parties – and which implicitly could be equivalent to disregarding the costs and prices of all the origin investigated, even in the case of market economies – should not prevail.

14. In this regard, in Argentina's view, Article 2.2 of the Anti-Dumping Agreement already takes account of the situation described by the above-mentioned third parties. Specifically, Article 2.2 provides that if the absence or insufficient level of sales in the ordinary course of trade does not permit a "proper comparison", the investigating authority must use one of the alternative methods established therein to remedy the situation.

15. Hence, Argentina disagrees with any interpretation that results in validating an additional method for calculating the margin of dumping, beyond the two methods already provided for in Article 2.2 of the Anti-Dumping Agreement for addressing such situations.

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<sup>3</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.73, 6.81 and 6.82.

<sup>4</sup> Panel Report, *Ukraine – Ammonium Nitrate (Russia)*, para. 7.99.

<sup>5</sup> Panel Report, *EU – Biodiesel (Argentina)*, paras. 6.73, 6.81 and 6.82.

<sup>6</sup> United States' third-party submission, paras. 6-12 and footnote 9.

16. Argentina understands that this conclusion is backed by the jurisprudence in **US – Anti-Dumping and Countervailing Duties (China)**, where the Appellate Body established once again that the second *Ad Note* to Article VI:1 of the GATT 1994 constitutes the sole legal basis for the use of surrogate values for all the origin investigated in the context of anti-dumping investigations.<sup>7</sup>

17. This was upheld by the Panel in **EU – Biodiesel (Argentina)**, which, in referring to "(...) the explicit provisions allowing investigating authorities to disregard domestic prices and costs when determining the normal value that are provided for under the second *Ad Note* to Article VI:1 of the GATT 1994 (which is incorporated by reference into the Anti-Dumping Agreement through Article 2.7 thereof) (...)", concluded that "[a]t the very least, these provisions suggest to us that their drafters considered explicit derogations to be needed in order to allow investigating authorities to use prices or costs other than those prevailing in the country of origin".<sup>8</sup>

18. Lastly, Argentina recalls that, in **EU – Biodiesel (Argentina)**, after concluding that when calculating the cost of production the investigating authority was not authorized to substitute the costs of a third country unaffected by an alleged distortion for the costs in the country of origin<sup>9</sup>, the Appellate Body concluded that the EU had acted inconsistently with Article 2.2 of the Anti-Dumping Agreement precisely for basing the cost of the main raw material used by producers of biodiesel on international prices instead of Argentine market prices.<sup>10</sup>

19. In this last regard, Argentina would like to draw the Panel's attention to the fact that, in line with the jurisprudence of **India – Patents (US)**, the principles of interpretation of treaties established in Article 31 of the Vienna Convention "neither require nor condone the imputation into a treaty of words that are not there (...)".<sup>11</sup>

20. In light of the foregoing, and given the existing wording of Article 2.2 and 2.7 of the Anti-Dumping Agreement, in Argentina's opinion, any interpretation of these provisions that results in authorizing the use of a dumping calculation method that entails the rejection of domestic costs and the replacement thereof with the costs of a third country unaffected by an alleged government "distortion" should be rejected, since market economies are involved, for supposing an undue expansion of the Anti-Dumping Agreement and the GATT 1994.

## **II.2. Claim relating to the phrase "particular market situation" in accordance with Article 2.2.**

21. In its submission, Russia contends that "the particular market situation" in Article 2.2 of the Anti-Dumping Agreement is restricted to "only one circumstance (...) which concerns a country's market as a whole", rather than "a particular market situation for the product concerned"<sup>12</sup>, and is restricted to the situation of a country that corresponds to the description of the second *Ad Note* to Article VI:1 of the GATT 1994.<sup>13</sup>

22. In this regard, Argentina disagrees with Russia regarding such a restrictive interpretation and, accordingly, concurs with other third parties that other situations may exist that could be defined as a "particular market situation" under the terms of Article 2.2 of the Anti-Dumping Agreement.<sup>14</sup>

23. However, at the same time, Argentina strongly disagrees with the position of certain third parties that appear to argue that establishing the existence of a "particular market situation" could, in the calculation of the margin of dumping, entail the use, in relation to market economies, of an exceptional method such as that provided for in the second *Ad Note* to Article VI:1 of the GATT 1994 for non-market economies.<sup>15</sup>

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<sup>7</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 569.

<sup>8</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.241.

<sup>9</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.73, 6.81 and 6.82.

<sup>10</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.81.

<sup>11</sup> Appellate Body Report, *India – Patents (US)*, para. 45.

<sup>12</sup> Russia's first written submission, paras. 138 and 147.

<sup>13</sup> Russia's first written submission, para. 144.

<sup>14</sup> Brazil's third-party submission, para. 15; United States' third-party submission, para. 22.

<sup>15</sup> United States' third-party submission, para. 22.

24. In this regard, Argentina reiterates that, according to the explicit text of Article 2.2 of the Anti-Dumping Agreement, if because of a "particular market situation" sales do not allow an adequate comparison, with regard to market economies, the dumping margin must be determined by the authorities, by means of one of the two alternative methods already established in this provision.

25. In Argentina's view, this interpretation is supported by the jurisprudence of the Appellate Body in **EC – Fasteners (China) (Article 21.5 – China)**, where the latter concluded that Article 2.7 of the Anti-Dumping Agreement and the second *Ad Note* to Article VI:1 of the GATT 1994 constitute the only legal provisions in the agreements on the basis of which investigating authorities can validly replace all domestic costs and prices with those of a third country.<sup>16</sup>

26. Furthermore, bearing in mind the lack of a definition of the phrase "particular market situation" in Article 2.2 of the Anti-Dumping Agreement, Argentina would point out that it concurs with Brazil that the Panel Report in **EEC – Cotton Yarn** can constitute a suitable benchmark for interpretation in the present dispute inasmuch as the said Report states that "[a] 'particular market situation' [is] only relevant insofar as it [has] the effect of rendering the sales themselves unfit to permit a proper comparison (...) it would be necessary, in the Panel's view, to establish that it affects the domestic sales themselves in such a way that they would not permit a proper comparison."<sup>17</sup>

27. Lastly, and still bearing in mind the lack of a definition in the Anti-Dumping Agreement, Argentina would also emphasize that it concurs with Brazil that, for the purpose of determination of a "particular market situation" in accordance with Article 2.2, "(...) the mere fact of government participation or presence in a given market – short of the situation described in the first *AD Note* to Article VI of the GATT 1994 – does not in itself indicate price distortions that should warrant a deviation from the use of in-country prices by the investigating authority".<sup>18</sup>

### **II. 3. Claim relating to the inconsistency of the adjustment methodology with the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement**

28. First of all, with regard to the fact that Russia challenges the rejection of costs when those costs are considered "artificially or abnormally low" owing to alleged "distortions" or "market impediments", Argentina considers the jurisprudence in **EU – Biodiesel (Argentina)** to be illustrative.

29. Firstly, we recall that, in the said dispute, the Appellate Body, when interpreting the scope of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, found that the said provision "(...) relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".<sup>19</sup>

30. The Appellate Body also agreed with the Panel that the said provision does not contain a standard of "reasonableness" pertaining to the costs themselves.<sup>20</sup>

31. In the same case, the Appellate Body rejected the argument that the existence of input costs and/or prices that are "artificially or abnormally low" in comparison with international prices on account of alleged "distortions" resulting from government regulations can constitute a sufficient legal basis in themselves for rejecting the records kept by exporters under investigation, and for replacing them with costs that are unaffected by such distortions.<sup>21</sup>

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<sup>16</sup> Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.205.

<sup>17</sup> Brazil's third-party submission, para. 16.

<sup>18</sup> Brazil's third-party submission, para. 17.

<sup>19</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.

<sup>20</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.37, 6.39 and 6.56; Brazil's third-party submission, para. 10.

<sup>21</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.

32. In Argentina's view, the findings and conclusions referred to above in **EU – Biodiesel (Argentina)** are consistent with the fact that:

(1) Article 1 of the Anti-Dumping Agreement, as a relevant context for the interpretation of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, provides that an anti-dumping measure can be applied consistently only under the circumstances provided for in Article VI of the GATT 1994 and in accordance with the object and purpose of this Agreement<sup>22</sup>; and

(2) As the Appellate Body found in **US – Stainless Steel (Mexico)**: "Dumping arises from the pricing practices of exporters (...)".<sup>23</sup>

33. In this last regard, Argentina would also draw the Panel's attention to the fact that the proposition that the practice of dumping is not restricted to the pricing conduct of exporters was already rejected previously by the Panel in **EU – Biodiesel (Argentina)** when it concluded categorically that "(...) We therefore see no reason to extrapolate from this provision that the concept of 'dumping' is generally intended to cover any distortion arising out of government action or circumstances such as those surrounding Argentina's export tax system and its impact on soybean prices as an input material for biodiesel".<sup>24</sup>

34. Hence Argentina does not concur with other third parties whose interpretation is that in **EU – Biodiesel (Argentina)** the Appellate Body left open the possibility of not taking account of exporters' or producers' costs in "specific circumstances" when such costs are allegedly affected by "government price controls".<sup>25</sup>

35. Moreover, Argentina recalls that recently the Panel in **EU – Biodiesel (Indonesia)** validated the findings and conclusions of case DS473 relating to the second condition in the second sentence of Article 2.2.1.1.

36. Therefore, in this third party's opinion, Article 2.2.1.1 of the Anti-Dumping Agreement clearly excludes any interpretation that validates the use of a dumping calculation method that rejects the actual costs incurred by exporters (and duly reflected in accounting records), on the basis of the alleged existence of a "distortion" or "market impediments", and replaces them with hypothetical costs that the exporter under investigation would have incurred in the absence of alleged government intervention or regulation.<sup>26</sup>

### III. CONCLUSION

37. Argentina thanks the Panel for this opportunity to present its views on the issues raised in this dispute.

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<sup>22</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.25 and footnote 130.

<sup>23</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94; Appellate Body Report, *US – Zeroing (Japan)*, para. 156; Appellate Body Report, *US – Zeroing (EC)*, para. 129.

<sup>24</sup> Panel Report, *EU – Biodiesel (Argentina)*, para 7.240.

<sup>25</sup> Japan's third-party submission, para. 24.

<sup>26</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.19, 6.20, 6.22, 6.30, 6.81 and 6.82.

## ANNEX C-2

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

#### I. INTRODUCTION

1. Australia's submission addresses two important interpretative issues regarding Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement: (i) the meaning of "particular market situation" and "proper comparison" in Article 2.2; and (ii) the guiding principle for cost construction in Article 2.2.1.1.

#### II. ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

2. Together, Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement provide that a product is considered "dumped" – that is, introduced into the commerce of an importing country at less than its normal value – if the price of the product exported from one country to another is: (i) less than the *comparable* price, (ii) *in the ordinary course of trade*, (iii) for the like product, (iv) when destined for consumption in the exporting country.
3. The ordinary meaning of these critical qualifying terms, "*comparable*" and "*in the ordinary course of trade*", together with "*proper comparison*" in Article 2.2 of the Anti-Dumping Agreement, indicates that: (i) dumping must be determined by comparing a product's export price with an appropriate or suitable domestic price of the like product; and (ii) a domestic price will only be appropriate or suitable for this purpose where it is determined by "'normal' commercial practice".<sup>1</sup>
4. This interpretation is confirmed by the *Ad Note* to Article VI:1 of the GATT 1994, which reinforces that prices not determined by normal commercial practice – such as prices distorted by the State's intervention – are not a *suitable or appropriate basis* for determining the existence or margin of dumping.<sup>2</sup>
5. The Appellate Body in *EU – Biodiesel (Argentina)* also confirmed that Article 2.2 of the Anti-Dumping Agreement concerns the establishment of "normal value" through an "*appropriate proxy for the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales*"<sup>3</sup> – an endeavour described by the Panel in that dispute as the "basic purpose" of constructing normal value.<sup>4</sup>
6. Article 2.2 of the Anti-Dumping Agreement provides three circumstances in which WTO Members must disregard domestic sales to determine the "normal value" of a product for the purpose of calculating the margin of dumping. This submission focuses on the second circumstance; that is, where sales in the exporting country's market do not "permit a proper comparison" with the export price because of the "particular market situation".<sup>5</sup>
7. The term "particular market situation" is not defined in Article 2.2. Therefore, panels must interpret this term (as directed by the *Vienna Convention on the Law of Treaties*<sup>6</sup>) in accordance with its ordinary meaning, in context, and in light of the object and purpose of the Anti-Dumping Agreement.
8. The ordinary meaning of the word "particular" is "pertaining or relating to a single definite thing or person, or set of things or persons, as distinguished from others; of or belonging to

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<sup>1</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 140.

<sup>2</sup> See, Appellate Body Reports, *EC – Fasteners (China)*, para. 285 and *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.207.

<sup>3</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

<sup>4</sup> Panel Report, *EU – Biodiesel (Argentina)*, para.7.233.

<sup>5</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 94.

