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

REPORT OF THE PANEL

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

**TABLE OF CONTENTS**

**1 INTRODUCTION ..... 16**
1.1 Complaint by the Russian Federation ..... 16
1.2 Panel establishment and composition ..... 16
1.3 Panel proceedings ..... 16
1.3.1 General ..... 16
1.3.2 Additional Working Procedures concerning Business Confidential Information ..... 17
1.3.3 European Union's request for a preliminary ruling ..... 17
**2 FACTUAL ASPECTS ..... 17**
2.1 The measures at issue ..... 17
**3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS ..... 17**
**4 ARGUMENTS OF THE PARTIES ..... 21**
**5 ARGUMENTS OF THE THIRD PARTIES ..... 21**
**6 INTERIM REVIEW ..... 21**
**7 FINDINGS ..... 21**
7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof ..... 21
7.1.1 Treaty interpretation ..... 21
7.1.2 Standard of review ..... 21
7.1.3 Burden of proof ..... 22
7.2 Russia's claims concerning the Cost Adjustment Methodology ..... 22
7.2.1 Introduction ..... 23
7.2.2 Whether Russia has demonstrated the existence of the Cost Adjustment Methodology ..... 24
7.2.2.1 Main arguments of the parties ..... 24
7.2.2.2 Legal standard ..... 26
7.2.2.3 Evaluation by the Panel ..... 27
7.2.3 Russia's request concerning Regulations 2017/2321 and 2018/825 ..... 44
7.2.4 Whether the Cost Adjustment Methodology is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement by providing for the rejection of the recorded costs ..... 46
7.2.4.1 Main arguments of the parties ..... 46
7.2.4.2 Legal standard ..... 48
7.2.4.3 Evaluation by the Panel ..... 49
7.2.4.4 Conclusion ..... 52
7.2.5 Whether the Cost Adjustment Methodology is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement by providing for the use of costs other than "the costs associated with the production and sale of the product under consideration" ..... 52
7.2.6 Whether the Cost Adjustment Methodology is inconsistent with Article 2.2 of the Anti-Dumping Agreement by providing for the use of costs other than "the cost of production in the country of origin" ..... 53
7.2.6.1 Main arguments of the parties ..... 53
7.2.6.2 Legal standard ..... 55
7.2.6.3 Evaluation by the Panel ..... 55

7.2.6.4 Conclusion ....57
7.3 Russia's claim concerning the first subparagraph of Article 2(3) of the Basic AD Regulation ....58
7.3.1 Introduction ....58
7.3.2 Whether the first subparagraph of Article 2(3) of the Basic AD Regulation requires that, in the construction of normal value, only "representative" prices shall be used ....58
7.3.2.1 Text ....59
7.3.2.2 Statement by the European Commission ....62
7.3.2.3 Provisions of the Basic AD Regulation ....63
7.3.2.4 Recitals of Regulation 1972/2002 and Regulation 2017/2321 ....64
7.3.2.5 Practice of the EU authorities in anti-dumping proceedings ....65
7.3.2.6 General Court of the European Union judgements ....66
7.3.3 Conclusion ....66
7.4 Russia's claims concerning the second subparagraph of Article 2(3) of the Basic AD Regulation ....66
7.4.1 Introduction ....66
7.4.2 Whether "the particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement refers exclusively to one specific situation which is the circumstance described in the second *Ad* Note to Article VI:1 of the GATT 1994 ....67
7.4.3 Additional arguments connected to the second *Ad* Note to Article VI:1 of the GATT 1994 ....71
7.4.3.1 Additional arguments independent of the second *Ad* Note to Article VI:1 of the GATT 1994 ....72
7.4.4 Conclusion ....74
7.5 Russia's claims concerning the final part of the second subparagraph of Article 2(5) of the Basic AD Regulation ....74
7.5.1 Introduction ....74
7.5.2 Whether Article 2.2 of the Anti-Dumping Agreement requires "the cost of production in the country of origin" to be based on the costs of other producers or exporters in the same country when the records of the investigated exporter or producer are rejected ....75
7.5.3 Whether Article 2.2.1.1 of the Anti-Dumping Agreement requires the cost of production to be based on the cost "associated with the production" of the product under consideration when the records of the investigated exporter or producer are rejected ....76
7.5.4 Whether the challenged part of the second subparagraph of Article 2(5) of the Basic AD Regulation prevents the European Commission from adapting "information from other representative markets" to arrive at "the cost of production in the country of origin" in accordance with Article 2.2 of the Anti-Dumping Agreement ....77
7.5.5 Conclusion ....79
7.6 Russia's claims concerning the anti-dumping measures on imports of certain welded tubes and pipes originating in Russia ....79
7.6.1 Introduction ....79
7.6.2 Russia's claims under the first sentence of Article 2.2.1.1 ....79
7.6.2.1 Main arguments of the parties ....79
7.6.2.2 The legal standard ....81
7.6.2.3 Evaluation by the Panel ....81
7.6.2.4 Conclusion ....85

7.6.3 Russia's claim under Article 2.2.1 ....85
7.6.3.1 Main arguments of the parties ....85
7.6.3.2 Legal standard ....86
7.6.3.3 Evaluation by the Panel ....86
7.6.3.4 Conclusion ....87
7.6.4 Russia's claim under Article 11.3 ....87
7.7 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 ....89
7.7.1 Whether certain claims presented by the Russian Federation should be rejected by the Panel because they concern pre-WTO determinations ....90
7.7.1.1 Article 18.3 does not apply because it is a transitional provision ....91
7.7.1.2 Article 18.3 only regulates the entry into force of the Anti-Dumping Agreement for importing Members ....92
7.7.2 Claims with respect to the product scope of the measures ....93
7.7.2.1 Introduction ....93
7.7.2.2 Whether the European Union extended the anti-dumping measures and levied anti-dumping duties on imports of stabilized AN and IGAN although no investigation was ever conducted and no dumping and material injury determinations were ever made (claim #1) ....93
7.7.2.3 Whether the European Union violated Article 11.3 by initiating the third expiry review on the basis of a petition which was not duly substantiated (claim #2) ....98
7.7.3 Russia's claims with respect to the establishment of the likelihood of recurrence of injury (claims #5 to #8) ....105
7.7.3.1 Introduction ....105
7.7.3.2 Whether certain claims presented by Russia should be disregarded by the Panel because Regulation 1722/2018 replaced and updated Regulation 999/2014 ....106
7.7.3.3 The relevant legal standard for the Panel's examination of Russia's claims relating to the likelihood of recurrence of injury determination ....109
7.7.3.4 Whether the European Union erred by failing to perform proper undercutting calculations (claim #5) ....111
7.7.3.5 Whether the European Union erred by basing its likelihood of recurrence of injury determination on incorrect or incomplete data (claim #6) ....121
7.7.3.6 Whether the European Union violated Article 11.3 of the Anti-Dumping Agreement by concluding that the non-injurious situation of the domestic industry was not sustainable (claim #7) ....127
7.7.3.7 Whether the European Union's findings with regard to spare capacities and demand in third country markets violate Article 11.3 of the Anti-Dumping Agreement (claim #8) ....133
7.7.4 Claims with respect to the determination of the likelihood of recurrence of dumping (claims #9 and #11) ....135
7.7.4.1 Introduction ....135
7.7.4.2 The relevant legal standard for the Panel's examination of Russia's claims #9 and #11 ....137
7.7.4.3 Whether the determination of likelihood of recurrence of dumping in Regulation 999/2014 relied on a dumping margin calculation ....139
7.7.4.4 Whether the European Union breached Article 11.3 of the Anti-Dumping Agreement by failing to examine the impact of the alleged absence of dumping by the largest Russian exporters (claim #9) ....142

7.7.4.5 Whether the European Union violated Article 11.3 of the Anti-Dumping Agreement by making the affirmative determination of likelihood of dumping on the basis of alleged "dumping" to third-countries without conducting proper dumping margin calculations (claim #11) ..... 146

7.7.4.6 Whether the European Union erred by failing to conduct a separate expiry review for the imports of Kirovo (claim #3) ..... 147

7.7.4.7 Whether the European Union erred by incorrectly defining the domestic industry and by making a likelihood of recurrence of injury determination based on incomplete data (claim #4) ..... 149

7.7.5 Claims with respect to the continuous levying of the anti-dumping duties (claims #12 to #15) ..... 151

7.7.5.1 Introduction ..... 151

7.7.5.2 Analysis ..... 153

7.7.6 Claims with respect to the conduct of the expiry review leading up to Regulation 999/2014 ..... 155

7.7.6.1 Russia's claim concerning alleged delays in giving access to the non-confidential file (claim #16) ..... 155

7.7.6.2 Russia's claim that the European Union failed to provide to the interested parties the full text of the application received on 28 March 2013 (claim #17) ..... 158

7.7.6.3 Russia's claim that the European Commission granted confidential treatment without a showing of good cause (claim #18) ..... 160

7.7.6.4 Russia's claim that the European Commission failed to request a meaningful summary (claim #19) ..... 163

7.7.6.5 Russia's claim that the European Commission used facts available in a manner inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement (claim #20) ..... 165

7.7.6.6 Russia's claim that the European Commission failed to disclose essential facts (claim #21) ..... 168

7.7.6.7 Russia's claim that the European Commission failed to explain the reasons which led to the imposition of the measures (claim #22) ..... 170

7.7.7 Conclusion on Russia's claim concerning the conduct of the third expiry review ..... 171

**8 CONCLUSIONS AND RECOMMENDATION ..... 172**

# LIST OF ANNEXES

## ANNEX A

WORKING PROCEDURES OF THE PANEL AND INTERIM REVIEW


| Contents | | Page |
|---|---|---|
| Annex A-1 | Working Procedures of the Panel | 4 |
| Annex A-2 | Additional Working Procedures of the Panel concerning Business Confidential Information | 11 |
| Annex A-3 | Interim Review | 13 |


## ANNEX B

ARGUMENTS OF THE PARTIES


| Contents | | Page |
|---|---|---|
| Annex B-1 | First integrated executive summary of the arguments of the Russian Federation | 64 |
| Annex B-2 | First integrated executive summary of the arguments of the European Union | 76 |
| Annex B-3 | Second integrated executive summary of the arguments of the Russian Federation | 87 |
| Annex B-4 | Second integrated executive summary of the arguments of the European Union | 99 |


## ANNEX C

ARGUMENTS OF THE THIRD PARTIES


| Contents | | Page |
|---|---|---|
| Annex C-1 | Integrated executive summary of the arguments of Argentina | 112 |
| Annex C-2 | Integrated executive summary of the arguments of Australia | 117 |
| Annex C-3 | Integrated executive summary of the arguments of Japan | 121 |
| Annex C-4 | Integrated executive summary of the arguments of the Republic of Korea | 124 |
| Annex C-5 | Integrated executive summary of the arguments of Norway | 127 |
| Annex C-6 | Integrated executive summary of the arguments of Ukraine | 129 |
| Annex C-7 | Integrated executive summary of the arguments of the United States | 131 |


## ANNEX D

PRELIMINARY RULING OF THE PANEL


| Contents | | Page |
|---|---|---|
| Annex D-1 | Preliminary Ruling of the Panel (2 September 2019) | 137 |

## CASES CITED IN THIS REPORT

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## EXHIBITS REFERRED TO IN THIS REPORT

| Exhibit | Short Title (if any) | Description/Long title |
|---|---|---|
| RUS-2 | Basic AD Regulation | Regulation (EU) No. 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, Official Journal of the European Union, L Series, No. 176 (30 June 2016), p. 21 |
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| RUS-9 | | Statements dated 16 October 2002, "Statements by the Commission to the Council Minutes", Annex No. 11510/02 |
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| RUS-13 | Case T 84/07 | General Court, Case T 84/07, EuroChem Mineral and Chemical Company OAO (EuroChem MCC) v. Council of the European Union (7 February 2013) (ECLI:EU:T:2013:64) |
| RUS-14 | Case T 459/08 | General Court, Case T 459/08, EuroChem Mineral and Chemical Company OAO (EuroChem MCC) v. Council of the European Union (7 February 2013) (ECLI:EU:T:2013:66) |
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| RUS-16 | Regulation 812/2008 | Council Regulation (EC) No. 812/2008 of 11 August 2008 amending Regulation (EC) No. 954/2006 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes of iron or steel originating, *inter alia*, in Russia, Official Journal of the European Union, L Series No. 220, (15 August 2008), p. 1 |
| RUS-17 | Regulation 236/2008 | Council Regulation (EC) No. 236/2008 of 10 March 2008 concerning terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No. 384/96 of the anti-dumping duty on imports of ammonium nitrate originating in Russia, Official Journal of the European Union, L Series, No. 75, (18 March 2008), p. 1 |
| RUS-18 | Regulation 1256/2008 | Council Regulation (EC) No. 1256/2008 of 16 December 2008 imposing a definitive anti-dumping duty on imports of certain welded tubes and pipes of iron or non-alloy steel originating in Belarus, the People's Republic of China and Russia following a proceeding pursuant to Article 5 of Regulation (EC) No. 384/96, originating in Thailand following an expiry review pursuant to Article 11(2) of the same Regulation, originating in Ukraine following an expiry review pursuant to Article 11(2) and an interim review pursuant to Article 11(3) of the same Regulation, and terminating the proceedings in respect of imports of the same product originating in Bosnia and Herzegovina and Turkey, Official Journal of the European Union, L Series, No. 343, (19 December 2008), p. 1 |
| RUS-19 | Regulation 1891/2005 | Council Regulation (EC) No. 1891/2005 of 14 November 2005 amending Regulation (EEC) No. 3068/92 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, Official Journal of the European Union, L Series, No. 302, (19 November 2005), p. 14 |

| Exhibit | Short Title (if any) | Description/Long title |
|---|---|---|
| RUS-20 | Regulation 1911/2006 | Council Regulation (EC) No. 1911/2006 of 19 December 2006 imposing a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate originating in Algeria, Belarus, Russia and Ukraine following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96, Official Journal of the European Union, L Series, No. 365 (21 December 2006), p. 26 |
| RUS-21 | Regulation 2015/110 | Commission Implementing Regulation (EU) No. 2015/110 of 26 January 2015 imposing a definitive anti-dumping duty on imports of certain welded tubes and pipes of iron or non-alloy steel originating in Belarus, the People's Republic of China and Russia and terminating the proceeding for imports of certain welded tubes and pipes of iron or non-alloy steel originating in Ukraine following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No. 1225/2009, Official Journal of the European Union, L Series, No. 20 (27 January 2015), p. 6 |
| RUS-22 | Regulation 1269/2012 | Council Implementing Regulation (EU) No. 1269/2012 of 21 December 2012 amending Implementing Regulation (EU) No. 585/2012 imposing a definitive anti-dumping duty on imports of certain seamless steel pipes, of iron or steel, originating, *inter alia*, in Russia, following a partial interim review pursuant to Article 11(3) of Regulation (EC) No. 1225/2009, Official Journal of the European Union, L Series, No. 357 (28 December 2012), p. 1 |
| RUS-23 | Regulation 1194/2013 | Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, Official Journal of the European Union, L Series, No. 315 (26 November 2013), p. 2 |
| RUS-24 | Regulation 237/2008 | Council Regulation (EC) No. 237/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No. 384/96 of the anti-dumping duty on imports of ammonium nitrate originating, *inter alia*, in Ukraine, Official Journal of the European Union, L Series, No. 75 (18 March 2008), p. 8 |
| RUS-26 | | 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) |
| RUS-27 | | 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) |
| RUS-28 | Regulation 240/2008 | Council Regulation (EC) No. 240/2008 of 17 March 2008 repealing the anti-dumping duty on imports of urea originating in Belarus, Croatia, Libya and Ukraine, following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96, Official Journal of the European Union, L Series, No. 75 (18 March 2008), p. 33 |
| RUS-29 | Case T 118/10 | General Court, Case T 118/10, Acron OAO v. Council of the European Union (7 February 2013) ECLI:EU:T:2013:67 |
| RUS-30 | Regulation 2018/825 | Regulation (EU) No. 2018/825 of the European Parliament and of the Council of 30 May 2018 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, Official Journal of the European Union, L Series, No. 143 (7 June 2018), p. 1 |
| RUS-31 | Regulation 1050/2006 | Council Regulation (EC) No. 1050/2006 of 11 July 2006 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus and Russia, Official Journal of the European Union, L Series, No. 191 (12 July 2006), p. 1 |
| RUS-32 | Regulation 907/2007 | Council Regulation (EC) No. 907/2007 of 23 July 2007 repealing the anti-dumping duty on imports of urea originating in Russia, following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96, and terminating the partial interim reviews pursuant to Article 11(3) of such imports originating in Russia, Official Journal of the European Union, L Series, No. 198 (31 July 2007), p. 4 |

| Exhibit | Short Title (if any) | Description/Long title |
|---|---|---|
| RUS-33 | Regulation 1251/2009 | Council Implementing Regulation (EU) No. 1251/2009 of 18 December 2009 amending Regulation (EC) No. 1911/2006 imposing a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate originating, *inter alia*, in Russia, Official Journal of the European Union, L Series, No. 338 (19 December 2009), p. 5 |
| RUS-34 | Regulation 954/2006 | Council Regulation (EC) No. 954/2006 of 27 June 2006 imposing definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine, repealing Council Regulations (EC) No. 2320/97 and (EC) No. 348/2000, terminating the interim and expiry reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, *inter alia*, in Russia and Romania and terminating the interim reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, *inter alia*, in Russia and Romania and in Croatia and Ukraine, Official Journal of the European Union, L Series, No. 175 (29 June 2006), p. 4 |
| RUS-35 | Regulation 238/2008 | Council Regulation (EC) No. 238/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No. 384/96 of the anti-dumping duty on imports of solutions of urea and ammonium nitrate originating in Russia, Official Journal of the European Union, L Series, No. 75 (18 March 2008), p. 14 |
| RUS-36 | Regulation 994/2007 | Commission Regulation (EC) No. 994/2007 of 28 August 2007 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in the People's Republic of China, Egypt, Kazakhstan, the former Yugoslav Republic of Macedonia and Russia, Official Journal of the European Union, L Series, No. 223 (29 August 2007), p. 1 |
| RUS-37 | Regulation 172/2008 | Council Regulation (EC) No. 172/2008 of 25 February 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ferro-silicon originating in the People's Republic of China, Egypt, Kazakhstan, the former Yugoslav Republic of Macedonia and Russia, Official Journal of the European Union, L Series, No. 55 (28 February 2008), p. 6 |
| RUS-38 | Case T 111/14 | General Court, Case T 111/14, Unitec Bio SA v. Council of the European Union (15 September 2016) ECLI:EU:T:2016:505 |
| RUS-47 | | Oxford Dictionaries online, definition of "that" http://www.oed.com/view/Entry/200177 (accessed 21 March 2019) |
| RUS-48 | Notice of initiation | Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of ammonium nitrate originating in Russia, Official Journal of the European Union, C Series, No. 200 (12 July 2013), p. 12 |
| RUS-53 | | *New Oxford American Dictionary*, 3rd edn, A. Stevenson and C. A. Lindberg (ed.), (Oxford University Press, 2011), definition of "this" |
| RUS-54 | | Oxford Dictionaries online, definition of "these" http://www.oed.com/view/Entry/200651?result=2&rskey=Oa3AQE& (accessed 21 March 2019) |
| RUS-55 | | Oxford Dictionaries online, definition of "those" http://www.oed.com/view/Entry/201046?redirectedFrom=those& (accessed 21 March 2019) |
| RUS-66 | Regulation 999/2014 | Commission Implementing Regulation (EU) No. 999/2014 of 23 September 2014 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No. 1225/2009, Official Journal of the European Union, L Series No. 280 (24 September 2014), p. 19 |
| RUS-68 | Regulation 2022/95 | Council Regulation (EC) No. 2022/95 of 16 August 1995 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia, Official Journal of the European Communities, L Series, No. 198 (23 August 1995), p. 1 |
| RUS-70 | Regulation 658/2002 | Council Regulation (EC) No. 658/2002 of 15 April 2002 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia, Official Journal of the European Communities, L Series, No. 102 (18 April 2002), p. 1 |

| Exhibit | Short Title (if any) | Description/Long title |
|---|---|---|
| RUS-72 | Regulation 945/2005 | Council Regulation (EC) No. 945/2005 of 21 June 2005 amending Regulation (EC) No. 658/2002 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia and Regulation (EC) No. 132/2001 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in, *inter alia*, Ukraine, following a partial interim review pursuant to Article 11(3) of Regulation (EC) No. 384/96, Official Journal of the European Union, L Series, No. 160 (23 June 2005), p. 1 |
| RUS-73 | Case T 348/05 (10 September 2008) | Court of First Instance, Case T 348/05, JSC Kirovo-Chepetsky Khimichesky Kombinat v. Council of European Union (10 September 2008) (ECLI:EU:T:2008:327) |
| RUS-74 | Case T 348/05 (9 July 2019) | Court of First Instance, Case T 348/05 INTP, JSC Kirovo-Chepetsky Khimichesky Kombinat v. Council of the European Union (9 July 2019) (ECLI:EU:T:2009:261) |
| RUS-78 (BCI) | Final disclosure | General Disclosure Document in R569 – Expiry Review of the Anti-dumping measures applicable to imports of ammonium nitrate originating in the Russian Federation, Proposal to impose definitive anti-dumping duties (13 June 2014) |
| RUS-79 (BCI) | | Comments by RFPA on the definitive disclosure (8 July 2014) |
| RUS-81 (BCI) | | Hearing Report in Case R569 (17 July 2014) |
| RUS-82 (BCI) | | RFPA submission (4 March 2014) |
| RUS-83 (BCI) | | Fertilizers Europe's submission (12 May 2014) |
| RUS-84 (BCI) | | Dataset filed by the EU industry (16 April 2014) |
| RUS-85 (BCI) | Comments by RFPA on the initiation of an expiry review | Comments by RFPA on the likelihood of recurrence of material injury, continuation of alleged dumping and procedural issues (30 September 2013) |
| RUS-86 (BCI) | | Sampling questionnaire submitted by OJSC Kuybyshevazot |
| RUS-90 (BCI) | | RFPA submission (25 April 2014) |
| RUS-94 (BCI) | | Fertilizers Europe's submission (14 May 2014) (excerpts) |
| RUS-96 | Regulation 2018/1722 | 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, Official Journal of the European Union, L Series No. 287 (15 November 2018), p. 3. |
| RUS-99 (BCI) | | Page 85 of Annex B, Dumping of the Request |
| RUS-102 (BCI) | | Comments on the definitive disclosure, Annex VI-B-I |
| RUS-105 | Regulation 490/2013 | Commission Regulation (EU) No. 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, Official Journal of the European Union, L Series, No. 141 (28 May 2013), p. 6 |
| RUS-110 | | Decision dated 5 August 2013 from the European Commission |
| RUS-116 | Regulation 989/2009 | Council Regulation (EC) No. 989/2009 of 19 October 2009 amending Regulation (EC) No. 661/2008, imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia, Official Journal of the European Union, L Series, No. 278 (23 October 2009), p. 1 |
| RUS 117 (BCI) | | Fertilizers Europe's submission (20 March 2014) (excerpts) |
| RUS-119 (BCI) | | Fertilizers Europe's submission (10 March 2014) |
| RUS-120 (BCI) | | Fertilizers Europe's submission (5 May 2014) |
| RUS-121 (BCI) | | Fertilizers Europe's submission (3 June 2014) |
| RUS-123 (BCI) | | Undertaking Report EuroChem |
| RUS-124 (BCI) | | Responses to questionnaires provided by Acron |
| RUS-125 (BCI) | | Determination of dumping margins for exports to the European Union |
| RUS-135 | Commission Decision 2008/577 | Commission Decision of 4 July 2008 accepting the undertakings offered in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Russia and Ukraine, Official Journal of the European Union, L Series, No. 185 (12 July 2008), p. 40 |
| RUS-144 (BCI) | | Responses to questionnaires provided by UralChem |
| RUS-145 (BCI) | | Dumping files of Acron |

| Exhibit | Short Title (if any) | Description/Long title |
|---|---|---|
| RUS-146 | Regulation 663/98 | Council Regulation (EC) No. 663/98 of 23 March 1998 amending Regulation (EC) No. 2022/95 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia, Official Journal of the European Communities, L Series, No. 93 (26 March 1998), p. 1 |
| RUS-149 | | Oxford Dictionaries online, definition of "without prejudice" https://www.oed.com/view/Entry/150162?redirectedFrom=without+prejudice#eid28522373 (accessed 25 September 2019), p. 3 |
| RUS-166 | Regulation 2019/1688 | Commission Implementing Regulation (EU) No. 2019/1688 of 8 October 2019 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America, Official Journal of the European Union, L Series, No. 258 (9 October 2019), p. 21 |
| RUS-167 | Regulation 2019/576 | Commission Implementing Regulation (EU) No. 2019/576 of 10 April 2019 imposing a provisional anti-dumping duty on imports of mixtures of urea and ammonium nitrate originating in Russia, Trinidad and Tobago and the United States of America, Official Journal of the European Union, L Series, No. 100 (11 April 2019), p. 7 |
| RUS-188 (BCI) | | Index NC File |
| EU-7 | | AN Russia Sunset: Summary of EU producers' facts and arguments (5 June 2014) |
| EU-9 (BCI) | | Business plan of the investment project for NAK Azot |
| EU-11 | | Request for an Anti-Dumping Sunset Review (Article 11(2) of the Basic EC Anti-Dumping Regulation), Imports of Ammonium Nitrate (AN) Originating in Russia |
| EU-15 (BCI) | | Annex 2: Detailed explanations on corrections done to data submitted by EuroChem Group |
| EU-20 | | Confirmation of the receipt of a submission of Fertilizers Europe (14 May 2014) |
| EU-22 | Email between the Commission and GrowHow | Email correspondence dated 6 May 2014 between the Commission and GrowHow regarding AN for technical use |
| EU-25 | | Email correspondence dated 29 April and 9 May 2014 between the Commission and Fertilizers Europe |

## ABBREVIATIONS USED IN THIS REPORT

| Abbreviation | Description |
|---|---|
| Anti-Dumping Agreement | Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 |
| AN | ammonium nitrate |
| Basic AD Regulation | Regulation (EU) No. 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, Official Journal of the European Union, L Series, No. 176 (30 June 2016), p. 21 |
| BCI | business confidential information |
| CIF | cost insurance freight |
| CN | combined nomenclature |
| CPO | crude palm oil |
| DSB | Dispute Settlement Body |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| EGAN | explosive grade ammonium nitrate |
| FGAN | fertilizer grade ammonium nitrate |
| FOB | free on board |
| GAAP | generally accepted accounting principles |
| GATT 1994 | General Agreement on Tariffs and Trade 1994 |
| IGAN | industrial grade ammonium nitrate |
| Kirovo | JSC Kirovo-Chepetsky Khimichesky Kombinat |
| LNG | liquefied natural gas |
| MEDT | Ministry of Economic Development and Trade |
| NME | non-market economy |
| OJSC | Open Joint Stock Company |
| POI | period of investigation |
| RFPA | Russian Fertilizers Producers Association |
| RIP | review investigation period |
| SCM | Agreement on Subsidies and Countervailing Measures |
| SG&A | selling, general and administrative |
| Vienna Convention | Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679 |
| WTO | World Trade Organization |

# 1 INTRODUCTION

## 1.1 Complaint by the Russian Federation

1.1. On 7 May 2015, the Russian Federation (Russia) requested consultations with the European Union pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), with respect to the measures and claims set out below.[1] Consultations were held on 26 June 2015.

1.2. Russia requested further consultations with the European Union on 29 March 2016 with respect to the measures and claims set out below.[2] A second round of consultations was held on 19 May 2016 but failed to resolve the dispute.

## 1.2 Panel establishment and composition

1.3. On 7 November 2016, Russia requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, and Articles 17.4 and 17.5 of the Anti-Dumping Agreement with standard terms of reference.[3] At its meeting on 16 December 2016, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Russia in document WT/DS494/4, in accordance with Article 6 of the DSU.[4]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Russian Federation in document WT/DS494/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[5]

1.5. On 5 December 2018, Russia requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 17 December 2018, the Director-General accordingly composed the Panel as follows:

| | |
|---|---|
| Chairperson: | Ms Usha Dwarka-Canabady |
| Members: | Mr Jan Heukelman<br>Mr Arie Reich |

1.6. Argentina, Australia, Brazil, Canada, China, Egypt, India, Indonesia, Japan, the Republic of Korea (Korea), Mexico, Norway, Ukraine, the United States, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

## 1.3 Panel proceedings

### 1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[6] and timetable on 8 March 2019. The Panel revised its timetable on 4 April, 14 May, 2 August, 30 September, 28 November 2019 and on 5 June 2020.

1.8. The Panel held a first substantive meeting with the parties on 11-12 September 2019. A session with the third parties took place on 12 September 2019. The Panel held a second substantive meeting with the parties on 20-21 November 2019. On 31 January 2020, the Panel issued the descriptive

[1] Request for consultations by the Russian Federation, WT/DS494/1.
[2] Request for consultations by the Russian Federation, *Addendum*, WT/DS494/1/Add.1.
[3] Request for the establishment of a Panel by the Russian Federation, WT/DS494/4 (Russia's panel request).
[4] DSB, Minutes of the meeting held on 16 December 2016, WT/DSB/M/390.
[5] Constitution note of the Panel, WT/DS494/5.
[6] See the Panel's Working Procedures in Annex A-1.

part of its Report to the parties. The Panel issued its Interim Report to the parties on 17 April 2020. The Panel issued its Final Report to the parties on 29 June 2020.

### 1.3.2 Additional Working Procedures concerning Business Confidential Information

1.9. After consultations with the parties, the Panel adopted its Additional Working Procedures concerning Business Confidential Information (BCI) on 22 March 2019.[7]

### 1.3.3 European Union's request for a preliminary ruling

1.10. In its first written submission dated 10 May 2019, the European Union requested the Panel to issue a preliminary ruling that several claims made by Russia in relation to the European Union's anti-dumping measures on imports of ammonium nitrate (AN) originating in Russia were not properly before the Panel.[8] Russia responded to the European Union's request for a preliminary ruling on 17 June 2019.[9] Third parties did not comment on the European Union's request in their third-party submissions filed on 17 May 2019. On 2 September 2019, after carefully considering the European Union's request and Russia's response to this request, the Panel issued a preliminary ruling rejecting the objections raised by the European Union in relation to the scope of the dispute.[10] The Panel's decision is set out in Annex D-1.

## 2 FACTUAL ASPECTS

### 2.1 The measures at issue

2.1. This dispute concerns four sets of measures attributed to the European Union.

2.2. First, Russia challenges "as such", i.e. independently of their application in specific instances, certain aspects of the following provisions of the Basic AD Regulation[11]: (a) the first subparagraph of Article 2(3); (b) the second subparagraph of Article 2(3); and (c) the second subparagraph of Article 2(5).[12]

2.3. Second, Russia challenges the so-called Cost Adjustment Methodology, an unwritten measure Russia claims the European Commission applies in anti-dumping investigations and reviews, when determining the costs of production in the country of origin for investigated companies.[13]

2.4. Third, Russia challenges certain aspects of the expiry review of the anti-dumping duties on imports of certain welded tubes and pipes of iron or non-alloy steel originating in Russia (certain welded tubes and pipes), which resulted in Regulation 2015/110 of 26 January 2015.[14]

2.5. Finally, Russia challenges certain aspects of the third expiry review of the anti-dumping duties on imports of AN originating in Russia, which resulted in Regulation 999/2014 of 23 September 2014.[15] Russia also challenges certain aspects of the partial interim review which resulted in Regulation 2018/1722 of 14 November 2018.[16]

## 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. In the context of its "as such" claims, Russia requests that the Panel find that[17]:

[7] Additional Working Procedures concerning Business Confidential Information (Annex A-2).
[8] European Union's first written submission, para. 44.
[9] Russia's response to the European Union's preliminary ruling request.
[10] Preliminary ruling of the Panel, 2 September 2019 (Annex D-1).
[11] Basic AD Regulation, (Exhibit RUS-2).
[12] Russia's first written submission, para. 21.
[13] Russia's first written submission, para. 21.
[14] Regulation 2015/110, (Exhibit RUS-21); Russia's first written submission, para. 22.
[15] Regulation 999/2014, (Exhibit RUS-66); Russia's first written submission, para. 22.
[16] Regulation 2018/1722, (Exhibit RUS-96). The anti-dumping duties on ammonium nitrate originating from Russia were originally imposed, subsequently reviewed and levied pursuant to the legal instruments listed in pages 4 and 5 of Russia's panel request.
[17] Russia's first written submission, para. 1257.

a. The first subparagraph of Article 2(3) of the Basic AD Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement because it requires that, in the construction of normal value of the like product, only "representative" prices shall be used.[18]

b. The second subparagraph of Article 2(3) of the Basic AD Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement because it provides that "a particular market situation for the product concerned" exists "when prices are artificially low", thus introducing an additional circumstance for determining normal value via alternative methods.[19]

c. The last part of the second subparagraph of Article 2(5) of the Basic AD Regulation – "or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets" – is inconsistent with:

   i. Article 2.2.1.1 of the Anti-Dumping Agreement because it prevents the European Commission from calculating the cost of production on the basis of the cost "associated with the production" of the product under consideration; and

   ii. Article 2.2 of the Anti-Dumping Agreement because it prevents the European Commission from constructing the cost of production on the basis of "the cost of production in the country of origin".[20]

3.2. Russia also requests the Panel to find that the alleged Cost Adjustment Methodology is inconsistent with:

a. the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement because, in applying the alleged Cost Adjustment Methodology, the European Commission:

   i. rejects part 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 (GAAP) of the exporting country and that reasonably reflect the costs associated with the production and sale of the product under consideration; and

   ii. uses costs other than "the 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 GAAP of the exporting country.[21]

b. Article 2.2 of the Anti-Dumping Agreement because, in applying the alleged Cost Adjustment Methodology, the European Commission uses, for the construction of normal value, costs 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".[22]

3.3. With respect to the anti-dumping measures on imports of certain welded tubes and pipes originating in Russia, Russia requests the Panel to find that the European Union acted inconsistently with:

a. the first sentence of Article 2.2.1.1 because, in determining the normal value in the course of the expiry review, the European Commission:

   i. failed to calculate the cost of production of certain welded tubes and pipes on the basis of the records that are kept by the producer under investigation in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the

[18] Russia's first written submission, paras. 21 and 91.
[19] Russia's first written submission, paras. 21 and 134.
[20] Russia's first written submission, paras. 268 and 281.
[21] Russia's first written submission, paras. 21, 405, and 1258.
[22] Russia's first written submission, paras. 21, 425, and 1258.

production and sale of the product under consideration, by rejecting the gas prices actually paid by the producer under investigation[23]; and

ii. used costs other than "the 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 GAAP of the exporting country.[24]

b. Article 2.2.1 of the Anti-Dumping Agreement because, in the ordinary-course-of-trade test conducted in the expiry review, the European Commission used incorrect costs of production, calculated in violation of the first sentence of Article 2.2.1.1.[25]

c. Article 11.3 of the Anti-Dumping Agreement because, in its determination of the likelihood of recurrence of dumping, the European Commission relied on a dumping margin determined on the basis of costs of production calculated in violation of the first sentence of Article 2.2.1.1 and Article 2.2.1 of the Anti-Dumping Agreement.[26]

3.4. With respect to the anti-dumping measures on imports of AN from Russia, Russia requests that the Panel find that the European Union acted inconsistently with[27]:

a. 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 Anti-Dumping Agreement and Articles I:1, II:1(a) and II:1(b), VI:1 and VI:2 of the GATT 1994 because the European Commission made likelihood of recurrence of dumping and injury determinations, extended the anti-dumping measures, and levied anti-dumping duties on imports of stabilized AN, as well as industrial grade ammonium nitrate (IGAN), for which Russia alleges no anti-dumping investigation was conducted and no dumping and material injury determinations were made.

b. Article 11.3 of the Anti-Dumping Agreement by initiating the expiry review that led to the adoption of Regulation 999/2014.

c. Articles 11.3, 3.1, 11.1, 1, and 18.1 of the Anti-Dumping Agreement by conducting a single expiry review with regard to anti-dumping measures having different product scopes of application, combining within such review the likelihood of recurrence of injury and dumping determinations with regard to products subject to anti-dumping measures having different scopes of application, and extending the measures applicable to Kirovo based on the likelihood of injury and dumping determinations for the product other than that which formed the basis for the anti-dumping measures applied on products of this company.

d. Articles 11.3, 2.6, 3.1, 3.2, 3.4, and 4.1 of the Anti-Dumping Agreement by making a recurrence of injury determination based on erroneous and incomplete data provided by the domestic industry and by incorrectly defining the domestic industry.

e. Articles 2.1, 2.3, 6.8, 6.10, and 11.3 of the Anti-Dumping Agreement due to the failure to examine the impact of the absence of dumping by the largest Russian exporters during the review investigation period.

f. Articles 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 making the affirmative determination of likelihood of dumping on the basis of alleged "dumping" without conducting proper dumping margin calculations.

g. Articles 11.1, 9.3, and 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by extending the anti-dumping measures and applying anti-dumping duties on imports of AN from Russia based on the dumping margins that (i) were incorrectly established under Articles 2.2.1.1, 2.2.1, and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of

[23] Russia's first written submission, paras. 22, 447, and 1259.
[24] Russia's first written submission, paras. 22, 447, and 1259.
[25] Russia's first written submission, paras. 22, 447, 464, 475-476, 483-485, and 1259.
[26] Russia's first written submission, paras. 22, 447, 476, 484-485, and 1259.
[27] Russia's first written submission, para. 1260.

the GATT 1994, and (ii) thereby exceeded the dumping margins had they been properly established.

h. Article 11.3 of the Anti-Dumping Agreement by extending the duration of anti-dumping duties on the basis of calculations made in the 2008 expiry review, in which the European Commission relied on dumping margins calculated not in line with Articles 2.2.1.1, 2.2.1, and 2.2 of the Anti-Dumping Agreement.

i. Articles 2.1, 2.2, 9.3, and 11.3 of the Anti-Dumping Agreement, and Articles I:1, VI:1, VI:2, and the second *Ad* Note to Article VI:1 of the GATT 1994, by imposing and continuing levying country-wide anti-dumping duties on AN from Russia for which the country-wide dumping margin was calculated pursuant to a methodology that does not conform to these provisions.

j. Articles 1 and 18.1 of the Anti-Dumping Agreement, because the 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 1994, as interpreted by the Anti-Dumping Agreement.

k. Articles 11.3, 3.1, and 3.2 of the Anti-Dumping Agreement by failing to perform proper undercutting calculations.

l. Articles 11.3, 3.1, 3.4, and 4.1 of the Anti-Dumping Agreement by basing the likelihood of recurrence of injury determination (i) on data relating to a non-representative sample of the domestic industry; (ii) on the incomplete, non-representative and erroneous data provided by the sampled EU companies; and (iii) by failing to examine and explain the significantly divergent economic performance between the sampled and non-sampled EU domestic producers.

m. Articles 11.3 and 3.1 of the Anti-Dumping Agreement by erroneously concluding that there were no indications that the non-injurious situation of the EU domestic industry would be sustainable.

n. Articles 11.3 and 3.1 of the Anti-Dumping Agreement because the conclusion that the expiry of the measures would be likely to lead to recurrence of dumping and recurrence of injury was not based on positive evidence and an objective examination of the relevant factors, including the level of production capacities available in Russia and the ability of third country markets to absorb Russian exports.

o. Articles 6.1.2, 6.4, and 11.4 of the Anti-Dumping Agreement by delaying on numerous occasions access to the non-confidential file for the Russian exporters.

p. Articles 6.1.3, 6.2, 6.4, and 11.4 of the Anti-Dumping Agreement because the European Commission failed to provide to the interested parties the full text of the written application received on 28 March 2013, on the basis of which it initiated the expiry review.

q. 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.

r. 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.

s. Articles 6.8 and 11.4 of the Anti-Dumping Agreement and paragraphs 3, 5, 6, and 7 of Annex II to the Anti-Dumping Agreement by refusing to rely on information provided by Russian exporters.

t. Articles 6.9 and 11.4 of the Anti-Dumping Agreement by failing to inform the interested parties of the essential facts under consideration which formed the basis for the decision to extend the anti-dumping measures.

u. Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to provide in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authority and to explain the reasons which led to the acceptance or rejection of the arguments of the interested parties.

3.5. Russia requests that the measures at issue should be withdrawn.[28]

3.6. The European Union requests that the Panel reject Russia's claims in this dispute in their entirety and find that the challenged measures are not inconsistent with the European Union's obligations under WTO law.[29]

## 4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1 to B-4).

## 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Australia, Japan, Korea, Norway, Ukraine, and the United States are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1 to C-7).[30]

## 6 INTERIM REVIEW

6.1. On 17 April 2020, the Panel issued its Interim Report to the parties. Annex A-3 sets out the requests made by the parties at the interim review stage, as well as the Panel's discussion and disposition of those requests.

## 7 FINDINGS

### 7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

#### 7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that agreement's provisions in accordance with the customary rules of interpretation of public international law. The principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention) are generally accepted as such customary rules.

#### 7.1.2 Standard of review

7.2. Article 11 of the DSU provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

[28] Russia's first written submission, para. 1261.
[29] European Union's first written submission, paras. 689 and 691.
[30] Brazil filed a third-party submission, made an oral statement at the third-party session and submitted responses to the questions posed by the Panel to the third parties following the third-party session, but did not submit an integrated executive summary of its arguments to the Panel. Canada, China, Egypt, India, Indonesia, Mexico, and Viet Nam did not submit written or oral arguments to the Panel.

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the [Anti-Dumping] Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the [Anti-Dumping] Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the [Anti-Dumping] Agreement if it rests upon one of those permissible interpretations.

7.3. Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute. The "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authority has provided a reasoned and adequate explanation as to (a) how the evidence on the record supported its factual findings; and (b) how those factual findings support the overall determination.[31] In performing this task, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the investigation[32] and must take into account all such evidence submitted by the parties to the dispute.[33] At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[34]

7.4. Finally, although couched in terms of an obligation on a panel, Article 17.6(i) of the Anti-Dumping Agreement in effect defines when an investigating authority can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of its "establishment" and "evaluation" of the relevant facts.[35] Therefore, a panel must assess if the establishment of the facts by the investigating authority was proper and if the evaluation of those facts by that authority was unbiased and objective.[36] If these standards have not been met, a panel must hold the investigating authority's establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement.[37]

### 7.1.3 Burden of proof

7.5. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[38] Therefore, as the complaining party in this proceeding, Russia bears the burden of demonstrating that the challenged aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement and the GATT 1994. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[39] Finally, it is generally for each party asserting a fact to provide proof thereof.[40]

## 7.2 Russia's claims concerning the Cost Adjustment Methodology

7.6. We find it appropriate to begin our analysis of Russia's claims by examining Russia's complaint in relation to the so-called Cost Adjustment Methodology.

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[31] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.
[32] Article 17.5(ii) of the Anti-Dumping Agreement requires a panel to examine the matter based on the facts made available to the authorities.
[33] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[34] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[35] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[36] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[37] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[38] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 337.
[39] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[40] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 335.

### 7.2.1 Introduction

7.7. In this dispute, Russia challenges an alleged unwritten measure of "general and prospective application"[41] attributable to the European Union, which Russia labels "Cost Adjustment Methodology".[42] According to Russia, pursuant to the Cost Adjustment Methodology, when calculating the costs of production of producers or exporters under investigation in anti-dumping proceedings, the European Commission:

a. rejects part of the costs reflected in the records, that are kept by the exporter or producer under investigation in accordance with the GAAP of the exporting country and that reasonably reflect the costs associated with the production and sale of the product under consideration, as not reasonably reflecting the costs associated with the production and sale of the product under consideration, when such costs – in particular, input costs and/or prices – are viewed by the authority as "artificially or abnormally low" due to alleged "distortions" or "market impediments", such as government price regulation or the application of export duties in the country of origin; and

b. replaces and/or adjusts such recorded cost data using cost data obtained from other sources, including so-called "representative markets", which are viewed by the authority as 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.[43]

7.8. Russia requests the Panel to find that the Cost Adjustment Methodology is "as such", i.e. independent of its specific instances of application[44], inconsistent with:

a. the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement by providing for (i) the rejection of part of the costs reflected in the records that are kept by the producer or exporter under investigation in accordance with the GAAP of the exporting country and that reasonably reflect the costs associated with the production and sale of the product under consideration; and (ii) the use of costs other than "the costs associated with the production and sale of the product under consideration".

b. Article 2.2 of the Anti-Dumping Agreement by providing for the use, in the construction of normal value, of costs 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".

7.9. Russia further requests the Panel to recommend that the Cost Adjustment Methodology should be withdrawn.[45]

7.10. The European Union responds that Russia has not demonstrated the existence of the Cost Adjustment Methodology and requests the Panel to reject Russia's claims that any such measure is inconsistent with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement.[46]

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[41] Russia's responses to Panel question No. 19, para. 68; question No. 67, para. 38; and opening statement at the second meeting of the Panel, para. 84.

[42] Russia submits that the short name "Cost Adjustment Methodology" reflects the essence of the challenged measure, i.e. a methodology that results in specific input cost adjustments in anti-dumping proceedings. (Russia's second written submission, para. 443).

[43] Russia's first written submission, para. 299.

[44] While Russia omits to characterize its complaint in connection to the Cost Adjustment Methodology as an "as such" claim, Russia indicates that "[its] challenge is not about a specific individual 'as applied' measure or 'as applied' measures, but about the [Cost Adjustment Methodology]". (Russia's opening statement at the second meeting of the Panel, para. 82). Russia further requests that the Cost Adjustment Methodology "should be withdrawn". (Russia's first written submission, para. 1261). Accordingly, we understand that Russia "seek[s] to prevent the [European Union] *ex ante* from engaging" in the application of the Cost Adjustment Methodology in future anti-dumping proceedings. *(*Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172). Therefore, in our examination of Russia's complaint in relation to the Cost Adjustment Methodology, we refer to it as an "as such" claim.

[45] Russia's first written submission, para. 1261.

[46] European Union's first written submission, para. 107; comments on Russia's response to Panel question No. 76, para. 45.

### 7.2.2 Whether Russia has demonstrated the existence of the Cost Adjustment Methodology

7.11. Given the unwritten nature of the measure challenged by Russia, the first issue before the Panel is whether Russia has demonstrated the existence of the Cost Adjustment Methodology.

#### 7.2.2.1 Main arguments of the parties

##### 7.2.2.1.1 Russia

7.12. Russia submits that the European Commission implements the Cost Adjustment Methodology in any anti-dumping proceeding (original investigations, partial interim reviews, new exporter reviews, and expiry reviews)[47], in which it examines the records of the producers or exporters under investigation in order to calculate their costs of production of the product under consideration.[48]

7.13. In explaining the operation of the Cost Adjustment Methodology, Russia asserts that this methodology is not applied "in every single case" but is triggered by a "specific set of circumstances"[49], pertaining to the existence of government measures allegedly affecting the domestic input prices. When faced with evidence of government regulation of input prices or other situations considered by the investigating authorities as "distortions" in the country of origin, the European Commission examines whether the recorded input prices are in line with world-market prices or prices in other countries or markets. To this effect, the European Commission compares the recorded input prices with input prices from "undistorted" countries.[50] Whenever the European Commission establishes that the recorded input prices are significantly below input prices in other countries or markets, or are set by the government, it concludes that such recorded input prices cannot be used to calculate the costs of production of the product under consideration because they do not "reasonably reflect the costs associated with the production and sale of the product under consideration".[51]

7.14. Russia explains that, subsequently, the European Commission replaces the input prices actually incurred by the producer or exporter under investigation with out-of-country input price information, which the European Commission considers "representative" and unaffected by "distortions".[52] Russia refers to these out-of-country input price information as "surrogate" input prices. However, Russia argues, the European Commission does not ensure that the adjusted costs represent the cost of production in the country of origin.[53] According to Russia, this is because the purpose of the Cost Adjustment Methodology is to remove, from the calculation of the costs of production, the "distortions" in the country of origin affecting the input price paid by the producer or exporter.[54]

7.15. Russia maintains that, even though the Cost Adjustment Methodology is not explicitly described in the Basic AD Regulation, there is a legal framework that "informs"[55] this methodology and "confirms"[56] its existence. In this connection, Russia argues that the anti-dumping determinations that Russia has put forward in this proceeding show that the European Commission implements the Cost Adjustment Methodology pursuant to the first and second subparagraphs of Article 2(5) of the Basic AD Regulation[57], when it examines whether the records of the producer or exporter under investigation "reasonably reflect the costs associated with the production and sale of

[47] Russia's first written submission, para. 326.
[48] Russia's first written submission, para. 304.
[49] Russia's first written submission, para. 300; opening statement at the first meeting of the Panel, para. 61; and second written submission, para. 458.
[50] Russia's first written submission, para. 305.
[51] Russia's first written submission, para. 306.
[52] Russia's first written submission, para. 307.
[53] Russia's first written submission, para. 299.
[54] Russia's first written submission, para. 283.
[55] Russia's first written submission, para. 312; opening statement at the first meeting of the Panel, para. 67.
[56] Russia's first written submission, paras. 285 and 322; opening statement at the first meeting of the Panel, para. 67.
[57] Russia's first written submission, paras. 305 and 307.

the product under consideration".[58] Moreover, Russia submits that other provisions of the Basic AD Regulation[59] and of EU law "disclose the main aspects" of the Cost Adjustment Methodology.[60]

7.16. Russia portrays the Cost Adjustment Methodology as a measure that "has certain characteristics and will be applied or is likely to be applied in the future".[61] In relation to the nature of this measure, Russia asserts that the Cost Adjustment Methodology constitutes a measure of "general and prospective application". Russia further argues that, by using the Cost Adjustment Methodology in anti-dumping proceedings, the European Commission "significantly increases" the cost of production and, hence, the normal value and the subsequent dumping margin.[62] Moreover, Russia submits that the Cost Adjustment Methodology has a "normative value", which the European Union "has strengthened" over time. In this connection, Russia submits that the challenged methodology has been endorsed in judgments of the General Court of the European Union and has been recently clarified by amendments to the Basic AD Regulation introduced in 2017 and 2018 by, respectively, Regulations 2017/2321[63] and 2018/825.[64]

7.17. Russia argues that the Cost Adjustment Methodology has been developed by the European Union, and is part of the European Union's deliberate defensive trade policy, to remove alleged distortions in the domestic market.[65] Arguing that the recently enacted Regulations 2017/2321 and 2018/825 amount to a "legislative manifestation" of the Cost Adjustment Methodology in dealing with the issue of "distortions" in input prices[66], Russia requests the Panel to also examine and make rulings in relation to Regulations 2017/2321 and 2018/825.[67] Specifically, Russia asks the Panel to find that Article 2(6a) of the Basic AD Regulation introduced by Regulation 2017/2321, Article 7(2a) of the Basic AD Regulation introduced by Regulation 2018/825, and recitals 3, 5, and 7 of Regulation 2017/2321 and recital 8 of Regulation 2018/825, are also inconsistent with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and should be withdrawn.[68]

#### 7.2.2.1.2 The European Union

7.18. The European Union contends that the alleged Cost Adjustment Methodology does not exist and that Russia has failed to establish the existence and precise content of any such methodology.

7.19. The European Union takes issue with Russia's description of the challenged measure.[69] Noting that Russia describes the alleged methodology as a measure of "general and prospective application", the European Union argues that Russia is required to set out the precise content of the Cost Adjustment Methodology in terms of "something that is capable of being understood as legislation or something akin to it" and to being applied to future cases.[70] However, for the European Union, the language used by Russia in setting out the precise content of the Cost

[58] Russia's first written submission, para. 306.
[59] Russia refers to the second subparagraph of Article 2(3) and to Articles 2(6a) and 7(2a) of the Basic AD Regulation. (Russia's first written submission, para. 322; opening statement at the first meeting of the Panel, para. 67).
[60] Russia refers to recitals 3 and 4 of Regulation 1972/2002, recitals 3, 5, and 7 of Regulation 2017/2321, and recital 8 of Regulation 2018/825. (Russia's first written submission, para. 322; opening statement at the first meeting of the Panel, para. 67).
[61] Russia's first written submission, para. 285; opening statement at the first meeting of the Panel, paras. 53 and 61; and second written submission, para. 514.
[62] Russia's first written submission, paras. 379-386.
[63] Regulation 2017/2321, (Exhibit RUS-11).
[64] Regulation 2018/825, (Exhibit RUS-30).
[65] Russia's first written submission, paras. 283 and 365-378.
[66] Russia's response to Panel question No. 25, para. 95.
[67] Russia's responses to Panel question No. 25, para. 101; question No. 67, para. 39; and second written submission, para. 617.
[68] Russia's responses to Panel question No. 25, para. 101; question No. 67, para. 39; and second written submission, para. 652.
[69] The European Union asserts that Russia is bound by Russia's statements throughout the proceeding about its alleged measure. (European Union's comments on Russia's responses to Panel question No. 20, para. 57 and question No. 67, para. 28).
[70] European Union's second written submission, para. 39; response to Panel question No. 20, para. 58.

Adjustment Methodology[71] describes "what might or might not have occurred in an individual 'as applied' measure or a number of individual 'as applied' measures".[72] In the European Union's view, this supposed measure cannot be characterized as one of "general and prospective application" because it is defined in terms that relate to the facts of particular cases, rather than in "as such" terms. For these reasons, the European Union finds Russia's description of the challenged measure as "logically incapable" of demonstrating the existence and precise content of the Cost Adjustment Methodology.

7.20. Moreover, the European Union objects to the fact that Russia seeks to challenge as an "unwritten measure" something that, according to Russia's explanations, results from the operation of provisions of the Basic AD Regulation, such as the first subparagraph of Article 2(5) and the second subparagraph of Article 2(5). According to the European Union, one cannot simply point at provisions of a Member's anti-dumping legislation (which correspond to multiple provisions of the Anti-Dumping Agreement), and assert that, as a whole, they constitute something called a "methodology", which by nature is a measure of "general and prospective application". According to the European Union, the application of these provisions depends on the facts of each case, so that the supposed measure cannot be characterized as one of "general and prospective application".[73]

7.21. In this context, the European Union calls in question the relevance of the set of European Commission's anti-dumping determinations put forward by Russia, to demonstrate the existence of the alleged Cost Adjustment Methodology as a measure of "general and prospective application".[74] According to the European Union, these determinations are "nothing more than examples" of the application of the provisions of the Basic AD Regulation, including the first and second subparagraphs of Article 2(5).[75] For the European Union, by definition, these "as applied" measures constitute "particular instances in which the investigating authority has taken a particular route through the complex decision tree set out in the legislation and reached a particular determination". However, in the European Union's view, evidence in this connection "does not conjure into existence" a "measure" that is different from what is written in the legislation.[76] While Russia is certainly free to challenge the "as applied" measures adopted by the European Commission if Russia considers that the European Commission has improperly interpreted or applied the provisions of the Anti-Dumping Agreement in those "as applied" measures, the European Union alleges that evidence of how provisions of the Basic AD Regulation have been applied in particular cases to particular fact patterns "does nothing" to demonstrate the existence or precise content of the alleged unwritten methodology.[77]

7.22. Finally, the European Union objects to Russia's request that the Panel includes Regulations 2017/2321 and 2018/825 in its terms of reference. The European Union notes that, at the time of the panel request, Regulations 2017/2321 and 2018/825 did not exist and that Russia's panel request includes no reference to these Regulations. Hence, the European Union submits, neither Regulations 2017/2321 and 2018/825, nor any provisions of these Regulations, are within the Panel's terms of reference.[78]

#### 7.2.2.2 Legal standard

7.23. Articles 3.3, 4.4, and 6.2 of the DSU refer to "measures" challengeable in WTO dispute settlement.[79] In principle, any act or omission attributable to a WTO Member can be a measure of

[71] European Union's second written submission, para. 39 (referring to Russia's first written submission, para. 299).
[72] European Union's second written submission, para. 39.
[73] European Union's first written submission, paras. 88-90.
[74] European Union's second written submission, paras. 35-37.
[75] European Union's first written submission, para. 101.
[76] European Union's second written submission, paras. 35-37.
[77] European Union's first written submission, para. 102; second written submission, para. 46.
[78] European Union's first written submission, para. 109; response to Panel question No. 24, paras. 70-71.
[79] Article 3.3 of the DSU refers to benefits accruing to a Member that are being "impaired by measures taken by another Member". Further, Article 6.2 of the DSU requires Members to "identify the specific measures at issue" in a panel request. This is one of the two requirements under Article 6.2, which together comprise the "matter referred to the DSB". This matter then forms the basis for a panel's terms of reference under Article 7.1 of the DSU. (Appellate Body Report, *US – Carbon Steel*, para. 125 (referring to Appellate Body Report, *Guatemala – Cement I*, paras. 69-76)).

that Member for the purposes of dispute settlement proceedings.[80] Accordingly, a broad range of measures can be challenged in WTO dispute settlement.[81]

7.24. A measure need not be compartmentalized into categories in order to be challengeable in WTO dispute settlement. This is because the term "measure" in Articles 3.3, 4.4, and 6.2 of the DSU is sufficiently broad to encompass various types of acts or omissions attributable to a WTO Member.[82] However, for every measure, a complainant must establish that the measure is attributable to the respondent, as well as the precise content of the challenged measure. A complainant may be required to demonstrate other elements, depending on the particular characteristics or nature of the measure being challenged.[83] The "specific measure at issue, whether it is written or unwritten, and how it is described, characterized, and challenged by a complainant, will inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged".[84]

7.25. In order to prove the existence of a challengeable measure of "general and prospective application", a complainant must clearly establish that the alleged measure is attributable to the responding Member, its precise content, and that it has "general and prospective application". A measure has "general application" to the extent that it affects an unidentified number of economic operators[85] instead of economic operators specified in the measure.[86] A measure has "prospective application" to the extent that it applies in the future.[87]

7.26. The evidentiary threshold for proving the existence of an unwritten measure is high.[88] A panel must not lightly assume the existence of an unwritten measure.[89] Particular rigour is required on the part of a panel to support a conclusion as to the existence of a measure that is not expressed in the form of a written document, and a panel must carefully examine the concrete instrumentalities that evidence the existence of the purported measure.[90]

#### 7.2.2.3 Evaluation by the Panel

7.27. With these considerations in mind, and in the light of Russia's description and characterization of the purported Cost Adjustment Methodology, we will examine whether Russia has demonstrated the precise content of this measure; its attribution to the European Union; and whether any such methodology has general and prospective application.

##### 7.2.2.3.1 Precise content

7.28. In the light of Russia's description and explanations, we understand the Cost Adjustment Methodology to consist of two elements, namely:

a. the rejection of the input costs reflected in the records of the producer or exporter under investigation on the grounds that they do not reasonably reflect the costs associated with the production and sale of the product under consideration, when such recorded input prices are significantly low, or affected by government regulation or other situations considered by the investigating authorities as "distortions" in the country of origin; and

[80] Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.122; *US – Corrosion-Resistant Steel Sunset Review*, para. 81; and *Argentina – Import Measures*, para. 5.100.
[81] Appellate Body Reports, *US – Anti-Dumping Methodologies (China)*, para. 5.122; *EC and certain member States – Large Civil Aircraft*, para. 794; and *Argentina – Import Measures*, paras. 5.106 and 5.109.
[82] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.122.
[83] Appellate Body Reports, *Argentina – Import Measures*, paras. 5.104 and 5.108.
[84] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.123 (referring to Appellate Body Reports, *Argentina – Import Measures*, paras. 5.108-5.110).
[85] Appellate Body Report, *US – Anti-Dumping Methodologies (China),* paras. 5.130 and 5.147.
[86] Appellate Body Report, *US – Anti-Dumping Methodologies (China),* paras. 5.130 and 5.147.
[87] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172 and 187; *US – Corrosion-Resistant Steel Sunset Review*, para. 82).
[88] Appellate Body Report, *US – Zeroing (EC)*, para. 198.
[89] Appellate Body Report, *US – Zeroing (EC)*, para. 196.
[90] Appellate Body Report, *US – Zeroing (EC)*, para. 198.

b. the subsequent replacement or adjustment of the recorded input prices by using out-of-country input cost data, without ensuring that the established or adjusted costs represent the cost of production in the country of origin.