<sup>6</sup> Vienna Convention on the Law of Treaties, Article 31.

some one thing (etc.) and not to any other, or to some and not to all; ... special; not general".<sup>7</sup> The ordinary meaning of the word "market" is "the action or business of buying and selling"<sup>8</sup> and "sale as controlled by supply and demand"<sup>9</sup>. The ordinary meaning of the word "situation" is a "condition or state (of anything)" and "position of affairs; combination of circumstances".<sup>10,11</sup>

9. In terms of context, the term "particular market situation" is one of the three conditions under which an investigating authority must derive the "normal value". The other two conditions address circumstances in respect of sales of the like product in the market of the exporting country (that is, where there are "no sales in the exporting country of the like product in the ordinary course of trade" and where "sales in the exporting country's market do not "permit a proper comparison" because of their low volume").<sup>12</sup> None address the specific condition in a country as a whole.
10. Consequently, in Australia's view, the ordinary meaning of the term "particular market situation", interpreted in its context and in light of the object and purpose of the Anti-Dumping Agreement, refers to any condition, state or combination of circumstances in respect of the buying and selling of the like product in the market of the exporting country that is distinguishable and not general.<sup>13</sup>
11. Interpreting the phrase "such sales do not permit a proper comparison" is also a contextual exercise. Australia recalls that the express purpose of constructing the normal value under Article 2.2 is to enable a "proper comparison" with the export price. Thus, the inclusion of the qualifying term "proper" indicates that the construction of normal value under Article 2.2 must yield a price that is *appropriate* or *suitable* for comparison with the relevant export price for the purpose of determining the existence (and margin) of dumping.
12. Accordingly, an investigating authority may find that a "particular market situation" exists when the evidence on record shows that a specific condition or set of circumstances renders domestic sales unfit for comparison with the export price. This interpretation is fully consistent with the findings of *EC – Cotton Yarn*, in which the GATT Panel found that a "particular market situation" was "relevant insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison" and that "[t]here must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison".
13. Australia further notes that there is nothing in the text of Article 2.2, 2.7 or the second *Ad Note* to Article VI:1 of the GATT 1994 that suggests that the term "particular market situation" is limited in the way Russia describes. In particular, the second *Ad Note* does not purport to define "particular market situation"; it merely recognises that one instance where domestic price may not be suitable for use as the basis for "normal value" is where imports are "from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State".
14. For these reasons, Australia disagrees with Russia that "particular market situation" under Article 2.2 of the Anti-Dumping Agreement only applies with respect to a country that meets the description of the second *Ad Note* to Article VI:1 of the GATT, and is a reference to the specific condition in a country as a whole.<sup>14</sup> In Australia's view, this interpretation is not consistent with a Vienna Convention analysis of the relevant terms, and does not accord with the reasoning in *EC – Cotton Yarn*.

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<sup>7</sup> The Compact Oxford English Dictionary, 2<sup>nd</sup> edition, J. A. Simpson & E. S. C. Weiner (ed.) (Oxford University Press, 1994), p. 1279. (emphasis added)

<sup>8</sup> The Compact Oxford English Dictionary, p. 1038. (emphasis added)

<sup>9</sup> The Compact Oxford English Dictionary, p. 1038.

<sup>10</sup> The Compact Oxford English Dictionary, p. 1778.

<sup>11</sup> See also, US' third party submission, para. 16.

<sup>12</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 94.

<sup>13</sup> See also, US' third party submission, para. 19.

<sup>14</sup> Russia's First Written Submission, para. 152.

15. A "particular market situation" such that domestic sales do not "permit a proper comparison" is a separate and distinct set of circumstances from that provided in the second *Ad Note* to Article VI:1 of the GATT 1994.

### III. ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

16. Russia claims several violations of the provisions of the Anti-Dumping Agreement in relation to the EU's Basic Regulation and the EU's cost construction methodology. Australia does not comment on the particular facts at issue, but rather focuses on the proper interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.
17. The plain text of Article 2.2.1.1 makes clear that this provision informs the manner in which costs should be calculated "for the purpose of" establishing normal value under Article 2.2.<sup>15</sup> The first sentence provides that "costs shall *normally* be calculated on the basis of records kept by the exporter or producer under investigation", provided two expressly stated conditions are met.
18. The ordinary meaning of the term "normally" suggests "[u]nder normal or ordinary conditions; ordinarily; as a rule".<sup>16</sup> The text of Article 2.2.1.1 thus provides that, under normal or ordinary conditions, an investigating authority should calculate costs for the purpose of Article 2.2 on the basis of the records kept by the relevant exporter or producer, where those records meet the conditions outlined.
19. Where the circumstances in respect of the records are not normal and ordinary, the investigating authority is not required to calculate costs on the basis of records kept by the exporter or producer under investigation, even if the two conditions in Article 2.2.1.1 are satisfied.<sup>17</sup> This interpretation is fully consistent with the findings of panels and the Appellate Body in relation to the meaning of "normally" in Article 2.2.1.1.<sup>18</sup>
20. The text of Article 2.2.1.1 therefore indicates that an investigating authority may depart "from the norm"<sup>19</sup> of calculating costs on the basis of exporter or producer records where: (i) the relevant conditions or circumstances are not "normal" or "ordinary"; and (ii) the investigating authority explains or justifies that departure.
21. Australia notes that the guiding principle for an investigating authority pursuant to Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement is that the constructed normal value must establish an "appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales".<sup>20</sup> The Appellate Body has confirmed that "costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy".<sup>21</sup>
22. This is not a question of whether the recorded costs are "reasonable". Rather, it is a question of whether the records are capable of fulfilling the "basic purpose"<sup>22</sup> of cost construction by generating an appropriate proxy for normal value. Where reliance on the costs reflected in the records of the producer or exporter would not result in an appropriate proxy, even if the two conditions in Article 2.2.1.1 are satisfied, an investigating authority must adjust or disregard those costs and provide reasons for doing so.

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<sup>15</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.17.

<sup>16</sup> *The New Shorter Oxford English Dictionary*, 4th edition, L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 1940.

<sup>17</sup> See, Appellate Body Report, *US – Clove Cigarettes*, para. 273.

<sup>18</sup> See, Appellate Body Reports, *US – Clove Cigarettes*, para. 273 and *Ukraine – Ammonium Nitrate*, para. 6.87 and footnote 315; Panel Reports, *China – Broiler Products*, para. 7.161 and *EU – Biodiesel (Argentina)*, para. 7.227.

<sup>19</sup> Panel Report, *China – Broiler Products*, para. 7.161.

<sup>20</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24; see also Panel Report, *EU – Biodiesel (Argentina)*, para. 7.233.

<sup>21</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

<sup>22</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.233.

23. In these situations, the Appellate Body has made it clear that an "out-of-country" benchmark can be used for the purpose of determining the constructed normal value. However, it has cautioned that "whatever the information ... it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation may require the investigating authority to adapt the information that it collects".<sup>23</sup>
24. In adapting an out-of-country benchmark to reflect the cost of production in the country of origin, such adjustments should not reintroduce inaccuracies or unreliabilities that have been legitimately rejected under Article 2.2.1.1. To do so would hinder the ability of the benchmark to yield an appropriate proxy – that is, to fulfil the "basic purpose" of cost construction.
25. As confirmed by the Appellate Body in *EU – Biodiesel (Argentina)*, the relevant costs in Article 2.2.1.1 "are those costs that, together with other elements, would otherwise form the basis for the price of the like product if it were sold *in the ordinary course of trade* in the domestic market".<sup>24</sup>
26. Interpreted in a manner that gives meaning to all of the crucial terms used, Articles 2.1, 2.2 and 2.2.1.1 require a "proper comparison" with a "comparable price" "*in the ordinary course of trade*" – that is, with prices and costs determined by normal commercial practice.

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<sup>23</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

<sup>24</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

## ANNEX C-3

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

#### I. THE METHODS PRESCRIBED IN ARTICLE VI:1 OF THE GATT 1994 AND ARTICLE 2.1 AND 2.2 OF THE ANTI-DUMPING AGREEMENT ARE NOT EXHAUSTIVE

1. Contrary to Russia's argument, Article 2.2 of the Anti-Dumping Agreement does not prescribe an exhaustive list of methods for determining normal value or the margin of dumping.<sup>1</sup> In considering this question, the Panel should examine the first and second sentences of Article VI:1 of the GATT 1994, which provides relevant context for the interpretation of Article 2.2 of the Anti-Dumping Agreement.<sup>2</sup> The first sentence of Article VI:1 of the GATT 1994 defines "dumping" as imports of products "at less than the normal value".<sup>3</sup> The second sentence of Article VI:1 of the GATT 1994 sets out a price comparison methodology to determine whether subject imports are being "dumped", i.e., whether they are introduced in the commerce of another country "at less than the normal value". That methodology entails a comparison between the export price and the domestic price of the subject imports. In the absence of a comparable domestic price, the second sentence of Article VI:1 of the GATT 1994 sets out two subparagraphs listing two alternative methodologies.

2. "Normal value" under both sentences of Article VI:1 of the GATT 1994 is a distinct concept from the "prices" or "cost" specifically referred to in the alternative methodologies listed in the second sentence of that provision. The second sentence does not specifically state that the "prices" or "cost" described therein constitute "normal value", and that a comparison between those prices or costs and export prices constitutes the sole means of determining "dumping". Instead, IT illustrates only the relationship of normal value to three alternative domestic transaction prices and costs. The phrasing of the second sentence thus demonstrates that the methodologies described in Article VI:1 of the GATT 1994 are merely examples of ways to determine what is *less than* normal value; they do not exhaust the acceptable ways of doing so. This interpretation applies to Articles 2.1 and 2.2 of the Anti-Dumping Agreement as well, because those provisions do not change the relationship between the first and second sentences of Article VI:1 of the GATT 1994.

#### II. ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT DOES NOT APPLY IN THE CONTEXT OF NON-MARKET ECONOMIES

3. The term "particular market situation" in Article 2.2 of the Anti-Dumping Agreement only refers to "market" situations, as is the rest of Article 2.2 of the Anti-Dumping Agreement, including Article 2.2 of the Anti-Dumping Agreement. Thus, where the exporting country is not a market economy, these provisions do not apply. As support for this interpretation, Japan notes that a proper interpretation of the term "normal value" in Article 2.2 of the Anti-Dumping Agreement is a value conforming to, or not deviating from, prices or costs generated under market economy conditions. This interpretation of "normal value" reconciles the definition of dumping with the requirement under Article VI:1 of the GATT 1994 that it be determined by reference to "the comparable price", and that the comparison achieve "price comparability". Prices or costs generated in a non-market economy cannot be considered as "comparable". This is because a comparison between such prices and costs and the export price is incapable of producing a meaningful answer to the question of whether there is dumping, as defined by Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement of the Anti-Dumping Agreement. Accordingly, Article 2.2 of the Anti-Dumping Agreement, including Article 2.2 of the Anti-Dumping Agreement.1.1, does not apply in the context of non-market economies.

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<sup>1</sup> Russia's first written submission, para. 94.

<sup>2</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 564 ("Article VI, entitled 'Anti-dumping and Countervailing Duties', is the genesis of both the SCM Agreement and the Anti-Dumping Agreement").

<sup>3</sup> Article VI:1 of the GATT 1994 provides that: "The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry" (underlining added).

4. For market economies, "a particular market situation" under Article 2.2 of the Anti-Dumping Agreement may be deemed to exist depending on the facts and circumstances of a particular case. This includes a situation where prices or costs in relation to a specific product or industry are found to be distorted by government intervention. In this regard, while Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement of the Anti-Dumping Agreement define "dumping" as imports of the product at less than its "normal value", they do not identify the underlying causes of dumping, much less exclude that government intervention may give rise to dumping.<sup>4</sup> Indeed, Article VI:5 of the GATT 1994 explicitly contemplates that dumping may result from subsidies or other government actions.

### **III. ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT PERMIT THE USE OF OUT-OF-COUNTRY INFORMATION**

5. For "market economies", Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement permit the use of out-of-country information to construct normal value in circumstances where costs generated in the domestic market are distorted. This flows from the fact that Article 2.2 of the Anti-Dumping Agreement "concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade when the normal value cannot be determined on the basis of domestic sales".<sup>5</sup> Accordingly, "costs calculated pursuant to Article 2.2.1.1 ... must be capable of generating such a proxy".<sup>6</sup> Where the cost of production in the country of origin is not capable of generating an appropriate proxy, cost-related information may thus be sourced from outside the country of origin. If this were not the case, the purpose of Article 2.2 of the Anti-Dumping Agreement would be defeated. However, because Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement are concerned with generating an *appropriate proxy* for home market prices, it may be necessary to adapt any cost-related information sourced from outside the home market to ensure that the proxy arrived at is in fact an appropriate proxy for home market prices.<sup>7</sup> The adaptation required would depend on the characteristics of the country of origin and the specific circumstances of each case.

### **IV. ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT REQUIRES A CAUSAL LINK BETWEEN DUMPING AND INJURY TO MAINTAIN AN ANTI-DUMPING DUTY**

6. Sunset reviews conducted under Article 11.3 of the Anti-Dumping Agreement are different in nature from original investigations. Unlike original investigations, sunset reviews are not concerned with the imposition of anti-dumping duties. Instead, they are concerned with the question of whether anti-dumping duties should be *maintained*. Because of this difference, the Appellate Body has noted that investigating authorities are not explicitly mandated to follow the provisions of Article 3 of the Anti-Dumping Agreement in sunset reviews.<sup>8</sup> This does not mean, however, that investigating authorities can make determinations freehandedly in sunset reviews. In particular, although the causal link between dumping and injury need not be established anew in sunset reviews, this does not mean that such link is not required to maintain an anti-dumping duty. On the contrary, Article 11.3 of the Anti-Dumping Agreement explicitly requires a nexus between "the expiry of the duty" and the likelihood of "continuation or recurrence of dumping and injury". This nexus, if shown, allows the existence of a causal link between dumping and injury to be reasonably assumed.<sup>9</sup> That nexus cannot be assumed. Article 11.3 of the Anti-Dumping Agreement requires a nexus that must be "clearly demonstrated"<sup>10</sup> between "the expiry of the duty", on the one hand, and the likelihood of "continuation or recurrence of dumping and injury", on the other hand.