#### 7.2.2.3.1.1 Russia's characterization of the first element: Rejection of recorded input costs

7.29. Russia explains that the first element of the Cost Adjustment Methodology – the rejection of recorded input costs – results from the operation of the *first* subparagraph of Article 2(5) of the Basic AD Regulation. This provision requires that the costs of a producer or exporter under investigation shall normally be calculated on the basis of its records, provided that the records are in accordance with the GAAP of the country concerned and "it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration".[91]

7.30. For Russia, whenever the recorded input prices are significantly low, or affected by government regulation or other situations considered as "distortions" in the country of origin, the European Commission, in application of the first subparagraph of Article 2(5), concludes that the records, or the costs reflected in the records, cannot be used to calculate normal value. The decision, according to Russia, is based on the European Commission's consideration that the input prices in the country of origin are "distorted". It does not take into account whether the records are in accordance with the GAAP of the exporting country or reflect the input prices actually paid by the producer under investigation in the country of origin. Pursuant to the Cost Adjustment Methodology, the European Commission rejects the costs reflected in the records of the producer or exporter under investigation on the grounds that they do not "reasonably reflect the costs associated with the production and sale of the product under consideration", *even though* 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".[92]

7.31. For the European Union, Russia's explanations do not demonstrate the existence of a measure akin to legislation: rather, Russia describes an alleged unwritten norm in terms that expressly provide for non-compliance with its own provisions, i.e. a situation where the recorded costs "reasonably reflect the costs associated with the production and sale of the product under consideration", but are considered not to "reasonably reflect the costs associated with the production and sale of the product under consideration".[93]

7.32. We disagree with the European Union. In fact, we understand Russia to mean that the costs reflected in the records of the producer or exporter under investigation are rejected on grounds that are unrelated to whether the records of the producers meet the two above-mentioned conditions. For this reason, according to Russia, the Cost Adjustment Methodology is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement, because it provides for the application of an additional test[94], not contemplated in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, i.e. whether the recorded input prices are significantly low, or affected by government regulation or other situations considered by the investigating authorities as "distortions" in the country of origin.

#### 7.2.2.3.1.2 Russia's characterization of the second element: Use of out-of-country input price information

7.33. As defined by Russia, the second element of the methodology – the use of out-of-country input cost data under the Cost Adjustment Methodology – results from the operation of the *second* subparagraph of Article 2(5) of the Basic AD Regulation. This provision provides that "[if] costs associated with the production and sale of the product under investigation" are not reasonably reflected in the records of the producer or exporter under investigation, "they shall be adjusted or

[91] The first subparagraph of Article 2(5) of the Basic AD Regulation provides:
Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.
[92] Russia's first written submission, para. 299; second written submission, para. 486.
[93] European Union's response to Panel question No. 20, para. 63.
[94] Russia's opening statement at the second meeting of the Panel, paras. 83 and 89.

established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets".[95]

7.34. According to Russia, following the rejection of the recorded input prices, the European Commission, in application of the second subparagraph of Article 2(5) of the Basic AD Regulation, replaces the recorded input prices with out-of-country input price data, considered not to be affected by "distortions" or reflecting market conditions. According to Russia, the Cost Adjustment Methodology fails to "ensur[e] that [the] adjusted or established costs represent the cost of production in the country of origin". We thus understand from the description and explanations of the challenged measure given by Russia[96] that the second element of the alleged Cost Adjustment Methodology consists in (i) replacing the input prices reflected in the records of the producer or exporter under investigation with out-of-country input price information, and, in doing so, (ii) 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".

7.35. We note the European Union's view that Russia is precluded to challenge, as an unwritten measure, acts or omissions resulting from the operation of legal provisions, such as the first and second subparagraph of Article 2(5) of the Basic AD Regulation. According to the European Union, the operation of complex and highly fact-dependent provisions, such as the first and second subparagraphs of Article 2(5) of the Basic AD Regulation, "cannot be strung together" and labelled as a "methodology" and a measure of "general and prospective application", because it would not be possible to discern, at an abstract level, what the precise content of any such alleged "methodology" is supposed to be or how these provisions might apply to future fact patterns.[97]

7.36. We disagree with the European Union's proposition that the operation of a legal provision cannot lead to an independent measure that could be challenged in WTO dispute settlement. First, we note that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[98] Second, in our view, there might be written provisions or instruments of a Member that "as such" are not necessarily WTO-inconsistent to the extent that they may be applied in both a WTO-consistent manner and a WTO-inconsistent manner. Hence, a challenge of such a written measure can properly be rejected by a panel. However, if the Member in question repeatedly applies the written provision at issue in a certain manner, we fail to see why this could not, in certain circumstances, amount to an unwritten measure that may be challenged "as such" in WTO dispute settlement. Moreover, if this repeated application is WTO-inconsistent, a panel could find that the unwritten measure is "as such" WTO-inconsistent. This WTO-inconsistent aspect of the law may not be apparent from the text of the legal provision. In that scenario, it seems to us that requiring a complainant to challenge every instance of application would affect the complainant's right to bring an "as such" challenge and to prevent the Member that maintains the unwritten measure "*ex ante* from engaging in the same conduct".[99]

7.37. We recall that, by definition, an "as such" claim challenges laws, regulations or other instruments of a Member that have general and prospective application, by asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations.[100] In the case before us, by portraying the Cost Adjustment Methodology as an unwritten measure of general and prospective application, Russia seeks to prevent the application of this methodology in future anti-dumping proceedings conducted by the European Commission. In our view, the fact that the alleged methodology results from the operation of other (written) provisions is immaterial when establishing whether the Cost Adjustment Methodology can be challenged "as such" in WTO dispute settlement.

[95] Second subparagraph of Article 2(5) of the Basic AD Regulation. See para. 7.203 below.
[96] Russia's first written submission, paras. 299 and 360; responses to Panel question No. 66, para. 33; question No. 68, paras. 40-44; and opening statement at the second meeting of the Panel, para. 83.
[97] European Union's first written submission, para. 101.
[98] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.
[99] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.
[100] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

#### 7.2.2.3.1.3 Whether Russia has established the precise content of the Cost Adjustment Methodology

7.38. To substantiate its factual assertions concerning the precise content of the Cost Adjustment Methodology, Russia has submitted, *inter alia*, a set of 17 anti-dumping determinations issued by the European Commission over a period of 15 years, between 2005 and 2019, in original investigations, partial interim reviews, new exporter reviews and expiry reviews, involving imports of products originating in Algeria, Argentina, Indonesia, Russia and Ukraine. The determinations cover imports of various products, namely potassium chloride, certain seamless pipes and tubes of iron or steel, solutions of urea and ammonium nitrate, ammonium nitrate, urea, certain welded tubes and pipes of iron or non-alloy steel, biodiesel, and mixtures of urea. The relevant input in the majority of determinations is gas. The European Union argues that these determinations concern different countries, different products, 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".[101] The European Union has advanced no 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.

7.39. Upon careful examination of these anti-dumping determinations, we are of the view that they establish the precise content of the Cost Adjustment Methodology as described by Russia, for the following reasons.

7.40. The determinations show that, pursuant to the first subparagraph of Article 2(5) of the Basic AD Regulation, the European Commission examined the records of the producers in the light of evidence that the domestic input prices for the relevant input were significantly low when compared to prices in other markets[102], regulated by the government of the country of origin[103], or affected by other government measures.[104] The European Commission concluded that, due to these reasons, the input prices paid by the producers and reflected in their records, could not be used to calculate the cost of production.[105] The rejection of the actual input prices is based on a conclusion that the input prices "were not reasonably reflected" in the producer/exporter's records or were found not to "reasonably reflect the costs" associated with the production and sale of the relevant input or the product under consideration.[106] Our review of the determinations reveals that the decisive factor in

[101] European Union's response to Panel question No. 70, paras. 6-7.

[102] Regulation 238/2008, (Exhibit RUS-35), recital 21; Regulation 236/2008, (Exhibit RUS-17), recital 18; Regulation 661/2008, (Exhibit RUS-15), recital 34; Regulation 1891/2005, (Exhibit RUS-19), recital 30; Regulation 1050/2006, (Exhibit RUS-31), recital 53; Regulation 954/2006, (Exhibit RUS-34), recitals 95 and 119; Regulation 1911/2006, (Exhibit RUS-20), recitals 27 and 58; Regulation 1194/2013, (Exhibit RUS-23), recitals 38 and 68; Regulation 812/2008, (Exhibit RUS-16), recital 17; Regulation 1269/2012, (Exhibit RUS-22), recital 21; Regulation 1256/2008, (Exhibit RUS-18), recital 111; Regulation 907/2007, (Exhibit RUS-32), recital 33; Regulation 2015/110, (Exhibit RUS-21), recital 69; and Regulation 1251/2009, (Exhibit RUS-33), recital 17.

[103] Regulation 1050/2006, (Exhibit RUS-31), recital 53; Regulation 954/2006, (Exhibit RUS-34), recital 119; Regulation 812/2008, (Exhibit RUS-16), recital 17; Regulation 1269/2012, (Exhibit RUS-22), recital 21; Regulation 1911/2006, (Exhibit RUS-20), recitals 27 and 58; Regulation 238/2008, (Exhibit RUS-35), recital 21; Regulation 1251/2009, (Exhibit RUS-33), recital 17; Regulation 236/2008, (Exhibit RUS-17), recital 18; Regulation 661/2008, (Exhibit RUS-15), recital 34; Regulation 907/2007, (Exhibit RUS-32), recital 33; Regulation 1256/2008, (Exhibit RUS-18), recital 111; and Regulation 2015/110, (Exhibit RUS-21), recital 69.

[104] Regulation 1194/2013, (Exhibit RUS-23), recital 28. See also Regulation 490/2013, (Exhibit RUS-105), recitals 44 and 64.

[105] We note that, in some instances, the European Commission decided not to reject the domestic input prices of the relevant input (electricity) because it considered that such prices were "in line with international market prices, when compared to other countries" or "similar" to out-of-country prices. See, e.g. Regulation 1911/2006, (Exhibit RUS-20), recital 26; Regulation 954/2006, (Exhibit RUS-34), recital 94; Regulation 1050/2006, (Exhibit RUS-31), recital 52; Regulation 661/2008, (Exhibit RUS-15), recital 33; and Regulation 907/2007, (Exhibit RUS-32), recital 32.

[106] Regulation 1891/2005, (Exhibit RUS-19), recitals 31-32; Regulation 1050/2006, (Exhibit RUS-31), recitals 54-55; Regulation 954/2006, (Exhibit RUS-34), recitals 96, 98, 120, and 125; Regulation 812/2008, (Exhibit RUS-16), recital 17; Regulation 1269/2012, (Exhibit RUS-22), recital 21; Regulation 1911/2006, (Exhibit RUS-20), recital 28; Regulation 238/2008, (Exhibit RUS-35), recital 21; Regulation 1251/2009, (Exhibit RUS-33), recital 17; Regulation 236/2008, (Exhibit RUS-17), recital 19; Regulation 661/2008, (Exhibit RUS-15), recitals 32 and 35; Regulation 1256/2008, (Exhibit RUS-18), recital 111;

rejecting the recorded input prices is that they were State-regulated and "far below market prices paid in unregulated markets".[107]

7.41. Subsequently, the European Commission "adjusted" the costs of the producer /exporter under investigation on the basis of out-of-country input price information, pursuant to the second subparagraph of Article 2(5) of the Basic AD Regulation. In almost the totality of determinations, the European Commission used the price of the relevant input when exported from the country of origin to another destination. In two instances – the anti-dumping investigation on imports of biodiesel from Argentina and Indonesia – the European Commission implemented the adjustment by replacing the price of the main raw material as recorded by the investigated companies with the average reference price of the raw material, published by, respectively, the Argentine Ministry of Agriculture[108] and the Indonesian Authorities.[109] In one case – the anti-dumping investigation on imports of certain seamless pipes and tubes, of iron or steel originating in, *inter alia*, Ukraine – the European Commission based the adjustment on an average of the prices observed during the period of investigation in a third country.[110]

7.42. We also observe that the European Commission made certain adjustments to the out-of-country input price information for export-related and transportation expenses. Specifically, the determinations show that adjustments were made for transport costs[111], customs export tax[112], value added tax[113], excise duty[114], local distribution costs[115], sea freight[116] and fobbing costs.[117]

7.43. Moreover, as asserted by Russia, the anti-dumping determinations do not show that the European Commission took steps to ensure that the resulting cost of production, based on adjusted out-of-country input price information, represent the cost of production of the product under consideration in the country of origin. While the majority of the anti-dumping determinations indicate that normal value was constructed by adding to the manufacturing costs, adjusted where necessary, a reasonable amount for selling, general and administrative expenses and profit[118], they do not explain whether the adjusted out-of-country input price information was considered to represent the

Regulation 2015/110, (Exhibit RUS-21), recital 69; Regulation 1194/2013, (Exhibit RUS-23), recitals 38 and 66; and Regulation 2019/576, (Exhibit RUS-167), recitals 52 and 58.

[107] See, e.g. Regulation 812/2008, (Exhibit RUS-16), recital 17; Regulation 1269/2012, (Exhibit RUS-22), recital 21; Regulation 1911/2006, (Exhibit RUS-20), recitals 27 and 58; Regulation 238/2008, (Exhibit RUS-35), recital 17; Regulation 1251/2009, (Exhibit RUS-33), recital 17; Regulation 236/2008, (Exhibit RUS-17), recital 18; Regulation 661/2008, (Exhibit RUS-15), recital 34; Regulation 237/2008, (Exhibit RUS-24), recital 19; Regulation 907/2007, (Exhibit RUS-32), recital 33; Regulation 1256/2008, (Exhibit RUS-18), recital 111; and Regulation 2015/110, (Exhibit RUS-21), recital 69.

[108] Regulation 1194/2013, (Exhibit RUS-23), recital 40.

[109] Regulation 1194/2013, (Exhibit RUS-23), recital 70.

[110] Regulation 954/2006, (Exhibit RUS-34), recital 127.

[111] Regulation 1891/2005, (Exhibit RUS-19), recitals 31 and 33; Regulation 1050/2006, (Exhibit RUS-31), recital 54; Regulation 954/2006, (Exhibit RUS-34), recital 97; Regulation 1911/2006, (Exhibit RUS-20), recital 58; Regulation 238/2008, (Exhibit RUS-35), recital 22; Regulation 1251/2009, (Exhibit RUS-33), recital 18; Regulation 236/2008, (Exhibit RUS-17), recital 19; Regulation 661/2008, (Exhibit RUS-15), recital 35; Regulation 237/2008, (Exhibit RUS-24), recital 26; Regulation 907/2007, (Exhibit RUS-32), recital 34; and Regulation 240/2008, (Exhibit RUS-28), recital 46.

[112] Regulation 1891/2005, (Exhibit RUS-19), recital 31.

[113] Regulation 1891/2005, (Exhibit RUS-19), recital 31; Regulation 1050/2006, (Exhibit RUS-31), recital 54.

[114] Regulation 1891/2005, (Exhibit RUS-19), recital 31; Regulation 1050/2006, (Exhibit RUS-31), recital 54; and Regulation 954/2006, (Exhibit RUS-34), recital 97.

[115] Regulation 812/2008, (Exhibit RUS-16), recital 17; Regulation 238/2008, (Exhibit RUS-35), recital 22; Regulation 1251/2009, (Exhibit RUS-33), recital 18; Regulation 236/2008, (Exhibit RUS-17), recital 19; Regulation 1256/2008, (Exhibit RUS-18), recital 111; Regulation 2015/110, (Exhibit RUS-21), recital 69; and Regulation 1911/2006, (Exhibit RUS-20), recital 28.

[116] Regulation 1911/2006, (Exhibit RUS-20), recital 28. In the expiry review on imports of solutions of urea and ammonium nitrate originating in, *inter alia*, Algeria, an adjustment was also made for liquefaction costs because the price of the relevant input (natural gas) was adjusted on the basis on the average price of liquefied natural gas. (Regulation 1911/2006, (Exhibit RUS-20), recitals 28-29).

[117] Regulation 1194/2013, (Exhibit RUS-23), recital 40.

[118] See, e.g. Regulation 1891/2005, (Exhibit RUS-19), recital 21; Regulation 1050/2006, (Exhibit RUS-31), recital 50; Regulation 954/2006, (Exhibit RUS-34), recital 45; Regulation 812/2008, (Exhibit RUS-16), recital 15; Regulation 1269/2012, (Exhibit RUS-22), recital 19; Regulation 1911/2006, (Exhibit RUS-20), recitals 24 and 29; Regulation 238/2008, (Exhibit RUS-35), recital 19; Regulation 1251/2009, (Exhibit RUS-33), recital 15; Regulation 236/2008, (Exhibit RUS-17), recital 46; Regulation 661/2008, (Exhibit RUS-15), recital 36; and Regulation 237/2008, (Exhibit RUS-24), recital 29.

cost of production in the country of origin. The anti-dumping determinations provide no reasoned and adequate explanation of whether the export-related and transportation adjustments made by the European Commission were adequate to adapt the out-of-country information to represent the cost of production in the country of origin. Our review of the determinations, rather, suggests that, in each case, the European Commission used out-of-country input prices "in the absence of undistorted" input prices relating to the domestic market of the country of origin.[119]

7.44. While, as pointed out by the European Union, the various anti-dumping determinations concern different underlying facts[120], we consider that such differences do not detract from the fact that the substance of the Cost Adjustment Methodology, i.e. the rejection of the input costs reflected in the records of the producer or exporter under investigation in the specific set of circumstances described by Russia, and the subsequent use of out-of-country input price data in calculating the costs of production in the above-mentioned terms, was replicated in each determination.

7.45. The following table presents the main conclusions of the European Commission in each anti-dumping determination:

| Regulation No. | European Commission's findings concerning the rejection of recorded input prices and the adjustments to the costs of production |
|---|---|
| *1891/2005*<br>*14 November 2005*<br><br>*Potassium chloride originating in Russia* | Recitals 30 and 31:<br>"As concerns gas supplies, it was established … that the domestic price of gas paid by the two Russian Producers was around one fifth of the export price from Russia. … Moreover, the price of gas paid by the two Russian Producers was significantly lower than the gas price paid by the Canadian producers.<br><br>[I]t was therefore considered that the prices charged by the regional Russian gas provider to the Russian potash producers … could not reasonably reflect the costs associated with the production of gas when compared to the exported price of gas from Russia and the price of a Canadian gas provider to a major industrial user in Canada. In accordance, therefore, with Article 2(5) of the basic Regulation, an adjustment to the cost of production for each of the applicants was made. In the absence of any other reasonable basis, such an adjustment was made using information concerning the price of gas for export, net of transport costs, customs export tax, value added tax and excise duty".[121] |
| *1050/2006*<br>*11 July 2006*<br><br>*Potassium chloride originating in Russia* | Recitals 53 and 54:<br>"[I]t was established … that the domestic price of gas paid by the two Russian producers was around one fifth of the export price of natural gas from Russia. … [A]ll available data strongly suggest that the gas prices charged to domestic customers were made at regulated prices far from cost recovery levels. Moreover, the investigation showed that the price of gas paid by the two Russian producers was significantly lower than the gas price paid by the two Canadian producers.<br><br>[I]t was therefore considered that the prices charged by the regional Russian gas provider to the Russian potash producers … could not reasonably reflect the costs associated with the production of gas when compared to the exported price of gas from Russia and the price of a Canadian gas provider to major industrial users in Canada. Therefore, in accordance with Article 2(5) of the basic Regulation, an adjustment to the cost of production for each of the Russian companies was made. In the absence of any other reasonable basis, such an adjustment was made using information concerning the price of gas for export, net of transport costs, value added tax and excise duty. This adjustment was made in accordance with the methodology used in the previous review investigation concluded in November 2005 by Regulation (EC) No 1891/2005".[122] |
| *954/2006*<br>*27 June 2006*<br><br>*Certain seamless pipes and tubes, of iron or* | **Russia**<br>Recitals 95-97:<br>"It was established … that the domestic price of gas paid by the two Russian producers was much lower than the average export prices from Russia to both Western and Eastern parts of Europe. … Moreover, the price of gas paid by the two Russian producers was significantly lower than the gas price paid by the Romanian and Community producers. |

[119] See, e.g. Regulation 907/2007, (Exhibit RUS-32), recital 34; Regulation 1256/2008, (Exhibit RUS-18), recital 111; and Regulation 2015/110, (Exhibit RUS-21), recital 69.
[120] European Union's opening statement at the second meeting of the Panel, para. 15.
[121] Regulation 1891/2005, (Exhibit RUS-19), recitals 30-31.
[122] Regulation 1050/2006, (Exhibit RUS-31), recitals 53-54.

| Regulation No. | European Commission's findings concerning the rejection of recorded input prices and the adjustments to the costs of production |
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| *steel originating in Russia and Ukraine* | [I]t was considered that the gas prices paid by the two Russian [certain seamless pipes and tubes] producers … could not reasonably reflect the costs associated with the production and distribution of gas.<br><br>Therefore, as provided for in Article 2(5) of the basic Regulation, the gas costs of the two Russian exporting producers were adjusted to reflect market prices for gas during the [investigation period], based on the price of gas for export to Western Europe, net of transport costs and excise duty".[123]<br><br>**Ukraine**<br>Recitals 119-127:<br>"With regard to the manufacturing costs, and in particular energy costs, it was found during the investigation that energy prices paid by the three groups of companies were regulated by the State and significantly lower than international prices.<br><br>The prices charged by the Ukrainian State-owned and/or State-regulated suppliers of electricity to the three groups of exporting producers were compared to prices in Romania as well as to prices in the Community … In all cases, these prices were found to be considerably lower than the prices in Romania and in the Community, and it was concluded that the electricity prices paid by the Ukrainian exporters did not reasonably reflect the actual production and sale costs of the electricity purchased.<br><br>The same approach was followed as regards gas prices. A comparison showed that gas prices charged to Ukrainian exporters by their State-owned and/or State-regulated suppliers were around half the prices in Romania and also considerably lower than average prices charged in the Community for gas to the same general category of customers.<br><br>Moreover, the prices paid by Ukrainian exporting producers were compared to the average export price from Russia to Western and Eastern Europe, … as well as to average gas prices in North America … In both cases they were found considerably lower.<br><br>Given the above, it was concluded that the gas prices paid by the Ukrainian exporting producers … did not reasonably reflect the costs associated with production and sale of the gas purchased.<br><br>Therefore, as provided for in Article 2(5) of the basic Regulation, the electricity and gas costs of the Ukrainian exporting producers were adjusted to reasonably reflect the costs associated with the production and sale of electricity and gas …. The adjustment was based on an average of the prices observed during the [period of investigation] in Romania, a market-economy country which also imports gas from Russia, and is roughly the same distance from the Russian gas fields." [124] |
| *812/2008<br>11 August 2008<br><br>Certain seamless pipes and tubes of iron or steel originating in Russia* | Recitals 16 and 17:<br>"[I]t was examined whether the gas prices paid by the exporting producers reasonably reflected the costs associated with the production and distribution of gas.<br><br>It was found that the domestic gas price paid by the exporting producers was around one fourth of the export price of natural gas from Russia … [A]ll available data indicates that domestic gas prices in Russia are regulated prices, which are far below market prices paid in unregulated markets for natural gas. Therefore, since gas costs were not reasonably reflected in the exporting producers' records as provided for in Article 2(5) of the basic Regulation, they had to be adjusted accordingly. In the absence of any sufficiently representative, undistorted gas prices relating to the Russian domestic market, it was considered appropriate to base the adjustment, in accordance with Article 2(5), on the basis of information from other representative markets. The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), adjusted for local distribution costs".[125] |
| *1269/2012<br>21 December 2012* | Recitals 20 and 21:<br>"[I]t was examined whether the gas prices paid by the exporting producers reasonably reflected the costs associated with the production and distribution of gas. |

[123] Regulation 954/2006, (Exhibit RUS-34), recitals 95-97.
[124] Regulation 954/2006, (Exhibit RUS-34), recitals 119-127.
[125] Regulation 812/2008, (Exhibit RUS-16), recitals 16-17.

| Regulation No. | European Commission's findings concerning the rejection of recorded input prices and the adjustments to the costs of production |
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| *Certain seamless steel pipes, of iron or steel, originating in Russia* | It was found that the domestic gas price paid by the exporting producers was around one third of the export price of natural gas from Russia … [A]ll available data indicates that domestic gas prices in Russia are regulated prices, which are far below market prices paid in unregulated markets for natural gas. Therefore, since gas costs were not reasonably reflected in the exporting producers' records as provided for in Article 2(5) of the basic Regulation, they had to be adjusted accordingly. In the absence of any sufficiently representative, undistorted gas prices relating to the Russian domestic market, it was considered appropriate to base the adjustment, in accordance with Article 2(5), on the basis of information from other representative markets. The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), adjusted for local distribution costs".[126] |
| *1911/2006*<br>*19 December 2006*<br><br>*Solutions of urea and ammonium nitrate originating in Algeria and Russia* | **Algeria**<br>Recitals 25 and 27-29:<br>"In accordance with Article 2(5) of the basic Regulation, it was examined whether the costs associated with the production and sales of the product under consideration were reasonably reflected in the records of the parties concerned.<br><br>[I]t was established … that the price paid by the Algerian producer was less than one fifth of the export price of natural gas from Algeria … [A]ll available data indicates that domestic gas prices in Algeria were regulated prices, which are far below market prices paid for natural gas, for example in the USA, Canada, Japan and the EU … Moreover, the price of gas paid by the companies concerned was significantly lower than the gas price paid by the Community producers.<br><br>In view of the above, it was considered that the gas prices paid in Algeria … could not reasonably reflect the costs associated with the production and distribution of gas. Therefore, as provided for in Article 2(5) of the basic Regulation, the gas costs borne by one cooperating exporting producer … were adjusted on the basis of information from other representative markets. The adjusted price was based on the average price during the RIP of Algerian liquefied natural gas (LNG) when sold for export at the French border, net of sea freight and liquefaction costs …<br><br>The manufacturing costs … were therefore recalculated in order to take account of the adjusted gas prices, using equally the prices of gas when sold at the French border, net of sea freight and liquefaction costs".[127]<br><br>**Russia**<br>Recital 58:<br>"It was examined whether the costs associated with the production and sales of the product under consideration were reasonably reflected in the records of the parties concerned. As regards gas costs, it was found that the domestic gas price paid by the Russian producers was around one fifth of the export price of natural gas from Russia … [A]ll available data indicates that domestic gas prices in Russia were regulated prices, which are far below market prices paid in unregulated markets for natural gas. Therefore, as provided for in Article 2(5) of the basic Regulation, the gas costs borne by the Russian producers were adjusted on the basis of information from other representative markets. The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs".[128] |
| *238/2008*<br>*10 March 2008*<br><br>*Solutions of urea and ammonium nitrate originating in Russia* | Recitals 20-22:<br>"In accordance with Article 2(5) of the basic Regulation, it was examined whether the costs associated with the production and sales of the product concerned were reasonably reflected in the records of the applicant.<br><br>It was established … that the prices [of gas] paid by the applicant were abnormally low … amount[ing] to one forth and one fifth of the export price of natural gas from Russia … [A]ll available data indicates that domestic gas prices in Russia were regulated prices, which are far below market prices paid in unregulated markets for natural gas. Since gas costs were not reasonably reflected in the applicant's records, they had to be adjusted accordingly … |

[126] Regulation 1269/2012, (Exhibit RUS-22), recitals 20-21.
[127] Regulation 1911/2006, (Exhibit RUS-20), recitals 25 and 27-29.
[128] Regulation 1911/2006, (Exhibit RUS-20), recital 58.

| Regulation No. | European Commission's findings concerning the rejection of recorded input prices and the adjustments to the costs of production |
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| | The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs and adjusted to reflect local distribution costs".[129] |
| *1251/2009*<br>*18 December 2009*<br><br>*Solutions of urea and ammonium nitrate originating in Russia* | Recitals 16-18:<br>"In accordance with Article 2(5) of the basic Regulation, it was examined whether the costs associated with the production and sales of the product concerned were reasonably reflected in the records of the applicant.<br><br>It was established that the domestic gas prices paid by the applicant were abnormally low … amount[ing] to between one fourth and one fifth of the export price of natural gas from Russia … [A]ll available data indicates that domestic gas prices in Russia were regulated prices, which are far below market prices paid in unregulated markets for natural gas. Since gas costs were not reasonably reflected in the applicant's records, they had to be adjusted accordingly. In the absence of any undistorted gas prices relating to the Russian domestic market, and in accordance with Article 2(5) of the basic Regulation, gas prices had to be established on 'any other reasonable basis, including information from other representative markets'.<br><br>The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs and adjusted to reflect local distribution cost".[130] |
| *236/2008*<br>*10 March 2008*<br><br>*Ammonium nitrate originating in Russia* | Recitals 17-19:<br>"In accordance with Article 2(5) of the basic Regulation, it was examined whether the costs associated with the production and sales of the product under consideration were reasonably reflected in the records of the parties concerned.<br><br>It was established … that the prices paid by the applicant were abnormally low … amount[ing] to one fifth of the export price of natural gas from Russia and were also significantly lower than the gas price paid by the Community producers … [A]ll available data indicate that domestic gas prices in Russia were regulated prices which are far below market prices paid in unregulated markets for natural gas.<br><br>Since gas costs were not reasonably reflected in the applicant's records, they had to be adjusted accordingly. In the absence of any undistorted gas prices relating to the Russian domestic market, and in accordance with Article 2(5) of the basic Regulation, gas prices had to be established on 'any other reasonable basis, including information from other representative markets'. The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs and adjusted to reflect local distribution costs".[131] |
| *661/2008*<br>*8 July 2008*<br><br>*AN originating in Russia* | Recitals 32, 34, and 35:<br>"[I]t had … been examined whether the costs associated with the production and sale of the product under consideration were reasonably reflected in the records of the parties concerned.<br><br>[I]t was established … that the price paid by EuroChem was around one-fifth of the export price of natural gas from Russia … [A]ll available data indicates that domestic gas prices in Russia were regulated prices, which are far below market prices paid for natural gas, for example in the USA, Canada, Japan and the EU …<br><br>In view of the above, it was considered that the gas prices paid by NAK Azot … could not be used for the purposes of determining the cost of production of the product concerned pursuant to the first sentence of Article 2(5) of the basic Regulation. Therefore, as provided for in Article 2(5) of the basic Regulation, [the costs for gas supplies of NAK Azot] had to be adjusted to reflect the costs associated with the production and sale of the like product … [T]he adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border, net of transport costs".[132] |
| *237/2008*<br>*10 March 2008* | Recitals 18, 19, and 26: |

[129] Regulation 238/2008, (Exhibit RUS-35), recitals 20-22.
[130] Regulation 1251/2009, (Exhibit RUS-33), recitals 16-18.
[131] Regulation 236/2008, (Exhibit RUS-17), recitals 17-19.
[132] Regulation 661/2008, (Exhibit RUS-15), recitals 32 and 34-35.

| Regulation No. | European Commission's findings concerning the rejection of recorded input prices and the adjustments to the costs of production |
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| *AN originating in Ukraine* | "When the applicants cost of production was assessed, it was found that gas costs were not reasonably reflected in the applicants records …<br><br>As regards gas costs, it was found that Ukraine is importing the majority of the gas consumed in the production of [ammonium nitrate] from Russia. … [A]ll available data indicate that Ukraine imports natural gas from Russia at prices which are significantly below market prices paid in unregulated markets for natural gas. The investigation revealed that the price of natural gas from Russia when exported to the Community was approximately twice as high as the domestic gas price in the Ukraine. Therefore, as provided for in Article 2(5) of the basic Regulation, the gas costs borne by the applicant were adjusted on the basis of information from other representative markets.<br><br>The adjusted gas price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs".[133] |
| *907/2007*<br>*23 July 2007*<br><br>*Urea originating in Russia* | Recitals 31, 33, and 34:<br>"It was … examined, pursuant to Article 2(5) of the basic Regulation, whether the costs associated with the production and sales of the product under consideration were reasonably reflected in the records of the parties concerned.<br><br>[I]t was established … that the prices paid by the Russian producers were abnormally low … amount[ing] to one fifth of the export price of natural gas from Russia and were also significantly lower than the gas price paid by the Community producers … [A]ll available data indicate that domestic gas prices in Russia were regulated prices, which are far below market prices paid in unregulated markets for natural gas. Since gas costs were not reasonably reflected in the four companies' records, they had to be adjusted pursuant to Article 2(5) of the basic Regulation.<br><br>In the absence of any undistorted gas prices relating to the Russian domestic market, and in accordance with Article 2(5) of the basic Regulation, gas prices had to be established on 'any other reasonable basis, including information from other representative markets'. The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs."[134] |
| *240/2008*<br>*17 March 2008*<br><br>*Urea originating in Ukraine* | Recital 46:<br>"[I]t was found that Ukraine is importing the majority of the gas consumed in the production of urea from Russia. … [A]ll available data indicates that Ukraine imports natural gas from Russia at prices which are significantly below the market prices paid in unregulated markets for natural gas … [T]he price of natural gas from Russia when exported to the Community was approximately twice as high as the domestic gas price in the Ukraine. Therefore, as provided for in Article 2(5) of the basic Regulation, the gas costs borne by the applicant were adjusted on the basis of information from other representative markets. The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs."[135] |
| *1256/2008*<br>*16 December 2008*<br><br>*Certain welded tubes and pipes of iron or* | Recitals 110-111:<br>"[I]t was examined whether the gas prices paid by the exporting producers reasonably reflected the costs associated with the production and distribution of gas.<br><br>It was found that the domestic gas price paid by the exporting producers was around one fourth of the export price of natural gas from Russia. … [A]ll available data indicates that domestic gas prices in Russia are regulated prices, which are far below market prices paid in unregulated markets for natural gas. Therefore, since gas costs were not reasonably reflected in the exporting producers' records as provided for in Article 2(5) of the basic |

[133] Regulation 237/2008, (Exhibit RUS-24), recitals 18-19 and 26.
[134] Regulation 907/2007, (Exhibit RUS-32), recitals 31 and 33-34.
[135] Regulation 240/2008, (Exhibit RUS-28), recital 46. The European Commission considered the application of the Cost Adjustment Methodology to exporting producers from Croatia and Libya, in the light of "significant doubts as to whether the costs for gas, which [was] the major input to produce urea, were reasonably reflected in the records of the exporting producer". The European Commission found that, in both cases, gas was sourced under particular conditions, determined by the fact that both the exporting producer and the gas supplier were majority-owned by, respectively, the Croatian and Libyan states, and that gas prices were "abnormally low". However, given that dumping was found to exist without the adjustments, and in the light of its findings on the likelihood of recurrence of injury, the European Commission considered that the adjustments, although warranted, were not necessary. (Regulation 240/2008, (Exhibit RUS-28), recitals 26 and 41).

| Regulation No. | European Commission's findings concerning the rejection of recorded input prices and the adjustments to the costs of production |
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| *non-alloy steel originating in Russia* | Regulation, they had to be adjusted accordingly. In the absence of any sufficiently representative, undistorted gas prices relating to the Russian domestic market, it was considered appropriate to base the adjustment, in accordance with Article 2(5), on the basis of information from other representative markets. The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), adjusted for local distribution costs".[136] |
| *2015/110*<br>*26 January 2015*<br><br>*Certain welded tubes and pipes of iron or non-alloy steel originating in Russia* | Recitals 68 and 69:<br>"[I]t was examined whether the gas prices paid by the … exporting producer reasonably reflected the costs associated with the production and distribution of gas.<br><br>It was found that the domestic gas price paid by the exporting producers was around 30% of the export price of natural gas from Russia. … [A]ll available data indicated that domestic gas prices in Russia are regulated prices, which are far below market prices paid in unregulated export markets for Russian natural gas. Since gas costs were not reasonably reflected in the exporting producer's records as provided for in Article 2(5) of the basic Regulation, they had to be adjusted accordingly. In the absence of sufficiently representative, undistorted gas prices relating to the Russian domestic market, it was considered appropriate to base the adjustment, in accordance with Article 2(5) of the basic Regulation, on the basis of information from other representative markets. The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), adjusted for local distribution costs".[137] |
| *1194/2013*<br>*19 November 2013*<br><br>*Biodiesel originating in Argentina and Indonesia* | **Argentina**<br>Recitals 38-40:<br>"[T]he domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system and, consequently, the costs of the main raw material were not reasonably reflected in the records kept by the Argentinean producers under investigation in the meaning of Article 2(5) of the basic Regulation …<br><br>The Commission has therefore decided to … disregard the actual costs of soya beans (the main raw material purchased and used in the production of biodiesel) as recorded by the companies concerned in their accounts and to replace them with the price at which those companies would have purchased the soya beans in the absence of such a distortion.<br><br>In order to establish the cost at which companies concerned would have purchased the soya beans in the absence of such a distortion, the Commission took the average of the reference prices of soya beans published by the Argentine Ministry of Agriculture for export FOB Argentina during the [period of investigation]".[138]<br><br>**Indonesia**<br>Recitals 66, 67, and 70:<br>"[T]he [Differential Export Tax] system in Indonesia distorts the costs of production of biodiesel producers in that country and … therefore the costs associated with the production and sale of the product concerned are not reasonably reflected in the records kept by the Indonesian producers under investigation.<br><br>The Commission has therefore decided to … disregard the actual costs of crude palm oil (CPO), the main raw material purchased and used in the production of biodiesel, as recorded by the companies concerned in their accounts and to replace them with the price at which those companies would have purchased the CPO in the absence of such a distortion.<br><br>The investigation has confirmed that the price level for the domestically traded CPO is significantly depressed as compared to the 'international' reference price, the difference being very close to the export tax applied to CPO …<br><br>For the reasons mentioned above, … the cost of the main raw material (CPO) recorded by the companies concerned has, pursuant to Article 2(5) of the basic Regulation, been replaced by the reference export price … for CPO published by the Indonesian Authorities which is in turn based on published international prices (Rotterdam, Malaysia and Indonesia)".[139] |
| *2019/576*<br>*10 April 2019* | Recitals 49, 52, 53, and 59: |

[136] Regulation 1256/2008, (Exhibit RUS-18), recitals 110-111.
[137] Regulation 2015/110, (Exhibit RUS-21), recitals 68-69.
[138] Regulation 1194/2013, (Exhibit RUS-23), recitals 38-40.
[139] Regulation 1194/2013, (Exhibit RUS-23), recitals 66, 67, and 70. (fn omitted)

| Regulation No. | European Commission's findings concerning the rejection of recorded input prices and the adjustments to the costs of production |
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| *Mixtures of urea and ammonium nitrate originating in Russia* | "Natural gas is the main raw material in the manufacturing process of [mixtures of urea and ammonium nitrate] and represents a significant proportion, more than 50%, of the total cost of production. Following the claim by the complainant and the findings of previous investigations concerning fertilizers originating in Russia, the Commission examined whether the costs of natural gas associated with the production of the product concerned were reasonably reflected in the records of the Russian exporting producers, in accordance with Article 2(5) of the basic Regulation.<br><br>The investigation found that natural gas prices in Russia are regulated by the State via federal laws and are based on policy objectives. Natural gas prices in Russia do not reflect normal market conditions. Under normal market conditions, prices are mostly set by production costs and profit expectations. In contrast, in Russia prices set by the State are directly applicable to Gazprom, the Russian state-owned gas provider. Gazprom is the biggest gas provider in the country with a market share above 50% and therefore acts as price-setter. The investigation confirmed this price-setting behaviour, where all other gas providers sell at similarly low prices. In addition, Gazprom is the owner of the pipelines through which all gas, including the one supplied by the independent producers, is transported at tariffs which are also regulated.<br><br>[A]s in previous investigations concerning fertilizers originating in Russia, [the European Commission] adjusted the Russian cost of natural gas by replacing the distorted Russian domestic price with an undistorted international benchmark price ('gas adjustment'). As a benchmark price, the Commission used the so-called Waidhaus price, which is the price of exported Russian gas at the German/Czech border. The price was duly adjusted to ex works-level of the Russian producers".[140] |

7.46. As mentioned above, the European Union questions the probative significance of the anti-dumping determinations put forward by Russia, arguing that the determinations are instances of application of the first and the second subparagraphs of Article 2(5) of the Basic AD Regulation.[141] In the European Union's view, these determinations do not demonstrate the existence and precise content of an alleged methodology[142], because an "as applied" measure is one in which the various provisions are applied to the extensive and complex facts of a particular case. According to the European Union, the anti-dumping determinations are merely particular instances in which the investigating authority has taken "a particular route" through the complex decision tree set out in the legislation and reached a particular determination.[143]

7.47. We disagree that the anti-dumping determinations cited by Russia are not relevant to establish the precise content of the Cost Adjustment Methodology. In our view, the anti-dumping determinations demonstrate the specific approach of the European Commission and the systematic application of the first and second subparagraphs of Article 2(5) of the Basic AD Regulation, when confronted with the specific set of circumstances described by Russia, i.e. evidence that the domestic prices for the relevant input are significantly low when compared to prices in other markets, regulated by the government of the country of origin, or affected by other government measures. We consider that this evidence reflects the essential features of the Cost Adjustment Methodology, in the light of the description and explanations given by Russia.

#### 7.2.2.3.2 Attribution to the European Union

7.48. With respect to whether the alleged measure is attributable to the European Union, it is undisputed that the acts claimed to be part of such measure are carried out by the European Commission, which is an organ of the European Union. Hence, the alleged Cost Adjustment Methodology is attributable to the European Union.

[140] Regulation 2019/576, (Exhibit RUS-167), recitals 49, 52, 53, and 59 (fn omitted). The definitive determination confirmed the cost adjustment. The European Commission considered that there were "certain undisputable facts … to conclude that the natural gas market in Russia [was] distorted". (Regulation 2019/1688, (Exhibit RUS-166), recitals 33-41).
[141] European Union's first written submission, para. 101.
[142] European Union's second written submission, para. 37.
[143] European Union's second written submission, para. 35.

#### 7.2.2.3.3 General and prospective application

7.49. We now turn to the issue of whether the Cost Adjustment Methodology constitutes a measure of "general and prospective application". As already noted, a measure has "general application" to the extent that it affects an unidentified number of economic operators[144] instead of economic operators specified in that rule or norm.[145] A measure has "prospective application" to the extent that it applies in the future.[146]

7.50. The parties disagree on the legal standard the Panel should apply to evaluate the purported "general and prospective application" of the Cost Adjustment Methodology. The European Union asserts that the Panel should apply the legal standard articulated by the Appellate Body in *US – Zeroing (EC).*[147] Hence, according to the European Union, in order to prove that the Cost Adjustment Methodology has "general and prospective application", Russia must provide evidence that goes beyond simply showing a "string of cases".[148] In this connection, the European Union suggests that Russia's claim must fail as Russia has not been able 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 terms of the Cost Adjustment Methodology] in the future".[149]

7.51. Russia responds that the European Union fails to recognize the differences between the zeroing methodology at issue in *US – Zeroing (EC)* and the Cost Adjustment Methodology. Russia argues that, unlike the zeroing methodology, the Cost Adjustment Methodology is not a computer programme code inserted into "each particular anti-dumping measure [that] operated in an entirely mechanistic and mathematical manner".[150] According to Russia, the Cost Adjustment Methodology is used by the European Commission in a specific set of circumstances.[151] Therefore, for Russia, the legal standard articulated in *US – Zeroing (EC)* is not applicable to the Cost Adjustment Methodology.

7.52. We note that, in *US – Zeroing (EC*), the Appellate Body agreed with the panel that the zeroing methodology amounted to a "rule or norm" of "general and prospective application". The Appellate Body noted that the panel relied on evidence consisting of "considerably more than a string of cases, or repeat action".[152] This evidence included the facts that the zeroing methodology was a "constant feature" of the computer programme used to perform margin calculations, that it was "invariably" applied for an extended period of time, that instances of non-application had not been identified, that the Member maintaining the measure (the United States) had not contested that the zeroing methodology reflected a "deliberate policy", and that certain provisions of a document of the USDOC (the Anti-Dumping Manual) confirmed "the 'standard' character of the … [z]eroing [p]rocedures".[153]

7.53. The elements taken into account in *US – Zeroing (EC)* to establish the existence of the zeroing methodology provide useful guidance for our analysis of the Cost Adjustment Methodology, considering that Russia has defined the challenged measure in similar terms: a methodology with "general and prospective application".[154] However, we do not understand the Appellate Body to have suggested that a complainant must always show all these elements to demonstrate successfully the "general and prospective application" of a measure. For instance, in establishing that the zeroing methodology was a "rule or norm" of "general and prospective application", in *US – Zeroing (EC)* the panel and the Appellate Body relied on the fact that the United States "ha[d] not contested … that [the] USDOC's zeroing methodology reflect[ed] a deliberate policy".[155] In this connection, we recall that the analysis of whether a measure has "general and prospective application" may vary

[144] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, paras. 5.130 and 5.147.
[145] Appellate Body Report, *US – Anti-Dumping Methodologies (China),* paras. 5.130 and 5.147.
[146] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172 and 187; *US – Corrosion-Resistant Steel Sunset Review*, para. 82).
[147] Appellate Body Report, *US – Zeroing (EC)*, para. 198.
[148] European Union's opening statement at the first meeting of the Panel, para. 16.
[149] European Union's response to Panel question No. 70, para. 7. (emphasis omitted)
[150] Russia's opening statement at the first meeting of the Panel, para. 57 (referring to European Union's first written submission, para. 87).
[151] Russia's opening statement at the first meeting of the Panel, para. 61.
[152] Appellate Body Report, *US – Zeroing (EC)*, para. 204.
[153] Appellate Body Report, *US – Zeroing (EC)*, paras. 199-204.
[154] Appellate Body Reports, *Argentina – Import Measures*, para. 5.107.
[155] Appellate Body Report, *US – Zeroing (EC)*, para. 199.

from case to case and the factors that may be relevant in this assessment would depend on the particular facts of the case.[156]

7.54. Turning to our analysis of the Cost Adjustment Methodology, we consider that the anti-dumping determinations of the European Commission advanced by Russia show that the European Commission has invariably engaged in the same conduct for a period that spans over 15 years, in anti-dumping proceedings covering a wide range of products originating in various WTO Members. We note that the European Union has advanced no evidence of any European Commission anti-dumping determination where, in the calculation of the costs of production, input prices were not rejected and replaced with an external benchmark in the circumstances described by Russia. We also note that the specific companies that were subject to the Cost Adjustment Methodology varied greatly.[157] In our view, this suggests that the Cost Adjustment Methodology is a measure of "general application" because it affects an unidentified number of economic operators. The Cost Adjustment Methodology does not concern specified economic operators from a specific WTO Member, in the sense that the companies that will be subject to the Cost Adjustment Methodology can be identified independently of any specific application of this norm.

7.55. As to the purported "prospective application" of the Cost Adjustment Methodology, we agree with the Appellate Body's consideration that, in order to demonstrate prospective application, a complainant is not required to show with "certainty" that a given measure will apply in future situations.[158] According to the Appellate Body, where prospective application is not sufficiently clear from the constitutive elements of the measure, it may be demonstrated through a number of factors:

> The existence of an underlying policy, which is implemented by the rule or norm, is a relevant element in establishing the prospective nature of that rule or norm. In addition, the more frequent, consistent, and extended the repetition of conduct is, the more probative such conduct will be in revealing, together with other factors, such an underlying policy. In this regard, the Appellate Body has explained that relevant evidence may include proof of the systematic application of the challenged rule or norm. Where ascertainable, the design, architecture, and structure of the rule or norm may also be relevant in identifying the underlying policy and prospective nature of that rule or norm. In addition, the extent to which a particular rule or norm provides administrative guidance for future conduct and the expectations it creates among economic operators that it will be applied in the future, are also relevant in establishing the prospective nature of that rule or norm.[159]

7.56. As already noted, the evidence put forward by Russia suggests that the Cost Adjustment Methodology was applied for the first time in 2005, and repeatedly in 2006, 2007, 2008, 2009, 2012, 2013, 2015 and 2019. In February 2013, the General Court of the European Union examined whether the costs adjustments implemented by the European Commission in four anti-dumping proceedings concluded in 2006, 2008 and 2009, concerning imports of ammonium nitrate and solutions of urea and ammonium nitrate from Russia[160], were consistent with Article 2(5) of the Basic AD Regulation. These cases –T 235/08 ("Acron I")[161], T 118/10 ("Acron II")[162], T 459/08[163], and T 84/07[164] were

[156] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.133.
[157] See, e.g. Regulation 1891/2005, (Exhibit RUS-19), recital 11 and Article 1; Regulation 954/2006, (Exhibit RUS-34), recital 15 and Article 1; Regulation 812/2008, (Exhibit RUS-16), recitals 2 and 6, and Article 1; Regulation 1269/2012, (Exhibit RUS-22), recitals 1 and 4, and Article 1; Regulation 1911/2006, (Exhibit RUS-20), recitals 14 and 21, and Article 1; Regulation 238/2008, (Exhibit RUS-35), recital 3; Regulation 1251/2009, (Exhibit RUS-33), recitals 3 and 9, and Article 1; Regulation 236/2008, (Exhibit RUS-17), recital 3; Regulation 661/2008, (Exhibit RUS-15), recitals 3 and 23, and Article 2; Regulation 237/2008, (Exhibit RUS-24), recital 5; Regulation 240/2008, (Exhibit RUS-28), recital 17; Regulation 2015/110, (Exhibit RUS-21), recital 12 and Article 2; and Regulation 1194/2013, (Exhibit RUS-23), Article 2.
[158] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.
[159] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187). (fns omitted)
[160] Regulation 236/2008, (Exhibit RUS-17); Regulation 1251/2009, (Exhibit RUS-33); Regulation 661/2008, (Exhibit RUS-15); and Regulation 1911/2006, (Exhibit RUS-20).
[161] Case T 235/08, (Exhibit RUS-12).
[162] Case T 118/10, (Exhibit RUS-29).
[163] Case T 459/08, (Exhibit RUS-14).
[164] Case T 84/07, (Exhibit RUS-13).

issued on the same date, address similar claims, and largely share the same reasoning. In the judgments, the General Court of the European Union was of the view that the European Commission was "fully entitled" to conclude, pursuant to Article 2(5), "that one of the items in the applicants' records could not be regarded as reasonable" and that, consequently, "that item had to be adjusted by having recourse to other sources from markets which the institutions regarded as more representative".[165] In all four cases, the General Court of the European Union concluded, under similar terms, that "[s]ince the price of gas in Russia was regulated, it may indeed be presumed that the cost of producing the product concerned was affected by a distortion of the domestic Russian market regarding the price of gas, as that price was not the result of market forces".[166]

7.57. In the definitive determination in the anti-dumping investigation concerning imports of biodiesel from Argentina and Indonesia issued in November 2013[167], citing the Acron I case, the European Commission relied on the conclusions of the General Court of the European Union to support its decision to disregard the costs of the main raw materials included in the records of the Argentinian and Indonesian exporting producers, and to replace each of them with a reference price. The European Commission rejected the claims raised by the Argentine and Indonesian exporting producers to the adjustments made to their costs of production, in the following terms:

> [T]he General Court established in the Acron [I] 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. The fact that the Acron [I] case concerned prices that were regulated by the State cannot, however, be interpreted as meaning that the Commission is precluded to apply Article 2(5) in respect to other forms of State intervention that distorts, directly or indirectly, a particular market by depressing prices to an artificially low level.[168]

7.58. In recent determinations, the European Commission invoked the above-mentioned judgements of the General Court of the European Union in support of the "adjustments" made to the costs of production. In particular, Russia submits two anti-dumping determinations issued by the European Commission in 2019, concerning the provisional[169] and definitive[170] determinations in the original investigation in relation to imports of mixtures of urea and ammonium nitrate originating, *inter alia,* in Russia (Regulations 2019/576 and 2019/1688).[171]

7.59. In the provisional determination, following its findings that the natural gas prices in Russia were regulated by the State via federal laws and were based on policy objectives, the European Commission rejected the claims made by the Russian exporting producers and considered

[165] See, e.g. Case T 235/08, (Exhibit RUS-12), para. 46.
[166] Case T 235/08, (Exhibit RUS-12), para. 44; Case T 118/10, (Exhibit RUS-29), para. 51; Case T 459/08, (Exhibit RUS-14), para. 65; and Case T 84/07, (Exhibit RUS-13), para. 58.
[167] Regulation 1194/2013, (Exhibit RUS-23).
[168] Regulation 1194/2013, (Exhibit RUS-23), recital 72. See also ibid. recital 42.
[169] Regulation 2019/576, (Exhibit RUS-167).
[170] Regulation 2019/1688, (Exhibit RUS-166).
[171] We note that, in one of its last submissions to the Panel, the European Union objected against Russia's "attempt to bring [Regulations 2019/1688 and 2019/576] in these proceedings" on the ground that they are "outside the scope" of the dispute. (European Union's comments on Russia's response to Panel question No. 71, para. 33). We reject this objection. First, Russia advanced Regulations 2019/1688 and 2019/576, and discussed this evidence for the first time, in its second written submission to the Panel, in response to the European Union's argument that the evidence on the record does not demonstrate the existence of the Cost Adjustment Methodology. (Russia's second written submission, paras. 459-460). We consider that, while there are temporal limitations on the measures that may be within the scope of a dispute, such limitations do not apply in the same way to evidence. In this connection, we agree with the Appellate Body's understanding in *EC – Selected Customs Matters* that "[e]vidence in support of a claim challenging measures that are within a panel's terms of reference may pre-date or post-date the establishment of the panel". A panel is, thus, "not precluded from assessing a piece of evidence for the mere reason that it pre-dates or post-dates its establishment". (Appellate Body Report, *EC – Selected Customs Matters*, para. 188). Accordingly, we find it appropriate to take into account Regulations 2019/1688 and 2019/576 in our analysis of the existence of a Cost Adjustment Methodology. Second, we note that the European Union does not allege that these regulations were filed late in the proceeding. In any event, we consider that Russia submitted Regulations 2019/1688 and 2019/576 at a time in the proceeding that conforms with our Working Procedures (see Panel's Working Procedures, para. 5) and that the European Union had opportunities to present its views on this evidence during the proceeding.

the "gas adjustments [to be] warranted under Article 2(5) of the [Basic AD] Regulation as confirmed by the Court of Justice".[172] In doing so, the European Commission referred to cases T 84/07 and T 118/10, which, as already noted, reflect the endorsement of the Cost Adjustment Methodology by EU Courts. In the final determination, in selecting the benchmark to be used for the gas adjustment, the European Commission considered the so-called "Waidhaus price", i.e. the price of exported Russian gas at the German/Czech border, to be a proper benchmark. The European Commission relied, *inter alia*, on the fact that "[the use of this price] as a benchmark was confirmed by the respective judgements of the Court of Justice".[173]

7.60. We note Russia's allegation, based on the language used in the definitive determination in the anti-dumping investigation concerning imports of biodiesel from Argentina and Indonesia, that the European Commission applies the Cost Adjustment Methodology as a "principle of law" recognized by the General Court of the European Union.[174] According to Russia, this "principle of law" is considered and accepted by the European Commission "as judicial and administrative guidance" in the conduct of anti-dumping proceedings.[175] The European Union contends that, as a matter of EU municipal law, Russia's affirmation that a "principle of law" underlies the application of the Cost Adjustment Methodology is "incomprehensible, erroneous and not supported by any evidence". [176]

7.61. We consider that, regardless of whether within the legal framework of the European Union the European Commission's reference to a "principle of law" has any legal binding force, the fact remains that the European Commission, the authority responsible for administering anti-dumping proceedings, considers the application of the cost adjustment to be endorsed by the General Court of the European Union and, based on that endorsement, implements the cost adjustment when faced with the circumstances described by Russia. Moreover, the European Commission's reference to a "principle of law" "established" by the General Court suggests to us that the European Commission regards the interpretation of Article 2(5) made by the EU Court as controlling and expected to be followed in future cases. In our view, the reference, in the determinations cited by Russia, to the decisions of the General Court of the European Union are relevant to the extent that they reveal the prospective invocation of the measure, thus suggesting that the European Commission would likely engage in that same conduct in the future. Moreover, regarding Russia's assertion that, by applying the Cost Adjustment Methodology, the European Commission "significantly increases" the cost of production and subsequent dumping margin in anti-dumping proceedings[177], we note that Russia supports this assertion with two instances of application of this measure.[178] While this evidence does not allow us to conclude that the Cost Adjustment Methodology, as a measure of general and prospective application, would necessarily have that effect in all cases where it is applied, we accept that it would logically follow that the application of the cost adjustment may result in an increase of the cost of production and subsequent dumping margin, in certain circumstances. However, there is no evidence in the record suggesting that the Cost Adjustment Methodology has been developed by the European Union as a "deliberate policy" to remove "distortions" or to increase the cost of production and subsequent dumping margin for investigated producers, as argued by Russia.

7.62. In the light of our examination of the evidence advanced by Russia, we are of the view that the Cost Adjustment Methodology has "prospective application". We base this conclusion on the following factors: (i) the methodology has been consistently and systematically applied for an extended period of time; (ii) it has been endorsed by the General Court of the European Union; and

[172] Regulation 2019/576, (Exhibit RUS-167), para. 58 and fn 12.
[173] Regulation 2019/1688, (Exhibit RUS-166), para. 41 and fn 9 (referring to Case T 84/07, (Exhibit RUS-13) and to Case T 118/10, (Exhibit RUS-29)). See also Regulation 2019/576, (Exhibit RUS-167), para. 55(d) and fn 9.
[174] Russia's responses to Panel question No. 19, para. 66; question No. 25, para. 94.
[175] Russia's response to Panel question No. 73, para. 63.
[176] European Union's response to Panel question No. 24, para. 69.
[177] Russia's first written submission, paras. 379 to 386.
[178] First, Russia refers to the expiry review on imports of urea from, *inter alia*, Croatia, Libya and Ukraine. In this proceeding, the European Commission declined to make an adjustment to the gas costs from Croatia and Libya, but noted that the adjustment "would increase the dumping margin significantly". (Regulation 240/2008, (Exhibit RUS-28), recitals 26 and 41). Second, Russia refers to the panel's statement in *EU – Biodiesel (Argentina)* that the replacement by the European Commission in the underlying investigation of the actual costs with a uniform price for soybeans for all producers "significantly increased the costs of production for each of the Argentine producers". (Panel Report, *EU – Biodiesel (Argentina),* para. 7.182).

(iii) the European Commission has relied on that endorsement as a "principle of law"" to continue to apply the methodology until at least 2019.

7.63. Finally, our conclusion that the Cost Adjustment Methodology has prospective application is also based on the fact that the European Union has not been able to identify any instance of non-application. In response to a panel question on whether there have been cases in which the challenged methodology has not been applied in the specific set of circumstances described by Russia, the European Union stated that "[i]f there are verified distortions in the price of inputs, the European Commission would have the right to have recourse to an appropriate proxy to establish the undistorted cost of production in the country of origin".[179] In our view, this statement suggests that the Cost Adjust Methodology, as described by Russia, is likely to be applied in the future.

#### 7.2.2.3.4 Conclusion

7.64. In the light of the above, we find that Russia has established the existence of the Cost Adjustment Methodology as a measure of "general and prospective application" attributable to the European Union.