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<sup>4</sup> Japan does not exclude the possibility that government intervention with a reasonable policy ground, for example, provision of universal services, may not be found to be distorting prices.

<sup>5</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

<sup>6</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

<sup>7</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

<sup>8</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 280.

<sup>9</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 121 ("[W]hen a 'review' takes place under Article 11.3, and it is determined that the 'expiry of the duty' would 'likely ... lead to continuation or recurrence of dumping and injury', it is reasonable to assume that, where dumping and injury continues or recurs, the causal link between dumping and injury, established in the original investigation, would exist and need not be established anew").

<sup>10</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 108 (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111).

7. The notion that a causal link is required to maintain an anti-dumping duty in the context of sunset reviews finds further support in Article VI of the GATT 1994. Article VI of the GATT 1994 makes clear that the purpose of an anti-dumping duty is to counteract dumping that causes injury. This purpose is common to both original investigations and sunset reviews. As recognized by the Appellate Body, "[a] causal link between dumping and injury to the domestic industry is ... fundamental to the imposition *and maintenance* of an anti-dumping duty".<sup>11</sup>

8. Finally, Japan also notes that the Appellate Body has also confirmed that "the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3".<sup>12</sup> Accordingly, it would be inconsistent with Article 11.3 of the Anti-Dumping Agreement to maintain an anti-dumping duty without ensuring, based on positive evidence and an objective examination, that imports are injurious.

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<sup>11</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 117.

<sup>12</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

## ANNEX C-4

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE REPUBLIC OF KOREA

#### I. INTRODUCTION

1. Korea welcomes the opportunity to present its views on the proper interpretation of the two provisions that are mainly at issue in this dispute. First is the meaning of a "particular market situation", or PMS, within the meaning in Article 2.2 of the Anti-Dumping Agreement ("ADA"), and the second is the method of calculating cost of production pursuant to the first sentence of Article 2.2.1.1 of the ADA. Korea has systemic interests in the proper interpretation and application of these provisions, which are essential components of establishing normal value in anti-dumping proceedings.

#### II. THE MEANING OF "PARTICULAR MARKET SITUATION" UNDER ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT

2. The WTO agreements do not provide a definition of PMS. As a result, Members have expressed divergent views on its proper interpretation, as evinced in the different interpretations proposed in this dispute. Korea offers the following observations on the proper interpretation of Article 2.2 of the ADA, in particular, the circumstances under which an investigating authority is permitted to disregard domestic sales based on its finding on the existence of a PMS.

3. A proper interpretation of PMS must be made in accordance with the general rules of treaty interpretation as provided under the Vienna Convention, namely, that the treaty must be interpreted in good faith, in accordance with its ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.<sup>1</sup>

4. The plain text of Article 2.2 permits an investigating authority to reject domestic sales prices by finding the existence of a PMS when three conditions are met: (1) there must be a "particular" situation in the "market at issue"; (2) this situation must have an effect on the "sales of the like product in the domestic market of the exporting country"; and (3) the effect must be such that a "proper comparison" with the export price cannot be made. Korea is of the view that all three conditions must be met in order to invoke the PMS exception in a proper manner. Korea examines each of the conditions in turn.

5. First, Russia in its first written submission provided the dictionary definitions of the terms "particular," "market," and "situation."<sup>2</sup> Based on the ordinary meaning of these terms, Korea agrees with Russia that PMS refers to a "special and distinct" situation in a market.<sup>3</sup> In this respect, Korea considers that the "special and distinct" situation would not include circumstances that arise normally in an economy that is operating principally on the basis of the market forces of supply and demand.

6. Korea does not consider, however, that the situation has to relate to the exporting country as a whole as Russia appears to argue.<sup>4</sup> Rather, a PMS should be interpreted as one confined to a specific product market. A contextual reading in light of the object and purpose of the agreement supports this finding. As the EU points out, the focus of Article 2.2 is to establish the normal value with respect to a particular like product.<sup>5</sup> Therefore, it is reasonable that the "market" to which the PMS requirements apply would be the market of the particular product under investigation, and not the entire market as a whole.

7. Korea recognizes that, as Russia has pointed out, Article 2.7 of the ADA references the *Ad Note* to GATT Article VI:1.<sup>6</sup> However, Korea considers that it would not be correct to place undue weight

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<sup>1</sup> Vienna Convention on the Law of Treaties, Article 31(1).

<sup>2</sup> Russia's first written submission, para. 140.

<sup>3</sup> Russia's first written submission, para. 142.

<sup>4</sup> Russia's first written submission, para. 142.

<sup>5</sup> EU's first written submission, paras. 67-68.

<sup>6</sup> Russia's first written submission, para. 146.

on the *Ad Note* to GATT Article VI:1 in interpreting the PMS within the meaning of Article 2.2 of the ADA. While the *Ad Note* may contextually offer guidance on the interpretation of Article 2.2, it is a legally separate provision that concerns a specific situation different from the one developed in detail in the ADA. Korea considers that neither in the WTO agreements as a whole, nor in the negotiating history of the ADA, can one find a meaningful link between the concept of PMS in Article 2.2 of ADA and the *Ad Note* to GATT Article VI. Moreover, the *Ad Note* applies in a very specific situation that might not even be present today. Korea notes that the *Ad Note* concerns a situation "where all domestic prices are fixed by the State". Therefore, to interpret PMS as confined solely to the *Ad Note*'s situation would effectively render inutile the concept of PMS.

8. Second, it is clear that the PMS in question must affect domestic sales of the like product in the exporting country, and not the export sales. This follows from the construction of Articles 2.1, 2.2, and 2.3 of the ADA. Article 2.1 sets forth the default rule that the normal value shall be based on the sales price in the domestic market. Article 2.2 provides for circumstances where the investigating authority must determine the normal value on an alternative basis. Thus, the PMS under Article 2.2 must be understood to refer to a situation that affects the normal value that would otherwise be determined pursuant to Article 2.1 – i.e., based on the sales of the like product when destined for consumption in the exporting country. In this respect, Article 2.2, which addresses the calculation of normal value, is clearly contrasted with Article 2.3, which applies to the determination of export price.

9. Third, a relevant PMS is one that has the effect of preventing a "proper comparison" with the export price, as mandated in Article 2.2 of the ADA. It is only when the PMS prevents a "proper comparison" that alternative methodologies may be used to determine the normal value. Conversely, if a PMS is found to exist, but there is no impact on the comparison of the normal value and the export price, then there is no basis to resort to alternative methodologies. Only when there are factors that affect the calculation of the normal value and the export price differently, can there be a PMS finding justifying the use of alternative methodologies. The Appellate Body confirmed this in *EC – Tube or Pipe Fittings* when it held that, to disregard domestic selling prices based on a PMS finding, it must be established that the "sales in the exporting country's market do not 'permit a proper comparison' because of 'the particular market situation'".<sup>7</sup>

10. Korea considers that specific situations affecting the cost of production, such as input subsidies, will not usually prevent a "proper comparison" because production costs are normally the same irrespective of whether the product is destined for domestic or export market. This is confirmed by the Appellate Body, which has observed that subsidies will, in principle, "affect the prices at which a producer sells its goods in the domestic market and in export markets in the same way and to the same extent", since "any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation".<sup>8</sup> Accordingly, the overall dumping margin would not be affected by such subsidization.

11. For these reasons, the fact that the prices in the market of exporting country are "artificially low" cannot alone justify provide a valid basis for finding that a PMS exists. Instead, the Panel must examine: (1) whether the situation which led to the "artificially low" prices is an exceptional set of circumstances; (2) whether the "low prices" affect domestic selling prices of the like product; and (3) whether they create asymmetry with the export price so that a proper comparison cannot be achieved. Only an affirmative answer to each of these three questions would justify resorting to an alternative methodology to establish the normal value because of PMS.

### **III. THE METHOD OF CALCULATING COST OF PRODUCTION PURSUANT TO THE FIRST SENTENCE OF ARTICLE 2.2.1.1 OF THE ADA**

12. When domestic sales prices cannot be used, Article 2.2 provides two alternative methods for establishing the normal value: use of third-country sales or the construction of normal value based on the "cost of production *in the country of origin* plus a reasonable amount for administrative, selling and general costs and for profits".<sup>9</sup> Specifically, at issue in this dispute are the conditions for justifying the rejection of cost records maintained by the exporters under Article 2.2.1.1 of the ADA,

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<sup>7</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 94.

<sup>8</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568.

<sup>9</sup> Emphasis added.

and when cost records are properly rejected, whether the proper interpretation of the Article permits the use of out-of-country costs to determine the cost of production.

13. While not taking a position on the consistency of the EU law at issue, Korea would like to offer the following observations on (1) the conditions for disregarding records maintained by the exporter or producer under investigation provided under Article 2.2.1.1 of the ADA and (2) the source of cost information that can be used under Article 2.2 and 2.2.1.1.

14. First, Article 2.2.1.1 provides that the cost of production shall normally be calculated on the basis of the records kept by the investigated exporter or producer. That rule is subject to two conditions: (1) that the records are "in accordance with the generally accepted accounting principles of the exporting country"; and (2) that they "reasonably reflect the costs associated with the production and sale of the product under consideration."

15. The EU has suggested that the reference to Article 2.2 and the use of the term "normally" in Article 2.2.1.1, besides the two aforementioned conditions, also provides a basis for rejecting *recorded costs in the construction of cost of production* upon a finding of PMS.<sup>10</sup> However, in Korea's view, the term "normally" does not support the existence of situations other than the two prescribed in Article 2.2.1.1, which could justify the derogation from the obligation of an investigating authority to use the records kept by the exporter or producer under investigation. Rather, Korea understands the term "normally" to establish the presumption that, if the specific conditions prescribed in the first sentence of Article 2.2.1.1 are met, the source for calculating cost of production must be the records maintained by the exporter or producer under investigation. This view was upheld by the panel in *China – Broiler Products (Article 21.5 – US)*.<sup>11</sup>

16. Second, while Article 2.2.1.1 does not contain any explicit restrictions on the *source* of information that can be used in situations when investigating authorities properly reject the records kept by the exporter or producer under investigation, investigating authorities are still required to use information that reflects the relevant cost *in the country of origin*. This is clear from the text of the ADA. In particular, as noted above, Article 2.2 provides that investigating authorities shall, when constructing the normal value, base it on "the cost of production *in the country of origin*."<sup>12</sup> Further, Article 2.2.2, which forms another pillar in the establishment of "constructed normal value" stipulates that the administrative, selling and general costs and for profits shall be based on data in "the country of origin".

17. Thus, in the view of Korea, even in the situation where the recorded costs are properly rejected, these costs may not simply be replaced with out-of-country data for the construction of the normal value. Rather, in situations where out-of-country data is used to calculate cost of production, there is an onus on the investigating authority to make necessary adjustments and provide sufficient explanation of how it ensured that the cost used is one that is reflective of the costs in the country of origin. Korea agrees with the Appellate Body in *EU – Biodiesel (Argentina)* when it explained that "*whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin'*". Compliance with this obligation *may require the investigating authority to adapt the information that it collects*".<sup>13</sup>

18. For this reason, whenever information is used that does not come from the exporting country in question, but are derived from third countries or global benchmarks, it is incumbent on the investigating authority to ensure that the cost data is fit for purpose, namely to establish the cost of production *in the country of origin*. Therefore, the data may have to be adjusted and tailored to the specific circumstances at hand, and be supported by an adequate and reasoned explanation so that interested parties can exercise their rights of defense in domestic proceedings or in dispute settlement proceedings at the WTO.

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<sup>10</sup> EU's first written submission, para. 98.

<sup>11</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.29.

<sup>12</sup> Emphasis added.

<sup>13</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. (Emphasis added)

## ANNEX C-5

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings.
2. Norway did not present a written third party submission to the Panel, and without taking a position on the facts of this dispute, Norway will briefly offer its observations on the interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.
3. The Russian Federation challenges the European Union's "cost adjustment methodology", whereby the EU investigating authorities allegedly reject part of the costs reflected in the records when such costs and/or prices are viewed by the EU authorities as "artificially or abnormally low" due to alleged "distortions" or "market impediments" like government price regulation or the application of export duties in the country of origin.<sup>1</sup>
4. The obligation on the investigating authorities according to Article 2.2.1.1, is subject to two cumulative conditions:
  - i) that the records kept by the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and
  - ii) that such records reasonably reflect the costs associated with the production and sale of the product under consideration.
5. If these two conditions are fulfilled, the investigating authorities "shall normally" calculate the costs on the basis of records kept by the exporter or producer under investigation.
6. The ordinary meaning of the adverb "normally" suggests "[u]nder normal or ordinary conditions; ordinarily; as a rule".<sup>2</sup> The Appellate Body confirmed in *US – Clove Cigarettes* that "the qualification of an obligation with the adverb 'normally' does not, necessarily, alter the characterization of that obligation as constituting a 'rule'", but rather that the term "normally" indicates that the rule "admits derogation" under conditions that are not "normal" or "ordinary".<sup>3</sup>
7. Moreover, the panel in *China – Broiler Products* also clarified that "the use of the term 'normally' in Article 2.2.1.1 means that an investigating authority is bound to explain why it departed from the norm and declined to use a respondent's books and records".<sup>4</sup>
8. Hence, WTO jurisprudence indicates that an investigating authority may depart "from the norm" of calculating costs on the basis of exporter or producer records only where: (i) the relevant conditions or circumstances are not "normal" or "ordinary"; and (ii) the investigating authority explains or justifies that departure.
9. Regarding the meaning of the second condition in the first sentence of Article 2.2.1.1, Norway notes that the question regarding whether the test of reasonableness is related to the quality of the records as such was accurately clarified in the Appellate Body Report in *EU – Biodiesel*. It is the *records* that must be in accordance with the GAAP, and the *records* that must "reasonably reflect the costs associated with the production and sale of the product under consideration". The Appellate Body held that "in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the Anti-Dumping Agreement, we understand this condition as referring to whether the records

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<sup>1</sup> The Russian Federation's First Written Submission, para. 299.