7.65. Before turning to the consistency of the Cost Adjustment Methodology with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement, we consider it useful to mention that our conclusion that the challenged measure exists results from our holistic assessment of all the arguments and evidence presented by Russia, and the responses and evidence provided by the European Union, in accordance with the considerations outlined in the previous paragraphs. In this connection, we note that Russia has submitted additional arguments and evidence to demonstrate the precise content and general and prospective application of the Cost Adjustment Methodology, such as (i) the second subparagraph of Article 2(3) of the Basic AD Regulation, read in the light of recital 3 of Regulation 1972/2002; (ii) opinions expressed by legal experts; and (iii) Article 2(6a) of the Basic AD Regulation introduced by Regulation 2017/2321, Article 7(2a) of the Basic AD Regulation introduced by Regulation 2018/825, and recitals 3, 5, and 7 of Regulation 2017/2321 and recital 8 of Regulation 2018/825. After reviewing these arguments and evidence, we conclude that they do not sufficiently support Russia's claims regarding the existence of the Cost Adjustment Methodology.[180]

7.66. In relation to Regulations 2017/2321 and 2018/825, we recall that Russia has asked us to find that the following measures fall within our terms of reference: Article 2(6a) introduced by Regulation 2017/2321; Article 7(2a) introduced by Regulation 2018/825; recitals 3, 5, and 7 of Regulation 2017/2321; and recital 8 of Regulation 2018/825. We respond to Russia's request in the next subsection.

[179] European Union's response to Panel question No. 69, paras. 4-5.

[180] For instance, we do not read the second subparagraph of Article 2(3) of the Basic AD Regulation and recital 3 of Regulation 1972/2002, either individually or together, as offering elements that establish the existence, or precise content, of a methodology pursuant to which the European Commission adjusts domestic input prices in the manner described by Russia. The second subparagraph of Article 2(3), and recital 3 of Regulation 1972/2002, clarify what circumstances could be considered by the investigating authorities as constituting a "particular market situation", which does not relate to the calculation of costs.

As regards the opinions expressed by legal experts, Russia refers to an article published in a law journal and to excerpts from a book. These academic writings draw a link between the introduction of the second subparagraph of Article 2(3) and the second subparagraph of Article 2(5) in 2002, and the granting by the European Union of market economy status to Russia in the same year. In these publications, the authors express a personal view that, by virtue of these amendments, the European Union extended the non-market economy techniques to market economies as well. While these authors consider that these provisions of the Basic AD Regulation could be applied in a way that results in the rejection of domestic costs and the use of costs from other markets, the publications do not refer to a cost adjustment methodology, nor describe or explain how such a methodology is applied by the European Commission. In fact, because they were published in 2002 and 2004, the publications pre-date the application of the Cost Adjustment Methodology.

Moreover, we do not consider that Regulations 2017/2321 and 2018/825, or the evidence related to the promulgation of such regulations put forward by Russia, support Russia's claims regarding the existence of the Cost Adjustment Methodology. Regulations 2017/2321 and 2018/825 do not concern the examination of whether the records of the investigated companies "reasonably reflect the costs associated with the production and sale of the product under consideration", pursuant to Article 2(5) of the Basic AD Regulation.

### 7.2.3 Russia's request concerning Regulations 2017/2321 and 2018/825

7.67. Russia notes that, following the establishment of the panel in December of 2016, the European Union enacted Regulations 2017/2321 and 2018/825, which amended the Basic AD Regulation, by introducing, respectively, Articles 2(6a) and 7(2a) to the Basic AD Regulation. Russia submits that these provisions, as well as related recitals 3, 5, 7 of Regulation 2017/2321 and recital 8 of Regulation 2018/825, "confirm" and "clarify" certain aspects of the Cost Adjustment Methodology.[181]

7.68. Russia asserts that the new provisions of the Basic AD Regulation introduced by Regulations 2017/2321 and 2018/825 provide for a new methodology to calculate the costs of production in anti-dumping proceedings, and that this new methodology has "similar substance and effects" as the Cost Adjustment Methodology.[182] According to Russia, like the Cost Adjustment Methodology, Articles 2(6a) and 7(2a) deal with the existence of "distortions" caused by government regulation that affects the price of "raw materials". Arguing that these provisions clarify the level of "distortions" that triggers the rejection of the correctly recorded input cost and its replacement with "undistorted" input prices[183], Russia asserts that Articles 2(6a) and 7(2a) constitute the last "evolutional development" of the legal basis for the application of the Cost Adjustment Methodology.[184]

7.69. Russia considers that Regulations 2017/2321 and 2018/825 represent evidence of "considerable weight"[185] for the Panel's examination of the existence of the Cost Adjustment Methodology.[186] But Russia also asks the Panel to make findings on the WTO-consistency of Articles 2(6a) and 7(2a) of the Basic AD Regulation, since these provisions and the Cost Adjustment Methodology are not "mutually exclusive". Rather, for Russia, both sets of measures have "clear connections", complement each other and can be applied, individually or together, in future anti-dumping proceedings to deal with purported "distortions" in costs of production.[187]

7.70. Based on these reasons, Russia requests us to find that Article 2(6a) of the Basic AD Regulation introduced by Regulation 2017/2321, Article 7(2a) of the Basic AD Regulation, and related recitals 3, 5, and 7 of Regulation 2017/2321 and recital 8 of Regulation 2018/825, are inconsistent with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement.[188] According to Russia, without such findings the dispute would not be fully resolved, as these new provisions of the Basic AD Regulation would continue providing the legal basis for European Commission's similar determinations and actions, as under the Cost Adjustment Methodology.[189]

7.71. The European Union contends that neither Regulations 2017/2321 and 2018/825, nor any provisions of these Regulations are within the Panel's terms of reference, because, at the time of the panel request, Regulations 2017/2321 and 2018/825 did not exist and there is no reference to these Regulations in Russia's panel request. Therefore, for the European Union, the WTO-consistency of Regulations 2017/2321 and 2018/825, or of any provisions of these Regulations, is not a matter within the terms of reference of the Panel.[190]

7.72. Article 6.2 of the DSU provides that a panel request "shall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Consistency with Article 6.2 must be determined on the basis of an objective

[181] Russia's opening statement at the first meeting of the Panel, para. 84; response to Panel question No. 25, para. 96; and second written submission, para. 622.
[182] Russia's response to Panel question No. 72, para. 51.
[183] Russia's response to Panel question No. 25, para. 96.
[184] Russia's first written submission, para. 303; second written submission, para. 627.
[185] Russia's response to Panel question No. 25, para. 91
[186] Russia's second written submission, para. 617.
[187] Russia's response to Panel question No. 72, para. 58; opening statement at the first meeting of the Panel, para. 86; and response to Panel question No. 25, para. 91.
[188] Russia's response to Panel question No. 25, paras. 91-92.
[189] Russia's response to Panel question No. 25, para. 101; second written submission, para. 652; and response to Panel question No. 67, para. 39.
[190] European Union's response to Panel question No. 25, para. 73. Moreover, the European Union submits that the existence and precise content of the alleged measure at issue must be assessed at the date on which the Panel was established. Because Regulations 2017/2321 and 2018/825 were adopted years later, they have no relevance to the analysis that the Panel is called upon to carry out.

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[191]; that is, "'on the face' of the panel request".[192] The term "specific measures at issue" in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the panel's establishment.[193]

7.73. Section I.D of Russia's panel request sets forth a claim under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement with respect to the Cost Adjustment Methodology, in the terms described by Russia.[194] Articles 2(6a) and 7(2a) of the Basic AD Regulation introduced by Regulations 2017/2321 and 2018/825, respectively, and recitals 3, 5, and 7 of Regulation 2017/2321 and recital 8 of Regulation 2018/825, are not included in Russia's panel request.

7.74. Russia submits that, while not explicitly mentioned, the terms of the panel request are broad enough as to include in the Panel's terms of reference Articles 2(6a) and 7(2a) of the Basic AD Regulation introduced by Regulations 2017/2321 and 2018/825, respectively, and recitals 3, 5, and 7 of Regulation 2017/2321 and recital 8 of Regulation 2018/825. Russia refers to Section IV of Russia's panel request[195], which provides that Russia's panel request covers any "amendments, replacements, extensions, related and implementing measures and any act of the European Union authorities that would affect the measures at issue".[196]

7.75. We note that phrases of the nature of that included in Section IV of Russia's panel request have been interpreted as authorizing a panel to consider within its terms of reference measures enacted after the panel's establishment.[197] This is to avoid that the procedural requirements of WTO dispute settlement result in a situation where later in time measures that are essentially the same as measures falling within a panel's terms of reference could completely evade review.[198] However, in order to find that a measure not included in a panel request is nevertheless within a panel's terms of reference, despite being later in time, a panel must examine whether the new measure and the original measure are of the same essence.[199] A measure enacted after the panel's establishment that "changes the essence" of the original measure or that "ha[s] legal implications overly different from those of the original measur[e]" would not be in the jurisdiction of a panel.[200]

7.76. After carefully examining Russia's arguments and evidence in relation to the set of measures enacted following the panel's establishment, and Russia's description and characterization of the Cost Adjustment Methodology, we are of the view that Articles 2(6a) and 7(2a) of the Basic AD Regulation introduced by Regulations 2017/2321 and 2018/825, respectively, and recitals 3, 5, and 7 of Regulation 2017/2321 and recital 8 of Regulation 2018/825, are not within our terms of reference. These measures and the Cost Adjustment Methodology described in Russia's panel request are not of the same essence.

7.77. We base this conclusion on the fact that, according to Russia's description and explanations of the challenged measure, the European Commission implements the Cost Adjustment Methodology "as part of their examination" pursuant to Article 2(5) of the Basic AD Regulation, in particular in the analysis of whether records kept by the investigated companies "reasonably reflect the costs associated with the production and sale of the product under consideration".[201] The provisions of Regulations 2017/2321 and 2018/825 cited by Russia do not concern the examination of whether

[191] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641 (referring to Appellate Body Reports, *US – Carbon Steel*, para. 127; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Continued Zeroing*, para. 161; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108).

[192] Appellate Body Report, *US – Continued Zeroing*, para. 161 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

[193] Appellate Body Report, *EC – Chicken Cuts*, para. 156

[194] Russia's panel request, p. 3.

[195] Russia's opening statement at the first meeting of the Panel, paras. 84-88.

[196] Russia's panel request, pp. 7-8.

[197] Panel Reports, *China – Raw Materials,* para. 7.12.

[198] Appellate Body Report, *Chile – Price Band System*, paras. 139 and 144; Panel Reports, *EC – IT Products,* para. 7.140.

[199] Panel Reports, *China – Raw Materials,* para. 7.15.

[200] Panel Reports, *EC – IT Products,* para. 7.139.

[201] Russia's first written submission, para. 305.

the records of the investigated companies "reasonably reflect the costs associated with the production and sale of the product under consideration", pursuant to Article 2(5) of the Basic AD Regulation. Rather, we read Regulations 2017/2321 and 2018/825 as introducing, respectively, new disciplines related to the calculation of normal value and to the determination of the level of duties to be imposed in anti-dumping proceedings.

7.78. The first provision of Article 2(6a) – 2(6a)(a) – introduced by Regulation 2017/2321, provides:

> In case it is determined, when applying this or any other relevant provision of this Regulation, that it is not appropriate to use domestic prices and costs in the exporting country due to the existence in that country of significant distortions …, the normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks.

7.79. Article 2(6a)(b) to Article 2(6a)(e) govern the application of this provision, including by introducing the notion of "significant distortions". In turn, Article 2(7a) introduced by Regulation 2018/825 concerns the determination of the level of duties to be imposed. According to this provision, when examining whether a duty lower than the margin of dumping would be sufficient to remove injury, the European Commission shall take into account whether there are significant distortions on raw materials with regard to the product concerned. While these provisions address the issue of significant distortions in the exporting country, none of them specifically concern whether the records "reasonably reflect the costs associated with the production and sale of the product under consideration", pursuant to Article 2(5) of the Basic AD Regulation. We note, however, that this is an essential feature of Russia's description of the challenged measure.

7.80. In our view, the text of Articles 2(6a) and 7(2a) of Regulations 2017/2321 and 2018/825 suggests that these provisions introduce disciplines concerning the calculation of normal value and determination of the level of duties, which have different legal implications from those arising from the Cost Adjustment Methodology. Accordingly, we are not persuaded that these new measures and the Cost Adjustment Methodology are of the same essence. We also find it relevant that, for Russia, the provisions added by Regulations 2017/2321 and 2018/825 to the Basic AD Regulation "do not replace" the Cost Adjustment Methodology.[202]

7.81. In the light of the above, we find that the provisions and recitals of Regulations 2017/2321 and 2018/825 referred to by Russia are not within our terms of reference. Accordingly, we reject Russia's request that we examine and make findings in relation to Articles 2(6a) and 7(2a) of the Basic AD Regulation introduced by Regulations 2017/2321 and 2018/825, respectively, and related recitals 3, 5, and 7 of Regulation 2017/2321 and recital 8 of Regulation 2018/825.

### 7.2.4 Whether the Cost Adjustment Methodology is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement by providing for the rejection of the recorded costs

7.82. We recall that Russia claims that the Cost Adjustment Methodology is inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement because, in applying the Cost Adjustment Methodology, the European Commission rejects the costs reflected in the records that are kept by the exporter or producer under investigation 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.

#### 7.2.4.1 Main arguments of the parties

##### 7.2.4.1.1 Russia

7.83. Russia submits that, under Article 2.2.1.1 of the Anti-Dumping Agreement, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that two conditions are met (a) the records are in accordance with the GAAP of the

[202] Russia's response to Panel question No. 72, para. 52.

exporting country; and (b) the records "reasonably reflect the costs associated with the production and sale of the product under consideration".[203]

7.84. Russia submits that the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement directs an investigating authority to examine whether the records "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".[204] According to Russia, this requires a comparison between, on the one hand, the costs as reported in the records and, on the other hand, the costs incurred by the specific producer/exporter, in order to establish whether the records reasonably reflect the costs actually borne by the producer/exporter.[205]

7.85. Russia argues that the second condition in Article 2.2.1.1 of the Anti-Dumping Agreement does not provide for an analysis of the "reasonableness" of the recorded costs themselves[206], nor should it be interpreted in a way that would allow an investigating authority to evaluate the "reasonableness" of the recorded costs *vis-à-vis* a benchmark unrelated to the cost of production in the country of origin, considered to reflect "normal circumstances".[207]

7.86. Russia recalls that the Cost Adjustment Methodology provides for the rejection of the recorded costs on the grounds that they are not reasonably reflected in the records of the producer/exporter.[208] Accordingly, for Russia, the Cost Adjustment Methodology relies on the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in rejecting the recorded input prices incurred by the investigated producers.[209] Russia claims that the Cost Adjustment Methodology is inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement because, relying on the second condition, it provides for the rejection of the recorded costs when input prices are significantly lower than international prices due to alleged "distortions" created by government regulation in the exporting country.[210] For Russia, through such comparison with international prices, the Cost Adjustment Methodology provides for an examination of the "reasonableness" of the costs themselves[211], in violation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

#### 7.2.4.1.2 European Union

7.87. Without engaging in the specific findings reflected in the anti-dumping determinations put forward by Russia, the European Union argues that the circumstances in which data or information in the records of the firm may be rejected are highly fact-dependent. According to the European Union, such circumstances may arise from the failure to respect either one of the two express conditions set out in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. However, these two express conditions in the first sentence of Article 2.2.1.1 do not exhaust the circumstances in which costs reflected in the records of the producer or exporter under investigation may be rejected.[212] According to the European Union, data or information in the records of the firm may also be rejected in the circumstances captured by the term "normally" that appears in the first

[203] Russia's first written submission, paras. 232 and 404.
[204] Russia's first written submission, para. 413 (referring to Appellate Body Report, *EU – Biodiesel (Argentina),* para. 6.26).
[205] Russia's first written submission, para. 418 (referring to Panel Report, *EU – Biodiesel (Argentina),* para. 7.242).
[206] Russia's first written submission, para. 413 (quoting Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56); response to Panel question No. 29(a), para. 121 (quoting Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.102).
[207] Russia's first written submission, para. 411 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.23 and 6.30)
[208] Russia's first written submission, para. 410.
[209] Russia's first written submission, para. 408.
[210] Russia's response to Panel question No. 21, para. 72.
[211] Russia's first written submission, para. 409.
[212] European Union's response to Panel question No. 75, para. 14.

sentence of Article 2.2.1.1, and in the circumstances captured by the terms "[f]or the purpose of paragraph 2" that also appear in the first sentence of Article 2.2.1.1.[213]

7.88. In relation to the term "normally", the European Union argues that in *Ukraine – Ammonium Nitrate,* the Appellate Body confirmed that the two circumstances or conditions explicitly described in the first sentence of Article 2.2.1.1 are not the only cases in which an investigating authority may decline to use the records of the investigated producer or exporter. The European Union argues that, given the reference to "normally" in the first sentence of Article 2.2.1.1, the Appellate Body "[did] not exclude that there might be circumstances other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply".[214] According to the European Union, such possible situations exist where the investigating authority is faced with unreliable data to make its determination.

7.89. In relation to the terms "[f]or the purpose of paragraph 2" in the first sentence of Article 2.2.1.1, the European Union argues that Article 2.2.1.1 is applied "[f]or the purpose" of Article 2.2, and the purpose of this latter provision is to determine a value that is "normal" pursuant to Article 2.1 of the Anti-Dumping Agreement, i.e. that permits a proper comparison, which for the European Union is a value that results from the normal operation of the market forces of supply and demand.[215]

7.90. For the European Union, the words "normally" and "[f]or the purpose of paragraph 2" in the first sentence of Article 2.2.1.1 thus confirm that there are circumstances, other than those explicitly set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply.[216] In these circumstances, the European Union submits, an investigating authority cannot be required to make its normal value determination on the basis of cost data that is in the nature of being distorted and thus unreliable for a proper comparison of normal value and export prices under Article 2 of the Anti-Dumping Agreement.[217]

#### 7.2.4.2 Legal standard

7.91. The first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement provides:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

7.92. The first sentence of Article 2.2.1.1 begins with the phrase "[f]or the purpose of paragraph 2". This indicates that, when normal value is being constructed because it cannot be determined on the basis of domestic sales, the calculation of "the cost of production in the country of origin" is subject to Article 2.2.1.1 of the Anti-Dumping Agreement.[218]

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[213] The European Union argues that that includes, for example, the existence of a "particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement. For the European Union, it also includes, for example, the existence of an association or compensatory arrangement rendering the relevant data unreliable. (European Union's first written submission, para. 98; opening statement at the first meeting of the Panel, para. 17).

[214] European Union's responses to Panel question No. 12, para. 42 and fn 13; question No. 29(a), para. 78 (referring to Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.87).

[215] European Union's response to Panel question No. 29(b), para. 79.

[216] European Union's comments on Russia's responses to Panel question No. 75, paras. 43-44; question No. 115, paras. 31-33.

[217] European Union's closing statement at the first meeting of the Panel, para. 8; response to Panel question No. 75, paras. 13-14 (referring to Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.87; comments on Russia's response to Panel question No. 75, paras. 43-44 (referring to Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.115).

[218] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.24 and 6.44; *Ukraine – Ammonium Nitrate*, para. 6.86.

7.93. The first sentence of Article 2.2.1.1 identifies the records of the investigated exporter or producer as the preferred source for cost of production data, and directs an investigating authority to normally base its calculations of costs on the records of the exporter or producer under investigation, provided that the records comply with two conditions (i) they are in accordance with the GAAP of the exporting country; and (ii) "reasonably reflect the costs associated with the production and sale of the product under consideration".[219]

7.94. The first condition relates to whether the records of a specific exporter or producer conform to the accounting principles, standards and procedures that are generally accepted and apply to such records in the exporting country. This condition has been understood to concern the general accounting and reporting practices of the exporter or producer.[220]

7.95. The second condition in the first sentence of Article 2.2.1.1 has been interpreted in two recent disputes: *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*. In *EU – Biodiesel (Argentina)*, the Appellate Body understood this condition to relate 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".[221] Noting that this provision focuses on the "records" of the exporter or producer under investigation, the Appellate Body rejected an interpretation that the second condition in the first sentence of Article 2.2.1.1 concerns whether the recorded costs themselves are "reasonable".[222] In this connection, based on the context provided by Article 2.2 of the Anti-Dumping Agreement, the Appellate Body understood that the second condition "should not be interpreted in a way that would allow an investigating authority to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production in the country of origin".[223]

7.96. In *Ukraine – Ammonium Nitrate*, the Appellate Body reiterated its view that there is no standard of "reasonableness" under the second condition in the first sentence of Article 2.2.1.1 that governs the meaning of "costs" itself, which would allow investigating authorities to disregard domestic input prices when such prices are lower than other prices internationally.[224] The Appellate Body recalled that it is the "records" of the individual exporter or producer under investigation that are subject to the condition to "reasonably reflect" the "costs associated with the production and sale of the product under consideration".[225]

#### 7.2.4.3 Evaluation by the Panel

7.97. Russia has demonstrated that the first element of the Cost Adjustment Methodology provides for the rejection of the costs reflected in the records of the producer or exporter under investigation when domestic input prices are significantly low when compared to other markets, regulated by the government of the country of origin, or affected by other government measures. In such situations, the European Commission considers that the costs are "not reasonably reflected" in the records of the exporter or producer under investigation or fail to "reasonably reflect the costs" associated with the production and sale of the relevant input or the product under consideration.[226] In our view, the reasoning set out in the extracts of the European Commission's determinations reproduced above is best understood to reveal that it applies the Cost Adjustment Methodology to reject recorded cost information in reliance on the *second condition* of the first subparagraph of Article 2(5) of the Basic AD Regulation. Indeed, before the General Court, the Council of the European Union defended the European Commission's application of the Cost Adjustment Methodology on precisely this basis

[219] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.18.
[220] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.21.
[221] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.
[222] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.
[223] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.23.
[224] Appellate Body Report, *Ukraine – Ammonium Nitrate,* para. 6.88 (referring to Appellate Body Report*, EU – Biodiesel (Argentina)*, paras. 6.37 and 6.56).
[225] Appellate Body Report, *Ukraine – Ammonium Nitrate,* para. 6.88.
[226] See para. 7.40 above.

in the five judgments put forward by Russia: T 235/08 ("Acron I")[227], T 118/10 ("Acron II")[228], T 459/08[229], T 84/07[230] and T 111/14.[231]

7.98. We recall that the second condition prescribed in Article 2(5) of the Basic AD Regulation stipulates that "it must be shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration". This language is virtually identical to the text of Article 2.2.1.1 of the Anti-Dumping Agreement. As set out above, the focus of the obligation in the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement has been understood to be on whether the records of the exporter or producer reasonably reflect their costs, rather than whether the costs incurred by them are reasonable.[232] We also note that in the two disputes in which the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement was interpreted – *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate* – both the panels and the Appellate Body considered that the existence of government measures in the country of origin, of a different nature and effect on domestic input prices in each case, did not constitute a sufficient or adequate basis to conclude, in application of the second condition in Article 2.2.1.1, that the records of the producer or exporter under investigation do not "reasonably reflect the costs associated with the production and sale of the product under consideration".

7.99. Indeed, in *EU – Biodiesel (Argentina)*, the government measure that was found to render the recorded costs unusable for the calculation of the costs of production was the Argentine export tax system, which depressed the domestic price of the relevant inputs to an "artificially-low level".[233] The Appellate Body agreed with the panel that the European Commission's 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 under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel. Based on this reason, the Appellate Body upheld the panel's finding that the European Union acted inconsistently with Article 2.2.1.1 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.[234]

7.100. Likewise, in *Ukraine – Ammonium Nitrate,* the Ministry of Economic Development and Trade (MEDT) of Ukraine, responsible for conducting anti-dumping investigations and reviews, rejected the gas cost reflected in the records of the Russian investigated companies because the gas price in the domestic Russian market was not a market price as the State controlled this price, it was artificially lower than the export price of gas from Russia and the price of gas in other countries, and was below costs.[235] The Appellate Body agreed with the panel in finding that the MEDT of Ukraine did not provide an adequate basis under that second condition of Article 2.2.1.1 to reject the reported gas cost. The Appellate Body recalled, in this connection, that the examination under the second condition in the first sentence of Article 2.2.1.1 does not concern whether the costs contained in the records are not reasonable because, for instance, they are lower than in other countries.[236]

7.101. In our view, the reasons underlying the rejection of the recorded costs under the Cost Adjustment Methodology are not distinguishable from those considered inadequate by the panels and the Appellate Body in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate* as a basis to disregard the recorded costs pursuant to the second condition of Article 2.2.1.1. We recall that, under the Cost Adjustment Methodology, the recorded costs of investigated companies are rejected from the calculation of the cost of production because of significant input price differences in the domestic and out-of-country markets and the existence of price regulation in the country of origin or other measures that impact the domestic input price. Our review of the manner in which the methodology operates reveals that the decisive factor in rejecting the recorded input prices is that

[227] Case T 235/08, (Exhibit RUS-12), recitals 34-35.
[228] Case T 118/10, (Exhibit RUS-29), recitals 35-36.
[229] Case T 459/08, (Exhibit RUS-14), recitals 55-56.
[230] Case T 84/07, (Exhibit RUS-13), recitals 42-43.
[231] Case T 111/14, (Exhibit RUS-38), recital 37.
[232] Panel Report, Ukraine – Ammonium Nitrate, para. 7.69.
[233] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.299.
[234] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.55.
[235] Appellate Body Report, *Ukraine – Ammonium Nitrate,* para. 6.100.
[236] Appellate Body Report, *Ukraine – Ammonium Nitrate,* para. 6.102.

they are State-regulated and "far below market prices paid in unregulated markets"[237], as indicated by Russia.

7.102. In light of the above, we consider that the Cost Adjustment Methodology does not provide for an analysis pertaining to whether the records kept by the exporter or producer 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".[238] Similar to the underlying facts in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium* Nitrate, the Cost Adjustment Methodology assesses the "reasonableness" of the costs reflected in the records kept by the investigated companies themselves *vis-à-vis* prices for the relevant inputs in what is considered to be unregulated markets. When this comparison reveals a significant price difference, the Cost Adjustment Methodology discards the recorded costs of the investigated companies. In our view, this does not constitute an adequate or sufficient basis under the second condition in the first sentence of Article 2.2.1.1 to conclude that the records of the investigated companies do not reasonably reflect the costs associated with the production and sale of the product concerned.

7.103. We note the European Union's position, based on the terms "normally" and "[f]or the purpose of paragraph 2" in the first sentence of Article 2.2.1.1, that the two express conditions in this sentence do not exhaust the circumstances in which costs reflected in the records of the producer or exporter under investigation may be rejected.[239]

7.104. Russia agrees that, when the two conditions in the first sentence of Article 2.2.1.1 are met, investigating authorities "normally", i.e. as a rule, shall use the records of the exporter or producer under the investigation to calculate costs. However, Russia maintains that the term "normally" in the first sentence of Article 2.2.1.1 does not incorporate an unlimited derogation from the obligation to use the records of the investigated companies.[240] According to Russia, only explicit derogations provide the legal basis for an investigating authority to use costs other than those incurred by the investigated companies in the country of origin.[241] Moreover, Russia submits that the introductory phrase "[f]or the purpose of paragraph 2" in Article 2.2.1.1 does not allow for an examination of the operation of the market forces of supply and demand in order to establish normal value.[242] However, because the Cost Adjustment Methodology consists in the rejection of the recorded input prices pursuant to the second condition in Article 2.2.1.1 of the Anti-Dumping Agreement, Russia argues that any attempt by the European Union to rely on the word "normally" to justify a derogation from the obligation to use the records of the investigated companies would constitute *ex post facto* rationalization.[243]

7.105. We agree with Russia that there is no evidence suggesting that the Cost Adjustment Methodology is or has been applied through any intention on the part of the European Union to give effect to its interpretation of the term "normally" in the first sentence of Article 2.2.1.1. We recall that, in the European Commission's anti-dumping determinations advanced by Russia, the decisive factor in rejecting the recorded input prices is that they were State-regulated and "far below market prices paid in unregulated markets". We understand the European Union to be arguing for purposes of this dispute that "distorted" cost information constitutes an "abnormal" circumstance that justifies the rejection of the costs in application of the term "normally" within the meaning of Article 2.2.1.1 of the Anti-Dumping Agreement. We note that the term "normally" also appears in the first subparagraph of Article 2(5) of the Basic AD Regulation in a way that corresponds in terms of structure and meaning to how it is used in Article 2.2.1.1.[244] However, the anti-dumping determinations evidencing the precise content of the Cost Adjustment Methodology do not indicate

[237] See para. 7.40 above.
[238] Appellate Body Report, *Ukraine – Ammonium Nitrate,* para. 6.97.
[239] European Union's response to Panel question No. 75, para. 14.
[240] Russia's response to Panel question No. 29(b), paras. 126 and 130-133; second written submission, para. 580.
[241] Russia argues that these derogations are set forth in the Anti-Dumping Agreement, i.e. the second *Ad* Note to Article VI:1 of the GATT 1994 incorporated by Article 2.7, and in the protocols of accession of certain Members which took specific commitment on price comparability in anti-dumping proceedings. (Russia's responses to Panel question No. 29(a), para. 124, question No. 29(b), paras. 131 and 133, and question No. 29(d), paras. 163-164).
[242] Russia's second written submission, paras. 491-492.
[243] Russia's second written submission, para. 690.
[244] See fn 91 above.

that the European Commission relied on the term "normally" in the first subparagraph of Article 2(5) when it rejected the recorded input prices. If the European Commission had derogated from the requirement in Article 2(5) that "costs … shall *normally* be calculated on the basis of … records", one could have expected to find an explanation of such derogation in the relevant determinations. However, no such explanation is present.

7.106. Accordingly, we find that the anti-dumping determinations evidencing the existence of the Cost Adjustment Methodology provide no reasoned and adequate explanation of whether and why the fact that the recorded input prices were State-regulated and "far below market prices paid in unregulated markets" constituted an "abnormal" circumstance or otherwise justified the rejection of the recorded costs pursuant to the term "normally" within the meaning of Article 2.2.1.1. On the contrary, in our view, the European Commission's reasoning in the determinations reproduced above is best understood to reveal that it applies the Cost Adjustment Methodology to reject recorded cost information in reliance on the *second condition* of the first subparagraph of Article 2(5) of the Basic AD Regulation. Moreover, as already noted, in the five court judgments advanced by Russia the Council of the European Union sought to defend the application of the Cost Adjustment Methodology by arguing that it was justified to reject the recorded cost information under the *second condition* of the first subparagraph of Article 2(5) of the Basic AD Regulation, not the alleged flexibility arising out of the term "normally" in the first subparagraph of Article 2(5) of the Basic AD Regulation. We thus do not find it necessary to consider further whether the two express conditions in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement exhaust the circumstances in which costs reflected in the records of the producer or exporter under investigation may be rejected.[245]

#### 7.2.4.4 Conclusion

7.107. In the light of the above, we conclude that the Cost Adjustment Methodology provides for the rejection of the costs reflected in the records of the exporter or producer under investigation in a manner inconsistent with the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Therefore, we find that the Cost Adjustment Methodology of the European Union is inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

### 7.2.5 Whether the Cost Adjustment Methodology is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement by providing for the use of costs other than "the costs associated with the production and sale of the product under consideration"

7.108. Russia claims that the Cost Adjustment Methodology is also inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement because it provides for the use of costs other than "the costs associated with the production and sale of the product under consideration".[246] The second condition is the source of the language Russia relies on as a basis for its claim.

7.109. Russia has indicated that this claim is independent of its above-mentioned claim under Article 2.2.1.1, i.e. unrelated to the improper rejection of the costs reflected in the records of the exporter or producer under investigation.[247] However, Russia's arguments in support of its claim under Article 2.2.1.1 appear to focus on the same factual and legal bases as its claim related to the rejection of the producers' records. Indeed, in explaining this claim in its first written submission, Russia provided a one-paragraph explanation indicating that "[i]n *EU – Biodiesel (Argentina)* and *[EU – Biodiesel] (Indonesia)*, the panels and the Appellate Body found that the [European Union] acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement".[248] The paragraphs of the reports referred to by Russia[249] contain the panels' and Appellate Body's findings in the respective disputes in connection with the rejection of the records of the investigated companies pursuant to the second condition in Article 2.2.1.1 of the Anti-Dumping Agreement. Whether the use of data other than that reflected in the records of the investigated companies is

[245] Accordingly, we find that it is not necessary, for the purpose of this dispute, to provide a full interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, as Russia requests, including the terms "[f]or the purpose of paragraph 2" and "normally", and Article 2.2 of the Anti-Dumping Agreement. (Russia's opening statement at the second meeting of the Panel, para. 101).

[246] Russia's first written submission, paras. 21, 405, and 1258.

[247] Russia's responses to Panel question No. 75, para. 68 and question No. 76, para. 78.

[248] Russia's first written submission, para. 421.

[249] Panel Reports, *EU – Biodiesel (Argentina),* paras. 7.249 and 8.1.c.i; *EU – Biodiesel (Indonesia),* paras. 7.27 and 8.1.a; and Appellate Body Report, *EU – Biodiesel (Argentina),* para. 6.57 and 7.2.a.

consistent with the first sentence of Article 2.2.1.1 is a question that is not addressed in these paragraphs.

7.110. We further note Russia's explanation that its second challenge under the first sentence of Article 2.2.1.1 concerns the use of costs that, unlike those reflected in the records of the investigated companies, have no "genuine relationship with the investigated producer of the product under consideration and with the production and sale of the specific product under consideration".[250] However, in the light of the text of Article 2.2.1.1 of the Anti-Dumping Agreement and the interpretation of this provision by previous panels and the Appellate Body, with which we agree, it is not apparent that the first sentence of Article 2.2.1.1 speaks about the nature of the cost information to be used in lieu of the costs reported in the records of the investigated companies. We recall that the focus of the second condition in the first sentence of Article 2.2.1.1 is the *records* of the costs kept by the exporter or producer, not the costs *per se.*[251] In our view, once the records have been rejected as the source of the cost of production for constructing normal value, the language in the second condition has no further applicability in respect of the cost data to be used.

7.111. For the above reasons, we find that Russia's claim lacks a valid basis in Article 2.2.1.1 of the Anti-Dumping Agreement and we, therefore, dismiss this basis for Russia's claim.

### 7.2.6 Whether the Cost Adjustment Methodology is inconsistent with Article 2.2 of the Anti-Dumping Agreement by providing for the use of costs other than "the cost of production in the country of origin"

7.112. Russia further claims that the Cost Adjustment Methodology is inconsistent with Article 2.2 of the Anti-Dumping Agreement because, in applying this methodology, the European Commission uses costs other than "the cost of production in the country of origin" in the construction of normal value. As a result, the constructed normal value is not based on "the cost of production in the country of origin", as required by Article 2.2.[252]

#### 7.2.6.1 Main arguments of the parties

##### 7.2.6.1.1 Russia

7.113. Russia submits that Article 2.2 of the Anti-Dumping Agreement requires an investigating authority to construct normal value on the basis of the cost of production of the product "in the country of origin".[253] Russia notes that Article VI:1(b)(ii) of the GATT 1994 similarly requires that the construction of normal value be on the basis of the cost of production of the product "in the country of origin".[254] According to Russia, "cost of production" refers to the cost of producing a specific product[255], i.e. the expenses paid to produce the product under consideration in the country of origin.[256] In constructing normal value pursuant to Article 2.2 of the Anti-Dumping Agreement, these expenses must reflect "the cost of production in the country of origin".[257]

7.114. Russia recalls that Article 2.2.1.1 of the Anti-Dumping Agreement identifies the records kept by the exporter or producer under investigation as the preferred source for cost of production data to be used in such calculation.[258] While acknowledging that Article 2.2 does not limit the sources of information that may be used in establishing the costs of production to sources inside the country of origin[259], Russia maintains that, when relying on any out-of-country information, an investigating authority must ensure that such information is used to arrive at the cost of production "in the country

[250] Russia's response to Panel question No. 75, paras. 75-76.
[251] Appellate Body Report, *EU – Biodiesel (Argentina),* para. 6.17.
[252] Russia's first written submission, paras. 425 and 436.
[253] Russia's first written submission, para. 427 (referring to Panel Report, *EU – Biodiesel (Argentina),* para. 7.171).
[254] Russia's first written submission, para. 427.
[255] Russia's first written submission, para. 427 (referring to Panel Report, *EU – Biodiesel (Argentina),* para. 7.237).
[256] Russia's first written submission, para. 427 (referring to Appellate Body Report, *EU – Biodiesel (Argentina),* para. 6.23).
[257] Russia's first written submission, para. 427.
[258] Russia's response to Panel question No. 29(d), para. 155 (referring to Appellate Body Report, *EU – Biodiesel (Argentina),* para. 6.71).
[259] Russia's second written submission, para. 595.

of origin", as provided for in Article 2.2.[260] Russia argues that an investigating authority is required to ensure that any out-of-country information it uses to calculate normal value "reflects" the cost of production in the country of origin.[261] Russia asserts that the Appellate Body in *EU – Biodiesel (Argentina)* made clear that Article 2.2 does not permit an investigating authority to simply "substitute" the correctly recorded input cost with the cost data from third countries.[262]

7.115. Russia claims that the Cost Adjustment Methodology is inconsistent with Article 2.2 of the Anti-Dumping Agreement because, in applying this methodology, the European Commission replaces the input prices actually paid by the investigated companies reflected in their records with out-of-country "surrogate" input prices.[263]

7.116. Russia further argues that, even though the "surrogate" input price information does not reflect the actual input prices borne by the investigated companies in the country of origin and is unrelated to the specific product under consideration[264], the Cost Adjustment Methodology does not ensure that this out-of-country information is adapted to a level that reflects the costs borne by the investigated companies "in the country of origin".[265] While noting that, in the specific anti-dumping determinations, certain adjustments to the out-of-country input price information are made for transport costs, customs export tax, value added tax, excise duty, local distribution costs, sea freight and fobbing costs, Russia argues that these adjustments are not sufficient as they cannot bring the surrogate input price to the level that reflects the cost of production in the country of origin.[266] Accordingly, pursuant to the Cost Adjustment Methodology, the European Commission fails to arrive at "the cost of production in the country of origin", in contravention of Article 2.2 of the Anti-Dumping Agreement.

#### 7.2.6.1.2 European Union

7.117. Relying on the findings of the Appellate Body in *EU – Biodiesel (Argentina)*, the European Union submits that an investigating authority is permitted under Article 2.2 of the Anti-Dumping Agreement to look for cost of production information from sources outside the country of origin, provided it is apt to or capable of yielding a cost of production in the country of origin.[267]

7.118. Without engaging in the specific findings reflected in the anti-dumping determinations put forward by Russia, the European Union asserts that the process of having recourse to information from other representative markets is highly fact-dependent. An investigating authority will consider and weigh all available relevant evidence to establish the normal value. Where more than one possibility presents itself, an investigating authority will have to base its decision on all the factual circumstances of the case at hand.[268] Similarly, the process of considering whether or not an adjustment is necessary and has been substantiated will also be a highly fact-dependent process. It will depend on substantive facts, such as the existence or absence of taxation in the other representative market. The European Union argues that it will also depend on the procedural context, such as whether or not the justification for and amount of any adjustment claimed has been duly substantiated by the interested party making the claim.[269]

7.119. According to the European Union, the adaptation or adjustment must be made in such a way as to ensure a "proper" and "fair" comparison, as provided for in Articles 2.2 and 2.4 of the Anti-Dumping Agreement. However, the European Union submits, Article 2.2 cannot be interpreted

[260] Russia's response to Panel question No. 29(d), para. 160 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.82).
[261] Russia's response to Panel question No. 29(d), para. 160.
[262] Russia's response to Panel question No. 29(d), para. 159 (referring to Appellate Body Report, *EU – Biodiesel (Argentina),* para. 6.73); opening statement at the second meeting of the Panel, para. 98 (referring to Appellate Body Report, *EU – Biodiesel (Argentina),* para. 6.73)
[263] Russia's first written submission, para. 283.
[264] Russia's first written submission, paras. 430 and 433; opening statement at the second meeting of the Panel, paras. 65 and 85.
[265] Russia's first written submission, para. 433; response to Panel question No. 67, para. 38.
[266] Russia's comments on the European Union's response to Panel question No. 78, para. 59.
[267] European Union's first written submission, para. 119; response to Panel question No. 114, para. 1.
[268] European Union's first written submission, para. 99; opening statement at the first meeting of the Panel, para. 17.
[269] European Union's first written submission, para. 100; opening statement at the first meeting of the Panel, para. 17.

as obliging an investigating authority to make a comparison other than a "proper" and "fair" comparison. In particular, according to the European Union, an investigating authority cannot be required to use data that it has already determined is not apt to ensure a "proper" and "fair" comparison.[270] That would be incompatible with the very purpose of Article 2.2, namely to establish whether dumping takes place by making a "proper" comparison between the normal value (i.e. a value that is "normal" – hence not based on distorted or unreliable information) and the export price.[271]

#### 7.2.6.2 Legal standard

7.120. Article 2.2 of the Anti-Dumping Agreement provides:

> 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 or the low volume of the sales in the domestic market of the exporting country, 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, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[272]

7.121. The expression "cost of production in the country of origin" in Article 2.2 has been understood as "a reference to the price paid or to be paid to produce something within the country of origin".[273]

7.122. While pursuant to the first sentence of Article 2.2.1.1 costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation, in *EU – Biodiesel (Argentina*), the Appellate Body ruled that Article 2.2 does not prohibit an investigating authority from relying on information other than that contained in the records of the exporter or producer, including in-country and out-of-country evidence, to calculate some or all such costs.[274] In this connection, the Appellate Body considered that Article 2.2 of the Anti-Dumping Agreement does not limit the *sources* of information or evidence to only sources inside the country of origin.[275] However, an investigating authority remains bound by the obligation to arrive at the cost of production "in the country of origin". Hence, where an investigating authority uses information other than that contained in the records kept by the exporter or producer to construct the cost of production, it has to ensure that the information is suitable to determine a "cost of production" "in the country of origin".[276] An 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".[277]

7.123. In *Ukraine – Ammonium Nitrate*, the Appellate Body confirmed that the phrase "cost of production in the country of origin" indicates that whatever information or evidence is used to determine the "cost of production", it must be apt to yield or capable of yielding a cost of production "in the country of origin" and that compliance with this obligation may require the investigating authority to adapt that information.[278] 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".

#### 7.2.6.3 Evaluation by the Panel

7.124. Russia has demonstrated that the second element of the Cost Adjustment Methodology provides for the use of out-of-country input price information for the calculation of the costs of production of the producer or exporter under investigation. As already noted, following the rejection

[270] European Union's response to Panel question No. 29(d), para. 81 (referring to Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China),* para. 5.207; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.52).
[271] European Union's closing statement at the first meeting of the Panel, para. 8.
[272] Fn omitted.
[273] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.69.
[274] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.
[275] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.74.
[276] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70 and 6.73.
[277] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.
[278] Appellate Body Report, *Ukraine – Ammonium Nitrate,* para. 6.121 (referring to *EU – Biodiesel (Argentina)*, para. 6.73).

of the input prices reflected in the records of the investigated companies, the European Commission proceeds to "adjust" their costs of production. The evidence submitted by Russia shows that such adjustments have been made by using information from other markets, which the European Commission deemed "representative". As noted above, in almost all determinations, the adjusted input price was based on the average price of the relevant input when exported from the country of origin to another destination.[279] In these cases, the European Commission made adjustments to the new input price for transport costs, customs export tax, value added tax, excise duty, local distribution costs, sea freight and fobbing costs, in order to remove export-related and transportations expenses. 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 reflects or represents the costs of production in the country of origin.

7.125. As already noted, while Article 2.2 of the Anti-Dumping Agreement does not limit the sources of information that may be used to calculate the costs of production to only those sources inside the country of origin[280], 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".[281] Compliance with the obligation to adapt information from outside the country of origin pursuant to Article 2.2 was examined in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*. In both cases, the Appellate Body confirmed the panels' findings that the respective investigating authorities acted in contravention of Article 2.2 by failing to explain how the information used in its calculations was adapted to ensure that it represented the cost of production in the country of origin.[282]

7.126. In *EU – Biodiesel (Argentina)*, following the rejection of the price actually paid by Argentine producers for soybeans based on a finding that the Argentine export tax system depressed the domestic input price to an artificially-low level, the European Commission replaced the actual purchase price of soybeans with the average reference price of soybeans published by the Argentine Ministry of Agriculture for export, net of fobbing costs.[283] The Appellate Body found that the European Commission had failed to meet the relevant standard in the specific anti-dumping determination at issue because:

> Other than pointing to the deduction of fobbing costs, the European Union has not asserted, either before the Panel or before us, that the EU authorities adapted, or even considered adapting, the information used in their calculation in order to ensure that it represented the cost of production *in Argentina*.[284]

7.127. In *Ukraine – Ammonium Nitrate*, following the rejection of the reported gas cost of the investigated Russian producers based on a finding that, *inter alia*, the price of gas in Russia was regulated by the government, MEDT of Ukraine replaced the reported gas cost with gas prices outside Russia, specifically the price of gas exported from Russia to the German border, adjusted for transportation expenses .[285] The Appellate Body agreed with the panel that there was no explanation of why the adjustment for transportation expenses made to the export price from Russia at the German border was sufficient to adapt the export price from Russia to reflect the cost of production in the country of origin:

> The Panel did not see any explanation by MEDT in the Investigation Report as to why adjustments for transportation expenses were adequate to adapt the export price from Russia at the German border to reflect the cost of the investigated Russian producers in the country of origin. The Panel also recalled its earlier finding under the second condition in the first sentence of Article 2.2.1.1, a finding with which we agreed above. Other than pointing to the deduction of transportation expenses, Ukraine has not asserted, either before the Panel or before us, that MEDT otherwise adapted the export

[279] See para. 7.41 above.
[280] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.74.
[281] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.
[282] Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.81; *Ukraine – Ammonium Nitrate,* paras. 6.122-6.123.
[283] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.182.
[284] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.81.
[285] Panel Report, *Ukraine – Ammonium Nitrate,* para. 7.94.

price of gas used in its calculations in order to ensure that it reflected the cost of production in Russia.[286]

7.128. We agree with these considerations and find them relevant to our analysis of the consistency of the Cost Adjustment Methodology with Article 2.2. Similar to the facts underlying the anti-dumping decisions in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*, 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, adjusted for export-related and transportation concepts, 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. This evidence persuades us that the Cost Adjustment Methodology contravenes Article 2.2.

7.129. Regarding the adjustments that should be made in order to arrive at the cost of production in the country of origin, we note the European Union's argument that the decision to make adjustments or not would depend on whether such adjustments have been invoked and justified by the investigated companies.[287] We do not agree. Article 2.2 requires investigating authorities to calculate the costs of production "in the country of origin" and, according to Article 2.2.1.1, this obligation "normally" requires the use of the records of the investigated companies provided that the two conditions set out in this provision are met. We consider that, to the extent an investigating authority bases its calculations on information other than that reflected in the records of the investigated companies, it will be required to ensure that adjustments, if necessary, are made in order to arrive at the cost of production "in the country of origin". We do not consider that compliance with this obligation under Article 2.2 is conditioned by the nature of the requests and participation of the investigated companies in the underlying investigation.

7.130. The European Union also asserts 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".[288] According to the European Union, that would be incompatible with the very purpose of Article 2.2, namely to establish whether dumping takes place by making a "proper comparison" between the normal value (i.e. a value that is "normal" – hence, not based on distorted or unreliable information) and the export price.[289] We do not find this argument to be relevant to resolve Russia's claim in relation the Cost Adjustment Methodology. As we have explained above, the investigating authority must provide a reasoned and adequate explanation of how the information used in its calculations was adapted to ensure that it represented the cost of production in the country of origin. Whether or not specific adaptations are appropriate or inappropriate to ensure the information has been properly adapted would be the subject of such explanation.[290]

#### 7.2.6.4 Conclusion

7.131. In light of the above, we conclude that the Cost Adjustment Methodology, by providing for the use of out-of-country input price information, without establishing whether or explaining how such information is adequate to reflect or represent the cost of production in the country of origin, contravenes Article 2.2 of the Anti-Dumping Agreement.

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[286] Appellate Body Report, *Ukraine – Ammonium Nitrate,* para. 6.122. (fns omitted)

[287] European Union's first written submission, para. 100; opening statement at the first meeting of the Panel, para. 17.

[288] European Union's response to Panel question No. 29(d), para. 81.

[289] European Union's closing statement at the first meeting of the Panel, para. 8.

[290] Moreover, we asked the European Union to explain why the cited references to the Appellate Body's statements in *EC – Fasteners (China) (Article 21.5 – China)* and *China – HP-SSST (Japan) / China – HP-SSST (EU)* are relevant to the Panel's assessment of Russia's claim under Article 2.2 of the Anti-Dumping Agreement, considering that the European Union does not treat Russia as an NME country (unlike the relevant facts underlying *EC – Fasteners (China) (Article 21.5 – China))* and that the present dispute does not deal with SG&A (unlike the relevant facts underlying *China – HP-SSST (Japan) / China – HP-SSST (EU))*. The European Union reiterated that these cases "confirm [its] more general 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". (European Union's response to Panel question No. 77, paras. 15-17). However, the European Union failed to explain how the disputes it cites support the claim that an investigating authority cannot use data that it has already rejected, especially given the substantive differences between the Cost Adjustment Methodology and the facts underlying these disputes.

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

### 7.3.1 Introduction

7.132. Russia asserts that the first subparagraph of Article 2(3) of the Basic AD Regulation requires that, in calculating a normal value on the basis of the cost of production, only "representative" prices shall be used.[291] Russia further asserts that EU authorities understand "representative" prices to mean those unaffected by "distortions" due to government regulation.[292] Russia claims that this measure is, therefore, inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement.[293]

7.133. The first subparagraph of Article 2(3) of the Basic AD Regulation provides:

> When there are no or insufficient sales of the like product in the ordinary course of trade, or where, because of the particular market situation, such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.

7.134. Russia's challenge is grounded in its assertion that the final part of the first subparagraph of Article 2(3), "provided that those prices are representative", applies to and conditions not only the prior term "export prices", but also applies to and conditions the more removed term "cost of production". In order to prevail on this claim, Russia must demonstrate that the content of the measure is, as matter of fact, as Russia has alleged. We recall in this regard that "[a] party asserting that another party's municipal law is inconsistent 'as such' with relevant WTO obligations bears the burden of introducing evidence as to the meaning of such law to substantiate that assertion".[294] Because WTO Members are presumed to have enacted their laws in good faith, a complaint against a Member's legislation "as such" is considered to be a "serious challenge".[295]

7.135. When a municipal law is challenged "as such", the starting point for the analysis will be the text of that municipal law, on its face.[296] A complainant may, therefore, seek to support its understanding of the meaning of the municipal law on the basis of the text of that municipal law only.[297] A complainant may also seek to support its understanding of the meaning of the municipal law at issue with additional elements, including "evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars".[298] Where a Member's municipal law is challenged "as such", our responsibility is to examine the meaning and scope of the municipal law at issue to make an objective assessment of the matter.[299] Accordingly, our analysis of this claim begins with the weighing of the evidence before us to assess whether the first subparagraph of Article 2(3) of the Basic AD Regulation has the content that Russia alleges. In particular, we assess whether or not the evidence demonstrates that the phrase "provided that those prices are representative" applies to and conditions the term "cost of production".

### 7.3.2 Whether the first subparagraph of Article 2(3) of the Basic AD Regulation requires that, in the construction of normal value, only "representative" prices shall be used

7.136. In this section, we briefly summarize the arguments of each party as they pertain to the assessment of the evidence presented as it relates to the alleged meaning of the first subparagraph

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[291] Russia's first written submission, paras. 62-90 and 109.
[292] Russia's first written submission, paras. 89-90.
[293] Russia's first written submission, paras. 89-110.
[294] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.156 (referring to Appellate Body Report, *US – Carbon Steel*, para. 157).
[295] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172-173.
[296] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.
[297] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.156.
[298] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.100 (quoting Appellate Body Report, *US – Carbon Steel*, para. 157).
[299] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.201 (referring to Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.98; *US – Carbon Steel (India)*, para. 4.445).

of Article 2(3) of the Basic AD Regulation, and we then proceed to examine and assess the relevant evidence.

7.137. Russia notes that the first subparagraph of Article 2(3) of the Basic AD Regulation describes two alternative methods to determine normal value (a) the cost of production in the country of origin; and (b) the export prices, in the ordinary course of trade, to an appropriate third country. Russia reads the phrase "provided that those prices are representative" in the final part of the first subparagraph of Article 2(3) as setting out a requirement, i.e. that "prices" are "representative", applicable to both alternative methods.[300]

7.138. The European Union argues that Russia's affirmations about the scope and meaning of the phrase "provided that those prices are representative" in the first subparagraph of Article 2(3) are incorrect as a matter of fact; the term "those prices" in Article 2(3) of the Basic AD Regulation refers back to the only other instance in Article 2(3) in which the term "prices" is used, that is, it refers to the "export prices".[301] The European Union asserts that 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".[302]

7.139. Russia's claim in relation to the first subparagraph of Article 2(3) of the Basic AD Regulation is grounded on the allegation that the final part of this provision – "provided that those prices are representative" – requires the "cost of production in the country of origin" to be "representative" in order to be used in the construction of normal value. Accordingly, the threshold question we address in respect of this claim is whether or not Russia has established that the final part of the challenged provision is applicable to the "cost of production in the country of origin". Russia draws support for its characterization of the final part of the first subparagraph of Article 2(3) from (a) the text of this provision, its historical development and the ordinary meaning of the terms used; (b) a statement made by the Commission of the European Communities in 2002; and (c) certain additional evidence concerning the meaning of the term "representative" including other provisions of the Basic AD Regulation, recitals 3 and 4 of Regulation 1972/2002, the practice of application of the relevant norms by the EU authorities, and judgments by the General Court of the European Union. We proceed to assess each of these categories of evidence.

#### 7.3.2.1 Text

7.140. Russia draws support for its position concerning the scope of the last part of the first subparagraph of Article 2(3) from the dictionary meaning of the term "those" and the placement of the phrase "provided that those prices are representative" in Article 2(3): after describing both of the alternative methods to determine normal value ("the cost of production" and "the export prices").[303]

7.141. As to the meaning of the term "those", Russia notes that "those", which precedes the word "prices", "is used, *inter alia*, to refer to 'things or persons pointed to or already mentioned'"[304], "in opposition to *this*: properly denoting the more distant of two things".[305] Russia notes that, in contrast, the word "these" is used to refer to "things or persons present or near (actually, or in thought, esp. as having just been mentioned)"[306] and refers to "the nearer of two things close to the

[300] Russia's first written submission, paras. 61-64.
[301] European Union's first written submission, paras. 51-52.
[302] European Union's opening statement at the first meeting of the Panel, para. 5.
[303] Russia's opening statement at the first meeting of the Panel, para. 10; response to Panel question No. 1, paras. 3 and 5; and second written submission, para. 23.
[304] Russia's first written submission, para. 65 (quoting Oxford Dictionaries online, definition of "those" http://www.oed.com/view/Entry/201046?redirectedFrom=those& (accessed 21 March 2019), (Exhibit RUS-55, meaning I.2.a.)).
[305] Russia's first written submission, para. 65 (quoting Oxford Dictionaries online, definition of "that" http://www.oed.com/view/Entry/200177 (accessed 21 March 2019), (Exhibit RUS-47, meaning II.B.2.a.)).
[306] Russia's first written submission, para. 65 (quoting Oxford Dictionaries online, definition of "these" http://www.oed.com/view/Entry/200651?result=2&rskey=Oa3AQE& (accessed 21 March 2019), (Exhibit RUS-54), meaning II.3.a.)

speaker".[307] For Russia, the pronoun "those" in its scope is wider than the pronoun "these"[308], thus covering "all available options" in the context of the first subparagraph of Article 2(3): the cost of production and the export prices.[309]

7.142. Russia notes that in 1995 the European Union changed the original language of the provision, from "provided that *these* prices are representative" to "provided that *those* prices are representative".[310] Based on the alleged dichotomy of the terms "these" and "those", Russia argues that this legislative change has very "concrete implications" for the scope of the challenged provision and evidences the European Union's deliberate[311] intention to extend the "representative" requirement to both the cost of production and the export prices. According to Russia, if the word "prices" were intended to refer only to export prices, it would be more appropriate to use the pronoun "these" as the plural form of "this" that "refers to the nearer of two things close to the speaker".

7.143. As to the placement of the phrase "provided that those prices are representative", Russia notes that in Article 2.2 of the Anti-Dumping Agreement the phrase "provided that this price is representative" is placed after the words "a comparable price of the like product when exported to an appropriate third country" and before the words "the cost of production in the country of origin", i.e. making it clear that the requirement applies to the export price only.[312] For Russia, this difference results in a different interpretation "when the pronoun of the corresponding provisions is changed".

7.144. The starting point for the analysis of the meaning of a provision of municipal law is the text of that municipal law, *on its face*.[313] Thus, we examine, based on the text of Article 2(3) *on its face*, whether the phrase "provided that those prices are representative" applies to the cost of production. We take note of Russia's arguments that Article 2(3) used to include different terminology and that Article 2.2 of the Anti-Dumping Agreement is structured in a different manner. These arguments, however, are of a different character than, and are assessed differently than, the evidence offered by the text of the challenged measure itself which, as noted, is the starting point of our analysis.

7.145. We observe that the dictionary definitions submitted by Russia show that the term "those" has two usages: as a demonstrative *pronoun*[314] and as a demonstrative *determiner.*[315] As a demonstrative pronoun, the term "indicat[es] things or persons pointed to or already mentioned", as observed by Russia. Under this meaning, "those" is a pronoun that *replaces* a noun, standing on its own. As a demonstrative *determiner,* the term indicates "things or persons as known to be such as described"[316] and "designat[es] the persons or things indicated".[317] Under this meaning, "those" *introduces* the noun, without replacing it. In the last part of the first subparagraph of Article 2(3), the word "those" is followed by the word "prices". The usage of "those prices" in the text of this provision we find to be consistent with the meaning of "those" used as a demonstrative determiner, i.e. with the purpose of indicating or introducing the word "prices". We observe that the only other instance in which the term "prices" is used in the first subparagraph of Article 2(3) is when referring to the second alternative method to determine normal value: "the export prices, in the ordinary

[307] Russia's first written submission, para. 64 (quoting *New Oxford American Dictionary*, 3rd edn, A. Stevenson and C. A. Lindberg (ed.), (Oxford University Press, 2011), definition of "this", (Exhibit RUS-53), p. 1)
[308] Russia's response to Panel question No. 1, para. 7.
[309] Russia's first written submission, para. 65.
[310] Russia's first written submission, paras. 36-39.
[311] Russia's response to Panel question No. 1, para. 6.
[312] While the text of the first subparagraph of Article 2(3) of the Basic AD Regulation is almost identical to the text of Article 2.2 of the Anti-Dumping Agreement, when describing the alternative methods to determine normal value, Article 2.2 first presents the export price to an appropriate third country and then the cost of production in the country of origin.
[313] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.
[314] Oxford Dictionaries online, definition of "those" http://www.oed.com/view/Entry/201046?redirectedFrom=those& (accessed 21 March 2019), (Exhibit RUS-55), meaning I.
[315] Oxford Dictionaries online, definition of "those" http://www.oed.com/view/Entry/201046?redirectedFrom=those& (accessed 21 March 2019), (Exhibit RUS-55), meaning II.
[316] Oxford Dictionaries online, definition of "those" http://www.oed.com/view/Entry/201046?redirectedFrom=those& (accessed 21 March 2019), (Exhibit RUS-55), meaning II.6.b.
[317] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3245.

course of trade, to an appropriate third country". We find the text's use of the term "export prices" followed by the term "those prices" establishes within the meaning of the first subparagraph of Article 2(3) a clear linkage between the phrase requiring that prices be representative and the second methodology for determining normal value, which is based on export prices. In our assessment, the text of the first subparagraph of Article 2(3) itself supports the understanding of the term "those" as only designating the noun that follows ("prices"), as asserted by the European Union.[318]

7.146. When describing the first methodology to determine normal value, the first subparagraph of Article 2(3) refers to "the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits". Thus, the clear linkage on the basis of the term "prices" is absent from the first method for determining normal value. This difference is reinforced by the fact that the structure of the first subparagraph of Article 2(3) establishes the first and second methodologies for determining normal value as alternatives, the first on the basis of costs of production and the second on the basis of export prices. Considering this structure, the use of the term "those prices" would be an illogical choice for a drafter intending to make reference to both alternative methods for determining normal value. A better formulation, if that was the intention, could have been for instance: "provided that those costs or prices are representative". Thus, we do not find that the text itself supports a reading of the phrase "provided that those prices are representative" as covering "all available options" as Russia suggests.[319]

7.147. The fact that the phrase "provided that those prices are representative" is placed at the end of the first subparagraph of Article 2(3) does not, by itself, mean that this phrase covers both methods mentioned in that subparagraph. In our view, the fact that the challenged phrase is placed at the end of the sentence indicates that it relates to the method presented in the second instance: "export prices … to an appropriate third country".