<sup>2</sup> The New Shorter Oxford English Dictionary, 4th edition, L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 1940.

<sup>3</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 273.

<sup>4</sup> Panel Report, *China – Broiler Products*, para. 7.161.

kept by the exporter or producer sustainably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".<sup>5</sup>

10. In Norway's view, the definition of dumping in the GATT 1994 Article VI underpins this interpretation of Article 2.2.1.1. Government regulation or intervention in the home market will typically affect prices on domestically consumed products and exported products alike. Thus, the products are not "introduced into the commerce of another country at less than the normal value of the products", as required by the dumping definition.

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<sup>5</sup> Appellate Body Report, *EU – Biodiesel*, para. 6.26.

## ANNEX C-6

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

#### 1. INTRODUCTION

1. Ukraine welcomes the opportunity to participate as a third party in case DS494 *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)* and to present its views on certain issues raised by parties in this dispute. Ukraine will provide its comments on the interpretation and application of the provisions of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade ("Anti-Dumping Agreement").
2. Ukraine is of particular interest and concern of the positions presented by Russia with regard to the interpretation and application of Article 2.2.1.1 of the Anti-Dumping Agreement, because Russia's position is not supported neither under the text of Article 2.2.1.1, nor by the finding of the Appellate Body in *EU – Biodiesel (Argentina)* contrary to Russian allegations. Under the plain meaning of Article 2.2.1.1 of the Anti-Dumping Agreement, an investigating authority may examine whether recorded costs "reasonably reflect the costs associated with the production and sale of the product under consideration."
3. Ukraine reserves the right to raise other issues at the third party hearing with the Panel.

#### 2. CLAIMS REGARDING ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

4. Ukraine will provide in this Section relevant understanding and interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement related to cost adjustment of price.

##### 2.1. Use of Adjusted Waidhaus Price as Source of Information to Establish the Undistorted Production Costs in Russia

5. In *EU – Biodiesel (Argentina)* the Appellate Body did not exclude the possibility that an investigating authority may use information and evidence outside the country of origin to determine the prices in the country of origin by stating that "the authority may also need to look for such information from sources outside the country".<sup>1</sup>
6. The reference to "in the country of origin", however, indicates that, whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin."<sup>2</sup> The Appellate Body further reasoned that compliance with this obligation may require the investigating authority to adapt the information that it collects.<sup>3</sup>
7. In *EU – Biodiesel (Argentina)*, the Appellate Body upheld Argentine's claim that the European Union acted inconsistently with the provisions of Article 2.2.1.1 because "the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself" a sufficient basis to conclude that the records did not reasonably reflect the costs, or for disregarding those costs when constructing the normal value of biodiesel.<sup>4</sup>
8. However, Ukraine submits that in *EU – Biodiesel (Argentina)* the situation was different in a way that the price is regulated by the state and the state is a predominant supplier of the product in question as Russia possesses the world's largest resources and reserves of natural gas and gas fields and the major share of natural gas in Russia is produced by Gazprom, a

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<sup>1</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

<sup>2</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

<sup>3</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

<sup>4</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.55.

majority state-owned company and, thus, the gas price for domestic consumption is not the result of market forces.

9. Instead, such situation was at issue in *US – Softwood Lumber IV*. The Appellate Body in *US – Softwood Lumber IV* confirmed that the obligations of an investigating authority under the respective provisions of an applicable agreement should not be interpreted in a way which would undermine or circumvent the right of Members to countervail subsidies, or as is the case at hand, to counter-act injurious dumping.<sup>5</sup>
10. Ukraine submits that the Appellate Body findings in *US – Softwood Lumber IV* are relevant to the case at issue as all WTO provisions regardless of the WTO agreement in which they are to be found, constitute context relevant to the interpretation of each other when the wording so allows.<sup>6</sup>
11. The Appellate Body in *US – Softwood Lumber IV* further stated that a government's role in providing a financial contribution, in terms of provision of goods and services, may be so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, thereby making the entire domestic market distorted.<sup>7</sup>
12. Thus, Ukraine agrees with the EU rejection of Russian gas costs and reliance on an adjusted price at the German/Czech border (Waidhaus),<sup>8</sup> because of the state regulation of prices on the domestic market, the resulting significant difference with market prices paid in unregulated export markets for Russia's gas.
13. In this vein, Ukraine shares the view of the EU that "there are circumstances in which an investigating authority can reject data in the records of the investigated firm; and there are circumstances in which an investigating authority can have recourse to information from another representative market."<sup>9</sup>
14. Moreover, the Appellate Body in *US – Softwood Lumber IV* and as further developed in the anti-dumping context in *EU – Biodiesel (Argentina)*, did not exclude the possibility that an investigating authority may use information and evidence outside the country of origin to determine the prices in the country of origin.<sup>10</sup>
15. The Appellate Body further stated that in using such information and evidence, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". The Appellate Body further reasoned that compliance with this obligation may require the investigating authority to adapt the information that it collects.<sup>11</sup>
16. Ukraine is, thus, of the view that the EU acted precisely according to these guidelines by adjusting these prices back so as to arrive to the price within Russia.

### **3. CONCLUSIONS**

17. Ukraine hopes that its contribution in the present dispute will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the Anti-Dumping Agreement. Ukraine thanks the Panel for the opportunity to share its views and would be happy to provide further comments on the occasion of the third-party session or answer any questions the Panel may have.

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<sup>5</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 95.

<sup>6</sup> Appellate Body Report, *Australia – Apples*, para. 173, footnote 285.

<sup>7</sup> Appellate Body Report, *US – Softwood Lumber IV*, paras. 93 and 101.

<sup>8</sup> Commission Implementing Regulation (EU) 2015/110, recital 69.

<sup>9</sup> First Written Submission by the EU, para. 103.

<sup>10</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

<sup>11</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.

## ANNEX C-7

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

#### I. INTERPRETATION OF ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT

##### A. Russia's Claim that the EU Basic Regulation Providing That Constructed Normal Value Use "Representative" Prices Is "As Such" Inconsistent With Article 2.2 of the Anti-Dumping Agreement

1. Russia argues that Article 2.2 of the Anti-Dumping Agreement does not permit investigating authorities to evaluate the "representativeness" of costs of production in the country of origin because requiring that costs be "representative" – i.e., unaffected by government-created distortions – imposes a requirement absent from the text of Article 2.2 of the Anti-Dumping Agreement. To the extent the Panel finds it necessary to evaluate the merits of Russia's claim, the United States comments on the proper interpretation of Article 2.2 of the Anti-Dumping Agreement.

2. Article 2.2 of the Anti-Dumping Agreement specifies that alternatives to domestic market prices may be used to determine normal value when, because of a "particular market situation" or a "low volume of ... sales in the domestic market of the exporting country," the domestic prices "do not permit a proper comparison." Article 2.2 prescribes two alternative data sources that may provide for a "proper comparison" whenever domestic market sales price data cannot be used to calculate normal value: (1) "a comparable price" for the like product when exported to an "appropriate" third country, provided the price is representative; or (2) the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits. A key phrase in Article 2.2 is "proper comparison," and the placement of this phrase in Article 2.2 reinforces that normal value must be based on prices (or costs) that "permit a *proper comparison*." Article VI:1 of the GATT 1994 establishes that the dumping comparison requires comparable prices or costs. Article VI:1(a) establishes that dumping occurs when the price of an exported product "is less than the *comparable price, in the ordinary course of trade*, for the like product" in the home market. This suggests that "determining price comparability" under Article VI:1 refers first to determining whether there *is* such a "comparable price, in the ordinary course of trade." Without a "comparable price, in the ordinary course of trade," or suitable proxy, no dumping comparison can be made. This applies to domestic prices, third-country export prices, and costs of production (which include prices between input suppliers and the exporter or producer under investigation).

3. The Anti-Dumping Agreement is, as its title suggests, an agreement on the application of Article VI of the GATT 1994 and, through Article 2, implements the principle of comparability set forth in Article VI:1. For example, Article 2.1 of the Anti-Dumping Agreement establishes that "a product is to be considered as being dumped, *i.e.* introduced into the commerce of another country at less than its normal value, if the export price of the product being exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." This text is nearly identical to Article VI:1 (specifically, the second sentence and subparagraph (a)). Article 2.1 thus retains the key elements from Article VI:1 for domestic prices or costs to be used to calculate normal value. Specifically, there must be a "comparable price, in the ordinary course of trade". Therefore, the "proper comparison" text of Article 2.2 of the Anti-Dumping Agreement reflects that establishing normal value requires a "comparable price, in the ordinary course of trade," and cannot be interpreted as preventing an investigating authority from evaluating evidence that government interference affects the "proper comparison" of prices or costs. Several examples demonstrate that domestic price, third-country export price, and cost of production may be considered not "a comparable price, in the ordinary course of trade," when the evidence of record indicates they do not reflect normal commercial principles:

- a price for a sale may not reflect the criteria of the marketplace;

- a price for a sale might not reflect normal commercial practices, such as in relation to other terms and conditions of sale;
- a price for a sale might be one established between related parties, rather than a transaction between economically independent entities at market prices, and thus not reflect normal commercial principles; or
- a price for the sale of an input used in the production of the product under consideration may not be consistent with an arm's-length transaction price or reflect normal commercial principles.

**B. Claims Regarding the Phrase "Particular Market Situation" in Article 2.2 of the Anti-Dumping Agreement**

4. Russia argues that "the particular market situation" in Article 2.2 of the Anti-Dumping Agreement is limited to "only one circumstance . . . which concerns the country's market as a whole" rather than a "particular market situation for the product concerned". "Artificially low prices" cannot provide a basis for a particular market situation finding, in Russia's view, because Article 2.2 of the Anti-Dumping Agreement contains no language regarding "artificially low prices" or a comparison to "world-market prices or prices in other representative markets". However, Article 2.2 of the Anti-Dumping Agreement, as noted above, establishes certain alternatives for determining normal value when, "because of the particular market situation ... such sales do not permit a proper comparison." Article 2.2, which includes the phrase "proper comparison", links back to the dumping definition in Article 2.1. If a particular market situation affects price comparability, e.g., if a particular market situation indicates that sale prices of the like product do not reflect market-based conditions (such as those reflecting normal commercial principles), such sale prices need not be used as a basis for normal value because they would not "permit a proper comparison". Although Article 2.2 of the Anti-Dumping Agreement does not define the term "the particular market situation," the definitions of the individual words that form the phrase "particular market situation" elucidate its meaning – i.e., that it addresses a specific condition or set of circumstances in the domestic market. For example, the word "market" is defined as a "place or group with a demand for a commodity or service", and the word "situation" is defined broadly as the "condition or state of a thing." These definitions indicate that what constitutes a "particular market situation" will depend on the particular facts at issue and thus should be evaluated on a case-by-case basis.

5. Russia is incorrect that Article 2.2 of the Anti-Dumping Agreement prohibits an analysis of whether "the government regulation of the price concerned, including its inputs, nor the effect of such regulation" amount to a particular market situation. An investigating authority may find that a "particular market situation" exists when the evidence of record demonstrates that a specific condition or set of circumstances renders the comparable price, in the ordinary course of trade, for the like product, unfit as a proper comparison. Nothing in the text of Article 2.2 suggests that the meaning of the phrase "particular market situation" is limited by the second *Ad Note*, which identifies one situation in which "special difficulties may exist in determining price comparability." The situation identified is "in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State." That is, the text does not limit the determination that there is no "comparable price, in the ordinary course of trade" to this one situation. The recognition by Members of a "case" creating special difficulties ("It is recognized that, in the case ...") does not logically imply that there could be no other "case".

6. Moreover, the history of the second Supplementary Provision to Article VI:1 does not support the extra-textual particular market situation conditions posited by Russia. As Russia notes, the Working Party Sub-Group in 1955 rejected Czechoslovakia's proposal to amend subparagraph 1(b) of Article VI of the GATT 1947 "to deal with the special problem of finding comparable prices for the application of that subparagraph to the case of a country all, or substantially all, of whose trade is operated by a state monopoly." However, the Sub-Group did not consider an amendment to Article VI:1 would be necessary to find that home market prices were not useable for purposes of the dumping comparison. Instead, the Sub-Group recommended adoption of an "interpretative note" nearly identical to what is now the Second Note. The Sub-Group's 1955 activity thus also supports the U.S. interpretation of GATT 1994 Article VI.