7.148. In support of its reading of the challenged provision, the European Union has submitted the French and Spanish versions of the 1995 amendment. Because both versions use the "same term" ("*ces* prix" in French and "*estos* precios" in Spanish), the European Union argues that any change made to the original language of the last part of the first subparagraph of Article 2(3) "ha[d] no impact whatsoever on the meaning of the provision".[320]

7.149. Our review of the Spanish version confirms that the condition to use "representative" prices exclusively applies to the determination of normal value based on export prices to a third country. In the Spanish version, Article 2(3) consists not of one but of two sentences. The first sentence provides that, in the circumstances specified therein, normal value is to be determined based on the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits. The second sentence provides that normal value may be also calculated based on export prices to an appropriate third country in the ordinary course of trade, "provided that such prices are representative".[321]

7.150. In the light of the above, we find that the text of the first subparagraph of Article 2(3) does not support reading the term "those prices" in the phrase "provided that those prices are representative" in the first subparagraph of Article 2(3) as covering both "the export prices" and "the cost of production in the country of origin". Thus, we find that the *text* of the first subparagraph of Article 2(3) does not support Russia's claim regarding the scope of this provision. Indeed, we find that the text is contrary to Russia's reading of the provision. Moreover, we find that the text of the first subparagraph of Article 2(3) is clear in this respect, and we assign substantial probative value to this finding. With this understanding of the text as evidence of the content of the challenged

[318] European Union's first written submission, para. 49.
[319] Russia's first written submission, para. 65.
[320] European Union's response to Panel question No. 2, para. 3.
[321] The Spanish version of the first subparagraph of Article 2(3) reads:
Cuando, en el curso de operaciones comerciales normales, no existan ventas del producto similar o estas sean insuficientes, o cuando, debido a una situación especial del mercado, dichas ventas no permitan una comparación adecuada, el valor normal del producto similar se calculará sobre la base del coste de producción en el país de origen más una cantidad razonable en concepto de gastos de venta, generales y administrativos y en concepto de beneficios. También podrá calcularse utilizando los precios de exportaciones realizadas a un tercer país apropiado en el curso de operaciones comerciales normales y siempre que estos precios sean representativos.

measure in mind, we proceed to examine and weigh the remaining evidence advanced by Russia in support of its alleged content for the challenged measure.

#### 7.3.2.2 Statement by the European Commission

7.151. Russia argues that the following statement made by the European Commission to the Council of the European Union confirms that the EU authorities disregard, from the determination of normal value actually incurred, certain costs of production on the grounds that they are not "representative", pursuant to the first subparagraph of Article 2(3):

> Information collection
>
> With regard to anti-dumping and anti-subsidy investigations in which use will likely be made of the new provisions of paragraphs 3 and 5 of Article 2 of Regulation (EC) No 384/96 and Article 6(2) of Regulation (EC) No 2026/97, which are inserted into these Regulations by the present Council Regulation, the Commission Services will, at the beginning of an investigation, request information not only from parties concerned but also from other relevant sources. The complainant and all other parties concerned will also be invited to suggest possible relevant sources. The information obtained in response to such requests will be used to assess whether or not prices and costs reported by exporters or producers under investigation are distorted within the meaning of the aforementioned amendments.

7.152. The statement is reflected in a document dated 16 October 2002 from the Working Party on Trade Questions to the Permanent Representatives Committee – Council, which concerns two legislative proposals to amend Regulation 384/96 (the Basic AD Regulation) and Regulation 2026/97 (the Basic Anti-Subsidy Regulation). The first proposal provided for clarifications to the Basic AD Regulation and the second proposal provided for the repeal or amendment of certain rules in the Basic Anti-Subsidy Regulation.[322]

7.153. Russia argues that the statement supports Russia's position that the phrase "provided that those prices are representative" applies to the cost of production. Russia claims that the provisions introduced by the amendments (the second subparagraph of Article 2(3) and the second subparagraph of Article 2(5)) connect with the first subparagraph of Article 2(3), and the statement indicates that the information obtained by EU authorities will be used to assess "whether or not prices and costs reported by exporters or producers under investigation are distorted within the meaning of the aforementioned amendments".[323] According to Russia, this shows that the cost of production must allegedly be undistorted in order to be used to determine normal value. In other words, Russia considers that the reference in the statement to an assessment of whether or not "prices and costs … are distorted" describes the application to the cost of production of the "representative" requirement found in the first subparagraph of Article 2(3), and that this statement equates costs with prices.[324]

7.154. We observe that the statement concerns the collection of information in both anti-dumping and anti-subsidy proceedings pursuant to the amendments introduced in the "new provisions" and the use of such information by the EU authorities. The statement does not mention the first subparagraph of Article 2(3) or the phrase "provided that those prices are representative". Additionally, the statement does not indicate that the first subparagraph of Article 2(3) contains a requirement that costs of production be "representative" in order to be used to determine normal value. Neither does the statement demonstrate that, in such a context, "undistorted" has the meaning "representative". For these reasons, we find that the statement by the European Commission does not weigh in favour of Russia's reading of the content of the first subparagraph of Article 2(3).[325]

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[322] Statements dated 16 October 2002, "Statements by the Commission to the Council Minutes", Annex No. 11510/02, (Exhibit RUS-9), p. 1.

[323] Russia's first written submission, para. 67; response to Panel question No. 3, paras. 11-17.

[324] Russia's response to Panel question No. 3, paras. 11-17.

[325] In the light of this, we do not find it necessary to address the parties' opposing arguments on whether the statement by the Commission of the European Communities carries interpretative weight in respect of the related provision of the Basic AD Regulation.

#### 7.3.2.3 Provisions of the Basic AD Regulation

7.155. Russia refers the Panel to the second subparagraph of Article 2(3), Article 2(2) and the second subparagraph of Article 2(5) arguing that the term "representative" used through these provisions of the Basic AD Regulation "impl[ies] identical meaning and application of this term".[326]

7.156. The second subparagraph of Article 2(3) provides:

> A particular market situation for the product concerned within the meaning of the first subparagraph may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements.

7.157. Russia argues that this provision, read in the light of the first subparagraph of Article 2(3), reveals that "artificially low prices" would not be accepted as "representative".[327]

7.158. We read the second subparagraph of Article 2(3) as clarifying circumstances that may be considered by the investigating authorities as constituting a "particular market situation", indicating that one such circumstance is when prices are "artificially low". "Particular market situation" is referenced in the first part of the first subparagraph of Article 2(3) and relates to the circumstances in which the normal value shall be determined based on alternative methods. As such, we find that the second subparagraph of Article 2(3) is limited in scope to clarifying the term "particular market situation", and does not inform or clarify the content of the challenged provision which describes the two alternative methods for determining normal value and concludes with the "representative" requirement relevant to this claim. In other words, the second subparagraph of Article 2(3) relates to the conditions that may indicate that a particular market situation exists such that domestic sales of the like product may be disregarded as the basis for normal value. It does not say anything about how alternative methods for determining normal value are to be implemented, which is the subject of the current claim. Thus, we do not consider that the second subparagraph of Article 2(3), including the reference therein to "artificially low" prices, informs whether the phrase "provided that those prices are representative" applies to the cost of production within the meaning of the challenged measure. For these reasons, we find that the second subparagraph of Article 2(3) does not weigh in favour of Russia's reading of the content of the first subparagraph of Article 2(3).

7.159. Article 2(2) of the Basic AD Regulation provides:

> Sales of the like product intended for domestic consumption shall normally be used to determine the normal value if such sales volume constitutes 5% or more of the sales volume of the product under consideration to the Union. However, a lower volume of sales may be used when, for example, the prices charged are considered *representative for the market concerned*.[328]

7.160. Russia argues that the reference to prices "representative" for the market concerned, together with the fact that the challenged provision comes right after Article 2(2), suggests that the first subparagraph of Article 2(3) requires EU authorities to examine the "representativeness" of costs of production.[329] Article 2(2) provides that a low volume of domestic sales might be considered sufficient when "the prices charged are considered representative for the market concerned". This provision informs a decision about whether a low volume of domestic sales relative to export sales may be relied upon for the purpose of determining normal value, such that resort to alternative methods of determining normal value would not be necessary. Thus, Article 2(2) does not speak to the costs of production that may be used to determine a constructed normal value, nor whether those costs are required to be "representative" in the meaning of the first subparagraph of Article 2(3). For these reasons, we find that Article 2(2) does not weigh in favour of Russia's reading of the content of the first subparagraph of Article 2(3).

7.161. The second subparagraph of Article 2(5) of the Basic AD Regulation provides:

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[326] Russia's first written submission, paras. 71-72.
[327] Russia's first written submission, paras. 68-69.
[328] Emphasis added.
[329] Russia's first written submission, para. 71.

> If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other *representative markets*.[330]

7.162. Russia argues that the word "representative" is also used in the second subparagraph of Article 2(5), "implying identical meaning and application of this term".[331] The second subparagraph of Article 2(5) relates to the source of information to be used for costs associated with the production and sale of the product under consideration. This provision does not require that costs of production be "representative". On the contrary, this provision indicates that costs "reasonably reflected in the records of the party concerned" are useable without reference to a "representativeness" condition. In this provision the term "representative" is applied to condition the *market* which may be a source of substitute cost information when records of the party and other sources in the same country have been rejected. This is in contrast to the meaning and application of the phrase "provided those prices are representative" as used in the first subparagraph of Article 2(3). For these reasons, we find that the second subparagraph of Article 2(5) does not weigh in favour of Russia's reading of the content of the first subparagraph of Article 2(3).

#### 7.3.2.4 Recitals of Regulation 1972/2002 and Regulation 2017/2321

7.163. Russia also refers the Panel to two EU Regulations in support of its interpretation of the word "representative" in the first subparagraph of Article 2(3).

7.164. Russia argues that recital 3 of Regulation 1972/2002 indicates that only world-market prices and prices in those markets in which they reflect supply and demand, i.e. without state regulation "market impediments" or "distortions", will be viewed by the European Union as "representative" for purposes of Article 2(3) of the Basic Regulation.[332] Recital 3 of Regulation 1972/2002 provides:

> Article 2(3) of Regulation (EC) No 384/96 stipulates, inter alia, that where because of a particular market situation sales of the like product do not permit a proper comparison, the normal value is to be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country provided that those prices are representative. It is prudent to provide for a clarification as to what circumstances could be considered as constituting a particular market situation in which sales of the like product do not permit a proper comparison. Such circumstances can, for example, occur because of the existence of barter-trade and other non-commercial processing arrangements or other market impediments. As a result market signals may not properly reflect supply and demand which in turn may have an impact on the relevant costs and prices and may also result in domestic prices being out of line with world-market prices or prices in other representative markets. Obviously, any clarification given in this context cannot be of an exhaustive nature in view of the wide variety of possible particular market situations not permitting a proper comparison.[333]

7.165. Russia argues that recital 4 of Regulation 1972/2002 indicates that only when prices are not affected by "market impediments" or "distortions" and are "in line with world-market prices or prices in other representative markets" will the European Union treat prices as "representative" being the indicators of "representative" markets.[334] Recital 4 of Regulation 1972/2002 provides:

> It is considered appropriate to give some guidance as to what has to be done if, pursuant to Article 2(5) of Regulation (EC) No 384/96, the records do not reasonably reflect the costs associated with the production and sale of the product under consideration, in

[330] Emphasis added.
[331] Russia's first written submission, para. 72 (referring to Council resolution of 8 June 1993, (Exhibit RUS-10), para. 3: "the various provisions of the acts should be consistent with each other; the same term should be used throughout to express a given concept").
[332] Russia's first written submission, para. 74.
[333] Regulation 1972/2002, (Exhibit RUS-3).
[334] Russia's first written submission, para. 76.

> particular in situations where because of a particular market situation sales of the like product do not permit a proper comparison. In such circumstances, the relevant data should be obtained from sources which are unaffected by such distortions. Such sources can be the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, any other reasonable basis, including information from other representative markets. The relevant data can be used either for adjusting certain items of the records of the party under consideration or, where this is not possible, for establishing the costs of the party under consideration.[335]

7.166. Russia also draws support for its reading of the term "representative" from recitals 5 and 6 of Regulation 2017/2321. As already noted, Regulation 2017/2321 is an instrument recently enacted by the European Union, which sets out new rules for establishing normal value in case of "significant distortions" in the market of the exporting country.[336] Russia argues these recitals confirm that the adjective "representative" in the phrases "representative markets" and "representative countries" in the context of the Basic AD Regulation refers to markets and countries without distortions and hence different from "the exporting country" where such alleged "distortions" are found to cause "artificially low" prices.[337] Recitals 5 and 6 of Regulation 2017/2321 provide, respectively:

> Costs are normally calculated on the basis of records kept by the exporter and producer under investigation. However, where there are direct or indirect significant distortions in the exporting country with the consequence that costs reflected in the records of the party concerned are artificially low, such costs may be adjusted or established on any reasonable basis, including information from other representative markets or from international prices or benchmarks. Domestic costs may also be used, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence.
>
> When data are sourced in representative countries and the Commission has to establish whether the level of social and environmental protection in such countries is adequate, it is necessary for the Commission to examine whether those countries comply with core [International Labour Organization] and relevant multilateral environmental conventions.

7.167. None of the recitals cited by Russia refers to the challenged provision or to the alleged requirement that costs of production be "representative" in order to be used in the construction of normal value. Rather, they refer to, clarify, or amend other provisions of the Basic AD Regulation. Therefore, the recitals do not weigh in favour of reading the phrase "provided those prices are representative" in the final part of the first subparagraph Article 2(3) as referring to "the cost of production in the country of origin" in that same provision, or that pursuant to that phrase, the first subparagraph of Article 2(3) requires that such "cost of production" be "representative".

#### 7.3.2.5 Practice of the EU authorities in anti-dumping proceedings

7.168. Russia argues that the European Commission's practice in applying the term "representative markets" in connection with Article 2(5) of the Basic AD Regulation informs the meaning of the term "representative" as used in the first subparagraph of Article 2(3).[338] In its first written submission, Russia referred the Panel to the following four determinations made by the European Commission in anti-dumping proceedings: Regulation 661/2008; Regulation 812/2008; Regulation 236/2008 and Regulation 1256/2008.[339] These determinations concern the application of the second subparagraph of Article 2(5) – including the identification of "representative markets", rather than the application of the first subparagraph of Article 2(3) and the phrase "provided that those prices are representative". Following the first substantive meeting, Russia referred the Panel to 12 additional

[335] Regulation 1972/2002, (Exhibit RUS-3).
[336] Regulation 2017/2321, (Exhibit RUS-11).
[337] Russia's first written submission, paras. 77-78.
[338] Russia's first written submission, paras. 80-86.
[339] Russia's first written submission, paras. 80-86 (referring to Regulation 661/2008, (Exhibit RUS-15), Regulation 812/2008, (Exhibit RUS-16), Regulation 236/2008, (Exhibit RUS-17), and Regulation 1256/2008, (Exhibit RUS-18).

determinations.[340] Again, none of these determinations concern the application of the first subparagraph of Article 2(3) and the phrase "provided that those prices are representative". For these reasons, we find that the cited determinations do not weigh in favour of Russia's reading of the content of the first subparagraph of Article 2(3).

#### 7.3.2.6 General Court of the European Union judgements

7.169. Russia refers the Panel to three judgements of the General Court of the European Union.[341] The judgements concern the interpretation and application of the second subparagraph of Article 2(5), rather than the application of the first subparagraph of Article 2(3) or the scope of the phrase "provided that those prices are representative". For this reason, we find that the cited judgements do not weigh in favour of Russia's reading of the content of the first subparagraph of Article 2(3).

### 7.3.3 Conclusion

7.170. In the light of the above review of the parties' submissions and our consideration of all the relevant evidence before us, we consider that the evidence does not support Russia's reading of the content of the first subparagraph of Article 2(3) of the Basic AD Regulation. Accordingly, we find that the evidence does not support, and therefore Russia has failed to demonstrate, that the first subparagraph of Article 2(3) of the Basic AD Regulation requires that only "representative" prices be used in the construction of normal value of the like product. Indeed, on the basis of our examination of the relevant evidence on the record before us, we conclude as a factual matter, that the challenged measure does not have the content Russia has alleged it to have. Russia bears the burden of proving that the challenged measure has the content that is alleged to be inconsistent with the Anti-Dumping Agreement. As such, Russia's claim in respect of this challenged measure must fail. Accordingly, we do not consider it necessary to further examine additional aspects of Russia's "as such" claim in respect of the first subparagraph of Article 2(3).

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

### 7.4.1 Introduction

7.171. Russia claims that the second subparagraph of Article 2(3) of the Basic AD Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement because it introduces an additional circumstance for determining normal value via alternative methods that is not provided for by Article 2.2 of the Anti-Dumping Agreement. Specifically, Russia claims that the second subparagraph of Article 2(3) provides that "a particular market situation for the product concerned" exists "when prices are artificially low".[342]

7.172. Russia's panel request sets forth its claim as follows:

> The second subparagraph of Article 2(3) of the Basic [AD] Regulation stipulates:
>
> "*A particular market situation for the product concerned* within the meaning of the first subparagraph may be deemed to exist, inter alia, *when prices are artificially low*, when there is significant barter trade, or when there are non-commercial processing arrangements." (emphasis added)
>
> 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

[340] Regulation 1891/2005, (Exhibit RUS-19); Regulation 1050/2006, (Exhibit RUS-31); Regulation 954/2006, (Exhibit RUS-34); Regulation 1269/2012, (Exhibit RUS-22); Regulation 1911/2006, (Exhibit RUS-20); Regulation 238/2008, (Exhibit RUS-35); Regulation 1251/2009 (Exhibit RUS-33); Regulation 237/2008, (Exhibit RUS-24); Regulation 240/2008, (Exhibit RUS-28); Regulation 994/2007, (Exhibit RUS-36); Regulation 172/2008 (Exhibit RUS-37); and Regulation 1194/2013 (Exhibit RUS-23). (Russia's response to Panel question No. 6(a), para. 26).

[341] Case T 235/08, (Exhibit RUS-12), paras. 36, 44, and 46; Case T 84/07, (Exhibit RUS-13), paras. 44 and 60; Case T 459/08, (Exhibit RUS-14), paras. 57 and 67. (Russia's first written submission, paras. 87-88).

[342] Russia's first written submission, para. 21(b).

> concerned" exists "when prices are artificially low" thus introducing an additional circumstance for determining normal value via alternative methods.
>
> This measure appears to be inconsistent with Article 2.2 of the [Anti-Dumping Agreement] since it extends the grounds for using alternative methods of determining normal value while "a particular market situation for the product concerned" is limited only to the situation described in the second Supplementary Provision to paragraph 1 of Article VI in Annex 1 to the GATT 1994.[343]

7.173. This is the claim before us, and Russia is required to prove this asserted claim that the second subparagraph of Article 2(3) of the Basic AD Regulation is "as such" inconsistent with Article 2.2 of the Anti-Dumping Agreement for the reasons asserted by Russia.[344] Russia bears the burden of demonstrating that the challenged aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement.[345] Russia will satisfy its burden if it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of Russia.[346] If this burden is not satisfied, then this claim cannot succeed.

7.174. Our analysis of this claim begins 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. Russia's interpretation of Article 2.2 asserted in its panel request is further developed in its written submissions and responses to Panel questions and is the principal basis upon which Russia's claim rests. Namely, that "the particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement refers exclusively to the specific circumstance described in the second *Ad* Note to Article VI:1 of the GATT 1994, i.e. "a country which has a complete, or substantially complete, monopoly of its trade and where all domestic prices are fixed by the State". We also address certain additional arguments of inconsistency that Russia develops in its written submissions, some of which are connected to the asserted relationship between "the particular market situation" and the second *Ad* Note to Article VI:1 of the GATT 1994, and some of which are independent of this interpretation.

### 7.4.2 Whether "the particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement refers exclusively to one specific situation which is the circumstance described in the second *Ad* Note to Article VI:1 of the GATT 1994

7.175. As noted, Russia submits that the wording "the particular market situation" in Article 2.2 of the Anti-Dumping Agreement shall be applied only with respect to a country which meets the description of the second *Ad* Note to Article VI:1 of the GATT 1994: "a country which has a complete, or substantially complete, monopoly of its trade and where all domestic prices are fixed by the State".[347] The question before us is whether, as asserted by Russia, "the particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement refers exclusively to one specific situation and whether one specific situation is the situation specified in the second *Ad* Note to Article VI:1.[348] To answer this question, it is not necessary for us to adopt a comprehensive interpretation of what may or may not constitute "the particular market situation" within the meaning of Article 2.2. We will examine whether Russia's asserted interpretation can form a valid basis for its claim of inconsistency with Article 2.2 as interpreted in accordance with customary rules of interpretation of public international law.

7.176. We begin our analysis by examining the text of the provision at issue. Article 2.2 of the Anti-Dumping Agreement provides:

> 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

[343] Russia's panel request, p. 2.
[344] Appellate Body Report, *US – Wool Shirts and Blouses*, DSR 1997:I, p. 337.
[345] Appellate Body Report, *US – 1916 Act*, para. 96. ("[A] complaining Member bears the burden of bringing forth sufficient evidence and legal argument to demonstrate that, *prima facie*, another Member's measure is inconsistent with a relevant obligation of that other Member under the covered agreements").
[346] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[347] Russia's first written submission, paras. 148 and 152.
[348] Russia's response to Panel question No. 13, paras. 41 and 45.

> situation or the low volume of the sales in the domestic market of the exporting country, 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, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.[349]

7.177. In support of its interpretation that the term "the particular market situation" refers only to one specific situation, Russia relies upon, *inter alia*, the facts that the term uses the definite article "the" and that the term "situation" is written in singular form.[350]

7.178. Russia argues that use of the definitive article "the" indicates that the drafters knew exactly to what situation in the market the phrase "the particular market situation" refers to.[351] We find that the use of the definite article "the" is better explained in relation to how Article 2.2 functions in relation to the determination of dumping in accordance with Article 2 of the Anti-Dumping Agreement. In particular, we note that dumping is determined on an exporter-specific basis under Article 2.[352] Thus, normal value is likewise determined on an exporter-specific basis, and Article 2.2 provides for three circumstances in which the exporter-specific normal value will not be determined on the basis of the exporter's own domestic sale prices of the like product sold in the ordinary course of trade (a) when there are no such sales; (b) when, because of the low volume of domestic sales, such sales do not permit a proper comparison; and (c) when, because of the particular market situation, such sales do not permit a proper comparison.[353] Thus, "the" particular market situation within the meaning of Article 2.2 corresponds to the situation that exists in relation to the domestic sales of the like product by the specific exporter for which dumping is being determined such that those sales do not permit a proper comparison with the exporter's export sales of the product under consideration. In any particular application of Article 2.2 for establishing normal value to determine dumping in relation to an exporter, the situation at issue in relation to the exporter's sales of the like product will be definite, not indefinite. We find that this understanding better explains the use of the definite article "the" in the phrase "the particular market situation" than the explanation offered by Russia's interpretation: that the use of "the" as a determiner qualifies "the particular market situation" to refer exclusively to one specific situation that was in the mind of the drafters of Article 2.2, namely the situation described in the second *Ad* Note to Article VI:1 of the GATT 1994.[354] Moreover, if the drafters of Article 2.2 had only one specific situation in mind when they used the phrase "the particular market situation", as Russia claims, then the drafters could have been expected to define the phrase specifying the situation that they intended to refer. As Russia admits, however, the phrase is not so defined.[355]

7.179. While the term "situation" is written in singular form, it does not follow that it must therefore refer exclusively to the same certain situation in every instance in which Article 2.2 might be applied, as argued by Russia. If the plural form "situations" had been used instead, then Article 2.2 could be read as requiring in each instance of determining normal value for a specific exporter that multiple situations must exist and are causing domestic sales to not permit a proper comparison before an investigating authority could disregard domestic sales of the like product as the basis for normal value and utilize instead an alternative means of determining normal value. We find that the use of the singular form "situation" in Article 2.2 merely avoids imposing an unintended requirement to find multiple situations in each instance of determining normal value and should be understood to mean that only *one* particular market situation that causes sales of the like product in the domestic

[349] Fn omitted.
[350] Russia's first written submission, para. 141.
[351] Russia's first written submission, para. 142.
[352] Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 87-95.
[353] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 94.
[354] We also find that this functional understanding of the application of Article 2.2 and "the particular market situation" condition avoids placing undue significance on the choice of a definite or indefinite article. We are not persuaded by Russia's argument that the use of the indefinite article "una" in the Spanish version in contrast to the definite articles in the English and French versions of Article 2.2 necessitates resort to Article 33 of the Vienna Convention to reconcile the texts because, in Russia's view, Article 2:4 of the Tokyo Round Anti-Dumping Code shows that the use of article "una" in the Spanish version of Article 2.2 of the Anti-Dumping Agreement is an error of translation. (Russia's response to Panel question No. 114, paras. 14-18). Rather, we find that such a conclusion would be warranted only if we found that Russia's asserted interpretation was correct.
[355] Russia's first written submission, para. 139.

market to not permit a proper comparison would be required in order to resort to alternative bases for determining normal value. Thus, we find that the use of the term "situation" in singular form lends no support to Russia's asserted interpretation.

7.180. Russia also argues that the ordinary meaning of the individual terms in the phrase "the particular market situation" support its asserted interpretation.[356] Russia argues that dictionary definitions suggest that the phrase "the particular market situation" means that "the situation in the market is special, individual for that specific market".[357] However, the reasons Russia offers in support of this argument again rely on the use of the definite article "the" and the use of the term "situation" in singular form.[358] These are arguments we have addressed above. The ordinary meaning of the word "particular" similarly does not establish that there is only one such situation being referenced in this provision. Rather, the term "particular" suggests that it is not a general situation and is specific to the facts and circumstances as viewed on a case-by-case basis. Thus, the ordinary meaning of the terms in the phrase "the particular market situation" offered by Russia does not persuade us that this phrase refers to one specific situation. We find that Russia's interpretation that the "particular market situation" can only be understood as referring to one specific situation is not supported by the text of Article 2.2. We find that nothing in the text of Article 2.2 suggests that the meaning of the phrase "the particular market situation" is so constrained.

7.181. Russia argues further that the phrase "the particular market situation" refers exclusively to the situation described in the second *Ad* Note to Article VI:1 of the GATT 1994: "a country which has a complete, or substantially complete, monopoly of its trade and where all domestic prices are fixed by the State".[359] As noted above, we find that the text of Article 2.2 does not support an interpretation of the phrase "the particular market situation" as referring to only one specific situation. Neither do we find any text in Article 2.2 that refers explicitly to the second *Ad* Note or to the specific circumstances described in the second *Ad* Note.

7.182. The second *Ad* Note to Article VI:1 of the GATT 1994 provides as follows:

> 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 necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

7.183. Because, in Russia's view, the second *Ad* Note to Article VI:1 of the GATT 1994 describes "a country that has special, individual market situation", Russia argues that the drafters of the Anti-Dumping Code adopted as the result of the Kennedy Round negotiations "took into account" the second *Ad* Note when introducing the term "the particular market situation".[360] Russia argues, on the basis of its interpretation, that it is reasonable to conclude that the negotiators referred to this "certain type of non-market economy" as "the particular market situation".[361] We consider that the drafters would have taken into account the principle of interpretation that where the provisions of an agreement use different terms it can be inferred that they have different meanings. If the intention of the drafters was to refer to the situation in the second *Ad* Note, then they would be expected to do so explicitly by reference or to use the same terms to do so. Even if we were to accept that "the particular market situation" was an apt label for the situation described in the second *Ad* Note, we could not agree that the text of Article 2.2 considered in the light of the second *Ad* Note supports an interpretation that the phrase "the particular market situation" refers *exclusively* to the situation described in the second *Ad* Note.

[356] Russia's first written submission, para. 140.
[357] Russia's first written submission, para. 140.
[358] Russia's first written submission, paras. 141-142.
[359] Russia's first written submission, paras. 148-151 (referring to 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)).
[360] Russia's first written submission, para. 148.
[361] Russia's first written submission, para. 148.

7.184. In support of its understanding of Article 2.2, Russia refers to the context provided by Article 2.7 of the Anti-Dumping Agreement.[362] Article 2.7 of the Anti-Dumping Agreement provides:

> [Article 2 of the Anti-Dumping Agreement] is without prejudice to the [second *Ad* Note to Article VI:1 of the GATT 1994].

7.185. Based on the dictionary meaning of the phrase "without prejudice"[363], Russia argues that Article 2.7 of the Anti-Dumping Agreement establishes that the provisions of Article 2 of the Anti-Dumping Agreement, including Article 2.2, apply "without detriment to the Members' rights under the second *Ad* Note". For Russia, Article 2.2 of the Anti-Dumping Agreement contains the obligation to determine normal value *via* one of two methods described in this provision, and the second *Ad* Note offers flexibility in respect of the determination of normal value. Russia argues that if the conditions of the second *Ad* Note are met, an investigating authority can derogate from the obligation in Article 2.2 of the Anti-Dumping Agreement by following the text of the second *Ad* Note.[364]

7.186. We do not read Article 2.7 as connecting Article 2.2 and the second *Ad* Note in the manner indicated by Russia. If, as asserted by Russia, the phrase "the particular market situation" refers exclusively to the situation described in the second *Ad* Note, then either the mandatory nature of this provision of Article 2.2 is nullified by the second *Ad* Note in all cases in which the provision applies, or this mandatory provision of Article 2.2 restricts the effect of the second *Ad* Note. The meaning of "without prejudice" rather suggests that Article 2 and the second *Ad* Note should operate in conjunction without narrowing the scope or effect of the second *Ad* Note. We 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. The text of the second *Ad* Note "recognizes" that a specific factual situation ("a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State"), could give rise to a circumstance ("special difficulties" in "determining price comparability"), in which an importing Member may need to take into account a possibility ("that a strict comparison with domestic prices … may not always be appropriate"). In this respect, we find that Russia's asserted interpretation would restrict the second *Ad* Note in at least two ways.

7.187. First, in recognizing that "special difficulties may exist in determining price comparability" the second *Ad* Note refers to the difficulty of *determining* price comparability, whereas Article 2.2 *requires* a determination that an exporter's domestic sales of the like product "do not permit a proper comparison". In other words, while the second *Ad* Note would allow the investigating authority to avoid a strict comparison with domestic prices that may be inappropriate because of the special difficulties that may exist in determining whether the prices are comparable, Article 2.2 is more restrictive by requiring a price to price comparison unless a determination is made that the domestic prices do not permit a proper comparison.

7.188. Second, the second *Ad* Note leaves the investigating authority considerable discretion ("*may find* it necessary to *take into account the possibility … may not always* be appropriate"[365]) to find that a strict price to price comparison is appropriate despite the presence of "special difficulties". In contrast, Article 2.2 is more prescriptive in its application ("*when*, because of the particular market situation …, such sales do not permit a proper comparison, the margin of dumping *shall be determined* [using one of two alternative methods for determining normal value as provided for in Article 2.2]").[366]

7.189. For these reasons, we find that Russia's asserted interpretation would restrict the second *Ad* Note in contravention of the requirement in Article 2.7 that Article 2 of the Anti-Dumping Agreement is without prejudice to the second *Ad* Note, or would nullify the mandatory

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[362] Russia's first written submission, para. 144.
[363] "Without detriment to any existing right or claim". (Russia's response to Panel question No. 14, para. 46 (referring to Oxford Dictionaries online, definition of "without prejudice" https://www.oed.com/view/Entry/150162?redirectedFrom=without+prejudice#eid28522373 (accessed 25 September 2019), (Exhibit RUS-149), p. 3).
[364] Russia's response to Panel question No. 14, para. 46.
[365] Emphasis added.
[366] Emphasis added.

nature of the provision relating to "the particular market situation" in Article 2.2 in all cases in which it applies. We find that neither outcome can be sustained as a proper interpretation.

7.190. In its interpretation of the relationship between Articles 2.2 and 2.7 of the Anti-Dumping Agreement and the second *Ad* Note to Article VI:1 of the GATT 1994, Russia also draws support from the following statement by the Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)*:

> The fair comparison requirement of Article 2.4 [of the Anti-Dumping Agreement] applies in all anti-dumping investigations, irrespective of the methodology used to determine normal value. In this context, we recall that Article 2.7 of the Anti-Dumping Agreement incorporates the [s]econd *Ad* Note to Article VI:1 of the GATT 1994. This provision, read in conjunction with Article 2.2 of the Anti-Dumping Agreement, has been understood to allow investigating authorities to disregard domestic prices and costs of a [non-market economy] producer in the determination of normal value on the ground that a strict comparison with such prices may not be appropriate.[367]

7.191. In *EC – Fasteners (China) (Article 21.5 – China)*, the Appellate Body was not called upon to interpret Article 2.2 or the second *Ad* Note. The claim examined by the Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* concerned the interpretation and application of Article 2.4 of the Anti-Dumping Agreement. Specifically, China argued before the Appellate Body that the panel erred in finding that the European Union did not act inconsistently with the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement in relation to the EU authorities' rejection of the Chinese producers' requests for certain adjustments. China argued that there was no legal basis in the Anti-Dumping Agreement or in China's Accession Protocol for a finding that Article 2.4 of the Anti-Dumping Agreement imposes a different and less stringent fair comparison obligation in investigations involving non-market economy (NME) producers.

7.192. The Appellate Body made the statement cited by Russia in setting out its understanding of "certain issues relating to the interpretation of [Article 2.4]".[368] By indicating that the second *Ad* Note, "read in conjunction with Article 2.2 of the Anti-Dumping Agreement", has been understood to allow authorities to disregard domestic prices and costs of a NME, the Appellate Body was referring to the general obligation under Article 2.2 to calculate normal value based on domestic prices unless there is a special circumstance – considering that, in the particular case of an NME, the special circumstance was set out in the second *Ad* Note. However, the Appellate Body does not indicate that "the particular market situation" referenced in Article 2.2 refers only to the situation described in the second *Ad* Note. Moreover, the Appellate Body made that statement without any analysis of the specific texts of Article 2.2 and the second *Ad* Note. Accordingly, we do not understand the Appellate Body's statement in *EC – Fasteners (China) (Article 21.5 – China)* on the relation between Article 2.2 and the second *Ad* Note to offer any support to Russia's asserted interpretation.

7.193. In consideration of all the arguments offered in support of Russia's asserted interpretation that "the particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement refers exclusively to one specific situation and that is the situation specified in the second *Ad* Note to Article VI:1 of the GATT 1994, for the above reasons we find that this interpretation cannot form a valid basis for Russia's claim that the second subparagraph of Article 2(3) of the Basic AD Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

### 7.4.3 Additional arguments connected to the second *Ad* Note to Article VI:1 of the GATT 1994

7.194. Russia makes additional arguments regarding the interpretation of Article 2.2 in support of its claim that Article 2(3) of the Basic AD Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement. Russia clarified that certain of these arguments are connected to its asserted interpretation that "the particular market situation" refers exclusively to the situation specified in the second *Ad* Note to Article VI:1 of the GATT 1994, and certain of its additional

[367] Russia's first written submission, para. 147 (referring to Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China),* para. 5.205).
[368] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.198.

interpretive arguments are independent of the second *Ad* Note.[369] We first address the additional arguments that are connected to the second *Ad* Note, and then turn to the arguments independent of the second *Ad* Note.

7.195. Russia argues that it follows from the asserted interpretation in connection with the second *Ad* Note that "the particular market situation" refers to a specific condition in a country "as a whole", such that a situation existing in respect of the market for the like product or its inputs may not constitute "the particular market situation", including a situation of "artificially low prices" in relation to the like product or its inputs.[370] We first note that the qualifier "as a whole" does not appear in the text of Article 2.2. We 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. As such, we perceive no functional reason that a situation existing in respect of the market for the like product or its inputs would necessarily be excluded from constituting "the particular market situation" within the meaning of Article 2.2 to address the circumstance that such situation causes the exporter's domestic sales of the like product to not permit a proper comparison with the exporter's export sales of the product under consideration. Accordingly, we disagree that such situations which do not relate to the exporting country "as a whole" or do not match the situation described in the second *Ad* Note are necessarily excluded from constituting "the particular market situation" in any application of Article 2.2 to the facts of a particular case. Therefore, we disagree with Russia's contention that such situations necessarily are in addition to the three circumstances provided for in Article 2.2 for disregarding an exporter's domestic sales of the like product and utilizing an alternative basis for normal value to determine dumping.[371] In sum, we find in the text and operation of Article 2.2 no basis for interpreting "the particular market situation" as necessarily relating exclusively to a country "as a whole" as Russia argues. Nor do we agree, for reasons explained above, that the second *Ad* Note supports such an interpretation of "the particular market situation" within the meaning of Article 2.2. We find that this additional interpretative argument cannot support Russia's claim that Article 2(3) of the Basic AD Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

#### 7.4.3.1 Additional arguments independent of the second *Ad* Note to Article VI:1 of the GATT 1994

7.196. We now turn to Russia's additional arguments regarding the interpretation of Article 2.2, which are independent of the asserted interpretation that "the particular market situation" refers exclusively to the situation specified in the second *Ad* Note to Article VI:1 of the GATT 1994, and we ascertain whether these additional arguments are capable of supporting Russia's claim that the second subparagraph of Article 2(3) of the Basic AD Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

7.197. First, Russia argues that the "particular market situation" provision of Article 2.2 provides no legal basis for an analysis by an investigating authority of whether prices are "artificially low" on the basis of an examination of supply and demand signals in markets, of alleged market distortions, or of product or input prices as compared to prices in world markets or representative markets.[372] Beyond this assertion, Russia offers no interpretive rationale for such a prohibition beyond observing that such analyses are not explicitly referred to in Article 2.2 of the Anti-Dumping Agreement. We consider this an insufficient basis upon which to find that Article 2.2 prohibits an investigating authority to undertake such analysis. Considering that an investigating authority is required to support its determinations under Article 2.2 with relevant and sufficiently established factual findings and a reasoned and adequate explanation, we do not consider that the lack of explicit authorization in the text of Article 2.2 can be interpreted as a prohibition against undertaking such analyses. We find that Russia has failed to demonstrate that such analyses could never be relevant to an investigating authority's determination of whether the facts and circumstances of a case required a determination that the particular market situation caused an exporter's domestic sales of the like

[369] Russia's responses to question Nos. 61(a) and 61(b).
[370] Russia's first written submission, paras. 148, 152, and 156; second written submission, paras. 127(a), 127(b), and 127(c).
[371] Russia's first written submission, paras. 125, 133, 135, 156, 157, and 159.
[372] Russia's first written submission, para. 160; second written submission, para. 127(d).

product to not permit a proper comparison for purposes of the dumping determination. Accordingly, we find this argument regarding the interpretation of Article 2.2 offers no support for Russia's claim that Article 2(3) of the Basic AD Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

7.198. Second, Russia argues that "low prices and prices that are lower than, for example, in the [European Union] can be typical prices in the home market of the exporter or producer under investigation and reflect the ordinary course of trade in the domestic market" and thus by providing that so called "artificially low prices" constitute the ground for using alternative methods to determine normal value the measure at issue is inconsistent with Article 2.2 of the Anti-Dumping Agreement.[373] Beyond this assertion, Russia offers no interpretive rationale why Article 2.2 necessarily requires that "typical prices" reflecting the ordinary course of trade in the domestic market could never be affected by the particular market situation such that those sales prices would be artificially lowered and would not permit a proper comparison. We note that under Article VI:1(a) of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, sales not in the ordinary course of trade are not eligible to be a basis for normal value in any case. Accordingly, the reference to "such sales" in Article 2.2 must refer to sales in the ordinary course of trade which could be used as a basis for normal value except if they do not permit a proper comparison either because of low volume or because of the particular market situation. This conclusion also follows from the word "or" following the condition "where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country", which indicates that the following two conditions (i.e. "particular market situation" and "low volume") pertain when there *are* sales in the ordinary course of trade in the domestic market of the exporting country but those sales may not be an appropriate basis for determining normal value for other reasons. Thus, observing that sales prices are typical and reflect the ordinary course of trade in the exporting country cannot, by itself, exclude the possibility that application of the low volume condition or the particular market situation condition would be valid under the facts of a particular case. On this basis, we find that Russia's interpretive rationale for this argument of inconsistency is not valid and cannot support Russia's claim that Article 2(3) of the Basic AD Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

7.199. Before concluding, we note that our examination thus far of the interpretive issues in relation to this claim under Article 2.2 of the Anti-Dumping Agreement have focused on the text and relevant context of that provision in the course of addressing Russia's legal rationale for its claim. We now take into account considerations of object and purpose of the Anti-Dumping Agreement. We note, firstly, that the Anti-Dumping Agreement does not contain a preamble to guide the inquiry into its object and purpose.[374] We also note that the Appellate Body has looked to the content and structure of the Anti-Dumping Agreement to discern its object and purpose, finding that it deals with injurious dumping by allowing Members to take anti-dumping measures to counteract injurious dumping and imposing disciplines on the use of such anti-dumping measures.[375] We find that the understanding we have derived from the text and relevant context of Article 2.2 of the Anti-Dumping Agreement is in accord with this understanding of the Anti-Dumping Agreement. We find that considerations of the object and purpose of the Anti-Dumping Agreement provide no basis for finding that Russia's legal rationale constitutes a proper interpretation of the relevant provisions of the agreement.

7.200. Finally, we note that the term "the particular market situation" was recently examined by a panel in *Australia – Anti-Dumping Measures on Paper* for which a panel report was adopted by the DSB following the second substantive meeting in this dispute.[376] We invited and received comments from the parties on potentially relevant aspects of that report and have taken the report and the parties' comments into consideration along with the fact that the measures, legal rationales and records at issue in these two disputes were substantially different. In particular, we note that Russia's legal rationale for this claim was not asserted by the parties in that dispute and therefore was not at issue in that case. As we understand it, the panel in *Australia – Anti-Dumping Measures on Paper* made findings in relation to the specific legal rationales asserted by the parties in that dispute, while our analysis has focused exclusively on Russia's particular legal rationale for this claim. Nevertheless, we observe that the reasoning of the panel in that case accords with our own

[373] Russia's first written submission, para. 161; second written submission, para. 127(e).
[374] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 118.
[375] Appellate Body Reports, *US – Washing Machines*, para. 5.52; *EU – Biodiesel (Argentina)*, para. 6.25.
[376] Panel Report, *Australia – Anti-Dumping Measures on Paper*.

conclusion that "the particular market situation" does not exclusively refer to the situation described in the second *Ad* Note:

> The phrase "particular market situation" does not lend itself to a definition that foresees all the varied situations that an investigating authority may encounter that would fail to permit a "proper comparison". In our view, the drafters' choice to use such a phrase should be treated as a deliberate one. Consequently, while the expression "particular market situation" is constrained by the qualifiers "particular" and "market", it nevertheless cannot be interpreted in a way that comprehensively identifies the circumstances or affairs constituting the situation that an investigating authority may have to consider.[377]

We find this reasoning persuasive and relevant to the claim before us insofar as it recognizes "varied situations … that would fail to permit a 'proper comparison'" and therefore is not limited exclusively to the situation described in the second *Ad* Note. We conclude, therefore, that our findings and reasoning in respect of this claim are additionally supported by the findings and reasoning of the panel in *Australia – Anti-Dumping Measures on Paper.*

### 7.4.4 Conclusion

7.201. After careful consideration of all the arguments offered in support of Russia's asserted interpretation of Article 2.2 of the Anti-Dumping Agreement, we find, for the above reasons, that they fail to support Russia's claim that the second subparagraph of Article 2(3) of the Basic AD Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement. We find 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, we dismiss Russia's claim.

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

### 7.5.1 Introduction

7.202. Russia claims that the final part of the second subparagraph of Article 2(5) of the Basic AD Regulation is inconsistent "as such" with Article 2.2 and Article 2.2.1.1 of the Anti-Dumping Agreement.

7.203. The second subparagraph of Article 2(5) of the Basic AD Regulation reads as follows:

> If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country *or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets*.[378]

7.204. Russia challenges only the final part of the second subparagraph of Article 2(5) of the Basic AD Regulation: "or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets".[379]

7.205. Russia's challenge is grounded in its assertion that in a certain scenario the challenged part of the second subparagraph of Article 2(5) prevents the European Commission from (a) calculating the cost of production based on the cost "associated with the production" of the product under consideration consistently with Article 2.2.1.1 of the Anti-Dumping Agreement, and (b) constructing the normal value based on the cost of production of the like product in the country of origin of the product under consideration consistently with Article 2.2 of the Anti-Dumping Agreement.[380] The scenario Russia posits is one where the costs of other producers or exporters in the country of origin of the product under consideration "are available" but "cannot be used" within the meaning of the second subparagraph of Article 2(5) because the European Commission determines that such

[377] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.21.
[378] Emphasis added.
[379] Russia's first written submission, para. 165.
[380] Russia's first written submission, para. 281.

costs are distorted due to government regulation in the country of origin of the product under consideration and for this reason rejected. Russia argues that when this scenario occurs, the challenged part of the second subparagraph of Article 2(5) prescribes that cost of production be "adjusted or established" "on any other reasonable basis" which means any basis other than the costs of other producers or exporters in the exporting country. According to Russia, this prevents the European Commission from complying with the obligation under Article 2.2 of the Anti-Dumping Agreement to construct the normal value on the basis of "the cost of production in the country of origin". In addition, Russia argues that the challenged part of the second subparagraph of Article 2(5) prescribes that the cost of production be "adjusted or established" on the basis of "information from other representative markets", which is alleged to refer to undistorted input prices and costs of production in third countries, and thereby prevents the European Commission from complying with its obligation under Article 2.2.1.1 of the Anti-Dumping Agreement to calculate the cost of production on the basis of the cost "associated with the production" of the product under consideration. Finally, Russia challenged the absence of an explicit requirement in the challenged part of the second subparagraph of Article 2(5) to ensure compliance with the obligation in Article 2.2 of the Anti-Dumping Agreement to base the construction of normal value on "the cost of production in the country of origin" and thus to ensure that the "adjusted" or "established" cost of production represents "the cost of production in the country of origin". We address each of these arguments in turn.

### 7.5.2 Whether Article 2.2 of the Anti-Dumping Agreement requires "the cost of production in the country of origin" to be based on the costs of other producers or exporters in the same country when the records of the investigated exporter or producer are rejected

7.206. According to Russia, the European Commission is prevented from complying with the obligation under Article 2.2 of the Anti-Dumping Agreement to construct the normal value on the basis of "the cost of production in the country of origin" because the final part of the second subparagraph of Article 2(5), under the posited scenario, requires the European Commission to establish or adjust costs on the basis of something other than the costs of other producers or exporters in the same country. In the context of this claim, we do not understand Russia to be challenging the basis for rejecting the records of the investigated exporter or producer, but rather the consequence of such rejection under the posited scenario resulting from the challenged part of the second subparagraph of Article 2(5). The interpretive question before us, therefore, is whether Article 2.2 of the Anti-Dumping Agreement requires an investigating authority that has rejected the records of an investigated exporter or producer to construct normal value based on the costs of other producers or exporters in the same country, such that the allowance in the challenged part to utilize "any other reasonable basis, including information from other representative markets" necessarily will result in the construction of normal value that does not comply with Article 2.2.

7.207. We have already set forth our understanding and interpretation of Article 2.2 of the Anti-Dumping Agreement in relation to Russia's claim in respect of the Cost Adjustment Methodology, and to avoid unnecessary repetition we refer to that analysis above. We recall that we have found that Article 2.2 of the Anti-Dumping Agreement does not limit the sources of information to be used to calculate the cost of production to only those sources inside the country of origin.[381] Once the records of the investigated exporter or producer have been rejected, there is no hierarchy of sources upon which to base the cost of production in the country of origin. The costs of other producers or exporters in the same country may constitute an appropriate source, but not necessarily the only possible source. Of course, an investigating authority remains bound by the obligation to arrive at the cost of production "in the country of origin". So long as the investigating authority arrives at a cost of production that represents the cost of production in the country of origin, the requirement of Article 2.2 is satisfied. We have already found that an investigating authority may be required to adapt out-of-country information in order to ensure that it is suitable to determine a cost of production "in the country of origin".[382] Compliance with the obligation to adapt information from outside the country of origin pursuant to Article 2.2 was also examined in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*. In both cases, the respective investigating authorities were found to have acted in contravention of Article 2.2 by failing to explain how the information used in its calculations was adapted to ensure that it represented the cost of

[381] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.74.
[382] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

production in the country of origin.[383] It follows, in our view, that the costs of other producers or exporters in the same country is not the sole source of cost information that is capable of satisfying the requirement of Article 2.2 to use the cost of production in the country of origin when constructing normal value.

7.208. For the above reasons, we find that Russia's claim lacks a valid basis in Article 2.2 of the Anti-Dumping Agreement and we, therefore, dismiss this basis for Russia's claim.

### 7.5.3 Whether Article 2.2.1.1 of the Anti-Dumping Agreement requires the cost of production to be based on the cost "associated with the production" of the product under consideration when the records of the investigated exporter or producer are rejected

7.209. According to Russia, the European Commission is prevented from complying with the obligation under Article 2.2.1.1 of the Anti-Dumping Agreement to calculate the cost of production based on the cost "associated with the production" of the product under consideration because the challenged part of the second subparagraph of Article 2(5) prescribes that the cost of production be "adjusted or established" on the basis of "information from other representative markets", which is alleged to refer to undistorted input prices and costs of production in third countries. As already noted, we do not understand Russia to be challenging the basis for rejecting the records of the investigated exporter or producer, but rather the consequence of such rejection under the posited scenario resulting from the challenged part of the second subparagraph of Article 2(5). The interpretive question before us, therefore, is whether Article 2.2.1.1 requires an investigating authority that has rejected the records of the investigated exporter or producer to construct normal value on the basis of the cost "associated with the production" of the product under consideration.

7.210. The first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement provides:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

7.211. We have already set forth our understanding and interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement in relation to Russia's claim in respect of the Cost Adjustment Methodology, and to avoid unnecessary repetition we refer to that analysis above. We recall that Article 2.2.1.1 identifies the records of the investigated exporter or producer as the preferred source for cost of production data, and directs an investigating authority to normally base its calculations of costs on the records of the exporter or producer under investigation, provided that the records comply with two conditions. The second condition is the source of the language Russia relies on as a basis for its claim that the challenged part of the second subparagraph of Article 2(5) is inconsistent with Article 2.2.1.1. As we have noted, however, the condition in question applies to the "records" of the investigated exporter or producer, rather than the cost information used in lieu of the costs reported in the records. Once the records have been rejected as the source of the cost of production for constructing normal value, the language in the second condition has no further applicability in respect of the costs to be used. Instead, as we have found, where an investigating authority uses information other than that contained in the records kept by the exporter or producer to construct the cost of production, it has to ensure that the information[384] is suitable to determine a "cost of production" "in the country of origin"[385] rather than to "reasonably reflect" the "costs associated with the production and sale of the product under consideration".[386]

7.212. For the above reasons, we find that Russia's claim lacks a valid basis in Article 2.2.1.1 of the Anti-Dumping Agreement and we, therefore, dismiss this basis for Russia's claim.

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[383] Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.81; *Ukraine – Ammonium Nitrate,* para. 6.123.

[384] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. (fns omitted)

[385] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70. (fn omitted)

[386] Appellate Body Reports, *Ukraine – Ammonium Nitrate*, para. 6.88; *EU – Biodiesel (Argentina)*, para. 6.18.

### 7.5.4 Whether the challenged part of the second subparagraph of Article 2(5) of the Basic AD Regulation prevents the European Commission from adapting "information from other representative markets" to arrive at "the cost of production in the country of origin" in accordance with Article 2.2 of the Anti-Dumping Agreement

7.213. Russia challenges the absence of an explicit requirement in the challenged part of the second subparagraph of Article 2(5) to ensure compliance with the obligation in Article 2.2 of the Anti-Dumping Agreement to base the construction of normal value on "the cost of production in the country of origin" and thus to ensure that the "adjusted" or "established" cost of production represents "the cost of production in the country of origin".

7.214. We have already set forth our understanding and interpretation of Article 2.2 of the Anti-Dumping Agreement in relation to Russia's claim in respect of the Cost Adjustment Methodology, and to avoid unnecessary repetition we refer to that analysis above. We recall that where an investigating authority uses information other than that contained in the records kept by the exporter or producer to construct the cost of production, it has to ensure that the information[387] is suitable to determine a "cost of production" "in the country of origin".[388] An 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".[389] Accordingly, we find that Russia has presented a valid basis in Article 2.2 of the Anti-Dumping Agreement upon which to assert a claim of inconsistency.

7.215. We recall that in order to prevail on this claim, Russia must demonstrate that the content of the measure is, as matter of fact, as Russia has alleged. Our analysis of this basis for Russia's claim begins with the weighing of the evidence before us to assess whether the challenged part of the second subparagraph of Article 2(5) of the Basic AD Regulation has the content that Russia alleges.

7.216. We recall that the second subparagraph of Article 2(5) of the Basic AD Regulation reads as follows:

> If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country *or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets*.[390]

7.217. We also recall that Russia challenges only the final part of the second subparagraph of Article 2(5) of the Basic AD Regulation: "or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets".[391]

7.218. Specifically, Russia challenges the absence of an explicit requirement in the challenged part of the second subparagraph of Article 2(5) to comply with the obligation in Article 2.2 of the Anti-Dumping Agreement to base the construction of normal value on "the cost of production in the country of origin" and thus to ensure that the "adjusted" or "established" cost of production represents "the cost of production in the country of origin".

7.219. Russia presents its argument that the absence of such an explicit requirement in the second subparagraph of Article 2(5) prevents the European Commission from complying with Article 2.2 as follows:

> [U]nder the second subparagraph of Article 2(5) of the Basic Regulation the EU authorities *have to* "adjust" or "establish" the disregarded input price or cost of production of the investigated producer "on any other reasonable basis, including information from other representative markets".

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[387] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. (fns omitted)
[388] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70. (fn omitted)
[389] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73.
[390] Emphasis added.
[391] Russia's first written submission, para. 165.

> [However, this] provision does not contain the specific second requirement to adapt the adjusted or established costs to ensure that they represent the cost of production of the product in the country of origin. Since the text of the Basic Regulation reflects deliberate and careful choice of the European Parliament and the Council of the European Union in delegating power to the EU authorities for specific actions, the absence of an additional legislative requirement to adapt the adjusted "undistorted" input price or established "undistorted" cost of production to *input price and costs in the country of origin* means that such an adaptation is not required.[392]

7.220. On the basis of the text itself, we 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 required by the challenged part of the second subparagraph of Article 2(5). However, in our view, this is not sufficient to render the challenged part inconsistent "as such" with Article 2.2. Russia argues further:

> Thus, the absence of the delegated power to conduct the adaptation prevents the EU authorities from ensuring that input prices and other costs of production that the authorities intend to use in calculations reflect the cost of production of the product in the country of origin.[393]

7.221. For this proposition, we find that Russia has not provided adequate supporting evidence that the absence of the delegated power to conduct the adaptation means that the European Commission is powerless to perform the required adaptations. We identified no evidence supporting that the asserted principle was a feature of the relevant municipal law of the European Union. We recall that in our examination of the Cost Adjustment Methodology, we found that in almost all of the determinations we examined applying the second subparagraph of Article 2(5), the European Commission made adjustments for transport costs, customs export tax, value added tax, excise duty, local distribution costs, sea freight and fobbing costs, in order to remove export-related and transportations expenses. Such adjustments are not explicitly provided for in Article 2(5), but the European Commission was not prevented from making such adjustments.

7.222. Russia argues that the practice of application of the challenged part of the second subparagraph of Article 2(5) demonstrates that it is applied without any adaptation that ensures arrival at the cost of production in the country of origin and that this lack of adaptation is supported by the General Court of the European Union.[394] We recall that we have found above that the systematic application of the first and second subparagraphs of Article 2(5) with the support of the relevant Court opinions demonstrate the operation of the Cost Adjustment Methodology, pursuant to which the European Commission fails to address the adaptation of out-of-country information to arrive at the cost of production in the country of origin. In light of our findings on the operation of the Cost Adjustment Methodology, we do not consider the evidence cited by Russia demonstrates that the meaning of the challenged part of the second subparagraph of Article 2(5) is that adaptation of the out-of-country information is prevented.

7.223. For these reasons, we find that the evidence does not support, and therefore Russia has failed to demonstrate, that the challenged part of the second subparagraph of Article 2(5) of the Basic AD Regulation prevents the European Commission from adapting out-of-country information to arrive at the cost of production in the country of origin. Accordingly, we dismiss Russia's claim of inconsistency with Article 2.2 of the Anti-Dumping Agreement on this basis.

7.224. Finally, we note that the second subparagraph of Article 2(5) was the subject of a prior dispute in which the measure was found to be not inconsistent "as such" with Article 2.2 and Article 2.2.1.1 of the Anti-Dumping Agreement. We have based our findings in respect of the challenged measure on our assessment of the evidence and arguments presented on the record of this dispute. We note, however, that our findings and reasoning in respect of this claim are not contrary to findings and reasoning of the panel and Appellate Body in *EU – Biodiesel (Argentina)*.[395]

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[392] Russia's first written submission, paras. 264-265. (emphasis original)
[393] Russia's first written submission, para. 265.
[394] Russia's first written submission, paras. 272-273.
[395] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.242; Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.169-7.174.

### 7.5.5 Conclusion

7.225. Having examined and rejected each of the rationales provided by Russia for its claim that the final part of the second subparagraph of Article 2(5) of the Basic AD Regulation is inconsistent with Article 2.2 and Article 2.2.1.1 of the Anti-Dumping Agreement, we conclude that Russia has failed to demonstrate this claim.

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

### 7.6.1 Introduction

7.226. The European Commission imposed anti-dumping duties on certain welded tubes and pipes from, *inter alia*, Russia by Regulation 1256/2008 of 16 December 2008.[396] As a result of an expiry review initiated in 2013, the European Commission extended the application of these duties for another five years by Regulation 2015/110 of 26 January 2015.[397] The European Commission found that there was a likelihood of recurrence of dumping[398] and injury[399] in case the measures were repealed.

7.227. Russia claims that, in the expiry review, the European Union acted inconsistently with the following provisions of the Anti-Dumping Agreement:

a. the first sentence of Article 2.2.1.1 because, in determining normal value, the European Commission:

   i. failed to calculate the cost of production of tubes and pipes on the basis of the records of the producer under investigation, because it rejected the gas prices actually paid by the producer under investigation; and

   ii. used costs other than "the costs associated with the production and sale of the product under consideration".

b. Article 2.2.1 because the European Commission used incorrect costs of production, calculated in violation of Article 2.2.1.1, in the ordinary-course-of-trade test.

c. Article 11.3 because the European Commission determined the likelihood of recurrence of dumping based on costs calculated in violation of Articles 2.2.1.1 and 2.2.1 of the Anti-Dumping Agreement.[400]

7.228. The European Union responds that Russia has failed to demonstrate that the European Commission's determinations related to the calculation of costs of production, the ordinary course of trade and the likelihood of recurrence of dumping reflected in Regulation 2015/110, are inconsistent with Articles 2.2.1.1, 2.2.1, and 11.3 of the Anti-Dumping Agreement.