**C. Claims that EU Basic Regulation Article 2(5) and the "Cost Adjustment Methodology" Are Inconsistent with Articles 2.2.1.1, 2.2, and 2.2.1 of the Anti-Dumping Agreement**

7. Russia argues that the EU applies an unwritten measure – i.e., a "cost adjustment methodology" – as a "measure that has certain characteristics and will be applied or is likely to be applied in the future." To evaluate Russia's claim, the Panel should consider: whether the rule or norm embodied in that measure is attributable to the responding Member; the precise content of the measure; and whether the measure has general and prospective application. In examining an unwritten measure, the Appellate Body has noted that "[p]articular rigour is required . . . to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document." Accordingly, a panel "must not lightly assume the existence of a 'rule or norm'" because in doing so "would act inconsistently with its obligations" to "'make an objective assessment of the matter before it.'"

8. Turning to the substance of Russia's claims, the phrase "[f]or the purpose of paragraph 2" indicates that Article 2.2.1.1 should be read together with Article 2.2. The costs calculated pursuant to Article 2.2 must be capable of generating "an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales." Given that the use of costs under Article 2.2.1.1 must be capable of generating an appropriate proxy to allow for a proper comparison, the term "cost" refers to costs that reflect normal commercial principles associated with producing the product in the exporting country and not simply the "cost" reflected, for example, in an invoice price. That the costs are "*associated with* the production and sale of the product under consideration" also supports a commercial conception of costs, because the term "associated with" suggests a substantive connection between real economic costs and the production or sale of the product under consideration. The Anti-Dumping Agreement in other circumstances similarly indicates that an investigating authority should be concerned with real, economically meaningful data.

9. The Appellate Body in *EU – Biodiesel (Argentina)* recognized that investigating authorities have leeway under Article 2.2.1.1 to reject or adjust recorded costs under certain situations. It specifically rejected the argument that "'no matter how unreasonable the production (or sale) costs in the records kept by the investigated firm would be when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do.'" A non-arm's-length sale illustrates one type of transaction where an investigating authority may look beyond the four corners of a respondent's records and determine whether the transaction does not "reasonably reflect" all costs incurred in respect of the production and sale of the product, because the reported price may fail to accurately and reliably reflect the interaction between independent buyers and sellers. When the normal value cannot be determined on the basis of domestic sales, the costs calculated pursuant to Article 2.2.1.1 must be capable of generating an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country. Therefore, like the situation in which parties to a transaction are related, where a State intervenes in the marketplace to interfere with the ability of buyers and sellers to enter into transactions according to their own commercial interests, "there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace". The Working Party Report on Russia's accession to the WTO highlights the understanding that if there is sufficient evidence of the possible absence of normal commercial conditions (e.g., because of State interference), an investigating authority should be able to examine under the second condition of Article 2.2.1.1 the records kept by an investigated firm.

10. The United States recalls that nothing in the text of Article 2.2 proscribes the use of out-of-country information to evaluate recorded costs, or to adjust or replace recorded costs when formulating the appropriate cost for an individual producer. Indeed, the Appellate Body in *EU – Biodiesel (Argentina)* did not exclude the possibility that an investigating authority may use information and evidence outside the country of origin to determine the prices in the country of origin. As the Appellate Body explained, when an investigating authority rejects cost data under the second condition of Article 2.2.1.1, information from out-of-country sources could be used to arrive at the cost of production in the country of origin.

11. Article 2.2.1 of the Anti-Dumping Agreement describes a methodology for determining whether below-cost sales may be treated as not being made in the ordinary course of trade. The "rules for calculating the costs used in the determination of whether below-cost sales may be treated

as not being made in the ordinary course of trade by reason of price are found in Article 2.2.1.1." If an unbiased and objective investigating authority found an appropriate evidentiary basis to reject or adjust a cost that does not reflect normal commercial principles under Article 2.2.1.1, and provided a reasoned and adequate explanation for doing so, the investigating authority would not nonetheless be required to use the cost information it already rejected in performing the test under Article 2.2.1.

## **II. INTERPRETATION OF ARTICLE 18.3 OF THE ANTI-DUMPING AGREEMENT**

12. Article 18.3 of the Anti-Dumping Agreement may implicate Russia's claims involving determinations issued before Russia's 2012 WTO accession. Under Article 18.3, the Anti-Dumping Agreement applies to investigations and reviews of "existing measures" that were "initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." Accordingly, the Anti-Dumping Agreement does not apply to investigations or reviews that predate "the date of entry into force for a Member of the WTO Agreement." In *US – DRAMS* the panel observed that Article 18.3 did not indicate that the Anti-Dumping Agreement applies to "all aspects" of a "pre-WTO measure simply because parts of that measure are under post-WTO review." Furthermore, the Appellate Body has identified the parallel provision of the SCM Agreement, Article 32.3, as a "transitional rule" with the implication that it expresses "an explicit intention to draw the line of application of the new *WTO Agreement* to [] investigations and reviews at a different point in time from that for other general measures" and applies where a proceeding "was underway at the time of entry into force of the *WTO Agreement*." Moreover, "the situation of a prospective Member of the WTO, which accedes" to the WTO "is different from that of former contracting parties to the GATT 1947 or signatories to the *Tokyo Round* [] because those agreements did not apply previously to its trading relations with other states."

## **III. CLAIMS REGARDING PRICE UNDERCUTTING ANALYSIS**

13. The investigating authority's obligations in a likelihood-of-injury determination stem not from Article 3 but from Article 11.3 of the Anti-Dumping Agreement. Article 11.3 obligates investigating authorities "to determine" whether the expiry of the duty would be likely to lead to a continuation or recurrence of injury in a "review". In *US - Corrosion Resistant Steel Sunset Review*, the Appellate Body stated that the ordinary meaning of "determine" is to decide or settle, and that the ordinary meaning of a "review" is an examination or a reconsideration of some subject. Based on this language, the Appellate Body found that the investigating authority must reach a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and re-examination." Further, the Appellate Body agreed with the panel that "[an] investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence" of injury. It emphasized, however, that the necessary reasoned conclusion as to the likelihood of injury need not in every case be satisfied through a particular methodology or the consideration of particular factors. The necessity of conducting such an analysis in a given case arises from the Article 11.3 requirement that a likelihood-of-injury determination rest on a "sufficient factual basis" permitting the agency to draw "reasoned and adequate conclusions", and not on the requirements of Article 3.

14. To the extent the Panel finds it necessary to evaluate the merits of Russia's price undercutting analysis claims, the Panel should evaluate whether the investigating authority acted in accordance with Article 11.3 of the Anti-Dumping Agreement such that it had a sufficient factual basis, on the basis of information gathered as part of the process of reconsideration and re-examination, to draw reasoned and adequate conclusions concerning the likelihood of injury.

## **IV. CLAIMS REGARDING SAMPLING OF DOMESTIC INDUSTRY**

15. Russia argues that in its 2014 expiry review of Russian ammonium nitrate the EU authorities used a non-representative sample of domestic producers, contrary to Articles 3.1, 3.4, 4.1, and 11.3 of the Anti-Dumping Agreement. To determine whether revocation of the ammonium nitrate ("AN") order was likely to result in recurrence of injury to those producers, the EU sampled domestic producers, inviting those not included in the provisional sample to volunteer for inclusion.

16. Article 11.3 of the Anti-Dumping Agreement provides for investigating authorities to review whether "expiry of the duty would be likely to lead to continuation or recurrence of dumping and

injury" to the "domestic industry". In conducting the expiry review, including the likelihood-of-injury analysis, the overarching requirements reflected in Article 3.1 that an injury determination be based on positive evidence and an objective examination would also be relevant to likelihood-of-injury determinations under Article 11.3. Here, given the limited number of producers in the domestic industry, the Panel should assess whether the sampling of the domestic industry introduced a material risk of distortion and resulted in a distorted definition of the domestic industry, thereby preventing an objective examination. Such distortion, if any, could unreasonably favor a petitioner in a manner inconsistent with the objectivity requirements of the Anti-Dumping Agreement.

17. In *EC – Fasteners*, the Appellate body considered whether an investigating authority could, consistent with the objectivity requirement, define the domestic industry by publishing a notice inviting domestic producers to volunteer for inclusion in the domestic industry definition. There, the EU had published a notice inviting domestic producers to identify themselves and volunteer for inclusion in a sample of the domestic industry. The EU then defined the domestic industry to include only producers that responded to the notice and volunteered for inclusion in the sample. The Appellate Body found that "by defining the domestic industry on the basis of willingness to be included in the sample, the {EU's} approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion", in a manner inconsistent with Article 3.1 of the Anti-Dumping Agreement.

18. The Panel should therefore examine whether the EU authorities (1) allowed companies to self-select and (2) in so doing introduced a material risk of distortion, contrary to Article 3.1 of the Anti-Dumping Agreement.

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**ANNEX D**

PRELIMINARY RULING OF THE PANEL

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## ANNEX D-1

### PRELIMINARY RULING OF THE PANEL

2 September 2019

#### 1 INTRODUCTION

1.1. Together with its first written submission filed on 10 May 2019, the European Union asked the Panel to rule that several claims made by the Russian Federation (Russia) in relation to the European Union's anti-dumping measures on imports of ammonium nitrate originating in Russia were not properly before the Panel.<sup>1</sup>

1.2. The European Union requests the Panel to find that:

- a. Claim 1 and other product scope claims, and claims 9, 16 to 21 and 17 are not properly before the Panel because they are outside of the scope of the consultations request<sup>2</sup> and impermissibly expand the scope of the dispute, in violation of Articles 4.4 and 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU);
- b. Claim 11 is not properly before the Panel as it goes beyond the scope of the panel request, in violation of Article 6.2 of the DSU;
- c. Russia failed to identify precisely Regulation 2018/1722 as a measure at issue. As a consequence, claims 12 to 15 that Russia bases on Regulation 2018/1722 are outside the scope of the proceedings for failing to meet the requirements of Article 6.2 of the DSU;
- d. Claim 14 is outside the scope of the terms of reference of the Panel because, in respect of this claim, Russia's panel request fails to meet the requirements of Article 6.2 of the DSU; and
- e. Claims 2, 18, 19 and 21 are not properly before the Panel because, in respect of these claims, Russia's panel request fails to meet the requirements of Article 6.2 of the DSU.<sup>3</sup>

1.3. Russia responded to the request of the European Union on 17 June 2019. Russia considers that these claims are properly before the Panel and asks the Panel to rule that:

- a. Claim 1 and other product scope claims, and claims 9, 16 to 21 and 17 are properly before the Panel, in accordance with Articles 4.4 and 6.2 of the DSU;
- b. Claim 11 is properly before the Panel, in accordance with Articles 6.2 and 7.1 of the DSU;
- c. Regulation 2018/1722 is covered by the panel request, and claims 12 to 15 are properly before the Panel, in accordance with Article 6.2 of the DSU; and
- d. Claims 2, 14, 18, 19 and 21 are properly before the Panel, in accordance with Article 6.2 of the DSU.<sup>4</sup>

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<sup>1</sup> European Union's first written submission, paras. 11–44.

<sup>2</sup> On 7 May 2015, Russia requested consultations with the European Union with respect to, *inter alia*, the anti-dumping measures by the European Commission and the Council of the European Union on imports of ammonium nitrate originating in Russia (WT/DS494/1 of 19 May 2015). Consultations were held on 26 June 2015. Russia requested further consultations with the European Union on 29 March 2016 (WT/494/1/Add.1 of 6 April 2016). In this decision, we refer to document WT/494/1/Add.1 as "Russia's consultations request".

<sup>3</sup> European Union's first written submission, para. 44.

<sup>4</sup> Russia's response to the European Union's request for a preliminary ruling, para. 169.

## 2 RELEVANT PROVISIONS AND LEGAL STANDARD

### 2.1 Consistency between the consultations request and the panel request

2.1. Articles 4 and 6 of the DSU set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the Dispute Settlement Body (DSB) for the establishment of a panel.<sup>5</sup>

2.2. Article 4.4 of the DSU provides in relevant part:

Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

2.3. Article 6.2 of the DSU provides in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

2.4. It is well established, however, that "there does not have to be precise identity between [a Member's] request for consultations and its panel request either with regard to the specific measures at issue or with regard to the legal basis of the complaint".<sup>6</sup>

2.5. With respect to the *measures at issue*, Articles 4.4 and 6.2 of the DSU do not require "a precise and exact identity" between the request for consultations and the panel request, provided that the "essence" of the challenged measures does not change.<sup>7</sup>

2.6. The same logic applies with respect to the *legal basis of the complaint*: the legal basis referenced in the request for consultations must not be identical to the legal basis set out in the panel request, as long as the latter "may reasonably be said to have evolved" from the consultations request and the consultations themselves.<sup>8</sup>

### 2.2 Sufficiency of the panel request

2.7. Pursuant to Article 6.2 of the DSU, a panel request must comply with two distinct requirements, namely (i) the identification of the specific measures at issue, and (ii) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly.<sup>9</sup>

2.8. The identification of the specific measures at issue and of the legal basis of the complaint serves a dual function. First, it forms the basis for a panel's terms of reference under Article 7.1 of the DSU. Second, it informs other WTO Members of the nature of the dispute, which in turn allows the respondent to prepare its defence and allows other Members to assess whether they have an interest in the matter.<sup>10</sup>

2.9. Compliance with the requirements of Article 6.2 of the DSU must be demonstrated *on the face* of the panel request. In order to determine whether a panel request identifies the specific measures at issue and provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly, a panel must conduct an objective examination of the panel request *as a whole*, as it existed at the time of filing, and on the basis of the language used therein.<sup>11</sup> A summary of the legal basis of the complaint is considered to be "sufficient to present the problem clearly" when the

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<sup>5</sup> Appellate Body Report, *Brazil – Aircraft*, para. 131.