### 7.6.2 Russia's claims under the first sentence of Article 2.2.1.1

#### 7.6.2.1 Main arguments of the parties

##### 7.6.2.1.1 Russia

7.229. Russia's claims under the first sentence of Article 2.2.1.1 are grounded in two main lines of argument.

[396] Regulation 2015/110, (Exhibit RUS-21), recital 1.
[397] Regulation 2015/110, (Exhibit RUS-21), Article 1; Russia's first written submission, para. 437; and European Union's first written submission, para. 110.
[398] Regulation 2015/110, (Exhibit RUS-21), recital 87.
[399] Regulation 2015/110, (Exhibit RUS-21), recital 163.
[400] Russia's first written submission, paras. 483-485.

7.230. The first ground for Russia's claim concerns the rejection of the gas costs reflected in the records of the producer under investigation. Russia states that, in examining the likelihood of recurrence of dumping, the European Commission constructed normal value. In doing so, the European Commission failed to calculate the costs of production of certain welded tubes and pipes on the basis of the records of the investigated producer.[401] In particular, Russia asserts that the European Commission discarded domestic gas prices because they (i) represented only 30% of the Russian export gas price and were far below market prices paid in unregulated export markets; and (ii) were regulated by the government. Based on this evidence, the European Commission concluded that gas costs were not "reasonably reflected" in the producer's records. Accordingly, Russia asserts that the European Commission rejected the recorded domestic gas costs in reliance on the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.[402] Russia recalls that, in *EU – Biodiesel (Argentina)*, the Appellate Body understood the second condition in the first sentence of Article 2.2.1.1 as not referring to the "reasonableness" of the reported costs. Rather, this provision concerns "whether the records … *suitably* and *sufficiently correspond to or reproduce* those costs incurred by the investigated exporter or producer".[403]

7.231. Russia asserts that the reasons provided by the European Commission in the expiry review to disregard the gas prices of the Russian producer – i.e. because they were not in line with "market prices paid in unregulated export markets" – are not, in themselves, sufficient to conclude that the gas costs were not "reasonably reflected" in the records of the Russian producer.[404] For Russia, the European Commission, rather, examined the "reasonableness" of the reported costs themselves.[405] Thus, for Russia, the European Commission acted inconsistently with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, by rejecting, pursuant to the second condition of Article 2.2.1.1, the gas prices reflected in the records of the Russian producer.[406]

7.232. The second ground for Russia's claim concerns the use of costs that are not "associated with the production and sale of the product under consideration". Russia submits that, following its finding that the gas costs reflected in the producer's records could not be used, the European Commission calculated the costs of production on the basis of an out-of-country surrogate price, i.e. the price of Russian gas when sold for export at the German/Czech border (Waidhaus). However, for Russia, this out-of-country gas price cannot be regarded as "associated with the production and sale of the product under consideration" because it has no "genuine relationship" with the costs pertaining to the production and sale of welded tubes and pipes in Russia.[407] Therefore, for Russia, the European Commission acted inconsistently with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, by failing to calculate the cost of production on the basis of "the costs associated with the production and sale of the product under consideration".

#### 7.6.2.1.2 European Union

7.233. The European Union disagrees that the European Commission acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement in finding that the domestic gas prices in Russia could not be used for determining the cost of production and using, instead, the price of Russian gas when sold for export at the German/Czech border (Waidhaus) to calculate the costs of production.

7.234. The European Union submits that, in the expiry review for certain welded tubes and pipes, the European Commission found that, due to the fact that "domestic gas prices in Russia [were] regulated prices", these prices were "far below market prices paid in unregulated export market for Russian natural gas". Based on these distortions, the European Commission disregarded the information reflected in the records of the Russian producer and went to look for other reliable data to establish the gas costs in Russia. According to the European Union, this is consistent with Article 2.2.1.1, since the words "normally" and "[f]or the purpose of paragraph 2" in that provision confirm that there are circumstances, other than those in the two situations set out in that sentence, in which the obligation to base the calculation of costs on the records does not apply.[408] It is also

[401] Russia's first written submission, para. 469.
[402] Russia's first written submission, paras. 464-476.
[403] Russia's first written submission, para. 470 (quoting Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.26); opening statement at the first meeting of the Panel, para. 659.
[404] Russia's first written submission, para. 472.
[405] Russia's opening statement at the first meeting of the Panel, para. 658.
[406] Russia's first written submission, para. 472.
[407] Russia's first written submission, paras. 481-482.
[408] European Union's response to Panel question No. 80, para. 26.

consistent with Article 2 of the Anti-Dumping 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.[409]

7.235. The European Union submits that the European Commission's rejection of Russian gas costs is also supported by the WTO case law. In this connection, the European Union asserts that, in *EU – Biodiesel (Argentina),* the Appellate Body did not exclude that there could be circumstances where data on the cost of production reported by the exporter or producer cannot be used. It also did not disagree that there are circumstances – beyond the two instances expressly mentioned in Article 2.2.1.1[410], where an investigating authority needs to rely on other evidence than the data reported in the exporter or producer's records to establish normal value.[411] According to the European Union, the Appellate Body confirmed this view in *Ukraine – Ammonium Nitrate*.[412]

7.236. For the European Union, the Appellate Body's finding that the second condition in Article 2.2.1.1 does not amount to a "reasonableness" test of the reported costs, does not apply to situations where the domestic input price is regulated. The European Union recalls that, in *EU – Biodiesel (Argentina*), the European Commission rejected the domestic price of the raw material - soybeans - because it was artificially lower than the international price due to the Argentine export tax system. However, in the welded tubes and pipes expiry review, the government interference on gas prices is much more direct because "the Russian government sets the domestic gas prices and does not allow the forces of supply and demand to play at all".[413]

7.237. Finally, the European Union submits that, in the light of the obligations Russia undertook at the moment of its accession to the WTO, it can reject the Russian domestic prices for gas inputs when they are not set on the basis of "normal commercial considerations, based on recovery of costs and profits". The European Union asserts that, upon accession to the WTO, Russia confirmed its commitment to ensure that its producers/distributors of natural gas in the Russian Federation would operate, within the relevant regulatory framework, on the basis of "normal commercial considerations", based on recovery of costs and profit.[414] According to the European Union, Russia's commitment, reflected in paragraph 132 of the Working Party Report on the Accession of Russia to the WTO and incorporated into its Accession Protocol, determines how WTO law applies to Russia.[415]

#### 7.6.2.2 The legal standard

7.238. The legal standard applicable to the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement is set out in paragraphs 7.91-7.96.

#### 7.6.2.3 Evaluation by the Panel

7.239. As part of its examination of the likelihood of recurrence of dumping of certain welded tubes and pipes, the European Commission assessed whether the like product was sold in the Russian domestic market in the ordinary course of trade, by establishing the proportion of profitable domestic sales to independent customers for the product type concerned. In this context, the European Commission first examined "whether the gas prices paid by the single collaborating exporting producer reasonably reflected the costs associated with the production and distribution of

[409] European Union's second written submission, paras. 53-55; opening statement at the second meeting of the Panel, para. 18.
[410] As already noted, Article 2.2.1.1 directs an investigating authority to normally base its calculations of costs on the records of the exporter or producer under investigation, provided that the records comply with two conditions (i) they are consistent with the GAAP of the exporting country; and (ii) "reasonably reflect the costs associated with the production and sale of the product under consideration".
[411] European Union's opening statement at the first meeting of the Panel, para. 19; second written submission, para. 52 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.18 and fn 120; Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.80 and fn 141); and opening statement at the second meeting of the Panel, para. 17.
[412] European Union's second written submission, para. 52 (referring to Appellate Body Report, *Ukraine – Ammonium Nitrate,* para. 6.87).
[413] European Union's first written submission, para. 114.
[414] European Union's first written submission, paras. 115-116; second written submission, para. 53; and opening statement at the second meeting of the Panel, para. 19.
[415] European Union's second written submission, para. 53.

gas".[416] The European Commission concluded that the gas costs "were not reasonably reflected in the exporting producer's records" in the light of the discrepancy between domestic gas costs and external gas prices and the fact that the domestic gas prices in Russia were regulated:

> It was found that the domestic gas price paid by the exporting producers was around 30% of the export price of natural gas from Russia. In this regard, all available data indicated that domestic gas prices in Russia are regulated prices, which are far below market prices paid in unregulated export markets for Russian natural gas. Since gas costs were not reasonably reflected in the exporting producer's records as provided for in Article 2(5) of the basic Regulation, they had to be adjusted accordingly. In the absence of sufficiently representative, undistorted gas prices relating to the Russian domestic market, it was considered appropriate to base the adjustment, in accordance with Article 2(5) of the basic Regulation, on the basis of information from other representative markets. The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), adjusted for local distribution costs. Waidhaus is the main hub for Russian gas sales to the EU, which is both the largest market for the Russian gas and has prices reasonably reflecting costs. It can therefore be considered to be a representative market within the meaning of Article 2(5) of the basic Regulation.[417]

7.240. In our view, the language used in the extract reproduced above could be read as suggesting that the European Commission rejected the recorded cost information of the Russian producer in reliance on the *second condition* of the first subparagraph of Article 2(5) of the Basic AD Regulation. As already noted, this provision requires that the costs of a producer or exporter shall normally be calculated on the basis of its records, provided that (i) the records are in accordance with the GAAP of the country concerned; and (ii) "it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration". Moreover, we note that the approach taken by the European Commission for rejecting the recorded costs in the expiry review for certain welded tubes and pipes constituted one of the pieces of evidence for the application of the Cost Adjustment Methodology.[418] As we have previously established, the reasoning set out in the determinations advanced by Russia to establish the existence of the Cost Adjustment Methodology is best understood to reveal that the European Commission applies the Cost Adjustment Methodology to reject recorded cost information in reliance on the *second* condition of the first subparagraph of Article 2(5) of the Basic AD Regulation.[419] As mentioned above, the European Commission's approach for rejecting recorded cost information has been defended by the Council of the European Union, on precisely this legal basis, in the five court judgments submitted by Russia.[420]

7.241. Based on the above, we find that, in the welded tubes and pipes expiry review, the European Commission rejected the recorded cost information of the Russian producer in application of the second condition of the first subparagraph of Article 2(5) of the Basic AD Regulation.

7.242. We recall that the second condition prescribed in Article 2(5) of the Basic AD Regulation stipulates that "it must be shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration". This language is virtually identical to the text of Article 2.2.1.1 of the Anti-Dumping Agreement. As already noted, in *EU – Biodiesel (Argentina)* the Appellate Body understood the second condition in the first sentence of Article 2.2.1.1 to relate to whether the producer's records "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".[421] Because it is the "records" that are subject to the condition to "reasonably reflect" the "costs associated with the production and sale of the product under consideration", there is no standard of "reasonableness" under the second condition that governs the meaning of "costs" itself. Accordingly, the second condition in Article 2.2.1.1 "should not be interpreted in a way that would allow an investigating

[416] Regulation 2015/110, (Exhibit RUS-21), recital 68.
[417] Regulation 2015/110, (Exhibit RUS-21), recital 69. The Panel notes that the determination does not reflect whether the Russian producer challenged the price of gas chosen by the European Commission during the underlying review.
[418] See para. 7.45 above.
[419] See para. 7.97 above.
[420] See para. 7.97 above.
[421] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.

authority to evaluate the costs reported in the records … pursuant to a benchmark unrelated to the cost of production in the country of origin".[422]

7.243. In light of the above, we consider that, in the expiry review for certain welded tubes and pipes, the European Commission improperly applied the second condition in the first sentence of Article 2.2.1.1 by rejecting the Russian producer's gas costs on the grounds that they were not reflected in the records.[423]

7.244. The European Union argues that the Appellate Body's understanding of the second condition in *EU – Biodiesel (Argentina)*, i.e. that the second condition in Article 2.2.1.1 does not include an examination of the "reasonableness" of the reported costs themselves, would not be applicable to situations like those allegedly prevailing in Russia, where domestic gas prices are regulated, such that there is no effective interaction of supply and demand in the gas market.[424] Russia disagrees that Article 2.2.1.1 of the Anti-Dumping Agreement provides the legal basis for the examination of government regulation, including how the government exercises its right to control prices and the effects thereof.[425]

7.245. As already noted, in *EU – Biodiesel (Argentina)*, the government measure that was found to render the recorded costs unusable for the calculation of the costs of production was the Argentine export tax system, which had the effect of depressing the domestic price of the relevant inputs to an "artificially-low level".[426] The Appellate Body agreed with the panel that the European Commission's 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 under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel.[427]

7.246. We see nothing in the panel or the Appellate Body report in *EU – Biodiesel (Argentina)* suggesting that the nature of the government measure, or the extent of its impact on domestic costs, was relevant to the panel's or Appellate Body's conclusions in relation to the second condition under Article 2.2.1.1. In fact, in a subsequent dispute (*Ukraine – Ammonium Nitrate*), in which gas prices were found to be controlled by the State and artificially lower than the export price of gas from Russia and the price of gas in other countries, the Appellate Body confirmed its understanding of the second condition in Article 2.2.1.1: there is no standard of reasonableness under that condition that governs the meaning of "costs" itself, which would allow investigating authorities to disregard domestic input prices when such prices are lower than an international benchmark.[428] Therefore, we disagree with the European Union that the Appellate Body's understanding of the second condition in *EU – Biodiesel (Argentina)* would not be applicable to the facts underlying the expiry review for certain welded tubes and pipes.[429]

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[422] Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.23; *Ukraine – Ammonium Nitrate*, para. 6.88.

[423] We note Russia's allegation that the records of the Russian producer were in accordance with the GAAP of the country concerned. Because the determination does not address whether the records of the Russian producer were GAAP-consistent, we understand the European Commission did not examine whether the first condition in the first sentence of Article 2.2.1.1 was satisfied. Hence, we refrain from expressing a view on whether the records of the Russian producer were GAAP-consistent. In any event, given that Russia's claim is focused on the *second* condition in the first sentence of Article 2.2.1.1, it is irrelevant to us whether the records were GAAP-consistent or not.

[424] European Union's first written submission, para. 114.

[425] Russia's opening statement at the first meeting of the Panel, para. 91; second written submission, para. 670.

[426] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.299.

[427] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.55.

[428] Appellate Body Report, *Ukraine – Ammonium Nitrate,* para. 6.88.

[429] We note that the panel in *Ukraine – Ammonium Nitrate* rejected an argument similar to that raised by the European Union in the case before us. In that dispute, the respondent (Ukraine) argued that the factual circumstances in *EU – Biodiesel (Argentina)* were different to those prevailing in Russia, because in *EU – Biodiesel (Argentina)* the investigating authority did not find any evidence of direct state intervention in regulating the costs of input and the distortion was not appreciable, even though the Argentinian export tax system had a price depressing effect on input prices. The panel was of the view that the reports of the panel and the Appellate Body in *EU – Biodiesel (Argentina)* do not suggest that "the economic level, and the direct or

7.247. We note the European Union's argument that the rejection of "distorted" gas cost information reflected in the Russian producer's records was justified by two sets of reasons. First, by the words "normally" and "[f]or the purpose of paragraph 2" in Article 2.2.1.1, which confirm that there are circumstances, other than those in the two situations set out in the first sentence of Article 2.2.1.1, in which the obligation to base the calculation of costs on the records does not apply. Second, by Article 2 of the Anti-Dumping 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.

7.248. We do not consider this argument to be relevant to resolve Russia's claim in relation to the rejection of recorded gas costs in the welded tubes and pipes expiry review. As already noted, the European Commission relied upon the second condition in the first sentence of Article 2.2.1.1 to disregard the domestic costs gas of the Russian producer. Moreover, the anti-dumping determination does not indicate that the European Commission relied on the term "normally" in the first subparagraph of Article 2(5) when it rejected the recorded input prices. If the European Commission had derogated from the requirement in Article 2(5) that "costs … shall normally be calculated on the basis of … records", one could have expected to find an explanation of such derogation in the determination. However, no such explanation is present in Regulation 2015/110. Accordingly, our analysis of whether the European Commission improperly rejected the recorded gas costs should be focused on the operation of the second condition in Article 2.2.1.1. We thus do not consider it necessary to examine whether the rejection of the recorded costs was justified pursuant to another circumstance, as explained by the European Union, as ultimately, there is no evidence that this is what motivated the European Commission's determination.

7.249. Moreover, the European Union argues that the European Commission was entitled to disregard the cost of gas reflected in the producer's records because, during its accession process to the WTO, Russia committed to ensure that natural gas producers/distributors would operate on the basis of "normal commercial considerations". However, according to the European Union, gas prices in Russia continue to be set by the government and, thus, remain far below market prices. Russia responds that paragraph 132 of the Working Party Report does not provide any legal justification for the European Commission's decision to reject the reported gas prices and to use instead the surrogate gas price.[430] Paragraph 132 of the Working Party Report belongs to a section of the Report "entitled 'Pricing Policies' which covers a subject matter which is distinct from commitments in the separate section on anti-dumping".[431] For Russia, only an "explicit commitment" in a section of the Accession Protocol or Working Party Report specifically dedicated to rules on anti-dumping may be considered as a legal basis for the European Union's position.[432]

7.250. Paragraph 132, in the section concerning "Pricing Policies" of the Working Party Report on Russia's accession to the WTO, states:

> In response to the concerns expressed, the representative of the Russian Federation stated that upon accession, producers/distributors of natural gas in the Russian Federation would operate, within the relevant regulatory framework, on the basis of normal commercial considerations, based on recovery of costs and profit. He confirmed that the policy of his Government was to ensure, upon accession, that these economic operators, in respect of their supplies to industrial users, would recover their costs (including the cost of production, overheads, financing charges, transportation, maintenance and upgrade of extraction and distribution infrastructure, investment in the exploration and development of new fields) and would be able to make a profit, in the ordinary course of their business. He added that his Government would continue to regulate price supplies to households and other non-commercial users, based on

indirect nature of the regulation in question", were relevant to the panel's or Appellate Body's analysis of the second condition under Article 2.2.1.1. (Panel Report, *Ukraine – Ammonium Nitrate,* para. 7.91).

[430] Russia's second written submission, para. 689; opening statement at the second meeting of the Panel, para. 114.

[431] Russia's second written submission, para. 688.

[432] Russia's second written submission, para. 687.

considerations of domestic social policy. The Working Party took note of these commitments.[433]

7.251. This paragraph records the statement of the representative of Russia that producers/distributors of natural gas in Russia "would operate … on the basis of normal commercial considerations, based on recovery of costs and profit". 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. Moreover, paragraph 132 does not make any reference to the Anti-Dumping Agreement, or Article VI:1 of the GATT 1994, and does not refer directly or indirectly to the calculation of the costs of production or normal value for Russian producers/exporters in anti-dumping proceedings. In this regard, unlike the instruments concerning the accession to the WTO of certain other Members[434], the Protocol of Accession of Russia does not contain specific rules applicable to anti-dumping proceedings conducted by foreign investigating authorities in relation to Russian imports. 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.

#### 7.6.2.4 Conclusion

7.252. In light of the above, we find that the European Commission rejected the costs reflected in the records of the producer under investigation in a manner inconsistent with the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Therefore, we find that, in the expiry review on certain welded tubes and pipes, the European Commission acted inconsistently with the first sentence of Article 2.2.1.1.

7.253. Having already concluded that the European Commission had no valid basis to reject the gas costs reflected in the records of the investigated producer, we do not find it necessary to resolve the question whether the European Commission acted inconsistently with the first sentence of Article 2.2.1.1 by using costs other than "the costs associated with the production and sale of the product under consideration".[435] We, therefore, exercise judicial economy on this claim.

### 7.6.3 Russia's claim under Article 2.2.1

#### 7.6.3.1 Main arguments of the parties

##### 7.6.3.1.1 Russia

7.254. Citing the panel in *EC – Salmon (Norway)*, Russia asserts that the rules for calculating the costs used in a 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 of the Anti-Dumping Agreement.[436] Russia further notes that, in *Ukraine – Ammonium Nitrate*, the panel

[433] This commitment is part of the obligations that Russia undertook at the moment of accession and incorporated in its Accession Protocol. (Working Party Report on the Accession of the Russian Federation to the WTO, WT/ACC/RUS/70, paras. 132 and 1450; Protocol of Accession of the Russian Federation, para. 2).

[434] For instance, Viet Nam's Accession Protocol sets out specific provisions for "determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement" in "proceedings involving exports from Viet Nam into a WTO Member". (Working Party Report on the Accession of Viet Nam to the WTO, WT/ACC/VNM/48, paras. 255 and 527; Protocol of Accession of Viet Nam, para. 2).

[435] In this regard, we note that, in relation to this second claim by Russia under Article 2.2.1.1, the parties have relied substantially on Article 2.2, including the possibility of calculating the costs of production in the country of origin using information other than that reflected in the records and the adaptation of external information in order to arrive at the costs of production in the country of origin. However, because Russia's claim is not based on Article 2.2 of the Anti-Dumping Agreement, we refrain from addressing these arguments.

[436] Russia's second written submission, para. 729 (referring to Panel Report, *EC – Salmon (Norway),* para. 7.252).

considered that the costs used in the ordinary-course-of-trade test under Article 2.2.1 must be consistent with Article 2.2.1.1.[437]

7.255. Russia asserts that, in performing the ordinary-course-of-trade test in the expiry review, the European Commission used costs of production calculated inconsistently with Article 2.2.1.1. According to Russia, because the gas costs in the welded tubes and pipes expiry review were calculated inconsistently with Article 2.2.1.1, the use of these improperly established costs of production in the ordinary-course-of-trade test is also inconsistent with Article 2.2.1.[438]

#### 7.6.3.1.2 European Union

7.256. The European Union argues that Russia has failed to demonstrate that, if the European Commission had relied on the "distorted domestic gas costs in Russia", it would necessarily have reached the conclusion that the sales of the product in the domestic market of Russia were in the ordinary course of trade.[439]

### 7.6.3.2 Legal standard

7.257. Article 2.2.1 of the Anti-Dumping Agreement provides:

> Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.[440]

7.258. Under Article 2.2.1, investigating authorities may treat below-cost sales of the like product as not being "in the ordinary course of trade" by reason of price, and may disregard such sales in determining the normal value "only if" the authorities determine that such sales were (i) made within an extended period of time; (ii) in substantial quantities; and (iii) at prices which do not provide for the recovery of all costs within a reasonable period of time.[441] The below-cost sales that may potentially be treated as not being made in the ordinary course of trade by reason of price must be ascertained.[442] This initial step requires investigating authorities to identify sales made at prices below "per unit (fixed and variable) costs of production plus administrative, selling and general costs".[443] In relation to the costs of production to consider in this assessment, the panels in *EC – Salmon (Norway)* and *Ukraine – Ammonium Nitrate* understood that 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.[444] We agree with this understanding.

### 7.6.3.3 Evaluation by the Panel

7.259. As mentioned above, in the expiry review of certain welded tubes and pipes, the European Commission examined "whether the like product was sold in the ordinary course of trade",

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[437] Russia's first written submission, para. 474 (referring to Panel Report, *Ukraine – Ammonium Nitrate,* para. 7.116).
[438] Russia's first written submission, paras. 473-475.
[439] European Union's response to Panel question No. 81, para. 28. The European Union also submits that, to the extent that Russia's claims under Article 2.2.1.1 fail, Russia's consequential claim under Article 2.2.1 of the Anti-Dumping Agreement should also be rejected. However, in case the Panel would consider that the European Union acted inconsistently with Article 2.2.1.1, for the European Union there would be no reason to find a violation of Article 2.2.1.
[440] Fns omitted.
[441] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.22.
[442] Panel Report, *EC – Salmon (Norway)*, para. 7.232.
[443] Panel Report, *EC – Salmon (Norway)*, para. 7.232.
[444] Panel Reports, *EC – Salmon (Norway)*, para. 7.252; *Ukraine – Ammonium Nitrate*, para. 7.116.

by establishing the proportion of profitable domestic sales to independent customers for the product type concerned.[445] In the light of its findings that gas costs could not be used and that they "had to be adjusted" on the basis of the "price of Russian gas when sold for export at the German/Czech border (Waidhaus)", the European Commission used for the ordinary-course-of-trade test "the average cost of production *after* the adjustment for the gas cost".[446]

7.260. We recall our previous finding that the European Commission improperly rejected the costs reflected in the records of the Russian producer, in a manner inconsistent with the first sentence of Article 2.2.1.1. Accordingly, in conducting the ordinary-course-of-trade test, the European Commission relied upon costs of production that were calculated inconsistently with Article 2.2.1.1. Consequently, it must necessarily follow that the European Commission's ordinary-course-of-trade test was also inconsistent with Article 2.2.1 of the Anti-Dumping Agreement.

7.261. We note the European Union's argument that, for Russia's claim to succeed, Russia would be required to show that the European Commission would have reached the conclusion that domestic sales were in the ordinary course of trade, had it relied on domestic gas costs. However, we do not consider that the obligation under Article 2.2.1 to use, in the ordinary-course-of-trade test, costs of production determined in a manner consistent with Article 2.2.1.1 is conditioned on a demonstration that compliance with that rule would lead to a different conclusion compared with non-compliance.

#### 7.6.3.4 Conclusion

7.262. In light of the above, we find that the European Commission acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in making its determinations under this provision, it relied on costs that were calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.

### 7.6.4 Russia's claim under Article 11.3

7.263. Pursuant to Article 11(2) of the Basic AD Regulation, in the expiry review for welded tubes and pipes, the European Commission examined whether dumping was likely to recur.[447] To this end, the European Commission examined (i) the "[l]ikely dumping during the review investigation period"[448]; and (ii) the "[d]evelopment of exports should measures be repealed".[449]

7.264. As part of its assessment of the "[l]ikely dumping during the review investigation period", as mentioned above, the European Commission used for the ordinary-course-of-trade test the average cost of production *after* the adjustment for the gas cost. The adjusted costs of production were then used for the establishment of the normal value. Specifically, the European Commission established normal value "as the average price of the profitable domestic sales during the review investigation period".[450] Subsequently, the European Commission determined the likely export price.[451] Based on these findings, the European Commission established a "likely dumping margin" of 38,7% during the review investigation period.[452]

7.265. As part of its assessment of the "[d]evelopment of exports should measures be repealed", the European Commission examined two factors (i) first, the production capacity of the exporting producers, concluding that "there [was] a substantial risk that Russian exporting producers will sell significant quantities of welded pipes to the Union market at dumped prices"[453]; and (ii) the

[445] Regulation 2015/110, (Exhibit RUS-21), recital 67.
[446] Regulation 2015/110, (Exhibit RUS-21), recital 70. (emphasis added)
[447] Regulation 2015/110, (Exhibit RUS-21), recital 16.
[448] Regulation 2015/110, (Exhibit RUS-21), recitals 65-78.
[449] Regulation 2015/110, (Exhibit RUS-21), recitals 79-86.
[450] Regulation 2015/110, (Exhibit RUS-21), recital 71.
[451] The European Commission explained that the significant non-cooperation from exporting producers in Russia led the Commission to use facts available in establishing the likely export price. (Regulation 2015/110, (Exhibit RUS-21), recitals 72-73).
[452] Regulation 2015/110, (Exhibit RUS-21), recital 78.
[453] Regulation 2015/110, (Exhibit RUS-21), recital 80.

attractiveness of the Union market, finding that "there [was] a significant risk of trade diversion to the Union market should measures be repealed".[454]

7.266. In relation to the likelihood of recurrence of dumping, the European Commission concluded in recital 87:

> The available spare capacity in Russia and the attractive price level in the Union market lead to the conclusion that there is a risk of an increase in Russian dumped exports of the product concerned to the Union should the measures in force be allowed to lapse.[455]

7.267. Russia claims that the European Union acted inconsistently with Article 11.3 of the Anti-Dumping Agreement because the European Commission determined the likelihood of recurrence of dumping based on a dumping margin established by using costs of production calculated in violation of Articles 2.2.1.1 and 2.2.1 of the Anti-Dumping Agreement.[456] In Russia's view, if an investigating authority chooses to rely upon dumping margins in making their likelihood determination in reviews, the calculation of these margins must conform to the disciplines of Article 2 of the Anti-Dumping Agreement.[457]

7.268. The European Union submits that Russia has not demonstrated that the conclusion on the likelihood of recurrence of dumping would have been altered, had the European Commission relied on the distorted domestic gas costs in Russia.[458]

7.269. Article 11.3 of the Anti-Dumping Agreement provides:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.[459]

7.270. In relation to the calculation of dumping margin in reviews conducted pursuant to Article 11.3, we understand that, while investigating authorities are not required to calculate a dumping margin, should they choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2. If margins were legally flawed because they were calculated in a manner inconsistent with a specific provision of Article 2, this could give rise to an inconsistency not only with that provision, but also with Article 11.3 of the Anti-Dumping Agreement. In such circumstances, "the likelihood [-of-dumping] determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3."[460]

7.271. We note that, as asserted by Russia, the European Commission determined the likelihood of recurrence of dumping based on, *inter alia*, the likely dumping margin established by the European Commission during the review investigation period. This "likely dumping margin" was determined to be 38,7% during the review investigation period. Moreover, as reflected in recital 87

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[454] Regulation 2015/110, (Exhibit RUS-21), recital 86.
[455] Regulation 2015/110, (Exhibit RUS-21), recital 87.
[456] Russia's first written submission, paras. 483-485; comments on the European Union's response to Panel question No. 81, para. 116.
[457] Russia's first written submission, para. 452 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).
[458] European Union's response to Panel question No. 81, para. 29. The European Union also submits that, to the extent that Russia's claims under Article 2.2.1.1 fail, Russia's consequential claim under Article 11.3 of the Anti-Dumping Agreement should also be rejected. However, in case the Panel would consider that the European Union acted inconsistently with Article 2.2.1.1, for the European Union, there would be no reason to find a violation of Article 11.3.
[459] Fn omitted.
[460] Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 127; *US – Zeroing (Japan)*, para. 183.

of the anti-dumping determination, the available spare capacity in Russia and the attractive price level in the Union market "[led] the [European Commission] to the conclusion that there [was] a risk of an increase in Russian dumped exports of the product concerned to the Union should the measures in force be allowed to lapse". The reference to "Russian dumped exports", and the determination of a dumping margin as part of the decision, persuade us that the likely dumped price was one of the factors that prompted the European Commission's positive conclusion that dumping was likely to recur in the absence of measures. We further note that the European Union does not deny that the European Commission had relied upon the likely margin of dumping in reaching a positive conclusion on the likely recurrence of dumping.

7.272. We recall our previous findings that, in determining normal value for the purpose of establishing the likely dumping margin, the European Commission (i) improperly rejected the costs reflected in the records of the Russian producer, in a manner inconsistent with the first sentence of Article 2.2.1.1; and (ii) relied upon costs of production that were calculated inconsistently with Article 2.2.1 in applying the ordinary-course-of-trade test.

7.273. Because the European Commission established the likelihood of recurrence of dumping relying upon a dumping margin established on the basis of costs of production calculated in violation of Article 2.2.1.1 and Article 2.2.1, the European Commission's determination of the likelihood of recurrence of dumping contravened Article 11.3 of the Anti-Dumping Agreement.

7.274. Therefore, we find that the European Commission acted inconsistently with Article 11.3 of the Anti-Dumping Agreement, by basing its conclusion that dumping was likely to recur on costs of production calculated in violation of Articles 2.2.1.1 and 2.2.1 of the Anti-Dumping Agreement.

### 7.7 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

7.275. Russia makes a series of claims regarding the imposition of anti-dumping measures by the European Union on AN from the Russian Federation and the expiry review which led to the imposition of these measures ("the Third Expiry Review").[461] Russia groups its claims into five categories:

i. claims regarding the product scope of the expiry review;

ii. claims against the EU's determination of likelihood of recurrence of injury;

iii. claims against the EU's determination of likelihood of recurrence of dumping;

iv. claims regarding the continuous levying of anti-dumping measures on imports of AN originating in Russia; and

v. claims regarding the conduct of the expiry review.

7.276. We recall that, as a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member.[462] In view of the claims and arguments made by the parties in this dispute, we have decided to start our examination by reviewing Russia's claims on the product scope of the expiry review, before turning to claims against the EU's determinations of likelihood of recurrence of injury and likelihood of recurrence of dumping. We will then take up claims regarding the continuous levying of anti-dumping measures on imports of AN and, finally, claims related to the conduct of the expiry review.

[461] In Section III.B ("Legal Basis for the Complaint") of its request for the establishment of a panel, Russia lists a total of 22 claims, labelled claim #1 to claim #22. In its written submissions, Russia does not provide any further explanation regarding claim #10 ("[t]he European Union violated Articles 11.3 of the ADA by proceeding to the determination of the likelihood of recurrence of dumping without first determining the likelihood of continuation of dumping"), so the Panel considered that Russia is no longer pursuing this claim.

[462] Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126.

7.277. At the outset, we note that the European Union makes a horizontal preliminary objection about the applicability of the Anti-Dumping Agreement to certain claims presented by Russia. We address this preliminary objection before turning to Russia's individual claims.

### 7.7.1 Whether certain claims presented by the Russian Federation should be rejected by the Panel because they concern pre-WTO determinations

7.278. 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. Since Russia became a Member of the WTO on 22 August 2012, only determinations made in connection with reviews initiated after this date can be subject to review by this Panel.[463]

7.279. We start by reviewing Article 18.3 of the Anti-Dumping Agreement, which states:

> Subject to subparagraphs 3.1 and 3.2, the provisions of this Agreement shall apply 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.

7.280. Article 18.3 deals with the temporal applicability of the Anti-Dumping Agreement and the admissibility of claims made before panels on the basis of this Agreement. It was interpreted by the panel in *US – DRAMS* as follows:

> In our view, pre-WTO measures do not become subject to the AD Agreement simply because they continue to be applied on or after the date of entry into force of the WTO Agreement for the Member concerned. Rather, by virtue of the ordinary meaning of the terms of Article 18.3, the AD Agreement applies only to "reviews of existing measures" initiated pursuant to applications made on or after the date of entry into force of the AD Agreement for the Member concerned ("post-WTO reviews"). However, we do not believe that the terms of Article 18.3 provide for the application of the AD Agreement to all aspects of a pre-WTO measure simply because parts of that measure are under post-WTO review. Instead, we believe that the wording of Article 18.3 only applies the AD Agreement to the post-WTO review. In other words, the scope of application of the AD Agreement is determined by the scope of the post-WTO review, so that pursuant to Article 18.3, the AD Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. *Any aspects of a pre-WTO measure that are not covered by the scope of the post-WTO review do not become subject to the AD Agreement by virtue of Article 18.3 of the AD Agreement*.[464]

7.281. The panel in that dispute went on to find that the product scope was determined "once and only once in the original pre-WTO investigation, well before the entry into force of the WTO Agreement for the United States on 1 January 1995."[465] The product scope determination was not part of the post-WTO "review" and accordingly was found not to be subject to the Anti-Dumping Agreement, rendering Korea's product scope claim inadmissible.

7.282. The panel, in *Brazil – Desiccated Coconut*, reached a similar conclusion in examining Article 32.3 of the SCM Agreement (the analogue of Article 18.3 of the Anti-Dumping Agreement):

> Article 32.3 defines comprehensively the situations in which the SCM Agreement applies to measures which were imposed pursuant to investigations not subject to that Agreement. Specifically, the SCM Agreement applies to "reviews of existing measures" initiated pursuant to applications made on or after the date of entry into force of the WTO Agreement. It is thus through the mechanism of reviews provided for in the SCM Agreement, and only through that mechanism, that the Agreement becomes

[463] European Union's first written submission, paras. 130 and 154. See also ibid. paras. 149, 151-152, 370, and 429.
[464] Panel Report, *US – DRAMS*, para. 6.14. (emphasis added; fn omitted)
[465] Panel Report, *US – DRAMS*, para. 6.16.

> effective with respect to measures imposed pursuant to investigations to which the SCM Agreement does not apply.[466]

7.283. Also relevant to this issue is the decision of the panel in *US – Shrimp (Viet Nam)*, in which the panel examined administrative reviews of an anti-dumping order taken before the date of Viet Nam's accession to the WTO. In that proceeding, Viet Nam challenged an "all others" rate calculated in the original investigation. In response, the United States argued that because the USDOC merely continued to apply the "all others" rate from the *original* investigation in the period *following* Viet Nam's accession to the WTO, the "all others" rate was not subject to WTO review, due to Article 18.3. The Panel rejected the United States' argument and distinguished the factual situation there from the situation in *US – DRAMS*:

> We are unable to accept the United States' argument which, in our view, is not supported by the findings of the panel in *US – DRAMS*. In *US – DRAMS*, the determination at issue – that of the product coverage of the Anti-Dumping measures at issue – was determined once, before the entry into force of the WTO Agreement, and never subsequently reconsidered. By contrast, the evidence before us shows that the USDOC made a new and distinct "all others" rate determination in each of the administrative reviews which are before us. … The mere fact that the "all others" rate ultimately applied was not recalculated does not change the extent of the analysis inherent in the USDOC's new determination to continue to apply that rate.
>
> …
>
> In sum, the evidence before us shows that the "all others" rates applied in each of the administrative reviews at issue were subject to full consideration by the USDOC in each case. … Accordingly, the United States' citation to the findings of the panel in *US – DRAMs* is inapposite.[467]

7.284. We agree with the interpretations of Article 18.3 of the Anti-Dumping Agreement developed by the panels in *US – DRAMS* and *US – Shrimp* (*Viet Nam*). As we understand them, these interpretations indicate that where a post-WTO investigation or review modifies or re-examines only a particular aspect of a pre-WTO investigation or review, that aspect must conform with the rules of the Anti-Dumping Agreement and, therefore, may be open to challenge despite the fact that it formed part of a measure imposed prior to the entry into force of the WTO. However, where there is no re-examination of a pre-WTO measure, or a certain aspect of the pre-WTO investigation or review, Article 18.3 holds that the specific measure, or aspect of the pre-WTO measure, is not subject to the disciplines of the Anti-Dumping Agreement.

7.285. Russia argues that Article 18.3 does not preclude its complaint against certain aspects of the European Union's challenged measures. Russia presents two main lines of arguments in support of its position.

#### 7.7.1.1 Article 18.3 does not apply because it is a transitional provision

7.286. First, Russia argues that Article 18.3 of the Anti-Dumping Agreement does not apply in this dispute as it is a transitional provision that was designed to regulate the transition from the time that the Tokyo Round Anti-Dumping Code was in effect to the entry into force of the Uruguay Round Anti-Dumping Agreement. For Russia, Article 18.3 applied only in the specific circumstances when an anti-dumping proceeding "was underway at the time of entry into force of the WTO Agreement".[468] Thus Russia argues that "Article 18.3 does not concern *an accession* to the WTO Agreement", which by definition took place after the entry into force of the WTO Agreement.

[466] Panel Report, *Brazil – Desiccated coconut*, DSR 1997:I, p. 270.
[467] Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.221-7.222.
[468] Russia's second written submission, para. 737 (quoting Appellate Body Report, *Brazil – Desiccated Coconut*, DSR 1997:I, p. 18. In that case, the Appellate Body was examining the terms of Article 32.3 of the SCM Agreement, which corresponds to Article 18.3 of the Anti-Dumping Agreement).

7.287. Russia's objection raises two interrelated questions, the first being whether or not Article 18.3 applied only at a certain point in time and the second concerning its applicability to acceding Members.

7.288. When examining the plain text of Article 18.3, there is no indication that it was designed to apply only during the transitional period between the application of the Tokyo Round Anti-Dumping Code and the entry into force of the Anti-Dumping Agreement, as Russia's line of argument would seem to imply. Russia argues that it follows from the terms of Article 18.3 that the relevant point in time for the application of the Anti-Dumping Agreement is the time of entry into force of the WTO Agreement in 1995, because the application of Article 18.3 is explicitly limited to "specific circumstances where [an anti-dumping] proceeding, either an investigation or a review, was underway at the time of entry into force of the *WTO Agreement*".[469] This view, however, is not consistent with the actual wording of Articles 18.3 and 18.3.2, which refer to the "entry into force *for a Member* of the WTO Agreement" rather than to the "entry into force *of the WTO Agreement*" per se. The term "for a Member" indicates clearly that the temporal application of the Anti-Dumping Agreement – in this instance the ability to bring a claim under that agreement – is subject to the date of entry into force of the WTO Agreement for each individual WTO Member. For Russia this date is 22 August 2012. In this light, accepting that Russia is entitled to bring a claim under the Anti-Dumping Agreement against a determination made prior to Russia's accession to the WTO would effectively hold an importing Member retroactively to obligations it never had *vis-à-vis* Russian imports at the time of the relevant determinations. In our view, this is precisely the type of situation that the transition rule in Article 18.3 is intended to avoid.[470]

#### 7.7.1.2 Article 18.3 only regulates the entry into force of the Anti-Dumping Agreement for importing Members

7.289. Russia's second main line of argument in support of its interpretation of Article 18.3 is that the term "a Member" found in Article 18.3 exclusively refers to an importing Member, *not* to an exporting Member. According to Russia, this is because the Agreement regulates investigations and reviews conducted by an importing Member. Thus, Russia argues that Article 18.3 does not establish any rules governing when Russia, as an exporter, is entitled to rely upon its rights under the Anti-Dumping Agreement.[471] 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*".[472]

7.290. There are various reasons why we cannot accept Russia's argument on this point.

7.291. The first of these relates to the wording of the provision, which uses the indefinite article "*a* Member" rather than the definite "*the* Member [imposing the measures]". In our view, this indicates that the provision is binding on all WTO Members.

7.292. 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

[469] Russia's second written submission para. 737 (quoting Appellate Body Report, *Brazil – Desiccated Coconut*, DSR 1997:I, p. 18).

[470] In this regard we note that in *US – Shrimp (Viet Nam),* the measures challenged post-dated the entry into force of the WTO Agreement for Viet Nam.

[471] Russia's second written submission, para. 738.

[472] European Union's second written submission, para. 64 (emphasis original). The European Union adds that several provisions of the covered agreements confirm this. See, for example, Article XII:1 of the WTO Agreement ("[s]uch accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto"); Article 15.2 of the TBT Agreement ("[e]ach Member shall, promptly after the date on which the WTO Agreement enters into force for it"); Article XXXIII of the GATT 1994 ("may accede to this Agreement").

of the Anti-Dumping Agreement apply equally to all Members of the WTO from the date of their accession.

7.293. Thus, for the reasons set out above, we are not convinced by Russia's arguments concerning the proper interpretation of Article 18.3 of the Anti-Dumping Agreement. In our view, Article 18.3 precludes Russia from challenging aspects of investigations or reviews which were initiated prior to its WTO accession. In our examination of Russia's individual claims, we may therefore have to decide, before addressing the substance of those claims, if the challenged determinations are shielded from the operation of the Anti-Dumping Agreement by virtue of Article 18.3.

7.294. Having considered the preliminary objection made by the European Union, we now turn to the "as applied" claims made by Russia. We start with claims regarding the product scope of the measures.

### 7.7.2 Claims with respect to the product scope of the measures

#### 7.7.2.1 Introduction

7.295. The Russian Federation makes a series of claims (claims #1 to #4), which it describes as "claims with respect to the scope of the applicable measures".[473] Although these four claims relate to different aspects of the third expiry review, we understand that Russia has decided to group them together because they are all connected, in one way or another, to the question of the product definition and in particular to the fact that, allegedly, no anti-dumping investigation was ever conducted, and no dumping and injury determinations were ever made in relation to imports of two types of ammonium nitrate: stabilized AN and Industrial Grade Ammonium Nitrate (IGAN).[474]

7.296. While claims #1 (whether the European Union extended the anti-dumping measures to stabilized AN and IGAN without conducting an original investigation) and #2 (whether the European Union initiated a review on the basis of a petition which was not duly substantiated) deal primarily – but not exclusively – with issues related to the product scope of the expiry review, we note that claims #3 and #4 concern respectively:

a. Whether the European Union erred by failing to conduct a separate expiry review for imports of stabilized AN from the Kirovo plant (claim #3);

b. Whether the European Union erred by incorrectly defining the domestic industry and by making a likelihood of recurrence of injury determination based on incomplete data (claim #4).

7.297. We have therefore decided to consider these claims as part of our analysis of claims relating to the European Union's determination of the likelihood of recurrence of dumping.

7.298. We thus examine claims #1 and #2 in turn below.

#### 7.7.2.2 Whether the European Union extended the anti-dumping measures and levied anti-dumping duties on imports of stabilized AN and IGAN although no investigation was ever conducted and no dumping and material injury determinations were ever made (claim #1)

7.299. In its first claim, Russia alleges that no anti-dumping investigation was ever conducted, and no dumping and injury determinations were ever made in relation to imports of stabilized AN and IGAN.[475] Russia argues in particular that:

> [B]oth stabilized AN and IGAN were not products under consideration in the original investigation and these goods are different from FGAN.[476]

[473] Russia's first written submission, section 9.3.1.
[474] Russia's first written submission, para. 542.
[475] Russia's first written submission, paras. 532-552.
[476] Russia's first written submission, para. 537.

7.300. Russia submits that stabilized AN was included in the product scope for the first time in the proceedings leading up to Regulation 945/2005, while IGAN appeared for the first time in Regulation 999/2014.

7.301. As a consequence, Russia submits that the imposition and application of the anti-dumping duties on imports of stabilized AN and IGAN from the Russian Federation are inconsistent with[477]:

i. Articles 1 and 18.1 of the Anti-Dumping Agreement because the measures are applied in the absence of an original investigation, dumping, injury and causal link determinations in relation to stabilized AN and IGAN;

ii. Articles 2.1, 2.2, 2.4, and 2.6 of the Anti-Dumping Agreement and Article VI:1 of the GATT because the anti-dumping duties were imposed without determination of dumping in relation to stabilized AN and IGAN in accordance with these provisions;

iii. Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement because the anti-dumping duties were imposed in relation to stabilized AN and IGAN without determination of injury in accordance with these provisions;

iv. Article 4.1 of the Anti-Dumping Agreement because the measures were imposed without a proper determination of the domestic industry;

v. Article 9.1 of the Anti-Dumping Agreement because the EU authorities did not fulfil the requirements for the imposition of these duties, and accordingly, were not entitled to take decision about their imposition;

vi. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT because without a positive dumping margin determination, the duties automatically "exceed the margin of dumping"; and

vii. Articles I, II:1(a) and II:1(b) GATT because the imposition of these additional duties exceeds the bound tariff rate. [478]

7.302. The European Union responds that the provisions of the Anti-Dumping Agreement and of the GATT 1994 cited by Russia do not apply to the product scope of the AN measures at issue, because the scope of the measure was determined before Russia's accession and was not revisited since then.[479] Additionally, the European Union argues that there was no re-examination, new determination, or modification of product scope in the expiry review leading up to Regulation 999/2014 (which is before the Panel), and thus the issue of product scope is an aspect governed solely by a pre-WTO determination, which is outside the scope of the post-WTO review, and therefore, under Article 18.3 of the Anti-Dumping Agreement, not subject to any of the disciplines of the Anti-Dumping Agreement.[480]

7.303. In our consideration of Russia's claim, we will therefore consider in turn:

i. Whether the issues raised by Russia in relation to the product scope are, as argued by the European Union, governed solely by a pre-WTO determinations;

ii. If it is indeed the case, we will examine whether the European Union's reliance on Article 18.3 means that claim #1 must be rejected because the relevant provisions of the Anti-Dumping Agreement and the GATT 1994 do not apply.

[477] Russia's first written submission, section 9.3.1.1.
[478] Russia's first written submission, para. 571.
[479] European Union's first written submission, para. 130.
[480] European Union's first written submission, para. 158 (quoting Panel Report, *US – DRAMS*, para. 6.17).

#### 7.7.2.2.1 Evolution of the product under consideration since the original investigation

**a. The product scope of the original measures**

7.304. The parties agree that the product scope of the original EU anti-dumping measure on AN was set by Regulation 2022/95 as "ammonium nitrate originating in Russia and falling within CN codes 3102 30 90 and 3102 40 90."[481] Later, Regulations 663/98 and 658/2002 (the "2002 Review") stated that they applied to the "same product" as the product concerned by the original investigation:

> *i.e.* ammonium nitrate (AN or product under consideration), a solid nitrogen fertiliser commonly used in agriculture. It is manufactured from ammonia and nitric acid and the nitrogen content exceeds 28% by weight in prilled or granular form.[482]

**b. The incorporation of stabilized AN in the scope of the measures**

7.305. Regulation 658/2002 was amended by a partial interim review which led to Regulation 945/2005.[483] The partial interim review covered "new product types" that had "essentially the same basic physical and chemical characteristics as the product concerned and were sold through the same channel of sales to the same end-users for the same purposes", but were classified in additional CN codes.[484] According to the European Union, the only new element in Regulation 945/2005 was that these new product types "simply … contained additional primary nutrients, P and/or K"[485]. These new product types are known as "stabilised AN". In addition, Regulation 945/2005 stated that the new product types were considered to be the product concerned only "*in relation to their content of AN* – as long as this exceeds 80% by weight – together with marginal substances and nutrients".[486]

7.306. In the subsequent review that led to Regulation 661/2008 ("the 2008 review"), the product concerned is defined as being "the same as the product defined in Regulation (EC) No 945/2005".[487]

**c. The exclusion of imports of stabilized AN from Kirovo following the judgment of the Court of First Instance in Case T 348/05**

7.307. A Russian exporting producer, JSC Kirovo-Chepetsky Khimichesky Kombinat (Kirovo) challenged the 2005 extension of the anti-dumping measure to imports of stabilized AN before the EU Court of First Instance in Case T 348/05. As a result of this judgement, Regulation 945/2005 was "annulled … insofar as Kirovo was concerned".[488]

7.308. According to Russia:

> The EU Court of First Instance ruled in particular that the EU never made a dumping and injury determination for Stabilized AN which is not "like" to FGAN and therefore the

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[481] European Union's first written submission, para. 131; Russia's first written submission, para. 532. We note that Regulation 2022/95 does not distinguish between FGAN and IGAN but refers to the use of the product under consideration as a "fertilizer". (Regulation 2022/95, (Exhibit RUS-68), recital 13).

[482] Regulation 663/98, (Exhibit RUS-146), recital 9; Regulation 658/2002, (Exhibit RUS-70), recitals 13 and 14.

[483] Regulation 945/2005, (Exhibit RUS-72).

[484] Regulation 945/2005, (Exhibit RUS-72), recital 7.

[485] European Union's first written submission, para. 133.

[486] European Union's first written submission, para. 134 (quoting Regulation 945/2005, (Exhibit RUS-72), recital 35) (emphasis added). See also recital 38 of Regulation 2018/1722, (Exhibit RUS-96), which explains the change introduced in 2005 as follows: "[o]riginally, the product concerned was defined as ammonium nitrate but was subsequently re-defined to solid fertilizers with specified ammonium nitrate content. This was the consequence of the product scope clarification in 2005 which aimed to cover also ammonium nitrate to which were added phosphorus and/or potassium nutrients (so-called 'dirty' or 'stabilized' ammonium nitrate, hereinafter referred to as 'dirty AN'), since it was found out that these mixtures had essentially the same basic physical and chemical characteristics and the same agronomic properties." (fn omitted)

[487] Regulation 661/2008, (Exhibit RUS-15), recital 27; see also ibid. Articles 1 and 2.

[488] Russia's first written submission, para. 491. European Union's first written submission, para. 184. Imports of ammonium nitrate from Kirovo falling under CN codes 3102 30 90 and 3102 40 90 were still covered by the anti-dumping measures.

> imposition of the antidumping measure on imports of Stabilized AN by Kirovo is illegal. As the benefits of a court judgment in the EU legal system extend solely to the applicant, imports into the EU of Stabilized AN manufactured by other Russian producers remained subject to the anti-dumping measure.[489]

7.309. Regulation 661/2008 was amended in 2009[490] in order to implement the judgment of the Court of First Instance. As a consequence of this amendment, all imports of stabilized AN from Russia remained within the product scope of the measures, except for stabilized AN exported by Kirovo. Other types of AN exported by Kirovo also remained within the product scope.[491]

**d. The alleged inclusion of IGAN in Regulation 999/2014**

7.310. Regulation 999/2014, which was adopted pursuant to the third expiry review, initiated on the basis of a request lodged on 28 March 2013[492], states that "the product concerned by this review is the same as the product defined in Regulation 661/2008".[493] The product under consideration was thus defined as:

> [S]olid fertilisers with an ammonium nitrate content exceeding 80% by weight, currently falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 20 and originating in Russia.[494]

7.311. Regulation 999/2014 also states that:

> It should be noted that the CN codes 3102 30 90 and 3102 40 90 (respectively, "ammonium nitrate other than in aqueous solutions" and "mixtures of ammonium nitrate with calcium carbonate or other inorganic non-fertilising substances, with a nitrogen content exceeding 28% by weight") *can include AN used for industrial purposes* (such as the production of explosives) [IGAN] *as well as AN used for agricultural purposes*. Both types have the same technical and chemical characteristics, can easily be interchangeable and are considered as the product concerned.[495]

7.312. Based on our examination of the history of the anti-dumping measures on AN from Russia, we note that the definition of the product concerned was significantly amended in 2005 in order to include "new product types". The definition was again altered in 2009, following the judgement of the Court of First Instance in order to exclude imports of stabilized AN from Kirovo from the product under consideration. These events affecting the product scope thus took place *before* Russia's accession to the WTO.

7.313. The alleged inclusion of IGAN in the product scope poses a different issue, since Regulation 999/2014 was the result of a review initiated *after* Russia's accession to the WTO. For the following reasons, however, we are not convinced by Russia's demonstration that the

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[489] Russia's first written submission, para. 491.
[490] By Regulation 989/2009, (Exhibit RUS-116).
[491] We note Russia's argument that the European Commission's refusal to exclude stabilized AN from the scope of the measures in the context of the third expiry review amounts to a "product scope determination". (Russia's second written submission, para. 744). We disagree with Russia that the events reflected at recitals 20 to 22 of Regulation 999/2014 amount to a re-examination of the product scope in the context of the third expiry review. As explained in these recitals, the representatives of Russian producers/exporters requested the exclusion of stabilized AN from the product scope of the review because the Court of First Instance of the European Union had annulled the Regulation expending the product scope to stabilized AN. In its response, the European Commission merely recalled that the judgement of the Court of First Instance in case T 348/05 "only … concerned one Russian exporting producer" (Kirovo) and that "[f]or all the other Russian producers, the applicable product scope *remains* the one specified in Regulation (EC) No 945/2005". (Regulation 999/2014, (Exhibit RUS-66). (emphasis added))
[492] Request for an Anti-Dumping Sunset Review (Article 11(2) of the Basic EC Anti-Dumping Regulation), Imports of Ammonium Nitrate (AN) Originating in Russia, (Exhibit EU-11).
[493] Regulation 999/2014, (Exhibit RUS-66), recital 44.
[494] Regulation 999/2014, (Exhibit RUS-66), recital 44.
[495] Regulation 999/2014, (Exhibit RUS-66), recital 46. (emphasis added)

European Union extended the scope of the product under investigation to IGAN in the context of the third expiry review.

7.314. In support of its claim that Regulation 999/2014 extended the product scope to include IGAN, Russia relies on the following statement contained in the regulation:

> It should be noted that the CN codes 3102 30 90 and 3102 40 90 … can include AN used for industrial purposes … as well as AN used for agricultural purposes.[496]

7.315. Russia argues that this statement amounts to an extension of the scope of the product under investigation because IGAN was not included in the scope of the product concerned in the original investigation.[497] Russia finds support for its claim that the original investigation was limited to agricultural grade ammonium nitrate in the following elements:

a. The definition of the product under consideration in Regulation 658/2002, and in particular the reference to "ammonium nitrate commonly used in agriculture."[498]

b. The fact that the original complainant was EFMA, a "European Fertilizer Manufacturer's Association representing the companies producing agricultural ammonium nitrate".[499]

c. The fact that Regulation 658/2002 specifies "farmers as the 'users of the product concerned'" and that Regulation 999/2014 analysed the Union interest with respect to farmers only. [500]

7.316. The European Union considers that the statement contained in Regulation 999/2014 does not change or expand the definition of the product concerned. Instead, it "simply clarifies that the product concerned can be used for industrial as well as agricultural purposes, and that in either case it is still the product concerned."[501]

7.317. In our view, the statement in recital 46 of Regulation 999/2014 that "CN codes 3102 30 90 and 3102 40 90 … can include AN used for industrial purposes"[502] merely describes the content of the CN codes. Further, we find that the arguments put forward by Russia do not support its claim: the facts that the original complainant was an association producing AN for agricultural use, or that farmers are the main users of the product, do not demonstrate that the investigating authority intended to limit the product under consideration to FGAN. As stated by the representatives of Russian exporters themselves, the "[[***]]"[503]: had it been the case, it would have been an indication that the authority intended to limit the product under consideration to certain sub-types of AN within the customs codes.

7.318. Like the European Union, we also note that, in March 2014, during the course of the third expiry review (i.e. before Regulation 999/2014 was published), the representatives of Russian exporters stated that the product concerned covered "[[***]]."[504] This indicates that, for the exporters of the product concerned, the product scope of the investigation already extended to ammonium nitrate, irrespective of its use. Accordingly, we conclude that there has been no re-examination, and consequently no extension, of the product scope in the 2014, "post-WTO" third expiry review.

7.319. We recall our conclusion above[505] that, by virtue of Article 18.3 of the Anti-Dumping Agreement, Russia is precluded from challenging a non-re-examined aspect of a determination made in investigations initiated before Russia's accession to the WTO. In the present

[496] Regulation 999/2014, (Exhibit RUS-66), recital 46.
[497] Russia's first written submission, paras. 537 and 546.
[498] Russia's first written submission, para. 546.
[499] Russia's first written submission, para. 547. (fn omitted)
[500] Russia's first written submission, para. 547 and fn 533.
[501] European Union's first written submission, para. 168.
[502] Regulation 999/2014, (Exhibit RUS-66), recital 46.
[503] RFPA submission (4 March 2014), (Exhibit RUS-82 (BCI)), p. 2.
[504] RFPA submission (4 March 2014), (Exhibit RUS-82 (BCI)), p. 3.
[505] See para. 7.293 above.

dispute, we are of the view that the product scope determination is a feature of the "original investigation" (a pre-WTO measure) which, if not subject to consideration on review by the investigating authority (post-WTO), is not subject to the Anti-Dumping Agreement. This is the case for the alleged product scope expansion in Regulation 945/2005: even if the European Union did in fact expand the product scope to include stabilized AN in that review, that determination cannot retroactively become subject to the provisions of the Anti-Dumping Agreement.

7.320. We thus agree with the European Union that the expansion of the product scope is covered by Article 18.3, which means that claim #1 must be rejected because the relevant provisions of the Anti-Dumping Agreement and the GATT 1994 do not apply. Further, we concluded above that there has been no re-examination, and consequently no expansion, of the product scope in the 2014, post-WTO review of the anti-dumping measures on ammonium nitrate.

7.321. 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"[506]. 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.

#### 7.7.2.3 Whether the European Union violated Article 11.3 by initiating the third expiry review on the basis of a petition which was not duly substantiated (claim #2)

##### 7.7.2.3.1 Introduction

7.322. Russia claims that the initiation of the expiry review was inconsistent with Article 11.3 of the Anti-Dumping Agreement on four independent grounds:

a. First, the expiry review request 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 Anti-Dumping Agreement.[507]

b. Second, the request was based on import data which did not exclude imports of stabilized AN from the Kirovo plant (a producer whose production of stabilized AN was normally excluded from the product scope). For Russia, the inclusion of imports of stabilized AN from Kirovo "infected" the data on the volume of imports from Russia.[508] Thus, the request submitted by Fertilizers Europe was supported by inaccurate, insufficient evidence.[509]

c. Third, the dumping margin calculations provided by Fertilizers Europe in support of its allegation of likelihood of continuation of dumping were based on a comparison between the cost of production outside the country of origin and export prices to third countries.[510]

d. Fourth, the request was based on an asymmetrical product coverage: "on the one hand, it relied on data about the state of the domestic industry manufacturing FGAN, and, on the other hand, it relied on data about the volume of Russian imports and dumping margin calculations with regard to FGAN, IGAN and Stabilised AN".[511] Thus, the evidence provided by Fertilizers Europe to support the initiation of the expiry review was not even-handed, accurate and sufficient for the initiation of the review, and thus, the request was not duly substantiated.[512]

[506] Russia's first written submission, para. 552.
[507] Russia's first written submission, para. 590; response to Panel question No. 34, para. 175.
[508] Russia's first written submission, para. 593.
[509] Russia's first written submission, para. 593; response to Panel question No. 34, para. 176.
[510] Russia's first written submission, paras. 599-605; response to Panel question No. 34, para. 177.
[511] Russia's first written submission, paras. 606-609; response to Panel question No. 34, para. 178.
[512] Russia's first written submission, para. 608.