<sup>6</sup> Panel Report, *EU – Footwear (China)*, para. 7.61.

<sup>7</sup> Appellate Body Report, *Brazil – Aircraft*, para. 132. (emphasis original)

<sup>8</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

<sup>9</sup> Appellate Body Report, *US – Carbon Steel*, para. 125.

<sup>10</sup> Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22; *EC – Bananas III*, para. 142; *US – Carbon Steel*, para. 126; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>11</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641.

panel request plainly connects the challenged measure with the provision claimed to have been violated. This ensures that a respondent can "know what case it has to answer, and ... begin preparing its defence".<sup>12</sup>

2.10. Defects in a panel request cannot be cured in subsequent submissions. Nevertheless, in considering the sufficiency of a panel request, submissions and statements made by the parties during the course of the proceedings -in particular the first written submission of the complaining party- may be consulted in order to: (i) confirm the meaning of the words used in the panel request; and (ii) assess whether the ability of the respondent to defend itself was prejudiced.<sup>13</sup>

### **3 EUROPEAN UNION'S OBJECTIONS CONCERNING THE SCOPE OF THE CONSULTATIONS REQUEST**

#### **3.1 Claim 1 and other claims related to the product scope of the anti-dumping measures**

##### **3.1.1 Main arguments of the parties**

3.1. Claim 1 concerns the product scope of certain reviews conducted by the EU authorities on imports of ammonium nitrate originating in Russia.

3.2. Russia alleges that, while the original investigation conducted by the European Commission covered only ammonium nitrate used as a fertilizer in agriculture (FGAN), subsequent reviews extended the anti-dumping measures to two additional products: Stabilised Ammonium Nitrate (stabilised AN) and Industrial Grade Ammonium Nitrate (IGAN). According to Russia, the EU authorities thus impermissibly expanded the product scope of the measures over time, in contradiction with several provisions of the Anti-Dumping Agreement and the GATT 1994.<sup>14</sup>

3.3. In its request for a preliminary ruling, the European Union asks the Panel to find that Russia's claim 1 and other product scope claims in Russia's first written submission are outside the scope of these proceedings, insofar as they refer to IGAN. The European Union observes that, while Russia's panel request refers to "stabilised ammonium nitrate" and "IGAN" as products which were not in the scope of the original investigations, Russia's consultations request refers only to "stabilised ammonium nitrate" and makes no mention of "IGAN". According to the European Union, Russia's claim regarding IGAN could not have developed during consultations, given the interested parties' references to this product during the underlying proceedings.<sup>15</sup>

3.4. Russia responds that, although the consultations request does not mention "IGAN", the addition of a reference to "IGAN" in the panel request evolved from claim n) in its consultations request, and from clarifications received during consultations.<sup>16</sup> Russia also submits that this inclusion does not change the essence of the dispute because, under claim n) of its consultations request and under claim 1 of its panel request, Russia takes issue with the EU authorities' lack of evidence:

... to initiate an expiry review, extend anti-dumping measures, levy and continue levying anti-dumping measures on part of the product scope currently covered by the anti-dumping measures.<sup>17</sup>

##### **3.1.2 Evaluation by the Panel**

3.5. We recall that a precise identity is not required between the consultations request and the panel request provided that the "essence" of the challenged measures does not change.

3.6. Paragraph n) of Russia's consultations request states that:

the European Union initiated an expiry review, made likelihood of recurrence of injury and dumping determinations, extended the anti-dumping measures, levied and

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<sup>12</sup> Appellate Body Report, *Thailand – H-Beams*, para. 88.

<sup>13</sup> Appellate Body Reports, *US – Carbon Steel*, para. 127; *Australia – Apples*, para. 418.

<sup>14</sup> Russia's first written submission, paras. 510-571.

<sup>15</sup> European Union's first written submission, para. 19.

<sup>16</sup> Russia's response to the European Union's request for a preliminary ruling, paras. 50-51.

<sup>17</sup> Russia's response to the European Union's request for a preliminary ruling, para. 50.

continues levying anti-dumping duties on imports of *stabilized ammonium nitrate* for which no anti-dumping investigation was ever conducted, and no dumping and material injury determinations were ever made.<sup>18</sup>

3.7. The panel request, under claim 1, contains the same description of Russia's claim, except for the addition of a reference to industrial-grade ammonium nitrate.<sup>19</sup> We also note that the consultations request and the panel request both connect this claim with the same measures at issue, i.e. Council Regulation 2022/95 (which contains the results of the original investigation) and subsequent reviews, including Commission Implementing Regulation 999/2014 (Regulation 999/2014), which contains the results of the third expiry review.

3.8. Our understanding of Russia's product scope claims is that the European Union breached a series of provisions of the Anti-Dumping Agreement and the GATT 1994, by improperly expanding the scope of the anti-dumping measures. We consider that, adding a reference to IGAN in the panel request does not change the essence of this dispute because the underlying matter remains the alleged inconsistency between the product scope of the original investigation and the product scope of subsequent reviews.

3.9. We note the argument of the European Union that the question of the product scope had already been raised, in relation to IGAN, during the underlying proceedings, so that the inclusion of IGAN in the panel request cannot be said to have reasonably evolved from the consultations.<sup>20</sup> However, we also note Russia's statement that it "obtained confirmation during consultations regarding the scope of the application of the anti-dumping measure, in particular to IGAN".<sup>21</sup>

3.10. Accordingly, we conclude that the addition of "IGAN" in Russia's panel request reasonably evolves from the consultations request and does not change the essence of the dispute. Therefore, we reject the European Union's request to rule that Russia's claim 1 and other product scope claims are not properly before the Panel, insofar as they refer to IGAN.

## **3.2 Claim 9**

### **3.2.1 Main arguments of the parties**

3.11. Claim 9 concerns the alleged failure, by the EU authorities, to examine the impact of an absence of dumping by the largest Russian exporters during the review period of investigation of the third expiry review. The legal basis put forward by Russia are Articles 11.3, 2.1, 2.3, 6.8 and 6.10 of the Anti-Dumping Agreement.

3.12. The European Union asks the Panel to find that Russia's claim 9, to the extent it invokes Articles 2.3, 6.8 and 6.10 of the Anti-Dumping Agreement, is not properly before the Panel because the corresponding claim in Russia's consultations request – claim e) – only mentions Articles 2.1 and 11.3 of the Anti-Dumping Agreement.<sup>22</sup>

3.13. Russia asserts that claim 9 in relation to Articles 2.3, 6.8 and 6.10 of the Anti-Dumping Agreement evolved from claims e) and h) in the consultations request, and from clarifications received during consultations and evidence collected before the consultations and thereafter.<sup>23</sup>

### **3.2.2 Evaluation by the Panel**

#### **3.2.2.1 Articles 2.3 and 6.8 of the Anti-Dumping Agreement**

3.14. Paragraph e) of Russia's consultations request sets out a claim under Articles 11.3 and 2.1 of the Anti-Dumping Agreement concerning the alleged failure by the EU authorities to examine the

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<sup>18</sup> Russia's consultations request, p. 4 (emphasis added).

<sup>19</sup> Request for the establishment of a panel by the Russian Federation, WT/DS494/4 (Russia's panel request), p. 5.

<sup>20</sup> European Union's first written submission, para. 19.

<sup>21</sup> Russia's response to the European Union's request for a preliminary ruling, para. 51.

<sup>22</sup> European Union's first written submission, para. 21.

<sup>23</sup> Russia's response to the European Union's request for a preliminary ruling, para. 58.

impact of the absence of dumping by the largest Russian exporters during the review investigation period.<sup>24</sup> This claim does not mention Articles 2.3 and 6.8 of the Anti-Dumping Agreement, as observed by the European Union.

3.15. However, like Russia, we note that a related claim in the consultations request concerning the use of the investigated producers' information and the application of facts available is based on Articles 2.3 and 6.8 of the Anti-Dumping Agreement. Specifically, paragraph h) of Russia's consultations request alleges that the measures at issue are inconsistent with:

Articles 11.3, 2.1, 2.3, 6.8 and paragraphs 3, 5, 6 and 7 of Annex II of the [Anti-Dumping] Agreement and Article VI:1 of the GATT 1994 because the European Union, when performing the dumping determination, improperly rejected data on export prices provided by the Russian exporters and based its findings on the existence of dumping on the facts available.<sup>25</sup>

3.16. In our view, the fact that the complainant has structured its panel request differently from its consultations request does not amount to a change in the essence of the dispute and does not prejudice the respondent's ability to prepare its defence. Therefore, we reject the European Union's request to exclude from the scope of the dispute Russia's claim 9, insofar as it invokes Articles 2.3 and 6.8 of the Anti-Dumping Agreement.

### **3.2.2.2 Article 6.10 of the Anti-Dumping Agreement**

3.17. Contrary to Articles 2.3 and 6.8, Article 6.10 of the Anti-Dumping Agreement is not mentioned in Russia's consultations request. This provision imposes an obligation on investigating authorities to calculate individual margins of dumping for each known exporter or producer, except where the large number of exporters, producers, importers or types of products involved makes individual margin determinations impracticable.<sup>26</sup>

3.18. We recall that in support of claim 9, Russia also invokes Articles 11.3, 2.1, 2.3 and 6.8 of the Anti-Dumping Agreement. These provisions deal respectively with expiry reviews, the determination of dumping and export prices, and the use of facts available. In this regard, Russia argues that:

... the claim set forth in the panel request and those identified in the request for consultations relate to the same issue in dispute and are based on the same factual circumstances. Indeed, both claim e) of the 29 March Consultations Request and claim #9 of the Panel Request challenge the EU's failure to examine the appropriate evidence and to rely on it in reaching its conclusions as regards the existence of a likelihood of continuation or recurrence of dumping in the course of the expiry review. Specifically, these claims concern the EU's failure to examine the impact of the absence of dumping by certain Russian exporters.<sup>27</sup>

3.19. Specifically, with respect to its Article 6.10 claim, Russia argues that it:

clearly evolved from claim h) of the 29 March Consultations Request and a better understanding of the operation of the challenged measure gained at the consultations.<sup>28</sup>

3.20. In support of its position that Article 6.10 can be said to have reasonably evolved from the consultations request, Russia cites the panel report in *China - Broiler Products*<sup>29</sup> which states that:

Although necessarily dependent upon the specific circumstances of each case, the application of this test in prior disputes reveals that at the very least, some connection must exist between the claims set forth in the panel request and those identified in the

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<sup>24</sup> Russia's consultations request, p. 3.

<sup>25</sup> Russia's consultations request, p. 3.

<sup>26</sup> Article 6.10 of the Anti-Dumping Agreement.

<sup>27</sup> Russia's response to the European Union's request for a preliminary ruling, para. 67. (fn omitted)

<sup>28</sup> Russia's response to the European Union's request for a preliminary ruling, para. 64.

<sup>29</sup> Russia's response to the European Union's request for a preliminary ruling, fn 72.

request for consultations in terms of either the provisions cited, the obligation at issue or issue in dispute, or the factual circumstances leading to the alleged violation.<sup>30</sup>

3.21. We recall that a precise identity in the legal basis of the complaint is not required between the consultations request and the panel request, provided that the "essence" of the challenged measures does not change.

3.22. In this context, the Appellate Body has considered that a complaining party "may learn of additional information during consultations ... that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent". Such a revision may lead to a narrowing of the complaint or to "a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant".<sup>31</sup>

3.23. Claim h) is set out in the consultations request as follows:

... the European Union, when performing the dumping determination, improperly rejected data on export prices provided by the Russian exporters and based its findings on the existence of dumping on the facts available.

3.24. Like the European Union, we note that the provisions of the Anti-Dumping Agreement cited in the consultations request and in the panel request in support of claim 9 are different and, in particular, that "at no point does Russia's Consultations Request even mention Article 6.10".<sup>32</sup> But we also agree with Russia that its claim under Article 6.10 is closely connected to the other claims made by Russia under claim h) of the consultations request. These claims relate to the decision of the investigating authority not to rely on the export price data of the companies in the sample to calculate a dumping margin for these exporters. In that sense, the issue in dispute and the factual circumstances leading to the alleged violation appear closely connected.

3.25. We therefore find that the inclusion of Article 6.10 in the panel request can be said to reasonably evolve from the consultations request and from the consultations and does not change "the essence" of the dispute. For these reasons, we reject the European Union's request to rule that claim 9, insofar as it invokes Article 6.10 of the Anti-Dumping Agreement, is not properly before the Panel.

### **3.3 Claims 16 to 21**

#### **3.3.1 Main arguments of the parties**

3.26. Claims 16 to 21 concern certain procedural issues allegedly affecting the conduct of the third expiry review. They are based on various provisions of Article 6 and Annex II of the Anti-Dumping Agreement, as well as Article 11.4 of the Anti-Dumping Agreement.<sup>33</sup> Article 11.4 provides that the provisions of Article 6 regarding evidence and procedure in the context of original investigations shall apply to reviews.

3.27. The European Union asks the Panel to find that Russia's claims 16 to 21, to the extent they refer to Article 11.4 of the Anti-Dumping Agreement, are not properly before the Panel. The European Union observes that Article 11.4 was not mentioned in Russia's consultations request. For the European Union, this indicates that the claims related to procedural issues set out in Russia's consultations request concerned only the original investigation but not the reviews. By adding a reference to Article 11.4 in its panel request, Russia thus expands the scope of the dispute to cover not only the original investigation, but also subsequent reviews.<sup>34</sup>

3.28. Russia submits that claims 16 to 21 evolved from claims o) to t) in the consultations request and from clarifications received during consultations and evidence collected before the consultations and thereafter. Russia also submits that claims o) to t) in the consultations request leave no doubt

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<sup>30</sup> Panel Report, *China – Broiler Products*, para. 7.224. (fn omitted)

<sup>31</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

<sup>32</sup> European Union's first written submission, para. 22.

<sup>33</sup> Russia's first written submission, para. 1085.

<sup>34</sup> European Union's first written submission, paras. 36-37.

as to the fact that all these claims relate to the conduct of the expiry review that concluded with the adoption of Regulation 999/2014.<sup>35</sup>

### 3.3.2 Evaluation by the Panel

3.29. We note that Russia's consultations request explicitly lists, as the measures at issue, the original investigation on imports of ammonium nitrate originating in Russia *and* the subsequent reviews.<sup>36</sup> In addition, we note that in most instances Russia's procedural claims under the provisions of Article 6 of the Anti-Dumping make an implicit or explicit reference to reviews. Specifically, claims o), p), r) and t) allege that the measures at issue are inconsistent with:

Articles 6.1.2 and 6.4 of the [Anti-Dumping] Agreement because on numerous occasions the European Union delayed granting the interested parties access to the non-confidential file of the *review*;

Articles 6.1.3 and 6.4 of the [Anti-Dumping] Agreement because the European Union failed to provide to the interested parties the full text of the written application received on 28 March 2013, on the basis of which the European Union initiated the *expiry review*;

Article 6.5.1 of the [Anti-Dumping] Agreement because the European Union failed to require the domestic industry to furnish a sufficiently detailed non-confidential summary of the data submitted in confidence, including the European Union domestic industry submission of 12 May 2014, which the European Union relied upon as the basis for determining that dumping and injury *were likely to recur*;

Article 6.9 of the [Anti-Dumping] Agreement because the European Union failed to inform the interested parties of the essential facts under consideration which formed the basis for the decision *to extend* the anti-dumping measures;<sup>37</sup>

3.30. In the light of this, we are of the view that, by adding a reference to Article 11.4 of the Anti-Dumping Agreement in its panel request, Russia *clarified* that claims 16 to 21 concern the way the challenged review was conducted.

3.31. Therefore, we conclude that the inclusion of Article 11.4 in Russia's panel request reasonably evolves from the consultations request and does not change the essence of the dispute. Thus, we reject the European Union's request to exclude from the scope of the dispute claims 16 to 21, to the extent they refer to Article 11.4 of the Anti-Dumping Agreement.

## 3.4 Claim 17

### 3.4.1 Main arguments of the parties

3.32. Claim 17 concerns the EU authorities' alleged failure to provide to the interested parties "as soon as the investigation has been initiated" the full text of the written application filed by the domestic industry on 28 March 2013. Russia's claim 17 invokes as legal basis Articles 6.1.3, 6.2, 6.4 and 11.4 of the Anti-Dumping Agreement.<sup>38</sup>

3.33. The European Union asks the Panel to find that Russia's claim 17, to the extent it refers to Article 6.2 of the Anti-Dumping Agreement, is not properly before the Panel, on the grounds that Russia's consultations request does not mention Article 6.2.<sup>39</sup>

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<sup>35</sup> Russia's response to the European Union's request for a preliminary ruling, para. 71.

<sup>36</sup> Russia's consultations request, pp. 1-2.

<sup>37</sup> Russia's consultations request, p. 4 (emphasis added).

<sup>38</sup> Russia's first written submission, paras. 1110-1144.

<sup>39</sup> European Union's first written submission, para. 38.

3.34. Russia submits that the reference to Article 6.2 of the Anti-Dumping Agreement evolved from claim p) in the consultations request and from clarifications received during consultations and evidence collected before the consultations and thereafter.<sup>40</sup>

### 3.4.2 Evaluation by the Panel

3.35. We note that claim p) in Russia's consultations request, concerns the alleged failure, by the EU authorities, to provide to the interested parties the full text of the written application in the context of the expiry review. In this regard, the consultations request mentions only Articles 6.1.3 and 6.4 of the Anti-Dumping Agreement.<sup>41</sup>

3.36. However, we do not consider that the addition of Article 6.2 of the Anti-Dumping Agreement in Russia's panel request improperly expands the scope of the dispute.

3.37. We observe that Articles 6.1.3 and 6.4 Anti-Dumping Agreement focus respectively on the right of interested parties to have access to the text of the petition and on the authorities' obligation to provide timely opportunities for all interested parties to see all relevant information. Article 6.2 of the Anti-Dumping Agreement sets out the closely related obligation that:

"[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests".<sup>42</sup>

3.38. We also note that the Appellate Body recognized that a violation of Article 6.4 of the Anti-Dumping Agreement would necessarily entail a violation of Article 6.2 of the Anti-Dumping Agreement.<sup>43</sup>

3.39. In view of these elements, we conclude that the inclusion of Article 6.2 in Russia's panel request reasonably evolves from the consultations request and does not change the essence of the dispute. Thus, we reject the European Union's request to exclude from the scope of the dispute Russia's claim 17, insofar it refers to Article 6.2 of the Anti-Dumping Agreement.

## 4 EUROPEAN UNION'S OBJECTIONS CONCERNING THE CONSISTENCY OF THE PANEL REQUEST WITH ARTICLE 6.2 OF THE DSU

### 4.1 Claim 11

#### 4.1.1 Main arguments of the parties

4.1. Claim 11 concerns the alleged failure by the EU authorities to conduct "proper dumping calculations" that comply with Articles 11.3, 2.1, 2.2 and 2.4 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, in the context of the third expiry review.<sup>44</sup>

4.2. The European Union asks the Panel to find that claim 11, to the extent it relates to the determination of likelihood of "recurrence" of dumping, is not properly before the Panel on the grounds that this matter goes beyond the scope of Russia's panel request. The European Union observes that Russia's panel request challenges the EU authorities' determination of the likelihood of "continuation" of dumping, without mentioning the EU authorities' determination on the likelihood of "recurrence" of dumping. The European Union submits that, consequently, references in Russia's first written submission to the EU authorities' analysis on "recurrence" of dumping improperly expand the scope of the dispute.<sup>45</sup>

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<sup>40</sup> Russia's response to the European Union's request for a preliminary ruling, para. 79.

<sup>41</sup> Russia's consultations request, p. 4.

<sup>42</sup> Article 6.2 of the Anti-Dumping Agreement.

<sup>43</sup> Appellate Body Report, *EC - Tube or Pipe Fittings*, para. 149.

<sup>44</sup> Russia's first written submission, paras. 709-739.

<sup>45</sup> European Union's first written submission, paras. 23-25.

4.3. Russia responds that the relevant sections of its panel request must be read together. It recalls that:

... compliance with the requirements of Article 6.2 [of the DSU] must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.<sup>46</sup>

4.4. In this connection, Russia asserts that the combined reading of the title of the section of the panel request to which claim 11 belongs and of claim 11 itself, confirms that Russia's claim on the determination of likelihood of "continuation" of dumping is connected with the determination of likelihood of "recurrence" of dumping.<sup>47</sup>

#### 4.1.2 Evaluation by the Panel

4.5. Claim 11 in Russia's panel request reads as follows:

The European Union failed to comply with Article 11.3, 2.1, 2.2 and 2.4 of the [Anti-Dumping Agreement], as well as Article VI:1 of the GATT 1994 by relying on a continuation of dumping without conducting proper dumping margin calculations that comply with Article 2 of the [Anti-Dumping Agreement].<sup>48</sup>

4.6. We note that claim 11 is included in a section of Russia's panel request which is labelled "Claims with Respect to the Establishment of the Likelihood of Recurrence of Dumping".<sup>49</sup> We read Russia's panel request in this section as including a claim that may encompass both the EU authorities' determination on likelihood of "continuation" and "recurrence" of dumping. Moreover, given the language used in the title of the section of the panel request to which claim 11 belongs, it is reasonable to expect that the European Union was on notice that claim 11 could also concern the determination of a "recurrence" of dumping.

4.7. For these reasons, we conclude that claim 11, to the extent it relates to the determination of the likelihood of recurrence of dumping, is within our terms of reference. Thus, we reject the European Union's request to exclude from the scope of the dispute Russia's claim 11, to the extent it relates to the determination of the likelihood of recurrence of dumping.

## 4.2 Claims 12 to 15

### 4.2.1 Main arguments of the parties

4.8. Claims 12 to 15 concern the "continuous levying of the anti-dumping duties" on imports of ammonium nitrate from Russia.<sup>50</sup> We note that the duty rates currently applied result from an amendment to Regulation 999/2014, implemented by Commission Implementing Regulation 2018/1722 (Regulation 2018/1722).<sup>51</sup>

4.9. The European Union asks the Panel to find that claims 12 to 15 that Russia bases on Regulation 2018/1722 are outside the scope of the dispute, for failing to meet the requirements of Article 6.2 of the DSU.<sup>52</sup> In particular, the European Union submits that Regulation 2018/1722,

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<sup>46</sup> Russia's response to the European Union's request for a preliminary ruling, para. 85 (citing Appellate Body Report, *US – Carbon Steel*, para. 127).

<sup>47</sup> Russia's response to the European Union's request for a preliminary ruling, para. 87.

<sup>48</sup> Russia's panel request, p. 6.

<sup>49</sup> Russia's panel request, p. 6.

<sup>50</sup> The legal basis put forward by Russia in relation to these claims is: (a) in respect of claim 12, Articles 11.1, 9.3 and 1 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994; (b) in respect of claim 13, Article 11.3; (c) in respect of claim 14, Articles 2.1, 2.2, 9.3 and 11.3 of the Anti-Dumping Agreement, and Articles I:1, VI:1 and VI:2 of the GATT 1994, along with the Second Supplementary Provision to Article VI:1 of the GATT 1994; and, (d) in respect of claim 15, Articles 1 and 18.1 of the Anti-Dumping Agreement (Russia's first written submission, paras. 740-920).

<sup>51</sup> Commission Implementing Regulation (EU) 2018/1722 of 14 November 2018 amending Implementing Regulation (EU) No 999/2014 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an interim review pursuant to Article 11(3) of Regulation (EU) 2016/1036 of the European Parliament and of the Council, OJ L 287, 15.11.2018, p. 3 (Exhibit RUS-96).

<sup>52</sup> European Union's first written submission, paras. 26-25.

adopted on 14 November 2018 (i.e. nearly two years after the request for the establishment of a panel), is not referenced as one of the measures at issue in Russia's panel request.<sup>53</sup>

4.10. Russia observes that the panel request explicitly states that it covers the listed measures at issue as well as "any and all amendments, replacements, extensions, related and implementing measures and any act of the European Union authorities that would affect the measures at issue". Russia submits that Regulation 2018/1722 is not a measure independent from the measures listed in the panel request but is an amendment of Regulation 999/2014 and, while the current anti-dumping duties were imposed by Regulation 2018/1722, in fact they are "based" on the various prior measures listed in the panel request, including Regulation 999/2014. Therefore, Russia submits that, although it is not explicitly mentioned, the panel request covers Regulation 2018/1722.

4.11. Russia also considers that, should the Panel object to the inclusion of Regulation 2018/1722 into its terms of reference, the objective of a prompt settlement of the dispute, stated in Article 3.3 of the DSU, would not be achieved. Finally, Russia argues that, including Regulation 2018/1722 in the terms of reference of the Panel does not change the essence of the dispute, since the violations claimed against this measure are the same as those affecting the measures listed in the panel request.<sup>54</sup>

#### 4.2.2 Evaluation by the Panel

4.12. Regulation 2018/1722 came into force after the establishment of the Panel, but shortly before the composition of the Panel.<sup>55</sup> By its terms, this Regulation *amends* Regulation 999/2014, which imposed a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia, following a partial interim review initiated on 17 August 2017 limited in scope to the examination of injury.<sup>56</sup> Although the anti-dumping duties at issue in this dispute are currently levied on the basis of Regulation 2018/1722, this measure is clearly connected to the determinations made in the original investigation on imports of ammonium nitrate and in subsequent reviews.

4.13. In this connection, we note that the panel request states in relevant part:

This request covers the measures set out above as well as any and all amendments, replacements, extensions, related and implementing measures and any act of the European Union authorities that would affect the measures at issue.<sup>57</sup>

4.14. We further note that claims 12 to 15 are not specifically directed at the determinations contained in Regulation 2018/1722 nor at the partial interim review limited to the examination of injury, but instead focus on determinations made in prior proceedings, specifically, in relation to the establishment of the dumping margins (claim 12)<sup>58</sup>, the extension of the anti-dumping duties in subsequent reviews (claim 13)<sup>59</sup>, the continuous levying of country-wide anti-dumping duties calculated on the basis of an allegedly WTO-inconsistent methodology (claim 14)<sup>60</sup>, and the general obligation to impose anti-dumping duties in accordance with the provisions of the Anti-Dumping Agreement (claim 15).<sup>61</sup> Accordingly, references to Regulation 2018/1722 in Russia's first written submission do not amount to an expansion of the terms of reference, affecting the due process and adequate notice objectives pursued by Article 6.2 of the DSU.