7.323. The European Union submits that Russia's claim #2 should be rejected as far as it relates to a product scope which was determined prior to Russia's accession to the WTO (for the same reasons it advanced to reject Russia's claim #1).[513] Further, the European Union rejects the arguments put forward by Russia relating to the content of the petitioner's request, because it considers that Russia conflates the requirements for the initiation of original investigations with the requirements for the initiation of expiry reviews. According to the European Union, these two types of investigations differ:

a. While in an anti-dumping investigation, the authority must determine whether dumping existed during the period of investigation, the purpose of an expiry review is to determine if dumping would be likely to recur or continue if the measures were terminated.

b. The analysis to be conducted in an expiry review is, by nature, prospective and the type of evidence required to demonstrate likelihood of continuation or recurrence of dumping and injury varies with the facts and circumstances of the case.[514]

c. The evidentiary standard for the initiation of an expiry review differs from the standard for the initiation of an investigation[515]: the obligation, contained in Article 11.3 of the Anti-Dumping Agreement that the request should be duly substantiated, is less demanding that the obligation in Article 5.3 that the petition contain "sufficient evidence to justify the initiation of an investigation".[516] While the petitioner requesting the initiation of an investigation must provide evidence of dumping, injury and a causal link, the petitioner requesting an expiry review must "only" explain why the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.[517]

7.324. For the European Union, Russia also conflates what is required from an investigating authority in order to make determinations and what is required from a petitioner requesting a review. Contrary to the authority conducting the review, the petitioner requesting the initiation of an expiry review does not have to positively establish the likelihood of continuation or recurrence of dumping and injury, according to the European Union.[518] In the present case, the European Union asserts that the petitioners simply claimed that the measure that was in force, should be extended *in time*.[519]

#### 7.7.2.3.2 The applicable legal standard under Article 11.3 of the Anti-Dumping Agreement

7.325. The first issue before the Panel concerns the applicable legal standard for a request for an expiry review to be "duly substantiated" as stated in Article 11.3 of the Anti-Dumping Agreement.

7.326. In that regard, Russia refers[520] to the provisions of Article 12.3 of the Anti-Dumping Agreement, which states that the provisions of Article 12 (which deals *inter alia* with notices of initiation of anti-dumping investigations) "shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11".

7.327. Russia refers in particular to Article 12.1, which provides that:

> When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5 … public notice shall be given.

7.328. For Russia, this means that the initiation of an expiry review will be consistent with Article 11.3 if it is based on "sufficient evidence" in relation to the allegation of likelihood of recurrence of dumping and injury.[521]

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[513] European Union's first written submission, para. 130.
[514] European Union's first written submission, paras. 216 and 218.
[515] European Union's first written submission, para. 219.
[516] European Union's first written submission, paras. 220-221.
[517] European Union's first written submission, para. 223.
[518] European Union's first written submission, para. 228.
[519] European Union's comments on Russia's response to Panel question No. 89.
[520] Russia's first written submission, paras. 576-577.
[521] Russia's first written submission, para. 580.

7.329. In addition, Russia considers that Article 5.3 of the Anti-Dumping Agreement provides proper context for the interpretation of the terms "sufficient evidence" and "duly substantiated". Article 5.3 states:

> 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.

7.330. Russia explains that this provision has been interpreted as requesting panels to examine whether an objective and unbiased investigating authority could properly have determined that there was sufficient evidence of dumping, injury and causal link to initiate an investigation.[522]

7.331. The European Union agrees that requests for the initiation of an expiry review must provide evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The European Union also agrees that the investigating authority's decision to initiate the review must be unbiased and objective.[523] However, the European Union disagrees that the legal standard for initiating original investigations can be imported in the context of expiry review.[524] The European Union considers that:

a. The evidentiary standard for initiating an expiry review under Article 11.3 must be less demanding than the standard for initiating an original investigation under Article 5.3. This is because "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." [525]

b. This evidentiary standard, for the European Union is "sufficient evidence … to justify initiation", not "sufficient evidence to support a preliminary or final determination".[526] Based on the dictionary definition of the terms "duly" and "substantiate", the European Union argues that Article 11.3 requires "merely the provision of evidence in support of a finding of likelihood or recurrence or continuation of dumping and injury."[527] Accordingly, the European Union argues that it is the process of "reconsideration and examination", which can only take place during the expiry review proceedings (i.e. after initiation) which enables the authority to go beyond "plausibility" and make a reasoned conclusion of "probability".[528]

7.332. In *US – Carbon Steel* the Appellate Body noted that Article 21.3 of the SCM Agreement (the provision corresponding to Article 11.3 of the Anti-Dumping Agreement) does not contain a cross-reference to Article 11 of the SCM Agreement (which governs the initiation of original countervailing duty investigations).[529] We note that the same is true for the Anti-Dumping Agreement: Article 11.3 does not cross-reference Article 5, which is thus only applicable to the initiation of original investigations. As the panel in *US – Corrosion-Resistant Steel Sunset Review* explained:

> [C]ross-references [in the Anti-Dumping Agreement] indicate that, when the drafters intended to make a particular provision also applicable in a different context, they did so explicitly. Therefore, their failure to include a cross-reference in the text of Article 11.3, or, for that matter, in any other paragraph of Article 11, to Article 5.6 (or *vice versa*) demonstrates that they did not intend to make the evidentiary standards of Article 5.6 applicable to sunset reviews.[530]

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[522] Russia's first written submission, para. 584.
[523] European Union's first written submission, para. 213.
[524] European Union's first written submission, para. 215.
[525] European Union's first written submission, para. 220; second written submission, para. 85; and comments on Russia's response to Panel question No. 91.
[526] European Union's response to Panel question No. 88, para. 51.
[527] European Union's first written submission, para. 221. See also European Union's response to Panel question No. 88, para. 55.
[528] European Union's response to Panel question No. 88, para. 52.
[529] Appellate Body Report, *US – Carbon Steel*, paras. 108-109.
[530] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.27.

7.333. We agree with this line of reasoning. The absence of any cross-reference in Article 11.3 to Article 5.3 must be understood to imply that the standard for the initiation of an expiry review is different from the standard required for the initiation of an original investigation, and that the standard in Article 5.3 of the Anti-Dumping Agreement does not apply to an expiry review. We also agree that it follows from a plain reading of the text that the appropriate standard against which to determine whether an expiry review has been properly initiated under Article 11.3 of the Anti-Dumping Agreement is whether the complainant has provided sufficient evidence that dumping and injury are likely to recur in the absence of anti-dumping measures to warrant initiation. The request is not required to demonstrate, as a certainty, that if the measures were to lapse, dumping and injury would be likely to recur or continue.

7.334. With this standard in mind, we now turn to address the merits of the four arguments made by Russia in support of its claim.

#### 7.7.2.3.3 Whether the European Union wrongfully accepted a request for the initiation of an expiry review aimed at extending the scope of the products covered by the anti-dumping measures to stabilized AN and IGAN despite never conducting an original investigation or making prior dumping or injury determinations in relation to these two products

7.335. First, Russia asserts that the petition contained a request to extend the product scope of the expiry review to products not falling within the product scope of the original investigation.[531] 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[532], 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."[533]

7.336. We note however that Russia has not provided any evidence that the petition sought an extension of the scope of the products covered by the measure to include stabilized AN and IGAN, nor that the European Commission accepted such a request for extension.[534] In fact, the relevant sections of the expiry review request make clear 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.[535]

7.337. Second, Russia argues that the European Commission decided to initiate the third expiry review on the basis of product types (stabilized AN and IGAN) which were never the subject of dumping and injury determinations in prior proceedings.

7.338. However, as already noted in Section 7.7.2.2.1 (d) of this Report, "the product concerned by [the third expiry] review is the same as the product defined in Regulation (EC) No 661/2008".[536] We have also found above that even if the European Union did in fact expand the product scope to include stabilized AN in a past review, that determination cannot retroactively become subject to the provisions of the Anti-Dumping Agreement. Accordingly, the European Commission's decision to initiate the third expiry review on the basis of the same product scope as the one defined before Russia's accession to the WTO, when the Anti-Dumping Agreement did not apply, cannot now be impugned under the Anti-Dumping Agreement.

7.339. We 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 European Commission's reliance on the product definition used in the 2008 review.

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[531] Russia's first written submission, paras. 590-591: "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 stabilised AN and IGAN."

[532] Russia's response to Panel question No. 89, para. 106.

[533] Russia's response to Panel question No. 89, para. 107. (emphasis added)

[534] In response to question 34 of the Panel, which asked Russia to point to precise elements on the record, Russia simply restated its argument, but failed to provide evidence that an extension of the product scope was requested.

[535] European Union's first written submission, paras. 231-232 (referring to Request for an Anti-Dumping Sunset Review (Article 11(2) of the Basic EC Anti-Dumping Regulation), Imports of Ammonium Nitrate (AN) Originating in Russia, (Exhibit EU-11)).

[536] Notice of initiation, (Exhibit RUS-48), section 2; Regulation 999/2014, (Exhibit RUS-66), recital 44.

#### 7.7.2.3.4 Whether the European Union wrongfully accepted a request for review based on evidence of imports of stabilized AN from Kirovo

7.340. Russia alleges that the petition included data on imports of stabilized AN produced by Kirovo, even though stabilized AN from the Kirovo plant was excluded from the product concerned.[537] Russia argues that the inclusion of imports from Kirovo in the review request led to a volume of imports which "overestimated the volume of Russian FGAN imports 4 time."[538] For Russia, interested parties are "required to exclude non-dumped imports from a request to initiate an expiry review. Otherwise, the evidence presented by an applicant would neither be accurate, nor adequate".[539]

7.341. The European Union "agrees that those exports are not within the product concerned, and that they are therefore not directly relevant evidence in the sense that they do not form part of the Russian exports to the EU of the product concerned".[540] However, for the European Union, Russia has not demonstrated that, as a matter of fact, the import statistics used in the request for an expiry review included imports from the Kirovo plant.[541] In addition, the European Union submits that a petitioner cannot be requested to provide information which is not publicly available: in the present case, the European Union states that the publicly available data on imports of AN into the European Union does not distinguish imports by exporter/company.[542] More generally, the European Union considers that:

> To require expiry review requests to be flawless (e.g. free of any surplus material, free of any deficiencies, providing complete evidence necessary to demonstrate the likelihood of recurrence) would be inconsistent with Article 11.3, because it would impose on initiation requests a standard that, at best, applies to the authority's final determination.[543]

7.342. We agree with Russia that exports of stabilized AN from Kirovo are not within the product concerned, and as such, are not directly relevant as evidence in the third expiry review. We are also concerned that, in view of the import volumes cited by Russia, the inclusion of imports of stabilized AN from Kirovo may have artificially increased the volume of imports estimated by the complainant in its request for review. We note however that the notice of initiation does not refer to the volume of imports prior to the period of review as a basis for initiation of the expiry review. The notice of initiation merely refers to the likely increase in imports of the product concerned should the measures lapse.[544] Given that stabilized AN from Kirovo did not fall within the product concerned, the statement in the notice of initiation suggests that the European Commission did not, in fact, rely upon the data on exports of stabilized AN from Kirovo included in the petition. Indeed, the European Union states that the European Commission "did not rely on this data as such to initiate the expiry review and that, unlike Fertilizers Europe, the Commission was in a position to separate out any data on Stabilised AN, because it has access to more detailed customs information."[545] Russia does not point to any evidence on the record showing that the European Commission did not separate imports of stabilized AN from Kirovo from the other imports, and that it actually relied on the volume of imports stated in the petition.

7.343. We 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.

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[537] Case T 348/05 (10 September 2008), (Exhibit RUS-73), paras. 9-13 and 23-24; Case T 348/05 (9 July 2019), (Exhibit RUS-74).
[538] Russia's first written submission, para. 607; second written submission, para. 831. We understand Russia to mean that the actual volume of Russian FGAN imports was only one fourth of the volume reflected in the petition.
[539] Russia's second written submission, para. 832.
[540] European Union's response to Panel question No. 90, para. 60.
[541] European Union's first written submission, para. 235.
[542] European Union's first written submission, para. 236. See also European Union's response to Panel question No. 90, paras. 64-67.
[543] European Union's response to Panel question No. 90, para. 62.
[544] Notice of initiation, (Exhibit RUS-48), section 4.2.
[545] European Union's response to Panel question No. 90, para. 68.

#### 7.7.2.3.5 Whether the European Union erred when it accepted the dumping margin calculations provided by the domestic industry in support of its allegation of likelihood of continuation of dumping

7.344. Russia asserts that the request for the initiation of the expiry review was not duly substantiated because it was based on allegations of likelihood of continuation of dumping, which relied on a margin of dumping that was determined in a manner inconsistent with Article 2 of the Anti-Dumping Agreement. Russia maintains in particular that the alleged margin of dumping was based on (i) a constructed normal value calculated using a cost for gas which was not the cost of production "in the country of origin", and (ii) a comparison of the constructed normal value with the export price of the Russian AN when sold for export to Brazil, not to the European Union.[546] According to Russia, the European Commission decided to initiate the expiry review on the basis of this information although "an unbiased and objective investigating authority, evaluating this evidence would have never determined that the expiry of the duty would be likely to lead to continuation or recurrence of dumping".[547]

7.345. We note that the notice of initiation of the third expiry review refers to the margin of dumping calculated by the applicant as supporting its allegation that dumping was likely to recur should the measures lapse. The notice of initiation states:

> [T]he allegation of likelihood of continuation of dumping is based on a comparison of a constructed normal value, based on manufacturing costs in Russia, with the exception of the input price for natural gas, which is based on the gas price for delivery at Waidhaus (DE), adjusted for transport costs., and the selling, general and administrative costs (SG&A) and normal profit, which were based on data from the United States of America, with the export price (at ex-works level) of the product under review when sold for export to the Union.
>
> In addition, the constructed normal value was also compared with the export price (at ex-works level) of the product under review when sold for export to Brazil, the main export market for fertilisers from Russia …
>
> On the basis of the above comparisons, which show dumping, the applicant alleges that there is a likelihood of continuation of dumping from Russia. Calculations are based on the export price net of the anti-dumping duty. The Commission, when verifying the calculations, has taken due account of the existence of a price undertaking. [548]

7.346. In view of the information provided by the notice of initiation, we therefore agree with Russia that the European Commission accepted as evidence of "dumping" and "likelihood of recurrence of dumping" the calculation made by the petitioners. This calculation was based on evidence which is not contested by Russia in the present dispute: the manufacturing costs for the like product in Russia, estimates of SG&A and profit, as well as the ex-works export price of ammonium nitrate when sold for export to the European Union. In addition, contrary to what Russia argues[549], the normal value was compared with the export price of the Russian AN when sold for export to the European Union (in addition to the export price to Brazil).

7.347. The only element of the constructed normal value which is contested by Russia is the adjustment made for the cost of gas, because "Article 2.2 of the Anti-Dumping Agreement mandatorily requires the constructed normal value to be based on "the cost of production in the country of origin"'.[550] The notice of initiation indicates that the European Commission "verified the calculations" and "took account" of the existence of a price undertaking. It does not indicate whether in its "verification of the calculations", the European Commission ensured that the cost of production used in the construction of the normal value was the cost of production in the country of origin.

7.348. As explained above, the correct legal standard against which the Panel should judge Russia's claim is whether the petition contained sufficient evidence of a likelihood of recurrence of dumping,

[546] Russia's first written submission, paras. 600-604.
[547] Russia's first written submission, para. 599 (quoting the Notice of initiation, (Exhibit RUS-48)).
[548] Notice of initiation, (Exhibit RUS-48), section 4.1.
[549] Russia's first written submission, para. 601.
[550] Russia's first written submission, para. 602.

should the measures lapse, for an expiry review to be initiated. We are of the view that the phrase "duly substantiated" imposes a high evidentiary standard on petitioners and on investigating authorities at the initiation stage. The evidentiary standard required at the initiation stage cannot be the same, however, as the evidentiary standard required to make a determination of likelihood of recurrence of dumping: it is only by conducting its review that an authority will be able to collect and verify the evidence necessary to support its determination. In contrast, a petition must only contain evidence necessary to support the initiation of the review and the quality of this evidence will necessarily be limited by the petitioner's ability to have access to the relevant information. In assessing whether the petition is duly substantiated, the investigating authority must ensure however that the evidence put forward by the petitioners is consistent with the information available to them at the time the petition is filed: this may include assumptions or reliance on estimates and proxies, which would not be considered as a reasonable basis for a final determination consistent with Article 11.3 of the Anti-Dumping Agreement. We also take the view that, if the authority chooses to rely on assumptions made by the applicant, it must explain why such assumptions substantiate the initiation of an expiry review. In the third expiry review on ammonium nitrate, we consider that the notice of initiation fell short of providing such an explanation by failing to indicate that the normal value constructed by the applicant and "verified" by the European Commission, was based on the cost of production in the country of origin.

7.349. Accordingly, we find that the European Union breached Article 11.3 of the Anti-Dumping Agreement by failing to verify whether the constructed normal value included in the request was based on the cost of production in the country of origin, and, as a consequence, by failing to ensure that the review request was duly substantiated.

#### 7.7.2.3.6 Whether the European Union acted contrary to Article 11.3 of the Anti-Dumping Agreement by initiating the expiry review based on a request for review that analysed indicators of the domestic industry manufacturing FGAN, on the one hand, and Russian imports of FGAN, IGAN and stabilized AN on the other hand

7.350. Russia argues that the request to initiate an expiry review was based on data from the domestic industry covering only producers of FGAN, while information on imports from Russia covered not only FGAN, but also IGAN and stabilized AN: Russia alleges in particular that the import volume used in the petition included stabilized AN from the Kirovo plant.[551]

7.351. Russia relies on a letter dated 4 March 2014[552] which indicates that the risk of an asymmetrical product mix was raised by Russian exporters during the investigation:

> [T]he definition of the "like product" advanced by the applicant in the application as well as in the questionnaire responses of the sampled Union producers is manifestly wrong as it covers only fertilizer grade ammonium nitrate (FGAN) while the product concerned currently covers both, FGAN and explosive grade ammonium nitrate (EGAN) …
>
> [T]he list of known producers in the application and the resulting definition of the Union industry manifestly excludes [certain] EU EGAN producers. And since the Union industry indicators and consumption are calculated for the Union FGAN industry, they exclude by definition data relating to EU production of EGAN. [553]

7.352. Accordingly, Russia submits that the request for initiation of the review was neither even-handed, accurate, nor sufficient.

7.353. The European Union responds that "the expiry review request concerned the same product scope as the existing measure, which includes both IGAN and stabilised AN (to the extent of its

[551] 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.

[552] Russia's first written submission, fn 556 (referring to RFPA submission (4 March 2014), (Exhibit RUS-82 (BCI)).

[553] RFPA submission (4 March 2014), (Exhibit RUS-82 (BCI)), p. 3.

AN content)".[554] Further, the European Union refers to the text of Regulation 999/2014 which indicates that:

> [T]he applicant and the supporters of the request are producers of FGAN as well as of other products covered by this expiry review. Therefore, the request was not supported only by FGAN producers, but also by producers of other types of the product concerned …[.][555]

7.354. For the European Union, Russia does not demonstrate that the data provided by the EU domestic industry in the petition covered only FGAN, nor that the data used to assess Russian imports included imports of stabilized AN from Kirovo. The European Union submits that, in any event, "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 in every respect." [556]

7.355. In view of the evidence on the record, we are not persuaded by Russia's claim that the expiry review was initiated on the basis of an asymmetrical product mix. We note for example that the same letter of 4 March 2014 from Russian exporters requested that the investigating authority ask the applicant to separate domestic industry data concerning FGAN and stabilized AN:

> Thus, the sampled EU producers should re-submit their questionnaire responses identifying separately their performance for the products that are (a) like AN imported from Russia, and (b) like Stabilized AN imported from Russia*. For the time being, the sampled EU producers and the applicant overall comingle the two* by alleging that imported Stabilized AN is like AN manufactured in the EU, but this is illegal pursuant to the General Court judgment which found the two to be unlike.[557]

7.356. This seems to indicate that the applicant did not distinguish between different types of AN in its questionnaire response. In fact, the notice of initiation does include stabilized AN in the scope of the "product under review"[558] and does not indicate that the like product should be defined otherwise.

7.357. We therefore reject Russia's claim that the European Union violated Article 11.3 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.

#### 7.7.2.3.7 Conclusion on Russia's claim #2

7.358. In view of the foregoing, we find that the European Union breached Article 11.3 of the Anti-Dumping Agreement by failing to indicate in the notice of initiation whether the dumping calculation included in the request was based on the cost of production in the country of origin. We reject the other arguments presented by Russia in support of claim #2.

### 7.7.3 Russia's claims with respect to the establishment of the likelihood of recurrence of injury (claims #5 to #8)

#### 7.7.3.1 Introduction

7.359. Russia makes a series of claims regarding the likelihood of recurrence of injury determination made by the European Commission in the third expiry review on ammonium nitrate.[559] According to Russia, the analysis and the determination reached by the European Commission are inconsistent with Article 11.3 and various provisions of Articles 3 and 4 of the Anti-Dumping Agreement.

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[554] European Union's second written submission, para. 87.
[555] European Union's first written submission, paras. 249 and 268 (quoting Regulation 999/2014, (Exhibit RUS-66), recital 7).
[556] European Union's first written submission, para. 251.
[557] RFPA submission (4 March 2014), (Exhibit RUS-82 (BCI)), p. 5. (emphasis added)
[558] Notice of initiation, (Exhibit RUS-48), section 2.
[559] Regulation 999/2014, (Exhibit RUS-66).

7.360. Russia's claims #5 to #8 related to the likelihood of recurrence of injury determination are the following:

a. Russia claims that the European Union breached Articles 11.3, 3.1 and 3.2 of the Anti-Dumping Agreement by failing to perform proper undercutting calculations[560] (claim #5);

b. Russia claims that the European Union violated Articles 11.3, 3.1, 3.4 and 4.1 of the Anti-Dumping Agreement, by basing its likelihood of recurrence of injury determination (i) on data relating to a non-representative sample of the domestic industry; (ii) on the incomplete, non-representative and erroneous data provided by the sampled EU companies; and (iii) by failing to examine and explain the divergent economic performance between the sampled and non-sampled EU domestic producers[561] (claim #6);

c. Russia claims that the European Union violated Articles 11.3 and 3.1 of the Anti-Dumping Agreement by erroneously concluding that there were no indications that the non-injurious situation of the EU industry would be sustainable[562] (claim #7);

d. Russia claims that the European Union violated Articles 11.3 and 3.1 of the Anti-Dumping Agreement by not basing its likelihood of recurrence of injury determination on positive evidence and an objective examination of the relevant factors[563] (claim #8).

7.361. Before turning to the substance of these four claims, we note that the European Union makes two arguments regarding:

a. Whether we should make findings and recommendations with regard to the likelihood of recurrence of injury determination made by the European Union in Regulation 999/2014, in view of the more recent likelihood of recurrence of injury determination in Regulation 1722/2018;

b. The legal standard applicable to the Panel's examination of Russia's claims #5 to #8.

7.362. We examine these two arguments in turn.

#### 7.7.3.2 Whether certain claims presented by Russia should be disregarded by the Panel because Regulation 1722/2018 replaced and updated Regulation 999/2014

7.363. The European Union makes two arguments about the measure at issue.

7.364. First, the European Union submits that Russia's claims #5 to #8 (concerning the determination of the likelihood of recurrence of injury) do not extend to Regulation 1722/2018, and pertain only to Regulation 999/2014.[564] We understand Russia to have confirmed this to be the case.[565]

7.365. Second, the European Union argues that Russia's claims concerning the determination of the likelihood of recurrence of injury in Regulation 999/2014 should be disregarded because a more recent determination of the likelihood of recurrence of injury was made in 2018.[566] The European Union asks the Panel not to make recommendations with regard to Regulation 999/2014, because the analysis it contains has been updated and replaced by the analysis of likelihood of recurrence of injury contained in Regulation 1722/2018. The European Union also asks the Panel not to make findings or recommendations regarding Regulation 1722/2018 "given that Russia has

[560] Russia's first written submission, paras. 922-955.
[561] Russia's first written submission, paras. 956-998.
[562] Russia's first written submission, paras. 999-1024.
[563] Russia's first written submission, paras. 1025-1084.
[564] European Union's second written submission, para. 124.
[565] Russia's response to Panel question No. 40, paras. 201 and 202.
[566] European Union's first written submission, para. 453; second written submission, para. 124.

not made any claims or arguments with regard to the conduct of the likelihood of recurrence of injury determination in Regulation 2018".[567]

7.366. We start by noting that both parties agree that Regulation 999/2014 is still in force.[568] We also recall that both Regulation 999/2014 and Regulation 1722/2018 are within the terms of reference of this Panel.[569]

7.367. In our preliminary ruling, we described the relationship between Regulation 999/2014 and Regulation 2018/1722 as follows:

> Regulation 2018/1722 came into force after the establishment of the Panel, but shortly before the composition of the Panel. 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. 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.[570]

7.368. The partial interim review which led to Regulation 2018/1722 was initiated on 17 August 2017 and was limited in scope to the examination of injury.[571] In line with Article 11(3) of the European Basic AD Regulation, the European Commission "examined whether the circumstances on the basis of which the current measures were established ha[d] changed and whether such change was of a lasting nature."[572] The focus of the interim review was therefore on the "lasting changes" claimed by the petitioners to have materialized, namely: an increased level of concentration of the Union industry producing the like product due to "numerous mergers and acquisitions"[573]; a decrease in the price of gas[574]; as well as "global market changes" in the ammonium nitrate market.[575] As part of its interim review, the European Commission conducted an analysis of the situation of the Union industry and concluded that "the Union industry [did] not suffer material injury within the meaning of Article 3(5) of the basic Regulation, although it [was] not as healthy as in the last expiry review …".[576]

7.369. In parallel to the partial interim review, the European Commission *also* conducted an analysis of the likelihood of recurrence of injury. This analysis can be found in Section 6 of Regulation 2018/1722 and assesses "what would be likely to happen to the Union industry's situation if measures were terminated".[577] As part of this likelihood of recurrence of injury analysis, the European Commission examined the following elements (i) the available spare capacity in Russia; (ii) the behaviour of Russian exporters on third country markets; (iii) the likely future evolution of Russian export prices; and (iv) the attractiveness of the Union market. The European Commission concluded that "there [was] a likelihood of recurrence of injury should the measures be removed."[578]

7.370. The likelihood of recurrence of injury analysis conducted by the European Commission in the context *of the third expiry review* thus covers the same subject matter as the analysis in Regulation 2018/1722. In the third expiry review the European Commission examined (i) the

[567] European Union's second written submission, para. 125. See also European Union's response to Panel question No. 86.
[568] European Union's response to Panel question No. 38, para. 113: "the European Union confirms that Regulation 999/2014 is still in force. It concerns an expiry review, which confirmed the likelihood of recurrence of dumping and injury. It applies for five years."
[569] Preliminary ruling of the Panel, para. 4.15.
[570] Preliminary ruling of the Panel, para. 4.12. (fns omitted)
[571] Regulation 2018/1722, (Exhibit RUS-96), recital 13. Article 11(3) of the Basic AD Regulation is the provision governing interim reviews. We also note that recital 14 indicates that "[o]n the same day, the Commission announced … the initiation of another partial review of the anti-dumping measures applicable to imports of ammonium nitrate originating in Russia, limited to the examination of dumping pursuant to Article 11(3) of the basic Regulation."
[572] Regulation 2018/1722, (Exhibit RUS-96), recital 46.
[573] Regulation 2018/1722, (Exhibit RUS-96), recital 47.
[574] Regulation 2018/1722, (Exhibit RUS-96), recital 62.
[575] Regulation 2018/1722, (Exhibit RUS-96), recital 70.
[576] Regulation 2018/1722, (Exhibit RUS-96), recital 130.
[577] Regulation 2018/1722, (Exhibit RUS-96), recital 131.
[578] Regulation 2018/1722, (Exhibit RUS-96), recital 167.

situation of the Union market, including the situation of the Union industry; (ii) the spare capacity, trade flows, attractiveness of the Union market and pricing behaviour of Russian exporting producers; and (iii) the impact of the projected volume of imports and price effects in case of repeal of the measures.

7.371. In view of the respective determinations made in Regulations 999/2014 and 2018/1722, which cover the same product and, in part, the same subject matter (whether injury is likely to recur should the anti-dumping measures lapse), we agree with the European Union that the adoption of Regulation 2018/1722, "updated" the likelihood of recurrence of injury determination made in the third expiry review.[579] We note however that Regulation 2018/1722 is not an expiry review within the meaning of Article 11.3 of the Anti-Dumping Agreement and thus does not "replace" entirely Regulation 999/2014, which is still in force. As noted by Russia:

> It cannot be argued that Regulation 2018/1722 replaced the likelihood-of-injury and likelihood-of-dumping determinations in Regulation 999/2014, insofar as the purpose and legal effects of Regulation 2018/1722 are different from those foreseen under Article 11.3 of the AD Agreement. In practical terms, this means that the decision to extend the duty on Russian AN is still based on the likelihood-of-dumping and likelihood-of-injury determinations contained in Regulation 999/2014.
>
> Regulation 2018/1722 only amended "Article 1(2) of Commission Implementing Regulation (EU) No 999/2014". Regulation 2018/1722 therefore only amended "[t]he rate of the definitive anti-dumping duty", whereas all other findings and determinations in Regulation 999/2014 are unaffected by Regulation 2018/1722.[580]

7.372. We agree with Russia that Regulation 999/2014 contains the last expiry review on ammonium nitrate and that, although the analysis of likelihood of recurrence of injury was updated during the partial interim review, that Regulation still has legal effects. We therefore find it appropriate to make findings with regard to Russia's claims concerning Regulation 999/2014.

7.373. Regarding the recommendations to be made by the Panel in this dispute, Article 19.1 of the DSU provides that:

> [W]here a panel … concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.[581]

7.374. Despite Article 19.1, the panel in *India – Iron and Steel Products* noted that:

> [P]anels generally refrain from making recommendations on measures found to be inconsistent with provisions of the covered agreements when these measures are no longer in existence. Having said that, to the extent that an expired measure may continue to have an effect on the operation of a covered agreement, it would be appropriate for a panel to provide recommendations with regard to the measures at issue.[582]

7.375. We recall that, in the present case, the European Union *does not argue* that Regulation 999/2014 is no longer in existence. Its argument is that the Panel should not make a recommendation with regard to the determinations contained in Regulation 999/2014, because they were later "updated" in Regulation 2018/1722. We agree with past panels that, in considering whether to make a recommendation under Article 19 of the DSU, we must take into account relevant amendments and other relevant developments relating to the measure at issue.[583] Therefore, should we find that the European Commission's likelihood of recurrence of injury determination in Regulation 999/2014 is inconsistent with the Anti-Dumping Agreement, we would, before making

[579] European Union's second written submission, para. 125.
[580] Russia's response to Panel question No. 86, paras. 100 and 102.
[581] Fns omitted.
[582] Panel Report, *India – Iron and Steel Products,* para. 7.27. (fns omitted)
[583] Panel Report, *Russia – Tariff Treatment*, para. 7.85.

recommendations as instructed by Article 19.1 of the DSU, examine to what extent the adoption of Regulation 2018/1722, affects our ability to do so.

7.376. We now turn to the question of the legal standard applicable to our examination of Russia's claims concerning the EU's likelihood of recurrence of injury determination.

#### 7.7.3.3 The relevant legal standard for the Panel's examination of Russia's claims relating to the likelihood of recurrence of injury determination

7.377. In its claims #5 to #8, Russia asks the Panel to make findings under Article 11.3 and Article 3 of the Anti-Dumping Agreement. In claim #6 Russia also asks the Panel to make a finding under Article 4.1 of the Anti-Dumping Agreement. The European Union asks the Panel to reject claims made on the basis of Article 3, because Article 11.3 is the only provision applicable to expiry reviews.[584] We thus begin our analysis of Russia's claims #5 to #8 by recalling the legal standard applicable to a panel's examination of an authority's determination of likelihood of recurrence of injury.

7.378. We recall first that a likelihood-of-injury determination in an expiry review requires that an investigating authority review whether the expiry of the anti-dumping measures in force would be likely to lead to continuation or recurrence of injury. This determination is different from a determination of injury in an original investigation, which requires that investigating authorities determine whether the domestic industry experienced material injury or a threat of material injury in the period covered by the original investigation, in the sense of Article 3 of the Anti-Dumping Agreement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body recalled the nature of the analysis to be undertaken in an expiry review and distinguished it from the analysis to be undertaken in an original investigation:

> The likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated. In considering the nature of a likelihood determination in a sunset review under Article 11.3, we recall our statement in *US – Carbon Steel*, in the context of the SCM Agreement, that:
>
> > … original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation.
>
> This observation applies also to original investigations and sunset reviews under the Anti-Dumping Agreement. In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*.[585]

7.379. The panel in *EU – Footwear* came to a similar conclusion and insisted on the need to take account of the fact that, in an expiry review, "an anti-dumping measure has been in place for some time":

> In original anti-dumping investigations, investigating authorities must determine whether the domestic industry of a Member is materially injured by dumped imports. At this stage, the focus is on the existence of "material injury" at the time of the determination. That determination is made under Article 3, based on information concerning the necessary and relevant factors for some previous period. In contrast, in an expiry review, an anti-dumping measure has been in place for some time, and

[584] European Union's response to the Panel question No. 44, para. 135. We do not understand the European Union to argue, however, that the provisions of Article 4 ("Definition of the Domestic Industry") do not apply in the context of expiry reviews.

[585] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* paras. 105-107. (fns omitted)

> investigating authorities must, based on a fresh analysis, determine whether the expiry of that measure would be likely to lead to continuation or recurrence of injury.[586]

7.380. Thus, previous panels and the Appellate Body have found that, if the requirements of Article 3 of the Anti-Dumping Agreement apply to the determination of injury in the context of an original investigation, they do not apply directly in the context of an expiry review. In this regard, the Appellate Body stated clearly in *US – Oil Country Tubular Goods Sunset Review* that "investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination".[587]

7.381. While we agree with these past panel and Appellate Body rulings on this issue, we are also mindful that the provisions of Article 3 of the Anti-Dumping Agreement, although not directly applicable, may be relevant to our interpretation of the obligations contained in Article 11.3. We find particularly relevant that the Appellate Body stated:

> This is not to say, however, that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in the paragraphs of Article 3. Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a "reasoned conclusion". In this respect, we are of the view 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. It seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination. But the necessity of conducting such an analysis in a given case results from the requirement imposed by Article *11.3* -not Article 3- that a likelihood-of-injury determination rest on a "sufficient factual basis" that allows the agency to draw "reasoned and adequate conclusions".[588]

7.382. We also recall the statement of the panel in *EU – Footwear (China)* that:

> In our view, a failure to examine relevant factors set out in the substantive provisions of Article 3 in the determination of likelihood of continuation or recurrence of injury could preclude an investigating authority from reaching a "reasoned conclusion", which would result in a violation of Article 11.3 of the AD Agreement. However, we recall that a determination of injury under Article 3 is not required under Article 11.3. Thus, we do not consider that all factors relevant to an injury determination under Article 3 are necessarily relevant to a determination of likelihood of continuation or recurrence of injury under Article 11.3.[589]

7.383. 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. As a consequence, we reject Russia's claim related to the consistency of the European Union's likelihood of recurrence of injury determination with Article 3 of the Anti-Dumping Agreement. Instead, we will examine the determinations made by the European Commission in light of the obligations contained in Article 11.3 of the Anti-Dumping Agreement. In doing so, we will refer to the provisions of Article 3 as context, as necessary and depending upon the nature of the determinations made by the European Commission, for interpreting the obligations contained in Article 11.3.

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[586] Panel Report, *EU – Footwear (China)*, para. 7.329.

[587] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review,* para. 280. The European Union also cites the panel report in the same case, which states that "the obligations set out in Article 3 do not normally apply to sunset reviews." (European Union's first written submission, para. 456).

[588] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 284.

[589] Panel Report, *EU – Footwear (China)*, para. 7.333.

### 7.7.3.4 Whether the European Union erred by failing to perform proper undercutting calculations (claim #5)

#### 7.7.3.4.1 Introduction

7.384. Russia claims that, in the context of the third expiry review, the European Commission carried out undercutting calculations in a manner inconsistent with the provisions of Articles 3.1, 3.2 and 11.3 of the Anti-Dumping Agreement.[590] Specifically, Russia submits that Regulation 999/2014 contains:

a. a comparison between the average Russian CIF export prices to the EU and the average ex-works prices of the sampled EU domestic producers[591]; and

b. a comparison between the Russian average ex-works export prices to third countries, with the sampled EU domestic producers' ex-works sales prices.[592]

7.385. For Russia, these comparisons are the basis for the authority's conclusions that:

a. a surge of [Russian] imports in significant quantities at *undercutting* prices will exert a strong pressure on the industry's sales prices and cause it to lose significant market share[593]; and

b. Russian AN would be exported to the Union market in significant volumes and at an injurious price level.[594]

7.386. Russia therefore claims that the following deficiencies in the European Commission's undercutting calculations violate Articles 3.1, 3.2 and 11.3:

a. the European Commission disregarded the prices of two Russian exporters subject to price undertakings[595];

b. the European Commission disregarded the import price of stabilized AN from Russia[596];

c. the European Commission disregarded the prices of a non-sampled cooperating Russian producer/exporter (OJSC Kuybyshevazot), which sold at prices which did not undercut the price of EU domestic producers[597]; and

d. the European Commission did not examine whether the allegedly dumped imports from Russia had "explanatory force" for the significant depression or suppression of domestic prices.[598]

7.387. In addition, with regard to the comparison between the price of Russian exports to third countries and EU domestic prices, Russia alleges that:

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[590] Russia's first written submission, para. 935.
[591] Regulation 999/2014, (Exhibit RUS-66), recital 112: "[b]y comparing the average Russian CIF export prices to the Union with the average ex-works price of the Union producers during the RIP, it appears that the Russian prices are undercutting the Union prices." See also Russia's first written submission, para. 936.
[592] Regulation 999/2014, (Exhibit RUS-66), recital 160: "during the RIP, Russian export prices to third countries were on average … or 34% lower than the current average price at which Union producers sell in the Union." See also Russia's first written submission, para. 936.
[593] Russia's first written submission, para. 935 (quoting Regulation 999/2014, (Exhibit RUS-66), recital 169).
[594] Russia's first written submission, para. 935 (quoting Regulation 999/2014, (Exhibit RUS-66), recital 166).
[595] Russia's first written submission, para. 940.
[596] Russia's first written submission, para. 942.
[597] Russia's first written submission, para. 943.
[598] Russia's first written submission, para. 944.

a. the European Commission failed to consider whether there had been a significant price undercutting by the dumped imports, as compared with the prices of the EU domestic industry[599]; and

b. finally, the European Commission did not consider whether adjustments were necessary in order to ensure that the price undercutting analysis was objective[600]. Adjustments requested and documented by the representatives of Russian producers/exporters were simply disregarded.[601]

7.388. The European Union responds that Article 11.3 does not impose any particular methodology for analysing the likelihood that injury would recur after anti-dumping measures expire. For the European Union, an investigating authority is not obliged to carry out price undercutting calculations in the sense of Article 3 of the Anti-Dumping Agreement. In the context of the third expiry review, the European Commission "assessed what the potential impact of the Russian exports to the Union market and on the Union industry would be if the measures in force were allowed to lapse".[602] The European Union insists that its analysis did not include a price undercutting calculation because "almost all exporting producers which sold the product concerned during the review investigation period had price undertakings" which could "not be considered as a reliable indicator in order to carry out a reliable and meaningful undercutting calculation".[603] Instead, the authority made a "forward-looking analysis"[604] of the likely diversion of trade flows[605] and of the likely prices of additional Russian exports to the Union[606], should the anti-dumping measures lapse. Such a "forward-looking" analysis "does not require the demonstration that *dumped imports* have explanatory force for *price effects*".[607] In general, the European Union submits that its price analysis was based on positive evidence, "namely the export prices of Russian producers to third countries"[608] and supported the Commission's "reasoned conclusions."[609]

#### 7.7.3.4.2 Analysis

7.389. We recall that the measure at issue is Regulation 999/2014, which sets out the results of the third expiry review conducted by the European Union under its domestic legislation implementing Article 11 of the Anti-Dumping Agreement. There is no dispute between the parties that Article 11.3 of the Anti-Dumping Agreement is specifically concerned with such reviews. In contrast, the European Union has asked us, and we have agreed, to reject Russia's claims under Article 3 of the Anti-Dumping Agreement, because this provision is not directly applicable in the context of an expiry review. Having set out above the legal standard for our review of Russia's claims under Article 11.3, we now turn to examining the arguments of the parties.

7.390. In view of the parties' submissions before the Panel, we note that they disagree:

a. on the *nature* of the analysis carried out by the European Commission in the context of the third expiry review (whether an undercutting calculation was used to support the likelihood of recurrence of injury determination); and

b. on whether the price analysis conducted by the European Commission is consistent with Article 11.3 of the Anti-Dumping Agreement.

7.391. We start by setting out the arguments of the parties on these two issues, before turning to our analysis of the determination reached by the investigating authority.

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[599] Russia's first written submission, para. 948.
[600] Russia's first written submission, para. 949.
[601] Russia's first written submission, para. 950.
[602] European Union's first written submission, para. 459 (referring to Regulation 999/2014, (Exhibit RUS-66), recital 148).
[603] European Union's first written submission, para. 459 (referring to Regulation 999/2014, (Exhibit RUS-66), recital 112).
[604] European Union's first written submission, para. 461.
[605] European Union's first written submission, para. 462.
[606] European Union's first written submission, para. 466.
[607] European Union's first written submission, para. 471. (emphasis original)
[608] European Union's first written submission, para. 474.
[609] European Union's first written submission, para. 462.

#### 7.7.3.4.2.1 Arguments of the parties

7.392. Russia argues that the European Commission's determination of likelihood of recurrence of injury includes an analysis of "the price effect of future dumped imports through an *undercutting* calculation"[610] of the prices of the domestic like product by Russian exports. Russia points in particular to recitals 112, 160, 166 and 169 of Regulation 999/2014.[611] Recital 112 states that "[b]y comparing the average Russian CIF export prices to the Union with the average ex-works prices of the Union producers during the RIP, it appears that the Russian prices are undercutting the Union price". In turn, recital 160 states that "[d]uring the RIP, Russian export prices to third countries were on average 201 EUR/tonne or 34% lower than the current average price at which Union producers sell in the Union." For Russia, these comparisons demonstrate that the European Commission calculated a margin of undercutting in support of its conclusion that "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".[612] Russia claims that this price undercutting analysis is inconsistent with the obligations contained in Article 3 and with the provisions of Article 11.3 of the Anti-Dumping Agreement.[613]

7.393. The European Union disagrees that Regulation 999/2014 contains a price undercutting analysis.[614] Although table 6 of Regulation 999/2014 evaluates the average CIF price of Russian imports, the Regulation clarifies that "such export prices cannot be considered as a reliable indicator in order to carry out a reliable and meaningful undercutting calculation."[615] The European Union refers to the "clear" language used by the authority in Regulation 999/2014 that: "the Commission did not carry out any undercutting and underselling calculations …" and that "[t]he Commission is not asserting that, should measures be allowed to lapse, Russian exports would undercut Union prices by 34%".[616] In order to justify why an undercutting calculation was not relevant or practicable, the European Union explains that "almost all exporting producers which sold the product concerned during the review investigation period had price undertakings and their export prices to the European Union were determined by those price undertakings which set minimum prices."[617] In addition, the European Union argues that Russian export sales to the Union market could not be used because of a lack of sales of the product concerned by three of the sampled producers/exporters (EuroChem, UralChem and SBU Azot) during the review period:

> Export sales to the Union could not be used for the determining the future behaviour of the three other sampled exporting producers for the following reasons. During the RIP, EuroChem and Acron only exported under the price undertaking. EuroChem had sales to the Union only during the period it had an undertaking in force, while it had no sales after the undertaking was withdrawn by the Commission by means of Decision 2012/629/EU. As far as SBU Azot and UralChem are concerned, they did not sell the product concerned to the Union during the RIP.[618]

7.394. For the European Union, the "prices under the price undertakings are not the result of the normal interaction of supply and demand in the market". [619] As a result, "Russian import prices to the European Union during the investigated period could not serve as positive evidence to reach …

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[610] Russia's first written submission, para. 936; second written submission, para. 1126. (emphasis added)
[611] Russia's response to Panel question No. 42, para. 203.
[612] Regulation 999/2014, (Exhibit RUS-66), recital 162.
[613] We do not understand Russia's claim #5 under Article 11.3 to be consequential to its claims under Articles 3.1 and 3.2. See for example, Russia's first written submission, para. 955: "by failing to conduct undercutting calculations that conform to Articles 11.3, 3.1 and 3.2 of the Anti-Dumping Agreement the EU acted contrary to its obligations under these Articles."
[614] European Union's response to Panel question No. 42, para. 128: "[t]here is no undercutting analysis anywhere in Regulation 999/2014, and thus also not in the mentioned recitals. In recital (112), it is exactly explained why the Commission could not make a price undercutting analysis on the basis of the price undertakings".
[615] Regulation 999/2014, (Exhibit RUS-66), recital 112.
[616] European Union's second written submission, para. 136 (quoting Regulation 999/2014, (Exhibit RUS-66), recitals 114 and 162. See also European Union's response to Panel question No. 41, para. 120. (emphasis omitted)
[617] European Union's first written submission, para. 459.
[618] Final disclosure, (Exhibit RUS-78 (BCI)), recital 43.
[619] European Union's first written submission, para. 468.

reasoned conclusions".[620] Instead of basing its determination on a price undercutting calculation between the export price of Russian producers and the price of domestic producers on the Union market, the European Union submits that it made a "'forward-looking analysis' based on reliable available evidence about pricing, together with data on consumption, spare capacity, trade flows and attractiveness of the Union market."[621] The European Union insists that its likelihood of recurrence of injury determination is based on the following four elements, which are set out both in the final disclosure[622] and in Regulation 999/2014:

a. the spare capacity of the product concerned[623];

b. the attractiveness of the Union market: in view of the fact that since "prices on the Union market were … at a level substantially above prices on … third country markets", the authority considered that "Russian producers [would] have a strong incentive not only to use their spare capacity for the Union market, but also to redirect some of their current exports to third countries to the Union market"[624]; and in view of the geographical proximity and "the existence of well-established distribution channels"[625];

c. limitations to additional Russian exports to third countries, in view of the fact that "Russian spare capacity [was] more than twice the predicted increase in consumption in those markets"[626]; and

d. the expected price of Russian exports to the European Union market, should the measures lapse.[627]

7.395. Having set out the arguments of the parties with regard to the type of price analysis conducted by the European Commission, we now examine the merits of Russia's claim under Article 11.3 of the Anti-Dumping Agreement.

#### 7.7.3.4.2.2 Evaluation by the Panel

7.396. In view of the arguments made by the parties, we start our evaluation of Russia's claim #5 by examining whether, as submitted by Russia, the European Commission conducted an undercutting calculation as part of its analysis of the price effect of future dumped imports.[628] We then turn to examining whether the price analysis conducted by the European Commission is consistent with the provisions of Article 11.3 of the Anti-Dumping Agreement.[629]

##### Whether the investigating authority made an undercutting calculation in the context of the third expiry review

7.397. We start by recalling what an analysis of significant price undercutting means in the context of Article 3 of the Anti-Dumping Agreement.

7.398. The second sentence of Article 3.2 of the Anti-Dumping Agreement, which is the relevant provision here, reads:

> With regard to the effect of the dumped imports, the investigating authorities *shall consider whether there has been a significant price undercutting* by the dumped imports as compared with the price of a like product of the importing Member, or whether the

[620] European Union's second written submission, para. 147.
[621] European Union's first written submission, para. 461. (fn omitted)
[622] Final disclosure, (Exhibit RUS-78 (BCI)).
[623] Regulation 999/2014, (Exhibit RUS-66), recital 152.
[624] Regulation 999/2014, (Exhibit RUS-66), recital 153.
[625] Regulation 999/2014, (Exhibit RUS-66), recital 155.
[626] Regulation 999/2014, (Exhibit RUS-66), recital 154.
[627] Regulation 999/2014, (Exhibit RUS-66), recitals 159-160.
[628] Russia's response to Panel question No. 42.
[629] Russia requested us to find that "even if the Panel finds that the European Commission did not conduct an undercutting analysis inconsistent with the provisions of Article 3 of the AD Agreement, the EU nevertheless acted in breach of Article 11.3 of the AD Agreement." (Russia's response to Panel question No. 44, para. 213).

> effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.[630]

7.399. A price undercutting calculation is thus a compulsory element of the analysis mandated under Article 3.2 in the context of *an original investigation*. Article 3.2 expressly establishes "a link between the price of subject imports and that of like domestic products" by requiring that a comparison be made between the two.[631] It is well established that a price undercutting analysis requires more than a mere comparison between two prices. As stated by the Appellate Body in *China – HP-SSST (Japan)*:

> [P]rice undercutting, under Article 3.2, is merely concerned with the question of whether there is a mathematical difference, at any point in time during the POI, between the prices of the dumped imports and the comparable domestic products. [632]
>
> The fact that Article 3.2 expressly establishes "a link between the price of subject imports and that of like domestic products, by requiring that a comparison be made between the two", does not mean that an investigating authority can comply with its obligations under Article 3.2 by simply considering "whether subject imports 'sell at lower prices than' comparable domestic products". While an examination of whether there is a price differential between imported and domestic products may be a useful starting point for an analysis of price undercutting, it does not provide a sufficient basis for an investigating authority to satisfy its obligation under Article 3.2.[633]

7.400. Instead, the Appellate Body ruled that:

> [A] proper reading of "price undercutting" under Article 3.2 suggests that the inquiry requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation (POI). An examination of such developments and trends includes assessing whether import and domestic prices are moving in the same or contrary directions, and whether there has been a sudden and substantial increase in the domestic prices.[634]
>
> The significance of the price undercutting found on the basis of that dynamic assessment is a question of the magnitude of the price undercutting. What amounts to significant price undercutting – that is, whether the undercutting is important, notable, or consequential – will therefore necessarily depend on the circumstances of each case.[635]

7.401. Further, when conducting a price effects analysis and comparing prices of the imported product to a certain domestic product, panels and the Appellate Body have emphasized that it is appropriate and important to consider factors affecting comparability, including the competitive relationship between the imported and domestic products at issue. Specifically, the Appellate Body found that even though there is no explicit requirement regarding price comparability in Article 3.2, a failure to ensure price comparability would be incompatible with basic principles for injury determination provided in Article 3.1.[636]

7.402. Turning to the content of both the final disclosure and Regulation 999/2014, we agree with Russia that these documents do not set out the elements of the kind of undercutting analysis that is contemplated in Article 3.2 of the Anti-Dumping Agreement. We also agree with Russia that several recitals of the final disclosure and Regulation 999/2014 point to an analysis of the respective

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[630] Emphasis added.
[631] Appellate Body Report, *China – GOES*, para. 136.
[632] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.160.
[633] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU),* para. 5.163. (fns omitted)
[634] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.159.
[635] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161. (emphasis omitted; fn omitted)
[636] Appellate Body Report, *China – GOES*, para. 200.

prices of domestic sales and Russian sales to the European Union and to third countries during the review period.

7.403. However, as recalled above, an undercutting analysis is not "merely" about the mathematical difference, at any point in time during the POI, between the prices of the dumped imports and the comparable domestic products. We also recall that such an analysis is not required in the context of an expiry review. In this regard, we are mindful of the findings of the panel in *US – Oil Country Tubular Goods Sunset Review* according to which:

> Article 11.3 does not mention whether an investigating authority is required to calculate the price effect of future dumped imports on the prices of the domestic industry. … [T]his means that an investigating authority is not necessarily required to carry out that calculation in a sunset review.[637]

7.404. In fact, the record shows that the investigating authority expressly stated that it did not perform an undercutting analysis. Instead, "the analysis focused on the consumption trends of the Union market, spare capacity, trade flows, the attractiveness of the Union market, and pricing behaviour of the Russian producers".[638] On this last point, the European Commission found that it was "unclear how [Russian exporters subject to a price undertaking] would set their prices if the undertakings lapse together with the anti-dumping duties". It thus relied on the export price of the sampled Russian producers/exporters to third countries in order to estimate "at what prices those additional exports from companies not subject to a price undertaking [were] likely to take place".[639] We are of the opinion that this is a reasonable approach to examine one of the relevant determinants of whether the expiry of the existing duty and price undertakings would be likely to lead to the recurrence of injury.

7.405. We therefore reject Russia's claim that "the EU failed to comply with its obligation to conduct an 'objective determination' based on 'positive evidence' *in the determination of price undercutting* under Articles 3.1 and 3.2 of the Anti-Dumping Agreement in the investigation that led to the adoption of Regulation 999/2014".[640] For the same reasons, we also reject Russia's claim that the European Union violated Article 11.3 of the Anti-Dumping Agreement by failing to consider whether there had been a significant price undercutting by the *dumped imports*, as compared with the prices of the EU domestic industry.[641]

### Whether the European Union's price analysis breached Article 11.3 of the Anti-Dumping Agreement

7.406. We now turn to 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".[642] In considering Russia's claim, we are mindful that the requirement to make a "determination" concerning likelihood:

> [P]recludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. 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.[643]

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[637] European Union's first written submission, para. 457 and fn 482 (referring to Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.273). See also Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.274.

[638] Regulation 999/2014, (Exhibit RUS-66), recital 149.

[639] Regulation 999/2014, (Exhibit RUS-66), recitals 159-160.

[640] Russia's first written submission, para. 939. (emphasis added)

[641] Russia's first written submission, para. 948.

[642] Russia's first written submission, para. 939.

[643] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 114 (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271).

7.407. We find it relevant for our analysis of the European Union's determination that the requirements of "positive evidence" and "objective examination" contained in Article 3.1 of the Anti-Dumping Agreement are not to be applied in the abstract: they relate to two essential elements of an injury analysis:

a. the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products; and

b. the consequent impact of these imports on domestic producers of such products.

7.408. Since these elements are compulsory aspects of an "objective examination" of injury, we do not exclude that they could be relevant in the context of an "objective examination" of the likelihood of recurrence of injury in an expiry review. Thus, "factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. [But] [a]n investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination".[644]

7.409. In assessing the consistency of the European Commission's price analysis with Article 11.3, we are particularly mindful that, "in an expiry review, an anti-dumping measure has been in place for some time, and investigating authorities must, based on a fresh analysis, determine whether the expiry of that measure would be likely to lead to continuation or recurrence of injury".[645] For that reason, we disagree with Russia that a price undercutting analysis based on a comparison of the price of Russian exports of AN to the Union market with the price of domestic producers would have provided a more objective basis for assessing the likelihood of recurrence of injury in the present case. As the European Commission recognized, Russian import prices could not be used for this purpose as they were subject to a price undertaking or in any case affected by the anti-dumping duties. In this regard, we find that the reasons set out by the European Commission for disregarding the export price of Russian exporters which had committed to a price undertaking to be reasoned and adequate. We are of the view that the anti-dumping measures in place necessarily have an impact on the volume and price of Russian AN imports in the Union market. As such, the price of those imports cannot be considered as a reliable indicator of the future behaviour of Russian producers/exporters, should the measures lapse. Further, we agree with the European Union that investigating authorities "are not restricted in the choice of methodology they will follow, as long as they arrive at reasoned conclusions on the basis of positive evidence."[646]

7.410. In the present case, we note that the European Commission's determination is based on a variety of factors, including the export price of Russian exports to third countries, the spare capacity in Russia and the attractiveness of the Union market and other third markets. On this last point, the European Commission found that it was "unclear how [Russian exporters subject to a price undertaking] would set their prices if the undertakings lapse together with the anti-dumping duties".[647] It thus relied on the export price of the sampled Russian producers/exporters to third countries in order to estimate "at what prices those additional exports from companies not subject to a price undertaking [were] likely to take place". In particular, the authority noted: "it is likely that Russian exports from companies not subject to a price undertaking, in the absence of anti-dumping measures, would enter the Union market at an average price level below that of the import prices from third countries and also below that of imports from Russia under the undertaking, which are at the higher end of the non-injurious target price of the Union industry."[648] In addition, the investigating authority found that "the current cost of production, and therefore the current non-injurious price is unlikely to decrease in the short term, given the trend of increased cost of production during the period considered".[649]

[644] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.
[645] Panel Report, *EU – Footwear (China)*, para. 7.329.
[646] European Union's first written submission, para. 458. See also European Union's second written submission, paras. 128, 131, and 133-134.
[647] Regulation 999/2014, (Exhibit RUS-66), recital 159.
[648] Regulation 999/2014, (Exhibit RUS-66), recital 160. The conclusion in this recital also relies on the analysis of the price of Russian exports of AN to third countries included in the section of Regulation 999/2014 dedicated to the likelihood of recurrence of dumping.
[649] Regulation 999/2014, (Exhibit RUS-66), recital 163.

7.411. We consider that these factors and their analysis by the European Commission, as set out in the final disclosure and in Regulation 999/2014, are relevant and consistent with the obligation to adopt a forward-looking approach and to base the determination on positive evidence and on an objective examination. In the context of the forward-looking analysis which the European Commission was carrying out, the authority was not obliged to consider whether dumped imports during the review investigation period (i.e. in the past) had "explanatory force" for the significant depression or suppression of domestic prices. In fact, we note that the European Commission examined the likely impact on domestic prices of future imports of Russian AN, should the measures lapse. We therefore reject Russia's claim that the European Union breached Article 11.3 of the Anti-Dumping Agreement by failing to consider whether the allegedly dumped imports from Russia had "explanatory force" for the significant depression or suppression of domestic prices

7.412. We therefore reject Russia's claim that the European Union violated Article 11.3 of the Anti-Dumping Agreement by:

a. disregarding the prices of two Russian exporters (Acron and EuroChem) subject to price undertakings[650];

b. failing to examine whether the allegedly dumped imports from Russia had "explanatory force" for the significant depression or suppression of domestic prices[651]; and

c. failing to consider whether there had been a significant price undercutting by the dumped imports, as compared with the prices of the EU domestic industry.[652]

7.413. *Finally*, we examine two additional arguments made by Russia in support of its claim #5.