4.15. For these reasons, we conclude that the lack of an explicit reference to Regulation 2018/1722 in Russia's panel request does not amount to a breach of Article 6.2 of the DSU. Thus, we reject the European Union's request to exclude from the scope of the dispute claims 12 to 15 that Russia bases on Regulation 2018/1722.

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<sup>53</sup> European Union's first written submission, paras. 27-29.

<sup>54</sup> Russia's response to the European Union's request for a preliminary ruling, paras. 102-119.

<sup>55</sup> The Panel was composed on 17 December 2018.

<sup>56</sup> Regulation (EU) 2018/1722, para. (13) (Exhibit RUS-96).

<sup>57</sup> Russia's panel request, p. 7.

<sup>58</sup> Russia's first written submission, paras. 741-841.

<sup>59</sup> Russia's first written submission, paras. 842-856.

<sup>60</sup> Russia's first written submission, paras. 857-907.

<sup>61</sup> Russia's first written submission, paras. 908-920.

### 4.3 Claim 14

#### 4.3.1 Main arguments of the parties

4.16. Claim 14 concerns Russia's allegation that the European Union imposed and continues levying country-wide anti-dumping duties on imports of ammonium nitrate from Russia, for which the country-wide dumping margin was calculated pursuant to a methodology that does not conform with Articles 2.1, 2.2, 9.3 and 11.3 of the Anti-Dumping Agreement, and Articles I:1, VI:1 and VI:2 of the GATT 1994, along with the Second Supplementary Provision to Article VI:1 of the GATT 1994.<sup>62</sup>

4.17. The European Union asks the Panel to rule that Russia failed to meet the standard of Article 6.2 of the DSU of "present[ing] the problem clearly" with respect to claim 14. The European Union submits that Russia's panel request refers to a "methodology that does not conform" with the provisions invoked, without explaining what "methodology" Russia would be referring to, what the methodology entails, where it can be found and how it would be inconsistent with the provisions alleged to have been violated.<sup>63</sup>

4.18. Russia submits that the narrative in its panel request makes clear that what Russia challenges is not any unspecified methodology, but the methodology used to calculate the dumping margin in prior reviews, which resulted in the application of a country-wide dumping margin on imports of ammonium nitrate from Russia. In relation to the nature of the challenged methodology, Russia submits that the reference to the Second Supplementary Provision to Article VI:1 of the GATT 1994, indicates that Russia challenges the use of "the methodology applied by the EU [authorities] to non-market economy countries".<sup>64</sup>

#### 4.3.2 Evaluation by the Panel

4.19. We recall that Article 6.2 of the DSU requires the complainant to provide in its panel request an identification of the specific measure at issue and a brief summary of the legal basis of the complaint sufficient to present the problem clearly. We also recall that in considering the sufficiency of a panel request, a panel may consider submissions and statements made by the parties, in particular in the first written submission of the complaining party, in order to (a) confirm the meaning of the words used in the panel request; and (b) assess whether the ability of the respondent to defend itself was prejudiced.

4.20. Russia's panel request sets out claim 14 in the following terms:

The European Union imposed and continues levying anti-dumping duties on the product concerned from Russia based on a country-wide dumping margin pursuant to a methodology that does not conform to the provisions of Articles 1, 2.1, 2.2, 9.3 and 11.3 of the [Anti-Dumping Agreement], as well as Articles I:1, VI:1 and VI:2 of the GATT 1994 along with the second Supplementary Provision to Article VI:1 in Annex I to the GATT 1994 and thus acted in breach of said provisions, as well as Article 11.3 of the [Anti-Dumping Agreement].<sup>65</sup>

4.21. Like the European Union, we note that Russia's panel request refers to "a methodology that does not conform to" certain provisions of the Anti-Dumping Agreement and the GATT 1994, without mentioning a specific methodology for determining normal value for non-market economy countries. However, we also observe that the legal provisions invoked by Russia in relation to this claim concern the determination of normal value and dumping margin, and that one of these provisions is the Second Supplementary Provision to Article VI:1 of the GATT 1994. This provision states that:

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it

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<sup>62</sup> Russia's first written submission, paras. 857-907.

<sup>63</sup> European Union's first written submission, paras. 31 and 33.

<sup>64</sup> Russia's response to the European Union's request for a preliminary ruling, paras. 128-132.

<sup>65</sup> Russia's panel request, p. 7.

necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

4.22. In the light of this, we consider that the panel request can be read as including a challenge to the methodology used for determining the normal value in the case of non-market economies. We thus conclude that, in respect of claim 14, the language in the panel request suffices to meet the standard under Article 6.2 of the DSU.

4.23. We further note that the challenged "methodology" has been confirmed by Russia in its first written submission. Russia explains in its first written submission that:

... the European Union authorities cannot apply the methodology for a non-market economy country in determination of normal value with respect to the products concerned originating in the Russian Federation for three reasons.<sup>66</sup>

4.24. For these reasons, we reject the European Union's request to rule that the panel request fails to meet the requirements of Article 6.2 of the DSU in relation to claim 14.

#### **4.4 Claims 2, 18, 19 and 21**

##### **4.4.1 Main arguments of the parties**

4.25. The European Union asks the Panel to find that claims 2, 18, 19 and 21 are not properly before the Panel because Russia failed to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, in contradiction with Article 6.2 of the DSU.<sup>67</sup>

4.26. The European Union asserts that, with respect to claim 2, Russia's panel request lists Articles 5.3 and 11.3 of the Anti-Dumping Agreement but does not refer to any act or omission by the EU authorities that could be considered as contrary to those provisions. For the European Union, the mere act of initiating an expiry review cannot, without more, be described as a violation of the Anti-Dumping Agreement.<sup>68</sup>

4.27. With respect to claims 18, 19 and 21, the European Union submits that Russia's panel request paraphrases the wording of Articles 6.5, 6.5.1 and 6.9 of the Anti-Dumping Agreement, but does not specify how, where or when the EU authorities allegedly acted inconsistently with these provisions, thus affecting the European Union's rights of defence.<sup>69</sup>

4.28. Russia responds that claims 2, 18, 19 and 21 meet the requirements set out in Article 6.2 of the DSU. Russia asserts that, with respect to claim 2, both the measure at issue (Regulation 999/2014) and the legal basis of the complaint (Articles 5.3 and 11.3 of the Anti-Dumping Agreement) are clearly established on the face of the panel request and in the light of attendant circumstances. In particular, Russia argues that the obligations contained in these provisions are clear and focus on the sufficiency of the evidence required to initiate an investigation or a review.<sup>70</sup>

4.29. With respect to claims 18, 19 and 21, Russia argues that the measure at issue (Regulation 999/2014) is clear, since the section of the panel request containing these claims is entitled "Claims with Respect to the Conduct of the Expiry Review Investigation". Russia also considers that the narrative under these three claims in the panel request is consistent with the requirement to provide a brief summary of the legal basis of the complaint, as it plainly connects the measure at issue with the provision allegedly breached. Russia submits that providing the additional details suggested by the European Union – for instance, the specific instances of violation of Articles 6.5, 6.5.1 and 6.9 – would go beyond the obligation set forth in Article 6.2 of the DSU.<sup>71</sup>

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<sup>66</sup> Russia's first written submission, paras. 869. See also paras. 871-875.

<sup>67</sup> European Union's first written submission, paras. 20 and 39-43.

<sup>68</sup> European Union's first written submission, para. 20.

<sup>69</sup> European Union's first written submission, paras. 39-43.

<sup>70</sup> Russia's response to the European Union's request for a preliminary ruling, para. 148.

<sup>71</sup> Russia's response to the European Union's request for a preliminary ruling, paras. 152-162.

#### 4.4.2 Evaluation by the Panel

4.30. In relation to the sufficiency of the panel request, the Appellate Body in *Korea – Dairy* stated that:

There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.<sup>72</sup>

4.31. We read this as indicating that while the simple listing of provisions of the WTO Agreements is normally not sufficient to "present the problem clearly", the obligation contained in a particular provision may nevertheless be sufficiently specific, to allow the defendant to understand what is at stake and to prepare its defence.

4.32. We now turn to the specific claims challenged by the European Union.

##### 4.4.2.1 Claim 2

4.33. Claim 2 is presented as follows in Russia's panel request:

The European Union violated Articles 5.3 and 11.3 of the [Anti-Dumping Agreement] by initiating the expiry review that led to the adoption of Regulation 999/2014.<sup>73</sup>

4.34. Article 5.3 of the Anti-Dumping Agreement sets forth an obligation on investigating authorities related to the sufficiency of the evidence required to initiate an investigation:

The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

4.35. Article 11.3 of the Anti-Dumping Agreement deals with the initiation and conduct of expiry reviews.

4.36. In our view, the reference to Article 5.3 of the Anti-Dumping Agreement and to the initiation of the review in the narrative of claim 2, put the European Union sufficiently on notice about the nature of claim 2, i.e. initiating a review in the absence of sufficient evidence to justify the initiation of an investigation.

4.37. In addition, we recall that in considering the sufficiency of a panel request, a panel may consider the first written submission of the complaining party, in order to: (i) confirm the meaning of the words used in the panel request; and (ii) assess whether the ability of the respondent to defend itself was prejudiced. The first written submission of Russia confirms that claim 2 is limited to the sufficiency of the evidence required to initiate a review.<sup>74</sup> Thus, we consider that the ability of the European Union to prepare its defence has not been negatively affected by the presentation of Russia's claim 2.

4.38. For these reasons, we conclude that, in respect of claim 2, the panel request meets the requirements of Article 6.2 of the DSU and we reject the European Union's request to rule that Russia's claim 2 is not properly before the Panel.

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<sup>72</sup> Appellate Body, *Korea – Dairy*, para. 124. (emphasis original)

<sup>73</sup> Russia's panel request, p. 5.

<sup>74</sup> Russia's first written submission, para. 609.

#### 4.4.2.2 Claims 18, 19 and 21

4.39. In relation to claims 18, 19 and 21 respectively, the panel request states:

The European Union failed to comply with Articles 6.5 and 11.4 of the [Anti-Dumping Agreement] by treating as confidential, without any good cause shown, information supplied by the domestic industry.

The European Union acted contrary to Articles 6.5.1 and 11.4 of the [Anti-Dumping Agreement] by failing to require the domestic industry to furnish sufficiently detailed non-confidential summaries of the data submitted in confidence.

The European Union breached Articles 6.9 and 11.4 of the [Anti-Dumping Agreement] by not informing the interested parties of the essential facts under consideration which formed the basis for the decision to extend the anti-dumping measures.<sup>75</sup>

4.40. We note that the specific measure at issue in relation to claims 18, 19 and 21 – i.e. the expiry review investigation whose results are reflected in Regulation 999/2014 – is identified in the panel request.<sup>76</sup> Indeed, in Section III.A, when presenting the "[m]easures at issue" in relation to Russia's claims regarding the anti-dumping duties imposed by the EU authorities on imports of ammonium nitrate originating in Russia and the underlying investigations, the panel request first identifies the expiry review that led to the adoption of Regulation 999/2014.<sup>77</sup> In the next section (Section III.B), the panel request lists the various claims raised by Russia, including in relation to Regulation 999/2014. Claims 18, 19 and 21 are presented in the section of this list dealing with the "Conduct of the Expiry Review Investigation". We consider that this reference, together with the identification of Regulation 999/2014 as a measure at issue, put the European Union on notice that Russia's claims 18, 19 and 21 concerned the treatment of confidential information and non-confidential summaries and the disclosure of essential facts in the context of the expiry review that led to Regulation 999/2014.

4.41. Moreover, we disagree with the European Union's argument that Russia's panel request does "no more than paraphrase the wording of Articles 6.5, 6.5.1 and 6.9 of the Anti-Dumping Agreement".<sup>78</sup> In our view, the narrative in Russia's panel request in respect of claims 18, 19 and 21 complies with the requirement to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. We agree with Russia that, requiring details such as the specific instances where the EU authorities allegedly treated information as confidential without good cause and allegedly failed to request non-confidential summaries and to disclose the essential facts, would go beyond the requirements of Article 6.2 of the DSU.

4.42. For these reasons, we conclude that, in respect of claims 18, 19 and 21, the panel request meets the requirements of Article 6.2 of the DSU. Thus, we reject the European Union's request to find that Russia's claims 18, 19 and 21 are not properly before the Panel.

## 5 CONCLUSION

5.1. In summary, after carefully considering the European Union's request for a preliminary ruling and Russia's response to this request, the Panel rules that:

- a. Claim 1 and other product scope claims (to the extent they refer to IGAN), and claims 9 (to the extent it refers to Articles 2.3, 6.8 and 6.10 of the Anti-Dumping Agreement), 16 to 21 (to the extent they refer to Article 11.4 of the Anti-Dumping Agreement), and 17 (to the extent it refers to Article 6.2 of the Anti-Dumping Agreement) are properly before the Panel;

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<sup>75</sup> Russia's panel request, p. 7.

<sup>76</sup> Russia's panel request, pp. 4-5.

<sup>77</sup> Russia's panel request, p. 4, fn 4.

<sup>78</sup> European Union's first written submission, para. 40.

- b. Claim 11 is properly before the Panel, including with regard to a determination of the likelihood of "recurrence" of dumping;
  - c. Regulation 2018/1722 and claims 12 to 15 that Russia bases on Regulation 2018/1722 are within the scope of the proceedings; and
  - d. Claims 2, 14, 18, 19 and 21 are properly before the Panel.
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