**Whether the European authority violated Article 11.3 of the Anti-Dumping Agreement by disregarding the price of export sales of stabilized AN and export sales of OJSC Kuybyshevazot**

7.414. Russia argues first that the European Union's likelihood of recurrence of injury analysis disregarded the import price of one of the product types covered by the definition of the product concerned: stabilized AN. Russia submits that failure to consider imports of this product type had an impact on the final determination reached by the authority, because the price of Russian stabilized AN was higher than the price of the Union industry.[653] Further, Russia considers that since those imports were not subject to anti-dumping measures, "they are the best benchmark of what the pricing behaviour of Russian exporting producers would be, absent the anti-dumping measures."[654] In support of its argument, Russia points to the comments on the definitive disclosure made by representatives of Russian exporters, which state:

> As RFPA has argued in its submission of 30 September 2013 the Commission also has at its disposal data on imports into the Union of Stabilized AN manufactured by a Russian exporter that is exempted from the antidumping duties. The price of such stabilized AN was verified and should also be taken into account as evidence of the likely Russian price behaviour on the Union market following the termination of the measures.[655]

7.415. Russia also points to the questionnaire response of one of the sampled exporters (UralChem), which contains a table showing that, during the review period, stabilized AN from Kirovo was indeed exported to the European Union.[656]

7.416. Further, Russia argues that the European Commission also failed to consider the export price of a non-sampled producer (OJSC Kuybyshevazot) [657] which, according to Russia, sold in the review

[650] Russia's first written submission, para. 940.
[651] Russia's first written submission, para. 944.
[652] Russia's first written submission, para. 948.
[653] Russia's first written submission, para. 942; second written submission, paras. 1140-1141.
[654] Russia's second written submission, para. 1141.
[655] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), p. 35.
[656] Responses to questionnaires provided by UralChem, (Exhibit RUS-144 (BCI)), p. 5.
[657] Russia's first written submission, para. 943; second written submission, para. 1142.

period without a price undertaking and at prices that did not undercut the EU domestic industry's prices. In their comments on the definitive disclosure, the representatives of Russian producers/exporters stated that:

> [A] significant volume of AN at a relatively high price, that does not result into price undercutting or underselling, was sold in the RIP into the EU by a cooperating Russian exporter Kuybyshevazot. Such sale was made outside of any price undertaking. RFPA requests that the high prices of such sale should be taken as an indication of what prices might be on the Union market following the termination of the measures.[658]

7.417. In response to Russia's argument regarding stabilized AN, the European Union points to two factors:

a. First, the European Union recalls that imports of stabilized AN from Kirovo are expressly excluded from the product concerned. Regulation 999/2014 states that:

> [A]s far as SBU Azot and UralChem [Kirovo] are concerned … [they] did not sell the product concerned to the Union during the [RIP].[659]

b. Second, with regard to sales made by OJSC Kuybyshevazot during the review period, the European Commission explains that its imports were included in the authority's evaluation, since they were reflected in the database used to calculate the volume and average price of Russian exports to the Union during the review period.

7.418. In view of the evidence on the record, we are not convinced by Russia's argument that disregarding sales made by Kirovo and OJSC Kuybyshevazot amounts to a violation of the duty to conduct an objective examination:

a. Concerning sales of stabilized AN from Kirovo, we disagree with Russia that these sales are the "best benchmark" of what the pricing behaviour of Russian exporting producers would be, absent the anti-dumping measures. The fact that these imports are not within the product scope of the measures places them in a competitive position which would no longer prevail should the anti-dumping measures lapse: these imports would have to compete with other Russian imports no longer submitted to anti-dumping measures. Their price is therefore not a good indicator of what the pricing behaviour of Russian exporting producers would be in the absence of measures.

b. Since OJSC Kuybyshevazot was not among the sampled exporters, we fail to see how the European Commission could have used its sales as a relevant benchmark. In fact, the only source of information on the company's sales volume and price that RFPA points to, is the - non verified - response of the company to the sampling questionnaire[660], which sets out the volume and value of two types of AN exported to the European Union during the review period. We also note the European Union's reference to the fact that these sales were incorporated in the database used to calculate an average price of Russian imports during the review period.

7.419. For these reasons, we reject Russia's claim that the European Union violated Article 11.3 of the Anti-Dumping Agreement by declining to use the price of sales of AN from OJSC Kuybyshevazot and Kirovo as a relevant indicator of the likely evolution of Russian AN prices, should the measures lapse.

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[658] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), p. 35 (fn omitted). Russia also points to the Sampling questionnaire submitted by OJSC Kuybyshevazot, (Exhibit RUS-86 (BCI)).

[659] European Union's first written submission, para. 470 (referring to Regulation 999/2014, (Exhibit RUS-66), recital 62).

[660] Russia's first written submission, para. 943 and fn 880. See also Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), fn 73. The sampling form itself is contained in Sampling questionnaire submitted by OJSC Kuybyshevazot, (Exhibit RUS-86 (BCI)).

**Whether the European authority violated Article 11.3 of the Anti-Dumping Agreement by not making adjustments to the export price of Russian AN to third countries**

7.420. As a final argument in support of its claim, Russia argues that the comparison made by the investigating authority between Russian export prices to third countries and Union prices was not probative because adjustments requested by representatives of Russian exporters (for ordinary customs duties, post-importation costs, differences in the product, packaging, and the level of trade) were not granted by the European Commission.[661]

7.421. The European Union responds that it was not obliged to make adjustments because it was not performing an undercutting calculation. [662] The European Union also argues that the Commission was unable to carry out any of the level of trade adjustments claimed by RFPA during the investigation 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.[663]

7.422. We note that there is evidence on the record that representatives of Russian producers/exporters requested certain adjustments. Recital 161 of Regulation 999/2014 indicates, for instance:

> RFPA 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.

7.423. Further, RFPA's comments on the final disclosure indicate that:

> EU and Russian prices should be compared at the same level of trade and logistical costs, including EU customs duties, are an important cost item that increases the delivered and comparable price for Russian imports.[664]

7.424. However, the evidence on the record does not demonstrate which adjustments were requested by the representatives of Russian exporters. In fact, the comments made by RFPA on the definitive disclosure[665] refer to a request for adjustments for Russian export prices *to the European Union*, rather than to Russian export prices to third countries:

> RFPA submits that in deciding on the prices under which additional exports from companies not subject to a price undertaking are likely to take place the Commission should rely on actual *Russian prices as witnessed in the EU market, properly adjusted*.[666]

7.425. We therefore agree with the European Union 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.[667] There is therefore insufficient evidence on the record for us to make a finding of inconsistency with Article 11.3 of the Anti-Dumping Agreement, as requested by Russia.

#### 7.7.3.4.3 Conclusion on claim #5

7.426. In conclusion, we recall 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

[661] Russia's first written submission, paras. 949-950.
[662] European Union's first written submission, para. 477; Regulation 999/2014, (Exhibit RUS-66), recital 114.
[663] European Union's second written submission, para. 155.
[664] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), p. 32.
[665] Russia's second written submission, para. 1150; Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), p. 33.
[666] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), p. 33. (emphasis added)
[667] European Union's first written submission, para. 478; second written submission, para. 154.

reasoned and adequate. After carefully considering the elements on the record and the arguments of the parties, we therefore reject Russia's claim #5 that the European Commission's determination of likelihood of recurrence of injury is inconsistent with Article 11.3 of the Anti-Dumping Agreement for the reasons raised by Russia.

#### 7.7.3.5 Whether the European Union erred by basing its likelihood of recurrence of injury determination on incorrect or incomplete data (claim #6)

##### 7.7.3.5.1 Introduction

7.427. Under claim #6, Russia further challenges – but for different reasons – the consistency of the European Union's determination of likelihood of recurrence of injury with Articles 3.1 and 11.3 of the Anti-Dumping Agreement.

7.428. In addition, Russia identifies a violation of Articles 3.4 and 4.1 of the Anti-Dumping Agreement because the European Union allegedly used data from a sample of domestic producers which was not representative, and based its determination on an incomplete data set.[668] Further, Russia complains that the investigating authority did not respond positively to the request made by representatives of Russian producers/exporters[669] to explain "significantly divergent economic performance between sampled and non-sampled producers".[670] Russia cites in particular divergent data on costs, prices and profitability, which affected the European Commission's determinations regarding the level of the non-injurious price and the overall determination of likelihood of recurrence of injury.[671]

##### 7.7.3.5.2 Analysis

7.429. We recall that the provisions of Article 3 which are applicable to injury determinations in original investigations, do not apply directly to expiry reviews. We have therefore decided to examine Russia's claims on the basis of Article 11.3 and Article 4, but not on the basis of Article 3.[672] Our examination of Russia's claims relating to the data used by the European Commission as a basis for its likelihood of recurrence of injury analysis will therefore focus on whether the authority's determination was the result of an objective examination and whether it was based on positive evidence.

###### 7.7.3.5.2.1 Summary of the relevant facts

7.430. We start by setting out our understanding of the European Commission's data collection in the context of the third expiry review. We consider first how the product concerned and the like product are defined in the context of the third expiry review. We then turn to examine the data obtained by the European Commission from the domestic industry producing the like product.

**The product under consideration and the like product**

7.431. We note first that the notice of initiation of the third expiry review defines the product concerned as:

> [S]olid fertilisers with an ammonium nitrate content exceeding 80% by weight, currently falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00,

[668] Russia's first written submission, paras. 966 and 975-978.
[669] Russia's first written submission, para. 983; Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), pp. 20-21 and 23-25.
[670] Russia's first written submission, paras. 981-997.
[671] Russia's first written submission, paras. 988-990.
[672] Russia indicates that "[e]ven if the Panel finds that there are no violations of Articles 3.1, 3.4 or 4.1, Russia maintains that Claim #6 should nevertheless be considered … the EU did not carry a 'rigorous examination' and eventually did not draw 'reasoned and adequate conclusions' supported by 'positive evidence' and a 'sufficient factual basis', as required under Article 11.3 of the AD Agreement." (Russia's response to Panel question No. 45, para. 215).

ex 3105 59 00 and ex 3105 90 91 and originating in Russia (the product under review).[673]

7.432. While Regulation 999/2014 defines the Union industry as "the known producers of AN in the Union during the period concerned"[674], it also adds that the definition of the product concerned by the expiry review covers ammonium nitrate falling within CN codes 3102 30 90 and 3102 40 90, which according to Regulation 999/2014 "can include" AN used for industrial and agricultural purposes.[675] The product concerned also covers stabilized AN, except for AN originating from the Kirovo plant.[676] With regard to the "like product" manufactured in the European Union, Regulation 999/2014 states that "the AN produced by the Union industry is a like product as regards physical and technical characteristics to the AN exported to the Union by Russia".[677]

### The data obtained by the European Commission from the domestic industry producing the like product

7.433. For the purpose of its examination of the "Economic Situation of the Union Industry"[678], the European Commission selected a sample of four domestic producers (Ab Achema, Grupa Azoty Zaklady Azotowe, Grow How UK Limited and Yara France) representing 42% of the Union production and 41% of the Union sales of the like product.[679] All sampled producers responded to injury questionnaires and their answers were verified by the investigating authority.[680] Although Russia argues that the sample "did not include producers of IGAN and Stabilized AN"[681], we note that, in its submissions to the Panel, it indicates that "[t]he only two IGAN producers forming part of the EU domestic industry, namely Yara France and GrowHow, are sampled producers."[682] We thus understand Russia to argue that, although Yara France and GrowHow produce IGAN, their questionnaire response did not include data on industrial grade ammonium nitrate. This understanding is supported by statements made by the European Union itself, which indicates that, "during the investigation" the investigating authority considered that "certain IGAN data was originally missing" from the responses obtained from these companies.[683] The European Union explains that it "made every reasonable effort to obtain all available and pertinent information", including by requesting "macro-data" covering the 28 Member States of the European Union, all known producers of the like product in the Union and data on agricultural and industrial grade ammonium nitrate. This information was, according to the European Union, provided by Fertilizers Europe in submissions made on 10 March[684], 16 April[685], and 12 May 2014.[686] The European Union indicates that the "macro" indicators reflected in Regulation 999/2014 are a "mixture" of the data received from the domestic industry in April (for data on production) and May 2014 (for data on sales and production capacity).[687] In this regard, the definitive disclosure indicates that:

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[673] Notice of initiation, (Exhibit RUS-48), section 2.
[674] Regulation 999/2014, (Exhibit RUS-66), recital 98.
[675] Regulation 999/2014, (Exhibit RUS-66), recital 46.
[676] Regulation 999/2014, (Exhibit RUS-66), recital 44.
[677] Regulation 999/2014, (Exhibit RUS-66), recital 50.
[678] Regulation 999/2014, (Exhibit RUS-66), section 5.4.
[679] European Union's second written submission, para. 159.
[680] Regulation 999/2014, (Exhibit RUS-66), recital 118.
[681] Russia's second written submission, para. 1154.
[682] Russia's first written submission, para. 966. See also, Russia's second written submission, paras. 1157 (d) and 1159 for the case of Yara France and para. 1157 (e) for the case of GrowHow; response to Panel question No. 46, paras. 216-221.
[683] European Union's second written submission, para. 161. The European Union also provides in Exhibit EU-22 an exchange of emails dated 6 May 2014, between the investigating authority and GrowHow, in which the company confirms that its sales data in volume and value covers both agricultural and industrial AN.
[684] The European Union indicates that the 10 March 2014 submission contained data for only 14 known producers composing the Union industry. The European Union also indicates that this submission included "some IGAN data". (European Union's second written submission, para. 161).
[685] Dataset filed by the EU industry (16 April 2014), (Exhibit RUS-84 (BCI)). This exhibit contains data provided by Fertilizers Europe on capacity, production and sales of the complainant for the EU28. The document lists 17 companies that provided data.
[686] European Union's second written submission, para. 161. See also European Union's response to Panel question No. 47, para. 138.
[687] European Union's second written submission, para. 162. We note that the Submission from Fertilizers Europe (12 May 2014), (Exhibit RUS-83 (BCI)) contains injury indicators covering "total AN: Agricultural AN, technical AN and other types of AN" for the Union industry. These indicators include data on prices, costs and profits/losses for the Union industry.

> For the purpose of the injury analysis, the economic situation of the Union industry is assessed on the basis of macroeconomic indicators (production, production capacity, capacity utilisation, sales volume, market share, growth, employment, productivity, and recovery from past dumping) and microeconomic indicators (average unit prices, unit cost, labour costs, inventories, profitability, cash flow, investments, return on investments, and ability to raise capital). The former are based on data contained in the request for review and from statistics and relate to all known Union producers. The latter are based on data contained in the questionnaire replies from the sampled Union producers and verified during the investigation.[688]

7.434. We thus understand that certain indicators were established at the level of the domestic industry as a whole, while other "micro" indicators were established on the basis of the verified data of the sample, in which "certain IGAN data was originally missing".[689] The verified data of the sample was used by the investigating authority to establish the non-injurious price for the Union industry during the review period, as indicated in the definitive disclosure:

> The Commission established the non-injurious price during the RIP for the Union industry by adding to the cost of production (established based on the verified data of the sampled Union producers set out in table 7 above), plus SG&A and the target profit.
>
> …
>
> On the basis of those figures, during the RIP the non-injurious price for the Union industry ranges between 257 EUR/tonne and 264 EUR/tonne.[690]

7.435. In turn, the non-injurious price served as a basis for the conclusion that:

> As the current price level of Russian imports currently under the price undertaking for one of the exporting producers corresponds to the upper end of the non-injurious price level, the Commission, on the basis of the information currently at its disposal, considers that it is likely that those additional imports will take place at an injurious level. Notwithstanding the current profit level of the Union industry, such likely prices would put at risk the Union industry's ability to achieve the normal profit that it could expect to achieve in the absence of dumped imports.
>
> The investigation has also demonstrated that the current cost of production, and therefore the current non-injurious price is unlikely to decrease in the short term, given the trend of increased cost of production during the period considered.[691]

7.436. We note that the representatives of Russian producers/exporters commented on the quality of the data collected by the European Commission and on the way this data was included in the analysis of the economic situation of the Union industry. In letters dated 14 March[692] and 25 April 2014[693], RFPA noted that (i) none of the main producers of EGAN was in the list of known producers of the like product and (ii) that Yara France and GrowHow (who produce both agricultural and industrial grade AN) did not report production, cost and sales data for EGAN. Further, in its comments on the definitive disclosure, RFPA stated *inter alia* that:

> The profitability of the sampled producers is … marked differently from the respective indicators of the supporters as provided by the Applicant on 12 May 2014[.]
>
> …
>
> Given a significant difference in key indicators, RFPA believes that the sample is manifestly non-representative of the Union industry and that the findings regarding the

[688] Final disclosure, (Exhibit RUS-78 (BCI)), recital 74.
[689] European Union's second written submission, para. 161.
[690] Final disclosure, (Exhibit RUS-78 (BCI)), recitals 110 and 112.
[691] Final disclosure, (Exhibit RUS-78 (BCI)), recitals 114-115.
[692] RFPA submission (4 March 2014), (Exhibit RUS-82 (BCI)), p. 3.
[693] RFPA submission (25 April 2014), (Exhibit RUS-90 (BCI)), p. 4.

costs, prices, and profitability should be established by reference to the Applicants' data of 12 May 2014.[694]

7.437. We understand that the investigating authority requested and obtained (in the 12 May data set) "all relevant macro and micro indicators covering all known Union producers of the like product"[695], as well as all types of AN composing the like product. However, it is clear on the face of Regulation 999/2014 that the injury indicators used by the investigating authority to examine the situation of the Union industry were established on the basis of verified data from the sample (for employment, productivity, sales prices, labour costs, inventories, profitability, cash flow and return on investment)[696] and on macro data received from Fertilizers Europe respectively in April (for data on production). Only sales and capacity appear to have been established on the basis of the complete dataset provided in May 2014.[697]

#### 7.7.3.5.2.2 Evaluation by the Panel

**Whether the European Commission's determination is based on a non-representative sample of the Union industry**

7.438. In the context of this claim, we understand Russia to argue that the sample chosen by the investigating authority was not representative of the domestic industry producing the like product because it was composed of companies producing only one type of AN. Consequently, the data obtained from the sample produced a result which was biased.

7.439. In view of the evidence on the record, we are not convinced that the sample chosen by the European Commission was not representative.

7.440. As stated in Regulation 999/2014, the European Commission selected the sample on the basis of the sales and production volumes of the like product during the review period and on the basis of geographical location within the European Union. The sample represented around 42% of the Union production and 41% of the Union sales. [698] Like the European Union[699], we note that "when invited to comment on the selection of the sample, there was no interested party that commented on the selection of the sample to claim that it was biased in light of the economic performance of the producers. Only following disclosure, [did] the RFPA claim[] that the sample would not be representative because profitability would differ between sampled companies and the industry overall."[700] In fact, in their initial comments on the selection of the sample, the representatives of Russian producers/exporters did not raise the risk of distortion linked to the selection of producers of FGAN vs IGAN: RFPA criticized the methodology chosen to establish the sample (choice of a provisional sample, before initiation, on the basis of letters of support for the complaint sent by the complainant; choice of a sample composed primarily of supporters of the complaint; limited period of time for requesting to be included in the sample) and the *inclusion* of stabilized AN in the product concerned.[701] In addition, we note that the evidence on the record shows that two of the sampled companies (Yara France and GrowHow) produce IGAN. It is therefore factually incorrect for Russia to state that the sample "was *ab initio* deficient as it did not include EU producers of IGAN and stabilized AN."[702]

**Whether the European Commission's determination is based on a set of data which was incomplete and erroneous**

7.441. *Second*, we consider that, based on the evidence on the record, Russia has not made a *prima facie* case that the determination of likelihood of recurrence of injury was based on an

[694] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), pp. 20-21.
[695] Fertilizers Europe's submission (12 May 2014), (Exhibit RUS-83 (BCI)), p. 1.
[696] Regulation 999/2014, (Exhibit RUS-66), tables 6, 7, 8, 9, and 10.
[697] European Union's second written submission, para. 162. Russia disagrees that the European Union's statement that the data provided on 12 May 2014 by Fertilizers Europe was used. (Russia's second written submission, paras. 1170 and 1173).
[698] Regulation 999/2014, (Exhibit RUS-66), recital 19.
[699] European Union's second written submission, para. 180.
[700] European Union's second written submission, paras. 180-181.
[701] Comments by RFPA on the initiation of an expiry review, (Exhibit RUS-85 (BCI)), pp. 41-45.
[702] Russia's second written submission, para. 1162.

erroneous/incomplete set of data provided by the sampled domestic producers.[703] Russia's argument is twofold:

a. that the questionnaire responses of sampled domestic producers did not include data on IGAN or stabilized AN;

b. that, although the investigating authority requested data specifically on IGAN and stabilized AN during the review, "the EU nevertheless failed to establish and examine micro-indicators of the domestic industry (employment, productivity, sales prices, labour costs, inventories, profitability, cash flow, investments and return on investments) that would cover EU production of IGAN and Stabilized AN."[704]

7.442. The European Union admits that "certain IGAN data was originally missing" from the responses obtained from these companies but argues that it subsequently requested and obtained this data. Further, the European Union insists that the likelihood of recurrence of injury determination is based on the situation of the industry producing the like product (ammonium nitrate), "regardless of use".[705]

7.443. It is well established that "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product".[706] We consider that this basic principle is part and parcel of the requirement to base a determination on positive evidence and on an objective examination. We also consider that it is equally relevant in the context of an analysis of likelihood of recurrence of injury determination under Article 11.3 of the Anti-Dumping Agreement.

7.444. In the present case, contrary to what Russia argues, we do not consider that the European Commission "excluded a whole category of producers of the like product". As noted above, the evidence on the record shows that two producers of IGAN were included in the sample.[707] Similarly, we are not convinced by Russia's evidence that domestic producers systematically failed to report economic indicators related to IGAN and stabilized AN. We agree with Russia that, once the like product is defined, the investigating authority must ensure that sampled domestic producers report economic data related to all sales of the like product and do not omit any category. However, we do not treat the European Union's statement that "certain IGAN data was originally missing" as an admission that no IGAN data was included in the questionnaire responses of the domestic industry.

7.445. In relation to Yara France, we note Russia's statement that "Yara did not provide a response for its Pardies plant solely manufacturing IGAN."[708] 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).[709]

7.446. However, we also note that the European Union has provided evidence showing that:

a. two producers of IGAN (GrowHow and Yara France) were included in the sample[710]; and

[703] Russia's first written submission, para. 978.
[704] Russia's second written submission, para. 1163.
[705] European Union's second written submission, paras. 163-164.
[706] Appellate Body Report, *EC – Fasteners (China)*, para. 414.
[707] Russia recognizes that "while some of the EU producers of IGAN formed part of the EU domestic industry, they did not submit data on the production and sales of IGAN." (Russia's first written submission, para. 966 (fn omitted)). See also ibid. fn 909 which cites the producers of IGAN which are included in the domestic industry.
[708] Russia's first written submission, para. 966; RFPA submission (4 March 2014), (Exhibit RUS-82 (BCI)). See also Russia's response to Panel question No. 46.
[709] RFPA submission (4 March 2014), (Exhibit RUS-82 (BCI)), p. 3.
[710] Russia's first written submission, para. 966.

b. GrowHow confirmed, when asked by the European Commission, that its sales data included data on "all … AN sales, whether straight fertilizer or industrial".[711]

**Whether the European Union failed to address the "significantly divergent economic performance between the sampled and non-sampled EU domestic producers"**

7.447. We now turn to Russia's argument that the European Union failed to address the "significantly divergent economic performance between the sampled and non-sampled European Union domestic producers."[712] Russia challenges in particular the gap in profitability between sampled producers representing 42% of the domestic industry's sales and the wider group of producers contained in the "May data set" representing 82% of the domestic industry's sales.[713] Russia considers that the investigating authority should have "objectively examined both datasets and then found how to reconcile them in such a manner as to reach reasoned conclusions in respect of profitability and costs in deciding whether material injury is likely to recur in the event the anti-dumping measures were lifted."[714] Russia notes that "Regulation 999/2014 is silent on this matter".[715]

7.448. The European Union responds that the injury indicators used by the investigating authority were "based on reliable data since the data of these sampled companies was verified at the premises of the companies."[716] Further, since the investigating authority found that the Union industry was not in an injurious state during the investigation period, "a variation between union producers with respect to their economic performances would not have led to a different outcome of the analysis of the situation of the Union industry, i.e. not suffering material injury."[717]

7.449. We recall that the right of investigating authorities to rely on information provided by a properly constituted sample of the domestic industry in its examination, analysis and determination of injury has been recognized in previous WTO disputes.[718] Similarly, the practice of using data obtained from the industry as a whole for macro-economic indicators and from a representative sample for micro-economic indicators has been found to be consistent with an objective examination based on positive evidence.[719] We consider that an investigating authority does not have to establish an average profit margin for all producers composing the domestic industry if it has already done so for a representative sample of producers. We therefore disagree with Russia that conducting an objective examination of the profitability of Union producers would have required basing the likelihood-of-injury determination on data for the domestic industry defined as all EU producers of AN and "reconcile[ing] it with the data of the sampled companies."[720]

7.450. For the foregoing reasons, we find that the European Commission did not base its likelihood-of-injury determination on data relating to a non-representative sample of the domestic industry and on incomplete/non representative and erroneous data provided by the sampled EU companies. We also find that the European Union was not required to examine and reconcile both datasets on profitability and costs in deciding whether material injury was likely to recur.

### 7.7.3.5.3 Conclusion on claim #6

7.451. In conclusion, we recall 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

[711] Email between the Commission and GrowHow, (Exhibit EU-22). In its second written submission, Russia challenges the statement made by GrowHow and argues that "Annex B4 to the [[***]] questionnaire response that is discussed in the email shows that the data covers only sales of a product called [[***]], which is FGAN". (Russia's second written submission, para. 1167). However, this statement is not supported by any evidence on the record of this Panel.
[712] Russia's first written submission, paras. 981-997.
[713] Russia's first written submission, para. 991.
[714] Russia's first written submission, para. 993.
[715] Russia's first written submission, para. 993.
[716] European Union's second written submission, para. 181.
[717] European Union's second written submission, para. 182.
[718] See e.g. Panel Report, *EC – Fasteners (China)*, para. 7.390.
[719] Panel Report, *EC – Fasteners (China)*, paras. 7.389-7.392.
[720] Russia's first written submission, para. 995.

reasoned and adequate. Russia had the burden of proving that the European Commission's determination of likelihood of recurrence of injury was inconsistent with Article 11.3 of the Anti-Dumping Agreement because it was based on data from a non-representative sample; because it was based on incomplete, non-representative and erroneous data and because the authority failed to examine and explain the divergent economic performance between sampled and non-sampled EU producers. After carefully considering the elements on the record and the arguments of the parties, we conclude that Russia's claim #6 is not sufficiently supported by the evidence on the record, for the Panel to find a breach of Articles 11.3 and 4.1.

#### 7.7.3.6 Whether the European Union violated Article 11.3 of the Anti-Dumping Agreement by concluding that the non-injurious situation of the domestic industry was not sustainable (claim #7)

##### 7.7.3.6.1 Introduction

7.452. Russia takes issue with a series of findings made by the European investigating authority in the course of the third expiry review. In particular, Russia challenges the finding, at recital 169 of Regulation 999/2014, that the non-injurious situation of the domestic industry was "not sustainable" because of the combination of three factors:

a. a decreasing consumption in the EU;

b. a projected decline in the business cycle and prices; and

c. a stability or further increase in the cost of production.[721]

7.453. Russia considers that these factual findings are erroneous and that the authority disregarded certain relevant facts on the record:

a. evidence relating to the forecasted evolution of Union consumption[722];

b. evidence relating to the evolution of AN prices in the European Union[723]; and

c. evidence relating to the price of gas.[724]

7.454. As a consequence, for Russia, the likelihood of recurrence of injury determination reached by the European investigating authority does not rest on a sufficient factual basis and is not based on positive evidence nor on an objective examination.[725]

7.455. We recall that Article 11.3 of the Anti-Dumping Agreement requires a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination" by an investigating authority. Moreover, a sunset review determination under Article 11.3 must be made on the basis of a "rigorous examination" leading to 'reasoned and adequate conclusions', and be supported by 'positive evidence' and a 'sufficient factual basis'".[726] In keeping with the standard of review under Article 11.3 of the Anti-Dumping Agreement we will consider below whether the evidence on the record supports the factual findings reached by the European Commission and whether these factual findings support the overall determination that the non-injurious state of the industry was not-sustainable.

[721] Russia's first written submission, para. 1001.
[722] Russia's first written submission, para. 1003.
[723] Russia's first written submission, para. 1006.
[724] Russia's first written submission, para. 1009.
[725] Russia's first written submission, para. 999.
[726] Appellate Body Report, *US – Zeroing (Japan)*, para. 182 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 113-114).

#### 7.7.3.6.2 Analysis

##### 7.7.3.6.2.1 Whether the authority failed to consider evidence on the record relating to the evolution of Union consumption

7.456. With regard to Union consumption, Russia argues that the representatives of Russian producers/exporters (RFPA) provided the investigating authority with a forecast that consumption in the European Union was likely to increase by 10% by 2017. Russia further refers to data provided by the EU domestic industry showing that increased consumption in Central Europe balanced the decline in consumption in the EU15 zone. [727]

7.457. We note that in the final disclosure, the European Commission evaluated the Union consumption during the review period on the basis of sales data provided by the domestic industry and import data for the product concerned. The European Commission came to the conclusion that:

> Between 2010 and the RIP, the Union consumption of AN decreased by 11%, notwithstanding the fact that the production of agricultural product did not decrease correspondingly. There seem to be two main reasons for such a decrease. First of all, spreading equipment and techniques have improved and as a consequence a lesser quantity of fertilisers is needed per square metre of land. Secondly, the decrease in AN consumption is compensated by the use of other fertilisers such as calcium ammonium nitrate or compound fertilisers.[728]

7.458. In Regulation 999/2014, the European Commission responded to RFPA's comments, and addressed in particular the content of the CRU report, stating that "the report referred to by RFPA suggests a marginal recovery of nitrogen fertilisers' demand and not necessarily an increase of consumption of the product concerned"[729].

7.459. Contrary to what Russia argues[730], we are of the view that the investigating authority did not "fail[] to take into account a number of relevant facts"[731] and did not limit itself to an evaluation of the situation *during* the period of review, but made a forward-looking assessment based on the following facts:

a. the increasingly stringent environmental and safety requirements that apply to the storage and use of AN;

b. the level of maturity reached by certain markets; and

c. the more effective spreading techniques.

7.460. The European Commission concluded that "even in case of an increase in fertiliser consumption, and particularly of nitrogen fertiliser consumption, the consumption of the product concerned will not increase in the foreseeable future."[732]

7.461. For these reasons, we are not convinced by Russia's argument that the authority failed to consider evidence on the record regarding domestic consumption.

##### 7.7.3.6.2.2 Whether the authority failed to consider evidence on the record relating to the evolution of prices of AN in the European Union

7.462. With regard to the evolution of prices in the European Union, Russia argues that, in its comments on the definitive disclosure, RFPA provided evidence that EU prices were expected to

[727] Russia's first written submission, para. 1005; second written submission, paras. 1201-1205. The "CRU report".
[728] Final disclosure, (Exhibit RUS-78 (BCI)), recital 68.
[729] Regulation 999/2014, (Exhibit RUS-66), recital 151.
[730] Russia's second written submission, para. 1199.
[731] Russia's first written submission, para. 1002.
[732] Regulation 999/2014, (Exhibit RUS-66), recital 151.

remain at the same level as during the review period until 2019.[733] Russia also argues that the authority "relied solely and exclusively on a market analysis provided by the applicant, which allegedly showed that 'price levels of the product concerned [were] expected to decrease in the next two years'".[734]

7.463. The European Union responds that the authority considered, "based on the market analysis provided by the applicant that, after having risen steadily every year since 2009, prices appeared to go down."[735] In this regard, the final disclosure states:

> [A]ccording to market analysis provided by the complainant the AN market prices have now reached their peak and the top of the business cycle. The business cycle, as well as prices, are now projected to decline.[736]

7.464. The final disclosure also indicates that:

> Given the prospective nature of the analysis of the likelihood of recurrence of injury, the Commission will carefully examine substantiated comments received following this disclosure, in particular regarding the likely development of prices in the absence of measures and the likely development of cost of production.[737]

7.465. Regulation 999/2014 shows that the European Commission considered RFPA's comments on the definitive disclosure.[738] It states however, that "the prospective nature of an expiry review makes it difficult to draw exact conclusions on projections about price levels in 2017 and beyond." The investigating authority thus decided to rely on "independent market analysis" indicating that "the price levels of the product concerned [were] expected to decrease in the next two years".[739]

7.466. It thus appears from Regulation 999/2014 that the authority based its finding regarding the likely evolution of prices on the forecast provided by the applicant and built on price data provided by an independent consultant (ICIS). The graph provided by the applicant covers the period 2009-2014 and shows a decline in the price of AN over the period 2012-2014, i.e. right after the review period (1 July 2012 to 30 June 2013). Our understanding is therefore that the European Commission relied primarily on a price forecast for the period following immediately the review period, which indicated that the peak of business cycle for AN had been reached in 2012. We also note that the applicant provided another table "Price correlation between Urea and AN", which shows a decline in the price of AN until 2017.[740]

7.467. We have already noted that there was evidence on the record showing that the authority had considered RFPA's comments but had decided to rely on information provided by the applicant. Although Russia argues that RFPA provided evidence that EU prices were expected to remain at the same level as during the review period until 2019, we fail to identify this evidence in RFPA's comments on the definitive disclosure. In fact, RFPA's comments did not contradict the price information provided by the applicant: rather, RFPA criticized the data provided by the applicant but did not provide any conflicting price forecast. Instead RFPA asked the authority to "take a longer perspective".[741] In particular, RFPA did not contest the price data provided by the applicant but noted that, beyond the period 2012-2014, "AN prices in 2020 will be pretty much the same as they are now".[742] Looking at the period preceding the review period in the third expiry review, RFPA also

[733] Russia's first written submission, para. 1006 and fns 935-936 (referring to Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), pp. 37-42).
[734] Russia's second written submission, paras. 1207 and 1213.
[735] European Union's first written submission, para. 518. The diagram on price forecast for AN is contained in AN Russia Sunset: Summary of EU producers' facts and arguments (5 June 2014), (Exhibit EU-7), p. 15. The source indicated for the price forecast is an independent consultant (ICIS).
[736] Final disclosure, (Exhibit RUS-78 (BCI)), recital 119.
[737] Final disclosure, (Exhibit RUS-78 (BCI)), recital 116.
[738] Regulation 999/2014, (Exhibit RUS-66), recital 170.
[739] Regulation 999/2014, (Exhibit RUS-66), recital 171.
[740] AN Russia Sunset: Summary of EU producers' facts and arguments (5 June 2014), (Exhibit EU-7), p. 16 (Fertecon price Forecast).
[741] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), p. 39.
[742] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), p. 39.

noted that "a decline of urea prices to USD 275 in 2017-2018 is nothing compared to where the prices were in 2000".[743]

7.468. We thus find that the investigating authority did consider the evidence presented by Russian exporters but that this evidence does not contradict the evidence provided by the applicant which was eventually relied upon by the European Commission. In view of the evidence on the record, we do not think that in doing so, the authority was not objective or failed to base its conclusion on positive evidence.

#### 7.7.3.6.2.3 Whether the authority failed to consider evidence on the record relating to the evolution of gas prices

7.469. With regard to gas prices, Russia argues that the investigating authority "disregarded" "uncontested evidence" that gas prices were "in a rapid decline"[744] and instead relied on "a single statement in an economic study submitted by the farmers' associations that 'natural gas prices in the Union … are expected to rise in the foreseeable future'".[745] In particular, Russia considers that the European Commission should have taken into account information provided by RFPA in a submission dated 12 June 2014 and in its comments on the final disclosure (an extract from Yara's quarterly report showing "Yara European gas and oil cost").[746]

7.470. We note that the final disclosure contains only a few references to the evolution of the price of gas:

a. First, in relation to the evolution of the cost of production of the sampled producers, table 7 sets out the verified cost of production per unit and indicates that "[t]he average costs of production increased, too, mainly due to the increase in the costs of gas which is the major input."[747]

b. Second, the European Commission notes that "there are no indications on the file that the price of the main input of Union producers, that is gas, will significantly reduce within the next one to two years".[748]

7.471. Regulation 999/2014 shows that the European Commission addressed the evidence on the record, even when it contradicted its own finding. In particular, the investigating authority stated that:

> As regards the decrease in the costs of gas announced by Yara international, this is a case apart because the Yara group is a multinational group with access to several sources of cheap gas outside the Union. Other producers of the product concerned, and notably those located in the Eastern regions of the Union, rely on Russian gas. Therefore, the Commission still considers that there is no convincing evidence that the gas prices for the Union producers will significantly decrease in the near future.[749]

7.472. We therefore disagree that the European Commission "disregarded uncontested evidence": we find on the contrary that the European Commission considered the evidence on the record showing a decline in gas prices but considered that the situation of Yara was not representative of the situation of other producers. In view of the evidence on the record, we are not convinced by Russia's argument that the authority's finding regarding the evolution of gas prices was not based on positive evidence or an objective examination.

[743] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), p. 40.
[744] Russia's first written submission, para. 1009; second written submission, paras. 1216-1219.
[745] Russia's second written submission, para. 1214.
[746] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), pp. 42-43.
[747] Final disclosure, (Exhibit RUS-78 (BCI)), recital 88.
[748] Final disclosure, (Exhibit RUS-78 (BCI)), recital 115.
[749] Regulation 999/2014, (Exhibit RUS-66), recital 165.

#### 7.7.3.6.2.4 Whether the authority failed to consider other evidence on the record

7.473. Finally, Russia points to a series of additional facts, allegedly presented by RFPA, in support of its claim that the EU domestic industry's non-injurious situation *"[was]* sustainable"[750]:

a. the export competitiveness of EU producers[751];

b. the evolution of the profit margin of the industry[752]; and

c. the diversion of trade flows and the attractiveness of the EU market.[753]

7.474. We thus examine whether, as submitted by Russia, the evidence provided by RFPA was "disregarded" by the investigating authority and whether this affected the objectiveness of the examination conducted by the European Commission.[754]

7.475. With regard to the European Commission's alleged failure to examine evidence showing that EU exports successfully competed with Russian-origin AN in third country markets, we note that, in its comments on the definitive disclosure, RFPA claimed that the "export performance of the Union industry demonstrates that it can successfully compete with Russian AN".[755] RFPA provided information on export volumes and prices over the period 2009-2013 and concluded that:

> This shows that the EU producers compete well with Russian and other third country producers in third countries market. There is no reason why, when the measures are repealed, EU producers cannot compete successfully with the Russian producers in its home market.

7.476. Russia also points to the request for review lodged by the applicant, which allegedly shows that "Russian imports in third countries were undercut by EU imports. For instance in Brazil, Russian imports were more expensive than imports from the Netherlands or Lithuania".[756]

7.477. The European Union responds that it actually considered and addressed in Regulation 999/2014 the comments made by RFPA on this issue[757], by noting that "the current positive economic situation of the Union industry, including its volume of export sales to third countries, does not automatically preclude that the situation may change in the future if the measures in force are allowed to lapse".[758]

7.478. While the European Commission could have been more explicit in its response, we are of the view that this reference to RFPA's comments shows that the investigating authority did consider the export performance of the EU industry.

7.479. With regard to the European Commission's finding that Russian exports would enter the Union market at an injurious level, thereby negatively affecting industry profit margins, Russia argues that:

> [T]he EU's statement that imports from Russia "will take place at injurious level" is totally unreasoned. There is no evidence on the record substantiating that target imports indeed will cause reduction of the EU domestic industry's profit margin below 8% target profit.[759]

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[750] Russia's first written submission, para. 1015.
[751] Russia's first written submission, para. 1010 and fn 942.
[752] Russia's first written submission, para. 1011.
[753] Russia's first written submission, paras. 1012-1013.
[754] Russia's first written submission, para. 1018.
[755] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), p. 31.
[756] Russia's second written submission, para. 1220 (referring to Page 85 of Annex B, Dumping of the request, (Exhibit RUS-99 (BCI))).
[757] European Union's second written submission, para. 189.
[758] Regulation 999/2014, (Exhibit RUS-66), recital 147.
[759] Russia's first written submission, para. 1011.

7.480. We disagree with Russia that the European Commission has not explained its conclusion with regard to the injurious price level of Russian imports and its impact on the profit margin of the industry. In fact, in Regulation 999/2014, the European Commission noted that "notwithstanding the current profit level of the Union industry, such likely prices would put at risk the Union industry's ability to achieve the normal profit that it could expect to achieve in the absence of dumped imports."[760] The European Commission added that "the current cost of production and therefore the current non-injurious price is unlikely to decrease in the short term, given the trend of increased cost of production during the period considered."[761] Further, we note that the conclusion of the authority on the level of the injurious price was based *inter alia* on the difference between the export price of Russian exports to third countries and the price of domestic sales of the like product on the Union market during the review period. Since both prices were based on verified data provided by Russian and domestic producers of AN[762], we cannot agree with Russia's arguments that "[t]his finding is … absolutely not grounded in facts."[763]

7.481. Finally, with regard to the attractiveness of the EU market, Russia argues that the European Union exaggerates the attractiveness of the Union market for two main reasons: first, because Russian exporters are not using up the duty free imports volumes provided for under the price undertakings currently in place and, second, because of the competitive advantage given to Union producers by a 6.5% regular customs duty.[764] We cannot agree with Russia that the conclusion reached by the European Commission with regard to the attractiveness of the Union market is not based on positive evidence. The evidence on the record shows that the Commission's conclusion is, in fact, based on the following elements:

i. the price level on the Union market compared to third country markets[765];

ii. existing limits to Russian exports to third countries[766]; and

iii. the geographical proximity of the Union market to Russia and the existence of well-established distribution channels.[767]

7.482. Our examination of the European Commission's factual findings regarding the attractiveness of the Union market thus leads us to the conclusion that the authority had enough evidence on the record to find that, should the measures lapse, the Union market would be an attractive destination for Russian exports of AN.

#### 7.7.3.6.3 Conclusion on Russia's claim #7

7.483. In conclusion, we recall 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. After carefully considering the elements on the record and the arguments of the parties, we therefore reject Russia's claim #7 that the European Commission's determination of likelihood of recurrence of injury is inconsistent with Article 11.3 of the Anti-Dumping Agreement because the investigating authority concluded that there were no indications on the record that the non-injurious situation of the EU domestic industry would be sustainable.

[760] Regulation 999/2014, (Exhibit RUS-66), recital 160.
[761] Regulation 999/2014, (Exhibit RUS-66), recital 163.
[762] Regulation 999/2014, (Exhibit RUS-66), recital 58: "[t]his finding was based on verified data provided by Russian exporting producers, which accounted for around 80% of the exports to third countries. … The export sales of all four sampled exporting producers to third countries were made at a sustainable price level during the RIP."
[763] Russia's second written submission, para. 1221.
[764] Russia's second written submission, paras. 1227-1228. See also Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), p. 26.
[765] Regulation 999/2014, (Exhibit RUS-66), recital 153.
[766] Regulation 999/2014, (Exhibit RUS-66), recital 154.
[767] Regulation 999/2014, (Exhibit RUS-66), recital 155.

### 7.7.3.7 Whether the European Union's findings with regard to spare capacities and demand in third country markets violate Article 11.3 of the Anti-Dumping Agreement (claim #8)

#### 7.7.3.7.1 Introduction

7.484. Russia makes a series of claims on the basis of Articles 3.1 and 11.3 of the Anti-Dumping Agreement, relating to the way the European Union calculated the spare capacity of Russian producers[768] and assessed the ability of third country markets to absorb this spare capacity.[769] In particular, Russia criticizes the fact that, for some Russian producers, the European Commission used nameplate capacities, while for others, it referred to actual production figures.

7.485. The European Union responds that it used a different methodology whenever there was a discrepancy between the nameplate capacity and the actual level of production.[770] As far as the absorption capacity of third countries is concerned, the European Union responds that whatever methodology is used, the additional demand likely to occur in third markets was, at the time of the review and beyond, just a fraction of the spare capacity available in Russia.[771]

#### 7.7.3.7.2 Analysis

##### 7.7.3.7.2.1 The European Commission's assessment of spare capacity

7.486. With regard to spare capacity, we are not convinced by the arguments presented by Russia. In particular, we disagree with Russia's statement that "the fact that production exceeds nameplate capacity cannot be deemed a sufficient factor to increase the capacity of Russian exporters."[772]

7.487. We note that the purpose of the European Commission's evaluation of the production capacity of Russian producers is to determine the volume of AN which could be exported to the Union market should the measures lapse.[773] For this evaluation, the *actual* production capacity of the plants producing the product concerned or able to produce the product concerned is the relevant indicator. While 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.

7.488. Russia further argues that nameplate capacity is the international standard for the evaluation of the production capacity in the industry.[774] We are of the view that, while this standard might be relevant for international comparisons of installed capacities, it is not necessarily relevant in the context of a likelihood of recurrence of injury analysis: for this purpose, considering the actual, verified, maximum capacity is a reasonable approach.

7.489. We also disagree that the European Commission used different benchmarks for assessing the production capacity of Russian producers and for assessing the production capacity of EU producers. The evidence on the record shows that the investigating authority collected data on the nameplate capacity of EU and Russian producers but relied on actual production capacity whenever it was higher than the theoretical capacity. We see no indication on the record that the investigating authority noted a gap between the nameplate capacity and the actual capacity of domestic producers.

7.490. Finally, Russia makes an additional argument regarding the capacity expansion of a Russian producer (EuroChem NAK).[775] The parties disagree on the volume of increased capacity that this expansion would produce. The European Union refers to a document provided by the company during

[768] Russia's first written submission, paras. 1033-1050.
[769] Russia's first written submission, paras. 1051-1066.
[770] European Union's first written submission, para. 537.
[771] European Union's first written submission, para. 548.
[772] Russia's first written submission, para. 1037.
[773] Regulation 999/2014, (Exhibit RUS-66), recitals 84 and 94.
[774] Russia's first written submission, para. 1040.
[775] Russia's first written submission, para. 1048 (referring to Annex VI of the Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI))).

the verification visit, which indicates that: "the capacity of the ammonium nitrate production facility is [[***]] tpd ([[***]] ktpa) presented as 100% ammonium nitrate."[776] Russia refers to RFPA's comments on the final disclosure[777], which states that although the reported capacity is [[***]] ktpa, only a fraction of this capacity is used for the production of prilled AN.

7.491. Having considered the evidence on the record (the document obtained by the European Commission during the investigation and RFPA's comments after the definitive disclosure), we are unable to understand how the investigating authority could have concluded from the documentation obtained that the capacity expansion was [[***]] ktpa instead of [[***]] ktpa. Further, since the European Commission based its factual finding on a document provided by the investigated company, which presented the expansion of [[***]] ktpa as 100% ammonium nitrate, we cannot agree with Russia that the conclusion reached by the authority was not objective and based on positive evidence.

7.492. For the foregoing reasons, we disagree with Russia that the European Union's findings on the actual production capacity of Russian exporting producers and on the spare capacity in the Russian Federation are "not based on an objective examination of positive evidence on the record".[778]

#### 7.7.3.7.2.2 The European Commission's assessment of the capacity of absorption of Russian exports by third countries

7.493. Second, with regard to the capacity of third markets to absorb Russian exports of AN, we recall the findings reached by the European Commission in the definitive disclosure:

a. The European Commission noted first that "some of the largest export markets for AN in the world … remain protected by anti-dumping measures from Russian exports" and "the Chinese market continues to be closed to imports of AN. Therefore, Russian producers are unlikely or unable to export to those markets".[779]

b. It then noted that the projected consumption in Latin America was at a level which "would only allow for the partial absorption of the Russian producers' spare capacity".[780]

c. With regard to Russian domestic consumption, the final disclosure noted that "during the RIP domestic sales were 53% of the total sales of the Russian producers and the projected increase by 3% each year for the next 5 years (on average approximately 120 000 tonnes per year) could be easily covered by the spare capacity the Russian producers already have at their disposal. The projected yearly increase constitutes less than 7% of the estimated yearly spare capacity of the Russian producers after the RIP".[781]

7.494. We found that the evaluation of the Russian producers' production capacity for AN was objective and based on positive evidence. In view of the evidence in the definitive disclosure, we also find that the European Commission's conclusion – that third markets would only absorb a fraction of Russia's spare capacity – was based on positive evidence and supports the determination that:

> [T]he 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.[782]

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[776] Business plan of the investment project for NAK Azot, (Exhibit EU-9 (BCI) (English translation)), p. 13.

[777] "The capacity of the prilled AN part of the project as is explicitly stated in the documents provided amounts to [[***]]". Russia's first written submission, para. 1048, and fn 983 (referring to Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), pp. 50-51: "Allegations Regarding a Further Major Increase of Capacity Are Incorrect."

[778] Russia's first written submission, para. 1047.

[779] Final disclosure, (Exhibit RUS-78 (BCI)), recital 55.

[780] Final disclosure, (Exhibit RUS-78 (BCI)), recital 57.

[781] Final disclosure, (Exhibit RUS-78 (BCI)), recital 58.

[782] Final disclosure, (Exhibit RUS-78 (BCI)), recital 60.

#### 7.7.3.7.3 Conclusion on claim #8

7.495. In conclusion, we recall 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. After carefully considering the elements on the record and the arguments of the parties, we reject Russia's claim #8 that the European Commission's determination of likelihood of recurrence of injury is inconsistent with Article 11.3 of the Anti-Dumping Agreement because the likelihood of recurrence of injury determination was not based on positive evidence and an objective examination of the level of production capacity available in Russia and of the capacity of absorption of Russian exports by third country markets.

### 7.7.4 Claims with respect to the determination of the likelihood of recurrence of dumping (claims #9 and #11)

#### 7.7.4.1 Introduction

7.496. Russia makes a series of claims regarding the likelihood of recurrence of dumping determination made by the European Commission in the third expiry review on ammonium nitrate. According to Russia, the analysis and the determination reached by the European Commission are inconsistent with Article 11.3 and various provisions of Articles 2 and 6 of the Anti-Dumping Agreement. Russia has confirmed that claims #9 and #11 concern Regulation 999/2014 only.[783]

7.497. We recall that we have decided to examine claims #3 and #4 as part of the series of claims concerning the likelihood of recurrence of dumping.[784]

##### 7.7.4.1.1 Summary of the relevant facts

7.498. The record indicates that the determination of likelihood of recurrence of dumping reached by the European Commission relied on three stated factors:

a. the export price of AN from Russia to third countries: the EU authorities found that all sampled exporters sold at dumped prices to third country markets such as Brazil, Colombia, Peru, Ukraine, and Kazakhstan[785];

b. the production capacity and spare capacity for AN in Russia. The EU authorities concluded that, should the measures lapse, the Russian producers had significant spare capacity likely to be exported to the European Union, because of the geographical proximity of the EU market to Russia and the well-established distribution channels in the European Union; the inability of the Russian market to absorb the spare capacity; and the fact that some of the potentially largest export markets for AN (such as the United States and Australia) remained protected by anti-dumping measures from Russian exports[786]; and

c. the attractiveness of the Union market and other third markets: based on a comparison of the price of sale of the product concerned on the Union market with the price of sale on third country markets, the EU authorities concluded that the EU market was attractive for Russian AN exporters.[787]

7.499. In light of these factors, the EU authorities concluded that there was a likelihood of recurrence of dumping and of substantial increase of the quantities exported to the Union, should the measures lapse.[788]

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[783] Russia's response to Panel question No. 35, para. 179.
[784] See para. 7.297 above.
[785] Regulation 999/2014, (Exhibit RUS-66), recitals 57-58.
[786] Regulation 999/2014, (Exhibit RUS-66), recitals 85 and 91-92.
[787] Regulation 999/2014, (Exhibit RUS-66), recital 93.
[788] Regulation 999/2014, (Exhibit RUS-66), recital 97.

7.500. With regard to the first factor (the export price of AN from Russia to third countries), the record indicates that although these export prices were found to be "dumped" (the weighted average export price being lower than the weighted average price on the domestic market)[789], the European authority did not make dumping calculations for these sales. Instead, the European Commission indicates that it "simply compared average ex-works domestic prices with ex-works export prices based on data reported by the sampled companies."[790]

#### 7.7.4.1.2 Russia's claims #9 and #11

7.501. Russia challenges the likelihood of recurrence of dumping determination by making the following claims:

7.502. First (claim #9), Russia argues that whenever an investigating authority establishes dumping margins as part of its likelihood analysis, it must ensure that the dumping margins are calculated in accordance with Article 2 of the Anti-Dumping Agreement.[791] If determinations related to dumping are not consistent with the provisions of Article 2, this leads to a violation of both Article 2 and Article 11.3 of the Anti-Dumping Agreement. According to Russia, the EU determination is in breach of:

a. 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[792];

b. Article 6.8 of the Anti-Dumping Agreement because the authority rejected the export prices of a producer (EuroChem), on the basis of the company's partial non-cooperation. Russia argues that since EuroChem provided the European Union with data on EU and other markets sales and a transaction-by-transaction report in the context of a price undertaking, the European Union could not rely on Article 6.8 to disregard EuroChem's prices[793];

c. Article 6.10 of the Anti-Dumping Agreement because the European Union did not determine individual dumping margins for the Russian sampled producers[794]; and

d. Article 11.3 of the Anti-Dumping Agreement because the European Union failed to examine the impact of the absence of dumping by the largest Russian exporters during the RIP when making a likelihood of recurrence of dumping determination.[795]

7.503. Second (claim #11), Russia submits that the European Union violated Articles 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 making an affirmative determination of likelihood of recurrence of dumping on the basis of alleged "dumping" without conducting proper dumping margin calculations.[796] According to Russia, since the European Union did not compare the normal value of the like product with the export price of the product under consideration supplied to the European Union (but, instead, to third countries), it violated Articles 2.1, 2.2 and, consequently, Article 11.3 of the Anti-Dumping Agreement and Article VI:1 of the GATT.[797] Additionally, Russia argues that the EU authorities did not conduct a fair comparison between the export price to the European Union and the normal value, as required by

[789] Regulation 999/2014, (Exhibit RUS-66), recitals 57-58.
[790] Regulation 999/2014, (Exhibit RUS-66), recital 60.
[791] Russia's first written submission, para. 667.
[792] Russia's first written submission, paras. 695-696. See also Determination of dumping margins for exports to the European Union, (Exhibit RUS-125 (BCI)).
[793] Russia's first written submission, para. 700.
[794] Russia's first written submission, para. 702.
[795] Russia's first written submission, para. 703.
[796] Russia's first written submission, para. 709.
[797] Russia's first written submission, para. 734.

Article 2.4 of the Anti-Dumping Agreement. As a result, the European Union allegedly violated Article 2.4 and, consequently, Article 11.3 and of the Anti-Dumping Agreement.[798]

7.504. We note, in this regard, that the parties disagree on the legal standard to be applied by the Panel to its examination of the European Union's determination of likelihood of recurrence of dumping. While Russia's main claims relate to the alleged inconsistency of the European authority's dumping calculation with Article 2 of the Anti-Dumping Agreement, and, as a consequence, to the inconsistency of the likelihood determination with Article 11.3, the European Union asks us to limit our findings to Article 11.3.[799] We first examine the question of the legal standard applicable to our evaluation of Russia's claim on the EU's likelihood of recurrence of dumping determination, before turning to the individual claims made by Russia in this dispute.

#### 7.7.4.2 The relevant legal standard for the Panel's examination of Russia's claims #9 and #11

7.505. In the present dispute, Russia challenges certain determinations made by the European Union's investigating authority in the context of the third expiry review on AN from Russia. Both parties agree that the provision of the Anti-Dumping Agreement dealing primarily with expiry reviews is Article 11. The relevant portion of Article 11.3 states:

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition … unless the authorities determine … that the expiry of the duty *would be likely to lead to continuation or recurrence of dumping and injury*.[800]

7.506. We recall that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* explained that original investigations and expiry reviews are distinct processes with different purposes:

> In an original anti-dumping investigation, investigating authorities must determine whether dumping exists during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*.[801]

7.507. The panel, in discussing the same issue, stated that "[i]n light of the fundamental qualitative differences in the nature of these two distinct processes … it would not be surprising to us that the textual obligations pertaining to each of the two processes may differ".[802]

7.508. Further, the Appellate Body noted that Article 11.3 does not prescribe any specific methodology to be applied in making a "likelihood" determination, and that this provision does not identify any particular factors that authorities must take into account in making such a determination[803], stating "we observe that Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member's investigating authority in making such a 'likelihood' determination."[804]

7.509. However, as noted by the panel in *US – Shrimp II (Viet Nam)*, the Appellate Body did provide guidance to investigating authorities in this regard.[805] In particular, the Appellate Body indicated that a determination made in line with Article 11.3 requires that investigating authorities "undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated".[806] Further, we are mindful that the language of Article 11.3 envisages an active

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[798] Russia's first written submission, paras. 736-739.
[799] European Union's first written submission, para. 289.
[800] Emphasis added.
[801] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 107. (emphasis original)
[802] Panel Report*, US – Corrosion-Resistant Steel Sunset Review*, para. 7.8.
[803] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 283.
[804] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.166.
[805] Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.305.
[806] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

process combining both investigatory and adjudicatory aspects[807], which requires authorities to act "with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination."[808] The word "likely", in particular, sets the relevant evidentiary standard, requiring that the evidence demonstrates a *reasonable probability* that dumping would occur if the duty were to expire. Any finding of likelihood should also be based on positive evidence.[809] A firm evidentiary foundation is required in each case for a proper likelihood determination, and such a determination "cannot be based solely on the mechanistic application of presumptions".[810]

7.510. We are also mindful of the general standard of review for anti-dumping investigations, as expressed in Article 17.6(i) of the Anti-Dumping Agreement:

> [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned[.]

7.511. We are thus of the view that an investigating authority may therefore rely on a range of positive evidence (including evidence of past dumping and evidence of dumping in other jurisdictions[811]) in order to support a finding of likelihood of recurrence of dumping, so long as the establishment of the facts in doing so was proper, the evaluation of those facts was unbiased and objective and the conclusion reached is reasoned and adequate.

7.512. With regard specifically to the relevance of Article 2 of the Anti-Dumping Agreement in a determination of likelihood of recurrence of dumping, we note the statement of the panel in *EU – Footwear (China)* that:

> [I]t is clear to us that Articles 2 and 3 of the AD Agreement are *not directly applicable* to a determination under Article 11.3, and thus to a panel's consideration of an alleged violation of Article 11.3. Moreover, our view in this regard is not changed by the fact that an investigating authority chooses to make a determination of dumping or injury in the context of a particular expiry review.[812]

7.513. In the present case, Russia relies on the panel's position in *US – Corrosion-Resistant Steel Sunset Review* that a "prospective likelihood determination will inevitably rest on a factual foundation relating to the past and present"[813] to argue that dumping determinations subject to Article 2 are relevant factors in a likelihood of recurrence of dumping determination.[814] Russia further submits that "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4." Further, "'[i]f these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the Anti-Dumping Agreement.' In such circumstances, 'the likelihood[-of-dumping] determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3.'"[815]

7.514. The Panel agrees with Russia's basic assumption that, should an authority rely on dumping margins to examine the likelihood of recurrence of dumping in an expiry review, these dumping margins should be established in a manner consistent with the provisions of Article 2 of the

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[807] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111.
[808] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111.
[809] Panel Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.45 and fn 48; *US – DRAMS*, para. 6.42; and Appellate Body Report, *US – Carbon Steel*, para. 88.
[810] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 178. See also Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.305.
[811] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.180.
[812] Panel Report, *EU – Footwear (China)*, para. 7.157. (emphasis added)
[813] Russia's response to Panel question No. 96, para. 139. Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.279.
[814] Russia's response to Panel question No. 96, para. 143.
[815] Russia's first written submission, para. 666; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 127-130.

Anti-Dumping Agreement. Otherwise, they could not support an objective examination of the likelihood of recurrence of dumping. However, Russia fails to put the Appellate Body's finding in context: in its clearest statement on the distinction between dumping determinations and likelihood of recurrence determinations, the Appellate Body set out plainly that "we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of … recurrence of dumping."[816] The Appellate Body then continued, as Russia quotes, "[h]owever, *should* investigating authorities choose to rely upon dumping margins in making their likelihood determination".[817] In the present case, as we will discuss below, we do not consider that the European Commission in fact relied upon dumping margins, either previously established or calculated afresh, in determining the likelihood of recurrence of dumping.[818]

7.515. With this in mind, we turn to Russia's argument that the investigating authority did in fact rely on a dumping margin calculation in determining whether or not there was a likelihood of recurrence of dumping. Should we find that the authority did not rely on dumping margins for its analysis of the likelihood of recurrence of dumping, we would decline to make findings on the consistency of the European Union's likelihood of recurrence of dumping determination with Article 2 of the Anti-Dumping Agreement. We would nevertheless examine the consistency of Russia's determination with Article 11.3 of the Anti-Dumping Agreement, that is, whether the determination was made "on the basis of a 'rigorous examination' leading to 'reasoned and adequate conclusion', and be supported by 'positive evidence' and a 'sufficient factual basis.'"[819]

#### 7.7.4.3 Whether the determination of likelihood of recurrence of dumping in Regulation 999/2014 relied on a dumping margin calculation

7.516. The record indicates that, in the expiry review at issue, the European Commission determined that there was a likelihood of recurrence of dumping if the measures were to lapse, on the following basis:

a. The European Commission selected a sample of four exporters in the Russian Federation (Acron, EuroChem, Ural Chem and SBU Azot): three provided partial questionnaire responses and Acron provided a full questionnaire response.[820] The first two respondents made sales to the European Union during the period of review but in the context of price undertakings; the last two respondents did not sell the product concerned to the European Union during the period of review.[821]

b. Due to incomplete responses or due to the fact that Acron exported under a price undertaking, the European Commission could not calculate a dumping margin for the four Russian producers/exporters.[822]

c. The EU Commission established an average domestic ex-works price for the sales of the four Russian producers/exporters during the period of review and compared it with their weighted average ex-works export price to certain third countries: it found that the average ex-works price of export sales of the four producers was below their average ex-works price of domestic sales and thus concluded that exports of AN were made at dumped prices to those third countries.[823]

7.517. The European Union further clarifies that the European Commission based its likelihood of recurrence of dumping determination on:

> [T]hree equally important and interlinked factors: exports from Russia to other destinations at prices below domestic prices (which suggest that it is likely, should the

[816] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.
[817] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127. (emphasis added)
[818] See para. 7.526 below.
[819] Russia's response to Panel question No. 96, para. 140 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 182).
[820] Russia's first written submission paras. 640-641.
[821] Russia's first written submission para. 642.
[822] Russia's first written submission para. 645; Regulation 999/2014, (Exhibit RUS-66), recitals 52-54.
[823] European Union's first written submission, para. 297; Russia's first written submission para. 648; and Regulation 999/2014, (Exhibit RUS-66), recitals 57-58.

> measures be removed, that Russian exporters would also sell to the EU at dumped prices), spare capacities of Russian producers (which are likely to be used and directed to the EU markets should the measures be removed), and incentives to redirect sales to the EU (in particular, the price difference between Russian exports to third country markets and prices charged in the EU suggests that, should the measures be removed, Russian exporters will have an incentive to redirect some of their export sales to the EU). The Commission assessed these three factors in a holistic fashion … [.][824]

7.518. Regulation 999/2014, in response to an RFPA allegation that no appropriate methodologies were used in the dumping calculations, explains that the investigating authority did not calculate dumping margins, but instead "compared [the] average ex-works domestic prices with [the] ex-works export prices [of the Russian exporters,] based on data reported by sampled companies."[825] Further, the same recital states that "in a likelihood of recurrence of dumping analysis there is no need to calculate precise dumping margins, so there was no reason to use CIF values, as suggested by RFPA."[826]

7.519. On the contrary, Russia argues that "whatever the legal characterization the EU tries to give to its price-to-price comparison, the Commission *did* make an actual dumping determination, and *did* calculate dumping margins, in order to reach a finding that Russian imports were 'dumped'".[827] Russia refers to instances where Regulation 999/2014 makes affirmative assertions that Russian imports were dumped in third-country markets.[828] These include the following phrases:

a. "Acron therefore sold at dumped prices to third country markets, in particular to Brazil"[829];

b. "actual domestic prices already show that export sales to third country markets are dumped"[830]; and

c. "Russian exporting producers currently sell the product concerned at dumped prices to third countries".[831]

7.520. According to Russia, these statements, and the price comparison do not constitute merely "'evidence relating to dumping' but consist in a 'price-to-price comparison', which is 'the core principle of dumping'".[832]

7.521. For the European Union, the comparison of average ex-works domestic prices with ex-works export prices was performed "for the sole purpose of an assessment of the likelihood of recurrence of dumping, and as only 'one relevant factor' in that assessment".[833] A determination of dumping is separate, and is governed by a distinct legal provision in the Anti-Dumping Agreement. The European Union argues that a simple price comparison may be different from a "full-blown dumping margin calculation" in a number of ways, which are case-specific, and that this was recognized in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*. There, according to the European Union, the panel made a distinction between a "dumping determination" and an analysis which relates to the "general concept of dumping".[834] An example of the difference between these two analyses, provided by the European Union, is that in a "full-blown dumping margin calculation" it is necessary to determine whether domestic sales were made in the ordinary course of trade.[835]

7.522. While we do not take a position with regard to the alleged legal differentiation advanced by the European Union between "the concept of dumping" and a "full-blown dumping margin calculation", we agree with the basic principle put forward by the European Union that a dumping

[824] European Union's response to Panel question No. 36, para. 101. (fns omitted)
[825] Regulation 999/2014, (Exhibit RUS-66), recital 60.
[826] Regulation 999/2014, (Exhibit RUS-66), recital 60.
[827] Russia's response to Panel question No. 37, para. 186. (emphasis added)
[828] Russia's second written submission, para. 983.
[829] Regulation 999/2014, (Exhibit RUS-66), recital 57.
[830] Regulation 999/2014, (Exhibit RUS-66), recital 63.
[831] Regulation 999/2014, (Exhibit RUS-66), recital 65.
[832] Russia's second written submission, para. 985.
[833] European Union's first written submission, para. 300.
[834] European Union's response to Panel question No. 36, para. 91 (quoting Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 7.75-7.77).
[835] European Union's response to Panel question No. 36, para. 92.

margin calculation is not required in order to make a finding that recurrence of dumping is likely. As discussed, in a likelihood of recurrence of dumping determination there is no *obligation* to rely on a dumping margin calculation, which logically means that such calculation is not a necessary component in finding that the recurrence of dumping is likely. We stress again that, in the context of an original investigation, an investigating authority needs to determine whether an exporter sold the product under consideration at dumped prices during the period of investigation (i.e. in the past). In the context of an expiry review, the authority needs to determine whether there is a likelihood that the exporter will sell at dumped prices in the future, after anti-dumping measures expire. For that purpose, various methodologies could be used, including using projections about the future export price and future normal value.

7.523. Given that Article 11.3 does not prescribe any specific methodology for an investigating authority to use or any particular factors that investigating authorities should consider when making a determination of likelihood of recurrence of dumping, the authority is free to use any evidence which it deems relevant to make its determination, as long as this results in reasoned and adequate conclusions, based on positive evidence, that dumping is likely to recur if the anti-dumping measures were to lapse. Further, as long as that evidence does not constitute a dumping margin calculation, it does not have to conform to the requirements of Article 2. As recognized by the panel in *US – Corrosion-Resistant Steel Sunset Review*, it is logical that "evidence relating to dumping (or the absence thereof)" since the imposition of the order could well be instructive in a likelihood of recurrence of dumping determination.[836] Indeed, that panel found that evidence of the existence of dumping in another jurisdiction might also be potentially relevant.[837] We do not believe that the only evidence relating to the existence of dumping during the period of imposition of the order that can be considered by an investigating authority is a "full-blown determination of dumping" made pursuant to Article 2.[838]

7.524. With this in mind, we turn to assess Russia's argument that the Commission did make a dumping determination in respect to third-countries, and thus must have calculated dumping margins, in order to reach a finding that Russian imports were "dumped".[839]

7.525. We note that Regulation 999/2014 sets out clearly, in the course of the expiry review, both what the Commission did and did not do, and that it specifically did not carry out dumping margin calculations, but that it did make a price-to-price comparison. This is not to say that the Commission's word is being taken at face value, but that the Commission appeared to correctly understand what we have discussed above, that (i) calculating a dumping margin and (ii) determining whether there would be a likelihood of recurrence of dumping from Russia should measures be allowed to lapse, may be two distinct processes, and proceeded on that basis to determine the second, without engaging with the first. Indeed, the Commission stated that, as most of the sampled Russian exporting producers did not fully cooperate, the Commission "did not have sufficient data to carry out any dumping calculations on the basis of the companies' own data".[840] While it could have carried out a dumping calculation for Acron, the Commission considered that its data was not reliable for the purpose of this expiry review.[841]

7.526. In this regard, the comparison of average ex-works domestic prices with the ex-works export prices of the Russian exporters does not in itself constitute a dumping margin calculation. It may be a required element of a dumping margin calculation but does not comprise one on its own. We consider, as the Commission did, that the price comparison is an important indicator in the assessment of how future exports to the European Union may develop if the anti-dumping measures were to lapse, especially where those exports to third countries are not subject to anti-dumping duties. This pricing policy of selling below domestic prices for sales to third-countries is a relevant factor in the determination, particularly if, like in the current dispute, export sales to the European Union during the RIP could not be used for determining the future likelihood of the recurrence of dumping.[842] In addition, we note that the price-to-price comparison was only one of

[836] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.180.
[837] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.180.
[838] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.180.
[839] Russia's first written submission, para. 731 (referring to Regulation 999/2014, (Exhibit RUS-66), recitals 63 and 57-58).
[840] Regulation 999/2014, (Exhibit RUS-66), recital 53.
[841] Regulation 999/2014, (Exhibit RUS-66), recital 52. See paras. 7.536-7.539 below.
[842] See paras. 7.536-7.539 below.

various elements relied upon by the Commission in reaching its conclusion that there was a likelihood of recurrence of dumping.

7.527. Like Russia, we have noted that the terms "dumped" or "dumped prices" appear several times in the text of Regulation 999/2014. However, when those statements are examined in their proper context, it appears clearly that the European Union did not engage in the calculation of dumping margins.

7.528. As a result of our findings above, particularly that there was no dumping margin calculation made in the course of the expiry review, we decline to make findings on the consistency of the European Union's likelihood of recurrence of dumping determination with Article 2 of the Anti-Dumping Agreement. We thus turn to examine Russia's claims #9 and #11 against the Commission's determination in light of the obligations contained in Article 11.3 of the Anti-Dumping Agreement.[843] In doing so, we may refer to the provisions of Article 2 as context for interpreting the obligations contained in Article 11.3, but note once again that they are not directly applicable.

7.529. We recall that Russia makes two arguments in support of its claim that the European Union's determination of likelihood of recurrence of dumping violated Article 11.3:

a. That the European Union failed to consider evidence submitted by the Russian exporting producers, that demonstrated an absence of dumping, and instead relied on export prices of AN to third countries (claim #9).[844]

b. That the European Union made findings on "dumping", based on Russian exports to third-countries although the European Union is the importing Member. Accordingly, the European Union should have assessed Russian exports of the product under consideration to the European Union (claim #11).[845]

7.530. As a consequence, Russia considers that the European Union did not carry out a "rigorous examination" and eventually did not draw "reasoned and adequate conclusions" supported by "positive evidence" and a "sufficient factual basis", as required under Article 11.3 of the Anti-Dumping Agreement.

#### 7.7.4.4 Whether the European Union breached Article 11.3 of the Anti-Dumping Agreement by failing to examine the impact of the alleged absence of dumping by the largest Russian exporters (claim #9)

##### 7.7.4.4.1 Arguments of the parties

###### 7.7.4.4.1.1 Russia

7.531. Russia argues that the EU authorities failed to examine the impact of the absence of dumping by the largest Russian exporters during the review investigation period.[846]

7.532. According to Russia, Acron and EuroChem together exported almost all Russian-origin AN to the European Union during the RIP, as SBU Azot and UralChem "did not sell the product concerned to the Union during the RIP."[847] Here Russia argues that:

> [T]hrough undertakings of Acron and EuroChem, including regular reporting on volume and prices of AN supplied to the European Union[666], replies of these companies in questionnaires[667] as well as the Commission's verification visits the EU authorities

[843] Russia submits: "[e]ven if the Panel finds that the investigating authority did not calculate a dumping margin as part of its likelihood-of-dumping analysis, Russia maintains that claims #9 and 11 should nevertheless be considered." (Russia's response to Panel question No. 37, para. 188).
[844] Russia's response to Panel question No. 37, para. 189.
[845] Russia's response to Panel question No. 37, para. 189.
[846] Russia's first written submission, paras. 683-708.
[847] Russia's first written submission, para. 643 (quoting Regulation 999/2014, (Exhibit RUS-66), recital 62). See also European Union's first written submission, para. 310.

received sufficient verifiable information to make determinations under Article 11.3 of the Anti-Dumping Agreement.[848]

[666] See Exhibit RUS-123 (BCI).
[667] For Acron's data, see Exhibit RUS-124 (BCI) and Exhibit RUS-145 (BCI). Comments on the definitive disclosure, Annex VI-B-I, Exhibit RUS-102 (BCI).

Russia further claims that the Anti-Dumping Agreement does not allow the investigating authority in a likelihood-of-dumping determination to disregard export prices on the sole basis that these prices are subject to a price undertaking and that the European Union was *obliged* to "base its dumping calculations on the export prices of investigated producers and exporters to the EU", including prices under price undertakings.[849] The data from EuroChem and Acron allegedly demonstrated that sales of Russian AN in the European Union were not made at dumped prices as the weighted average dumping margin for sales made by both companies stood at [[***]].[850] Russia explains that EuroChem's data was superior to that presented in the definitive disclosure since it is transaction-specific and since, in the review, the European Union incorrectly focused on the dumping margins calculation based on sales to third countries, rather than to the European Union.

#### 7.7.4.4.1.2 The European Union

7.533. The European Union responds that the two producers that made sales to the European Union in the RIP (Acron and EuroChem) were both subject to price undertakings which set minimum prices for their respective imports into the European Union, either during the entirety of the period under review (in the case of Acron), or during a part of that period (in the case of EuroChem).[851] For the European Union, price undertakings do not reflect the actual forces of supply and demand and therefore, as stated in Regulation 999/2014, the decision to reject data from Acron and EuroChem was based on the fact that the European Commission did not consider "export prices based on a price undertaking a meaningful indicator in the analysis of future behaviour of exporting producers in the absence of measures and any price undertaking."[852] Additionally, the European Union notes that Russia's claim that EuroChem's and Acron's sales to the European Union were not at dumped prices is incorrect, as the document which allegedly demonstrates this does not accurately reflect the data that was provided to and verified by the Commission.[853] The Commission concluded that the relevant export prices were considered an "unreliable element in the analysis of the likelihood of continuation or recurrence of dumping in the specific circumstances of this investigation."[854]

7.534. The European Union also argues that the requirement for an investigating authority to arrive at a "reasoned conclusion" as to the likelihood of recurrence of dumping does not have to be satisfied through a specific methodology or the consideration of particular factors in every case.[855] Instead, for the European Union, what is important is that the factors which *are* relied upon provide a sufficient factual basis for the conclusion of likely future recurrence of dumping.

#### 7.7.4.4.2 Evaluation by the Panel

7.535. Russia claims that the investigating authority failed to examine the impact of the absence of dumping by the largest Russian exporters, on the likelihood of recurrence of dumping.

7.536. We note first that Regulation 999/2014 indicates that eight exporting producers provided a response to the sampling questionnaire and that the European Commission selected a sample representing 88% of the total export sales from Russia in volume (to the Union and to third

[848] Russia's first written submission, para. 690.
[849] Russia's response to Panel question No. 97, para. 151.
[850] Determination of dumping margins for exports to the European Union, (Exhibit RUS-125 (BCI)).
[851] European Union's first written submission, para. 310 (referring to Regulation 999/2014, (Exhibit RUS-66), recitals 52 and 62).
[852] Russia's first written submission, para. 688; European Union's first written submission, paras. 311 and 313; and Regulation 999/2014, (Exhibit RUS-66), recitals 52, 54, and 62.
[853] European Union's first written submission, para. 320 and table 2.
[854] Regulation 999/2014, (Exhibit RUS-66), recital 54.
[855] European Union's response to Panel question No. 96 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 283).

countries) during the review period.[856] Questionnaires requesting information on export prices to all destinations, including to the European Union, were sent to the sampled producers and the authority obtained at least partial responses from all four producers/exporters.[857] Regulation 999/2014 also notes that "only Acron provided a complete questionnaire reply [while] EuroChem, UralChem and SBU Azot provided only partial replies".[858] In addition, the European Commission conducted verification visits at the premises of four Russian producers/exporters.[859]

7.537. The European Commission examined the sales data provided by Russian producers/exporters and came to the conclusion that such export prices were "an unreliable element in the analysis of the likelihood of continuation or recurrence of dumping in the specific circumstances of this investigation."[860]

7.538. We do not agree with Russia's position that the Anti-Dumping Agreement does not allow the investigating authority to disregard export prices which are subject to a price undertaking from the factors considered for the purpose of making a likelihood-of-dumping determination, particularly in a situation where no dumping margin calculation was made, as is the case here. In the relevant price undertakings, the exporting producers agreed to sell the product concerned at or above price levels which eliminate the injurious effects of dumping.[861] While sales could have been made below the minimum price set by the undertaking, this would result in the imposition of the anti-dumping duty.[862] By its nature, a minimum price undertaking has market-distorting effects which heavily discourage sales being made at below-minimum prices in order to avoid imposition of the anti-dumping duty.[863] The price undertaking also involved a cap on quantity and other restrictions.[864] We thus find it difficult to agree with Russia's argument that those sales made under a minimum price undertaking would be a reliable indicator regarding the likely future development of prices *in the absence of that price undertaking*. As [[***]] sold the product concerned at a price above the minimum import price under the undertaking while [[***]], who was subject to the undertaking only for a limited period of time during the RIP, sold below the minimum import price, it is unclear how prices would be set if the undertakings and anti-dumping duties were to lapse. In this sense, each of these companies' export prices could not be considered to be only the result of normal market conditions.[865]

7.539. Accordingly, we agree with the European Union that the export prices of Acron and EuroChem, which were based on a price undertaking, were not a meaningful indicator in the analysis of *future* pricing behaviour of exporting producers, in the absence of the anti-dumping measures and any price undertaking, especially given the practically limited amount of evidence of market prices from the sampled producers in this regard.[866]

7.540. So long as the conclusion reached by the investigating authority is reasoned, adequate and is based on positive evidence, we see no reason to rule that specific evidence or a particular methodology should have been used. We recall 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. We thus reject Russia's claim that the European Union breached Article 11.3 by failing to examine the impact of the alleged absence of dumping by the largest Russian exporters during the review investigation period.

[856] Regulation 999/2014, (Exhibit RUS-66), recitals 26-29.
[857] Regulation 999/2014, (Exhibit RUS-66), recitals 30-31.
[858] Regulation 999/2014, (Exhibit RUS-66), recital 32. The Regulation indicates that "[t]hese partial replies did not allow the Commission to fully verify their sales data as well as their cost of production."
[859] Regulation 999/2014, (Exhibit RUS-66), recital 36.
[860] Regulation 999/2014, (Exhibit RUS-66), recital 54.
[861] Commission Decision 2008/577, (Exhibit RUS-135), recital 12.
[862] European Union's response to Panel question No. 97, para. 97.
[863] There appears to be no evidence that sales were made at below-minimum prices during the RIP. See European Union's response to Panel question No. 97, para. 98.
[864] Commission Decision 2008/577, (Exhibit RUS-135), recitals 12 (referring to quantitative ceilings and price indexation) and 13 (prohibiting sales to certain customers).
[865] Regulation 999/2014, (Exhibit RUS-66), recital 159.
[866] European Union's first written submission, para. 336; Regulation 999/2014, (Exhibit RUS-66), recital 54.

7.541. We now turn to two additional claims made by Russia under claim #9.

#### 7.7.4.4.2.1 Whether the European Union breached Article 6.10 of the Anti-Dumping Agreement by failing to determine individual dumping margins for each of the sampled producers

7.542. 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.[867]

7.543. The European Union argues that the Commission was not required to engage, and did not in fact engage, in any dumping determination, or any determination of dumping margins, for the Russian producers' exports to the European Union or to third countries. According to the European Union it was also "not under any obligation to determine individual dumping margins under Article 6.10, and certainly not under Article 11.3, which is the relevant provision that speaks to the obligations of investigating authorities in expiry reviews."[868]

7.544. We agree with the European Union that, given that the Commission did not rely on a dumping margin calculation in its determination of likelihood of recurrence of dumping, and was not required to do so, it was not required to calculate dumping margins for each individual sampled producer. As the European Union points out, the Appellate Body has previously agreed with the finding that "the provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of *likelihood* of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis."[869] We agree with this understanding and see no reason why it would not apply here. Accordingly, we reject Russia's claim that the European Commission's determination of likelihood of recurrence of dumping was inconsistent with Article 6.10.

#### 7.7.4.4.2.2 Whether the European Union breached Article 6.8 of the Anti-Dumping Agreement by rejecting EuroChem's export prices based on its partial non-cooperation

7.545. Russia argues that by refusing to use EuroChem's export price data to the European Union during the review period in its likelihood of recurrence of dumping determination, the European Union separately violated the provisions of Article 6.8 of the Anti-Dumping Agreement.[870] According to Russia, EuroChem provided the European Union with the data on its EU and other markets sales that the European Union allegedly verified and later used to calculate dumping margins.[871] Additionally, EuroChem provided the European Union with a transaction-by-transaction report in the context of a price undertaking. As a result, according to Russia, the European Union could not legitimately rely on Article 6.8 to disregard EuroChem's export prices.

7.546. The relevant portion of Article 6.8 of the Anti-Dumping Agreement states that "[i]n cases in which any interested party … does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

7.547. We note that nothing on the record indicates that the European Commission had recourse to "the facts available" alternative in the case of EuroChem. The European Commission noted the partial cooperation of EuroChem in its response to the written questionnaires but did not replace the missing facts with facts available in order to reach its determination. It appears that the European Commission determined that it did not have enough information on the record to establish a dumping margin for EuroChem and decided to base its determination of likelihood of recurrence

[867] Russia's first written submission, para. 702.
[868] European Union's first written submission, para. 331.
[869] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 155. (emphasis original)
[870] Russia's first written submission, para. 700.
[871] Regulation 999/2014, (Exhibit RUS-66), recital 58.

of dumping on other indicators as discussed elsewhere in this report. The European Union however notes that its analysis *did* include the ex-works sales prices reported by EuroChem.[872]

7.548. In this context, we find that Russia's claim under Article 6.8 of the Anti-Dumping Agreement is not sufficiently supported by the evidence on the record. We therefore reject this element of Russia's claim #9.

#### 7.7.4.5 Whether the European Union violated Article 11.3 of the Anti-Dumping Agreement by making the affirmative determination of likelihood of dumping on the basis of alleged "dumping" to third-countries without conducting proper dumping margin calculations (claim #11)

7.549. The alleged inconsistency of the European Union's determination of likelihood of dumping with various provisions of the Anti-Dumping Agreement with respect to third countries is the subject of Russia's claim #11. Russia's claim centers around Articles 2.1, 2.2, and 2.4 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 and the alleged calculation of dumping margins, and Russia invokes a violation of Article 11.3 as a consequence of violating those prior provisions.[873]

7.550. In this regard, Russia argues that:

a. The dumping determination made by the EU violates Article 2.1 of the Anti-Dumping Agreement because the EU did not undertake the first step in the process of determination of normal value, i.e. it did not exclude sales not made 'in the ordinary course of trade', from the calculation of normal value.

b. The dumping determination made by the EU violates Article 2.2 of the Anti-Dumping Agreement because the EU did not consider sales of the like product in the ordinary course of trade, and instead relied on an alternative base (i.e. weighted average ex-works domestic prices of three different producers) outside the circumstances set forth in Article 2.2 of the Anti-Dumping Agreement.

c. The dumping determination made by the EU violates Article 2.4 of the Anti-Dumping Agreement because the EU failed to make a "fair comparison … between the export price and the normal value" and instead compared some values relating to domestic sales of the like product with export prices of the like product to third countries.

d. The dumping determination made by the EU violates Article VI:1 of the GATT 1994 because the EU made determination of dumping without properly having determined that the export price to the EU was "less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" and relied on alternative bases not foreseen by Article VI:1 of the GATT 1994.

e. As the dumping determinations are tainted, and since they have been relied on by the EU in their likelihood-of-dumping analysis, such analysis is not based on reasoned conclusions drawn from an adequate factual basis premised on positive evidence and therefore violates Article 11.3 of the Anti-Dumping Agreement.[874]

7.551. The European Union responds that it did not engage in any affirmative determination of dumping or any dumping margin calculation, when determining the likelihood of recurrence of dumping[875] and had no obligation to calculate or rely on dumping margins in making a likelihood-of-dumping determination. It also submits that Article 2 of the Anti-Dumping Agreement does not apply to such a determination.[876]

[872] See Annex 2: Detailed explanations on corrections done to data submitted by EuroChem Group, (Exhibit EU-15 (BCI)).
[873] Russia's first written submission, paras. 710-739; response to Panel question No. 37, para. 189.
[874] Russia's second written submission, para. 991.
[875] European Union's first written submission, para. 344.
[876] European Union's first written submission, para. 345.

7.552. We note that Russia's claim #11 under Article 11.3 is consequential to the alleged violations of Article 2, due to what it understands to be incorrectly calculated dumping margins.[877]

7.553. We recall our findings above that:

a. the European Union's likelihood of recurrence of dumping determination does not rely on a dumping margin calculation; and

b. Article 2 is not directly applicable to an analysis under Article 11.3.

7.554. We also recall our finding that, as far as Russia's claims in this section are based on direct violations of Article 2, we have rejected them. As its claim under Article 11.3 is purely consequential on a finding that the European Union's determination of a likelihood of recurrence of dumping was in violation of Articles 2.1, 2.2, and 2.4, and as its claim under Article VI of the GATT 1994 similarly relies on such findings, we accordingly reject Russia's claim #11 in its entirety.

7.555. We now turn to claims #3 and #4.

#### 7.7.4.6 Whether the European Union erred by failing to conduct a separate expiry review for the imports of Kirovo (claim #3)

##### 7.7.4.6.1 Introduction

7.556. Russia claims that the European Union violated Articles 11.3, 3.1, 11.1, 1, and 18.1 of the Anti-Dumping Agreement because it "made findings relating to (a) likelihood of recurrence of dumping, and (b) likelihood of recurrence of injury, for the product scope comprising FGAN, IGAN and stabilized AN at large only, but not for the reduced product scope of the antidumping measure applicable to imports of FGAN and IGAN by Kirovo (excluding stabilized AN)".[878] Russia argues that the European Union:

> [I]mposed anti-dumping measures on imports of AN manufactured by Kirovo, excluding Stabilized AN, while the likelihood of dumping and injury determinations were made for a different product scope that included Stabilized AN.[879]

7.557. Thus, according to Russia, the European Commission should have conducted two separate analysis of likelihood of recurrence of dumping and injury, in order to take into account, respectively: (i) the product scope comprising FGAN, IGAN and stabilized AN, and (ii) the product scope of imports from the Kirovo plant, which includes FGAN and IGAN, but not stabilized AN.[880] By applying the likelihood determination made in relation to the broader set of product types (IGAN, FGAN and stabilized AN) to the narrower set of product types, Russia argues that the European Union breached its obligations under the Anti-Dumping Agreement.

7.558. The European Union responds that "it is difficult to see what Russia considers objectionable with respect to Kirovo and the conduct of a 'single' expiry review".[881] The European Union also recalls that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* ruled that there is no requirement that "the determination of likelihood of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis."[882]

7.559. The European Union argues that Regulation 999/2014 applies to the same product scope as the one established in previous determinations.[883] Further, its analysis of likelihood of recurrence of

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[877] Russia's second written submission, para. 991, fifth bullet point.
[878] Russia's first written submission, para. 618 (fn omitted). We recall that imports of stabilized AN from the Kirovo plant had been excluded from the scope of the product concerned by a judgment of the Court of First Instance of the European Communities.
[879] Russia's second written submission, para. 854.
[880] Russia's second written submission, para. 843.
[881] European Union's first written submission, para. 259.
[882] European Union's first written submission, para. 259 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review,* para. 155).
[883] European Union's first written submission, paras. 185 and 255. See Regulation 989/2009, (Exhibit RUS-116), recitals 4 and 44. See also Case T 348/05 (9 July 2019), (Exhibit RUS-74).

dumping was based on three factors: (i) the export price from Russia to third countries, (ii) the production capacity and spare capacity in Russia as a whole and (iii) the attractiveness of the EU market compared to third-country markets.[884] For the European Union, the analysis of these factors does not necessitate a distinction between product scopes including or not including imports of stabilized AN from Kirovo. Moreover, the situation of Kirovo was mentioned in Regulation 999/2014 in relation to spare capacity of "other types of ammonium nitrate currently excluded from the application of the anti-dumping measures".[885] In this regard, the European Union refers to Regulation 999/2014, which explains that:

> [T]he total spare capacity of Kirovo was included in the spare capacity calculation as the spare capacity of other types of ammonium nitrate currently excluded from the application of the anti-dumping measures can very easily be used for producing ammonium nitrate currently falling within CN codes 3102 30 90 and 3102 40 90.[886]

7.560. With regard to the analysis of likelihood of recurrence of injury, the European Union argues that "it is difficult to see how an analysis of domestic prices or of the state of the domestic industry could be conducted differently with regard to different Russian producers, or sets of Russian producers".[887]

#### 7.7.4.6.2 Analysis

7.561. In essence, Russia's claims are based on the view that the European Commission should have made two likelihood of recurrence of dumping and injury determinations – one including all product types falling within the product under consideration (FGAN, IGAN and stabilized AN), and another covering only those product types produced by Kirovo that are subject to measures (FGAN and IGAN).[888] Russia acknowledges that the anti-dumping duty imposed on Kirovo is limited to IGAN and FGAN, but argues that this is irrelevant, as the product scope in the case of Kirovo is different from the product scope examined during the expiry review with respect to other Russian exporting producers.

7.562. According to Regulation 999/2014, the product concerned by this review is the same as the product defined in Regulation 661/2008 (solid fertilisers with an ammonium nitrate content exceeding 80% by weight, currently falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 20). Importantly, with regard to AN produced by Kirovo, only AN currently falling within CN codes 3102 30 90 and 3102 40 90 is the product concerned pursuant to Regulation 989/2009.[889] Thus, we find that the product scope has been clearly defined in Regulation 999/2014, regarding Kirovo, as being only AN currently falling within CN codes 3102 30 90 and 3102 40 90 (thus excluding stabilized AN from any later determinations made, in regard to that company).

7.563. Further, we are of the view that an analysis of likelihood of dumping and injury in the context of an expiry review is conducted on the basis of "a product". As the European Union argues, Regulation 999/2014 assesses the likelihood that dumping of the product concerned will recur, and that injury to the domestic industry, caused by such dumping, will recur.[890] We therefore disagree with Russia that the judgment of the Court of First Instance, as implemented by Regulation 989/2009, resulted in "two separate product scopes"[891]: Regulation 989/2009 implemented a modification in the product scope which excluded imports of stabilized AN from Kirovo. We thus disagree that the investigating authority should have assessed the likelihood of recurrence of dumping and injury separately for each one of these alleged product scopes.

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[884] European Union's first written submission, para. 257.
[885] Russia's second written submission, para. 844.
[886] European Union's first written submission, para. 257 (quoting Regulation 999/2014 (Exhibit RUS-66), recital 69).
[887] European Union's first written submission, para. 258.
[888] Russia's second written submission, para. 852.
[889] Regulation 999/2014, (Exhibit RUS-66), recital 44.
[890] European Union's first written submission, para. 259.
[891] Russia's second written submission, para. 845.

7.564. Russia, for us, has failed to demonstrate that the investigating authority, by not conducting two separate determinations, did not act with an appropriate degree of diligence and failed to arrive at a reasoned and adequate conclusion, as required by Article 11.3.

7.565. Under claim #3, Russia makes several additional claims respectively on the basis of Article 1, Article 3, Article 11.1, and Article 18.1 of the Anti-Dumping Agreement.

7.566. We recall our conclusion above[892] that Article 3 of the Anti-Dumping Agreement does not apply to a determination of likelihood of recurrence of injury in an expiry review, unless this determination is based on a finding of material injury. Under claim #3, Russia does not argue that the European Commission's determination of likelihood is based on a finding of material injury. We therefore reject Russia's claim #3 insofar as it is based on Article 3.

7.567. Regarding Article 11.1, 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", we note, like the panel in *US – Shrimp II (Viet Nam)* that:

> Several prior panel decisions suggest that Article 11.1 does not impose independent obligations upon Members, but rather, establishes the general principle that duties may only continue to be imposed so long as they remain necessary, which principle is operationalized in Articles 11.2 and 11.3.[893]

7.568. We agree with this statement and find that we do not need to make a separate evaluation of Russia's claim #3 under Article 11.1 of the Anti-Dumping Agreement in order to resolve the dispute.

7.569. Finally, Russia's claim under Articles 1 and 18.1 is consequential to a finding of inconsistency with the provisions of the Anti-Dumping Agreement ("as a result of the above mentioned violations").[894] Since Russia has failed to show any inconsistency with the Agreement under claim #3, we also find that Russia has not demonstrated that the European Union acted inconsistently with Articles 1 and 18.1.

7.570. We thus reject Russia's claim #3 as it relates to Articles 11.1, 11.3, and 3, and find it unnecessary to make findings on this claim under Articles 1 and 18.1.

#### 7.7.4.7 Whether the European Union erred by incorrectly defining the domestic industry and by making a likelihood of recurrence of injury determination based on incomplete data (claim #4)

##### 7.7.4.7.1 Introduction

7.571. Russia alleges that there was a discrepancy between the product types produced by the domestic industry and the product types produced by Russian exporters that were considered in the European Commission's determination of the likelihood of recurrence of injury. In particular, Russia alleges that the domestic industry was defined to comprise of producers of FGAN, while the scope of products imported from Russia was wider, including other types of ammonium nitrate. According to Russia, this discrepancy means that the likelihood of recurrence of injury analysis is not based on positive evidence and thus violates 3.1, 3.2, and 3.4, as well as Article 11.3 of the Anti-Dumping Agreement.

7.572. In addition, Russia claims that "there is a dissimilarity between the like products manufactured by the domestic industry and the products imported from Russia, in contradiction with Article 2.6 of the Anti-Dumping Agreement, insofar as the scope of the products imported from Russia is broader than the scope of the like product manufactured by the domestic industry considered for injury determination purposes".[895]

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[892] See para. 7.383 above.
[893] Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.363.
[894] Russia's first written submission, para. 622 (iv).
[895] Russia's first written submission, para. 628.

7.573. Further, Russia claims that, due to the exclusion of key IGAN and stabilized AN producers from the domestic industry examined for the purpose of the likelihood of recurrence of injury determination "it cannot be claimed that the 'domestic industry' as defined [by the investigating authority] … corresponds to 'the domestic producers as a whole of the like products'". Russia considers that this constitutes a breach of Article 4.1 of the Anti-Dumping Agreement.[896]

7.574. The European Union asks us to reject Russia's claims. According to the European Union, the domestic industry was defined from the very beginning as producers of ammonium nitrate as a whole (irrespective of the end use of the product).[897] Moreover, four out of ten major producers of IGAN supported the expiry review request and were included in the domestic industry; and an additional producer (GrowHow) provided the European Commission with information on its production of AN for both agricultural and industrial purposes.[898] The European Union also argues that the Commission actually used a combination of two injury datasets (provided in April and May 2014 respectively) which included information on both FGAN and IGAN.[899]

#### 7.7.4.7.2 Analysis

7.575. In essence, Russia claims that the domestic industry was defined as producers of FGAN only, when the likelihood of recurrence of injury to be caused by future dumped imports was assessed on the basis of imports of FGAN, stabilized AN and IGAN. Russia explains that:

> As a result there is a dissimilarity between the like products manufactured by the domestic industry and the products imported from Russia, in contradiction with Article 2.6 of the Anti-Dumping Agreement, insofar as the scope of the products imported from Russia is broader than the scope of the like product manufactured by the domestic industry considered for injury determination purposes.[900]

7.576. Article 2.6 of the Anti-Dumping Agreement reads:

> Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

7.577. Although we have concluded above that the provisions of Article 2 are not directly applicable in the context of an expiry review, we agree with Russia that a failure to correctly define the like product would necessarily mean that the expiry review was not objective and based on positive evidence. In the present dispute we understand Russia to argue that the European Commission's definition of the like product was biased, as it failed to include certain product types which compose the product under consideration imported from Russia.

7.578. For Russia, the "EU at the initiation of the review, and in line with the past practice, defined the domestic industry as consisting solely of producers of FGAN"[901], while the product under consideration included other types of ammonium nitrate, namely IGAN and stabilized AN.[902] In support of its argument, Russia refers to a response given by the investigating authority in the Hearing report dated 17 July 2014[903], listing the producers of AN included in the domestic industry for the purpose of the expiry review. Russia argues that "none of these producers is a major producer of IGAN" and "none of the major EU producers of IGAN … formed part of the EU domestic industry and cooperated with the review."[904]

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[896] Russia's first written submission, para. 634.
[897] European Union's first written submission, para. 271.
[898] European Union's first written submission, paras. 269-270.
[899] European Union's first written submission, paras. 272-273.
[900] Russia's first written submission, para. 628.
[901] Russia's first written submission, para. 624.
[902] Russia's first written submission, paras. 623-624.
[903] Russia's first written submission, fn 573 (referring to Hearing Report in Case R569 (17 July 2014), (Exhibit RUS-81 (BCI)), p. 8).
[904] Russia's first written submission, para. 624. (fn omitted)

7.579. In our view, the evidence on the record does not support Russia's claim that the like product, as defined by the investigating authority, does not include IGAN and stabilized AN. We note first that Regulation 999/2014 states that "[t]he AN produced by the Union industry is a like product as regards physical and technical characteristics to the AN exported to the Union by Russia."[905] This statement must be read in parallel with the description of the product under consideration which states that the product concerned is AN falling under CN codes which "can include AN used for industrial purposes …" and stabilized AN.[906] On its face therefore, Regulation 999/2014 defines the AN produced by the domestic industry as comprising the same types of AN as the product concerned.

7.580. Regulation 999/2014 also indicates that the applicant and the supporters of the request are producers of FGAN as well as of other product types covered by this expiry review. Therefore, the request was not supported only by FGAN producers, but also by producers of other types of the product concerned.[907] This is confirmed by Russia itself in its submissions before the Panel. Russia indicates that "the only two IGAN producers forming part of the EU domestic industry, namely Yara France and GrowHow, are sampled producers."[908] This statement thus contradicts the argument that "none of the major EU producers of IGAN … formed part of the EU domestic industry and cooperated with the review."

7.581. We have previously found, in rejecting Russia's claim #6[909], that the European Union was not in contravention of its obligation to correctly define the domestic industry under Article 4.1. We do not consider that Russia's arguments relating to Article 4.1 under this claim differ in any material way to those under its claim #6, and our conclusion follows. We consider that the European Union did not incorrectly define the domestic industry in the context of its expiry review, as a result of its alleged improper expansion of the product scope: we are not convinced that the sample chosen by the European Commission was not representative[910] and that Russia has made a *prima facie* case that the likelihood of recurrence of injury assessment was made on erroneous and incomplete data provided by the domestic industry[911]; and indeed, we consider that the domestic industry as defined includes producers of FGAN as well as IGAN.[912] In addition, we recall our conclusion that Regulation 999/2014 does not expand the product scope of the product concerned.[913]

7.582. For the foregoing reasons, we therefore reject Russia's claim that the European Union violated Article 11.3 of the Anti-Dumping Agreement by defining the like product as FGAN only and Article 4.1 by defining the domestic industry as producers of FGAN only. We also reject Russia's additional claim under Article 3 of the Anti-Dumping Agreement because this claim is consequential to a finding that the European Commission failed to correctly define the like product. We also recall that Article 3 does not apply directly in the context of an expiry review.

7.583. We therefore reject Russia's claim #4 in its entirety.

### 7.7.5 Claims with respect to the continuous levying of the anti-dumping duties (claims #12 to #15)

#### 7.7.5.1 Introduction

7.584. Claims #12 to #15 relate to the continuous imposition and levy of anti-dumping duties on Russian AN imports. Russia argues that these duties are based on WTO-inconsistent dumping

[905] Regulation 999/2014, (Exhibit RUS-66), recital 50.
[906] Regulation 999/2014, (Exhibit RUS-66), recital 46.
[907] Regulation 999/2014, (Exhibit RUS-66), recital 7.
[908] Russia's first written submission, para. 966. See also Russia's second written submission, paras. 1157 (d) and 1159 for the case of Yara France and para. 1157 (e) for the case of Grow How, and Russia's response to Panel question No. 46, paras. 216-221.
[909] See para. 7.451 above.
[910] See paras. 7.439-7.440 above; Russia's first written submission, paras. 631 and 966; and Regulation 999/2014, (Exhibit RUS-66), recital 19.
[911] See para. 7.441 above, as well as Russia's first written submission, paras. 635 and 978.
[912] See para 7.440 above, as well as Russia's first written submission, para. 966. See also, Russia's second written submission, paras. 1157 (d) and 1159 for the case of Yara France and para. 1157 (e) for the case of GrowHow; Russia's response to Panel question No. 46, paras. 216-221.
[913] See para. 7.318 above.

margins that were extended and relied on in subsequent regulations.[914] Russia describes its claims #12 to #15 as follows:

> In this claim, the Russian Federation challenges the levying of the individual anti-dumping duties on AN of EuroChem, which were set with the use of the WTO-inconsistent cost adjustment for natural gas and extended, and maintained under Regulation (EU) 999/2014, and currently applied in the amended amounts.[915]

7.585. Thus, for the purpose of these claims, what we are examining is not the alleged dumping determination in Regulation 999/2014, but rather whether the European Union's continuous levying of the anti-dumping duties, itself, is inconsistent with its obligations.

a. Under claim #12, Russia argues that the duties on EuroChem, which were extended and maintained by Regulation 999/2014 and are currently applied by virtue of Regulation 1722/2018, were calculated using a WTO-inconsistent cost adjustment for natural gas, violating Articles 11.1, 9.3, and 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, because the original dumping margins were incorrectly established under Articles 2.2.1.1, 2.2.1, and 2.2 of the Anti-Dumping Agreement and Articles VI:1(b)(ii) of the GATT 1994.[916]

b. Under claim #13, Russia argues that the European Union violated Article 11.3 of the Anti-Dumping Agreement because the dumping margins on which the European Union relied upon to extend the duration of anti-dumping duties were calculated inconsistently with Articles 2.2.1.1, 2.2.1, and 2.2 of the Anti-Dumping Agreement.[917]

c. In claim #14, Russia argues that the country-wide duties extended by Regulation 999/2014 and the duties currently applied on ammonium nitrate by virtue of Regulation 1722/2018 were calculated according to a methodology applicable to a non-market economy, which does not conform to the provisions of Articles 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. These country-wide duties were initially calculated in the context of the expiry and interim reviews of 2002, using surrogate values for the establishment of the normal value.[918]

d. Finally, under claim #15, Russia claims that the European Union violated Articles 1 and 18.1 of the Anti-Dumping Agreement because the anti-dumping measures on AN from Russia were not determined in accordance with the provisions of Articles VI:1, and VI:2 of the GATT 1994, as interpreted by the Anti-Dumping Agreement.[919]

7.586. With regard to the measure at issue in each case, we note that claims #12 to #15 challenge the continuous imposition and levy of anti-dumping duties on Russian AN imports, whereas such duties are based on allegedly WTO-inconsistent dumping margins that were extended and relied on through Regulations 999/2014 and 1722/2018.

7.587. The relevant dumping margins – on the basis of which the anti-dumping duties continue to be levied – were set in Regulation 661/2008 for EuroChem and Regulation 658/2002 for all other producers.

7.588. Russia argues that the Anti-Dumping Agreement, including Article 18.3 and Article VI of the GATT 1994, do not set any temporal scope of applicability of the GATT and the Anti-Dumping Agreement on the "continuous levying of anti-dumping duties", which Russia challenges as a separate measure. Here, Russia refers to Article VI (6)(a) of the GATT 1994, which provides that "[n]o contracting party shall levy any anti-dumping … duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping … is such as to cause or threaten material injury to an established domestic industry". Russia argues that

[914] Russia's second written submission, paras. 1016-1017.
[915] Russia's first written submission, para. 742.
[916] Russia's first written submission, paras. 741-742.
[917] Russia's first written submission, para. 845.
[918] Russia's first written submission, paras. 871-896, 905, and 915.
[919] Russia's first written submission, para. 908.

Article VI of the GATT 1994 prohibits a contracting party from assessing an anti-dumping duty on imported goods "unless there has been a demonstration that the imported goods are dumped and the effect of the dumping is to cause material injury." According to Russia, since this requirement is tied to the assessment and collection of duties, it imposes ongoing obligations with respect to both dumping and injury throughout the life of the anti-dumping measure.

7.589. The European Union responds that:

> Russia challenges the levying of individual anti-dumping duties on AN of EuroChem and the levying of country-wide anti-dumping duties on AN from Russia. The level of duties that are currently levied are set in 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. The duty levels are based on the injury margin. The current level of duties that are levied can thus not be affected by any of the WTO-inconsistencies that Russia alleges with regard to the dumping determination.
>
> …
>
> [Additionally] the European Union notes that the fact that duties, set before Russia acceded to the WTO, were maintained in Regulation 999/2014 is no longer relevant. This is because the duty levels that are currently levied are determined solely by Regulation 2018/1722. It is thus this Regulation 2018/1722 that is the relevant source of the duty levels that Russia complains about.[920]

7.590. Further, the European Union submits that Russia's argument that "because duties keep being levied, any previous related anti-dumping determinations, whether WTO law applied to them or not, become open to challenge" must be rejected. This is so, according to the European Union, because it would read Article 18.3 (which it argues also applies to the GATT 1994) out of the Anti-Dumping Agreement and improperly allow Russia to rely on the rights contained in the Anti-Dumping Agreement retroactively. Additionally, the European Union argues that Article VI (6)(a) of the GATT 1994 suggests that the rules of the covered agreements on anti-dumping do not apply to a determination unless both the party imposing the measure and the affected party are WTO Members, or contracting parties to the GATT 1994, when the determination is made.

#### 7.7.5.2 Analysis

7.591. We recall that the Anti-Dumping Agreement only applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review. *If* there are elements of pre-WTO determinations which were subject to review in either Regulation 999/2014 or Regulation 1722/2018, then these elements could be examined by this Panel. On the contrary, if the pre-WTO determinations referenced by Russia in claims #12 to #15 were not the subject of a review, but were merely referenced or maintained, they are not subject to the Anti-Dumping Agreement.

7.592. The Panel takes note of *Brazil – Desiccated Coconut*, in which the panel made the following statement about Article 32.3 of the SCM Agreement, a provision which prescribes a similar rule on the temporal scope of the SCM Agreement than Article 18.3 of the Anti-Dumping Agreement:

> If … a panel could examine in the light of the SCM Agreement the continued collection of a duty even where its imposition was not subject to the SCM Agreement, and if … that examination of the collection of the duty extended to the basis on which the duty was imposed, then in effect the determinations on which those duties were based would be subject to standards that did not apply – and which, in the case of determinations made before the WTO Agreement was signed, did not yet even exist – at the time the

[920] European Union's response to Panel question No. 38, paras. 112 and 114. See also European Union's first written submission, paras. 353, 357, and 369-370.

> determinations were made. In our view, such an interpretation would be contrary to the object and purpose of Article 32.3 and would render that Article a nullity.[921]

7.593. In claims #12 to #15, Russia claims that it challenges the continuous levying of the anti-dumping duties and not, in themselves, the determinations of dumping and dumping margins. It is apparent however that, without a finding of violation under Article 2 of the Anti-Dumping Agreement, Russia's challenge cannot succeed. Its claims of violation regarding the continuous levying of the duties are predicated upon the allegation that various dumping determinations and dumping margins made prior to Russia's accession to the WTO were calculated in contravention of the rules of the Anti-Dumping Agreement. Having regard to the above discussion, the Panel cannot see how those pre-WTO determinations can be made subject to Anti-Dumping Agreement obligations *now*, without rendering Article 18.3 of the Anti-Dumping Agreement inutile.

7.594. With regard to claim #12, Russia argues that the European Union levied and continues levying anti-dumping duties in breach of its obligations under Articles 9.3, 11.1, and 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Each of these provisions relates to the margin of dumping as determined under other relevant provisions of the Anti-Dumping Agreement. For example, Article 9.3 states that the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. Key here is the fact that at the time that the relevant authority calculated the dumping margin, the European Union did not have obligations under the Anti-Dumping Agreement with regard to Russia, a non-WTO Member. To require that the European Union establish its dumping margin in accordance with WTO rules prior to Russia's accession would be to apply those rules retroactively. Therefore, we are of the view that it is unnecessary to examine the dumping margin calculations for the purposes of this claim, due to the fact that, at the time they were calculated, they could not be calculated inconsistently with Articles 2.2.1, 2.2.1.1, and 2.2 of the Anti-Dumping Agreement because that Agreement did not apply to those calculations. Consequently, any continuous levying of anti-dumping duties based on those margins would not be in violation of Articles 11.1, 9.3, and 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 if the reason for that alleged violation stemmed from a breach of the rules applying to their calculation according to Articles 2.2.1.1, 2.2.1, and 2.2 of the Anti-Dumping Agreement and Articles VI:1(b)(ii) of the GATT 1994. Thus, the Panel is not able to find that the anti-dumping duties applied on EuroChem are inconsistent with the European Union's obligations under Articles 11.1, 9.3, and 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 on the basis that the original dumping determination was calculated inconsistently with Articles 2.2.1.1, 2.2.1, and 2.2 of the Anti-Dumping Agreement.

7.595. The same reasoning applies to claim #13. There was no obligation on the European Union to calculate dumping margins in line with Articles 2.2.1.1, 2.2.1, and 2.2 of the Anti-Dumping Agreement in the 2008 expiry review and, as such, any consequent claim that relies on a calculation which was allegedly not made in accordance with those provisions cannot be demonstrated to be in contravention of the Anti-Dumping Agreement. As the European Union argues, it did not act inconsistently with the Anti-Dumping Agreement when it determined whether the domestic Russian sales of AN products were in the ordinary course of trade.[922] As there was no obligation on the European Union to calculate dumping margins in line with Articles 2.2.1.1, 2.2.1, and 2.2 of the Anti-Dumping Agreement in the past, it stands to reason that this, in itself, cannot be a cause for violation of Article 11.3 of the Anti-Dumping Agreement.

7.596. Similar reasoning applies to claims #14 and #15.

7.597. Where Russia argues, in its claim #14, that the European Union imposed and continues levying country-wide anti-dumping duties for which the dumping margin was calculated in 2002 with the use of an allegedly WTO-inconsistent methodology, we recall again that Russia was not a WTO Member when the European Commission made the dumping margin determination in 2002 and thus there was no obligation on the European Union to calculate that dumping margin consistently with WTO law.

7.598. Finally, in claim #15, Russia argues that the European Union acted inconsistently with Articles 1 and 18.1 of the Anti-Dumping Agreement due to the fact that the anti-dumping measures were not taken in accordance with provisions of Articles VI:1 and VI:2 of the GATT, as interpreted

[921] Panel Report, *Brazil – Desiccated Coconut*, para. 230
[922] European Union's first written submission, para. 406.

by the Anti-Dumping Agreement, including Articles 2.1, 2.2, 2.2.1, 2.2.1.1, 3.1, 3.2, 3.4, 9.3, and 11.3.[923] This claim is consequential on findings that the continuous levying of anti-dumping duties described in previous claims is inconsistent with WTO law. As the Panel has not found that those measures can be proved to be WTO-inconsistent, Russia's claim #15 cannot be upheld.

7.599. For the foregoing reasons, we reject Russia's claims #12 to #15 in their entirety.

### 7.7.6 Claims with respect to the conduct of the expiry review leading up to Regulation 999/2014

7.600. Russia makes a series of procedural claims regarding the conduct of the expiry review leading to Regulation 999/2014. Russia's claims #16 to #21 are made on the basis of various provisions of Article 6 of the Anti-Dumping Agreement regarding "Evidence".

7.601. Since the measure at issue is the regulation implementing the results of an expiry review, Russia also claims corresponding violations of Article 11.4 of the Anti-Dumping Agreement. Article 11.4 provides that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under [Article 11]." Should the Panel consider that the European Union has violated the provisions of Article 6 of the Anti-Dumping Agreement in the conduct of the third expiry review, we would thus also find that the European Union is in breach of Article 11.4.

#### 7.7.6.1 Russia's claim concerning alleged delays in giving access to the non-confidential file (claim #16)

##### 7.7.6.1.1 Introduction

7.602. Russia submits that on four occasions, representatives of Russian exporters were confronted with excessive delays when requesting access to evidence provided by the domestic industry.[924]

a. Russia explains that on 10 March 2014, representatives of the Russian exporters ("RFPA") requested access to the non-confidential file. A reminder was sent to the European Commission on 26 March. Access was only granted on 1 April. Russia argues that, because of this delay of 22 days, RFPA was prevented to see two submissions made by the domestic industry (on 10 March and on 20 March) and therefore did not have sufficient time to prepare for a hearing which took place on 14 March and to prepare a meaningful written submission before 25 April 2014.[925]

b. Then, on 2 June 2014, RFPA again requested access to the file, but access was only granted on 16 June, following a repeated request on 12 June 2014. In this case, Russia does not refer to specific documents on the file but criticizes the excessive delay between RFPA's request and the actual consultation of the file.[926]

c. Third, according to Russia, submissions dated 16 and 17 April were only added to the non-confidential file on 13 May 2014.[927] Russia submits that this excessive delay prevented RFPA from commenting on these submissions until 27 May 2014.

d. Finally, Russia alleges that documents dated 12 May 2014 were only added to the non-confidential file on 27 May 2014.[928]

7.603. Russia asks the Panel[929] to rule that the delays experienced by Russian exporters in these four instances are inconsistent with the obligation in Article 6.1.2 of the Anti-Dumping Agreement

[923] Russia's first written submission, para. 915.
[924] Russia's first written submission, para. 1094.
[925] Russia's first written submission, paras. 1095-1097; response to Panel question No. 105. In its response to question No. 105 of the Panel, Russia confirms that the evidence at issue are the submissions of 10 and 20 March and that its claim concerns the delayed access to these two submissions but also, "in general, the delayed access to the non-confidential file".
[926] Russia's first written submission, paras. 1099-1101.
[927] Russia's first written submission, para. 1102.
[928] Russia's first written submission, para. 1103.
[929] Russia's response to Panel question No. 48.

to make evidence presented by one interested party available "promptly" to other interested parties. Russia also makes a claim under Article 6.4 of the Anti-Dumping Agreement that the European Commission did not provide "timely opportunities" for the representatives of Russian exporters to see all information relevant to the presentation of their cases and to prepare presentations on the basis of this information.

#### 7.7.6.1.2 Analysis

7.604. We consider first Russia's claim under Articles 6.1.2 and 11.4 of the Anti-Dumping Agreement.[930]

7.605. Article 6.1.2 states:

> Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

7.606. As the European Union argues, it has previously been found[931] that the obligation to make evidence available "promptly" does not mean that authorities must make such evidence available "immediately", i.e. as soon as the information is provided by an interested party to the authority, nor as soon as a party requests access to the file.[932] The context of the proceeding in question and the format and content of the evidence provided may justify that an authority take some time to update the non-confidential file. This is the case in particular when the evidence provided contains confidential information: before such information can be added to the non-confidential file, the authority needs to ensure that confidential data is adequately redacted, and that the non-confidential summary complies with the requirements of Article 6.5.1 of the Anti-Dumping Agreement.

7.607. In its second written submission, the European Union explains generally how the European Commission gives access to the non-confidential file when a request is lodged by an interested party. In particular, the European Union explains that "this procedure involves several steps which may take a number of days (depending, for example, on whether confidential treatment was sought)".[933] The European Union further explains that documents filed by interested parties are first "registered", "which means simply that receipt is confirmed" and that:

> The document would then need to be processed, classified, and confidentiality checks would need to be made (i.e. whether any confidential information is disclosed, or conversely, whether non-confidential information is withheld or if there is good cause for confidentiality). This would require more time, depending on the nature and complexity of the document. Only after all this would the document be available to the interested parties (i.e. "on the open file").[934]

7.608. The European Union also insists that "[only] delays that can be attributed to the Commission … can be the basis for any finding" under Articles 6.1.2 and 6.4 of the Anti-Dumping Agreement.[935] With regard to the computation of delays, the European Union argues that "any delays in providing a document could only be calculated *from* the date of the request (not from the placing on the file, and certainly not from the date of the document) *to* the date of the provision of access (not to the actual access)".[936]

7.609. We agree with the European Union that delays originating in the sole conduct of the interested parties cannot give rise to an inconsistency with Articles 6.1.2 and 6.4 of the Anti-Dumping Agreement. We note however that, based on the evidence on the record, the alleged

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[930] We recall that Article 11.4 of the Anti-Dumping Agreement provides that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under [Article 11]." A breach of Article 6.1.2 would therefore necessarily constitute a breach of Article 11.4.

[931] Panel Report, *EU – Footwear (China),* para. 7.583.

[932] European Union's first written submission, para. 575.

[933] European Union's second written submission, para. 222.

[934] European Union's response to Panel question No. 105. See also the description given at para. 221 of the European Union's second written submission.

[935] European Union's second written submission, para. 223.

[936] European Union's response to Panel question No. 105, para. 125.

delays challenged by Russia can be attributed to the European Commission: they concern the placement of evidence on the non-confidential file as well as the granting of access to the file (in the form of a DVD-Rom provided to the representatives of the parties).[937]

a. In relation to the first alleged delay in granting access to the non-confidential file (March-April 2014), Russia provides evidence showing that the representatives of RFPA lodged a request on 10 March and again on 26 March, and received an invitation to consult the file on 1 April.[938]

b. In relation to the second alleged delay in granting access to the non-confidential file (June 2014), Russia provides evidence showing that the representatives of RFPA lodged a request on 2 June and that the DVD containing the file was consulted on 16 June.[939] The European Union notes that the exhibit submitted by Russia refers to 16 June as the date of consultation, rather than the date on which access was actually granted.[940] In response, the European Union does not provide the Panel with evidence contradicting Russia's argument that the non-confidential file was made available on 16 June 2014.

c. In relation to the two alleged delays in inserting documents in the non-confidential file (April and May 2014), Russia provides evidence[941] that submissions dated 16/17 April and 12 May 2014 were placed in the non-confidential file respectively on 13 May and 27 May.[942]

7.610. We note that the panel in *Guatemala – Cement II* stated that, under Article 6.1.2 of the Anti-Dumping Agreement, access to the non-confidential file must be "regular and routine". The panel further elaborated:

> The Article 6.1.2 proviso regarding the "requirement to protect confidential information", when read in the context of Article 6.5, cannot be interpreted to allow an investigating authority to delay making available evidence submitted by one interested party to another interested party for 20 days simply because of the possibility – which is unsubstantiated by any request for confidential treatment from the party submitting the evidence – that the evidence contains confidential information. We do not believe that the specific requirement of Article 6.1.2 may be circumvented simply by an investigating authority determining that there is a possibility that the evidence at issue contains confidential information. Such an interpretation could undermine the purpose of Article 6.1.2, since in principle there is a possibility that any evidence could contain confidential information (and therefore not be "made available promptly" to interested parties).[943]

7.611. The four instances criticized by Russia show that it took the European Commission two to three weeks to grant access to the file or to update the file after a submission had been made. In two instances, the interested party requesting access had to renew its request (on 26 March in the first instance and on 12 June in the second instance). Under these circumstances and in the absence of any convincing explanation from the European Union justifying such delays[944], we

[937] European Union's first written submission, para. 581.
[938] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)).
[939] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)).
[940] European Union's first written submission, para. 591.
[941] Index NC File, (Exhibit RUS-188 (BCI)).
[942] The European Union challenges the evidence provided by Russia with regard to the fourth alleged delay (May 2014): the European Union states that the submission dated 12 May 2014 was only received on 14 May by registered mail and "was inserted into the non-confidential file on the same day". (European Union's first written submission, para. 599 and Confirmation of the receipt of a submission of Fertilizers Europe (14 May 2014), (Exhibit EU-20)). We note however that the European Union does not provide any evidence that the DVD-Rom containing the non-confidential file was made available before 27 May: Exhibit EU-20 is evidence of the date of receipt and registration of the submission by the European Commission, but does not contain any information on the date on which the non-confidential file was provided to the interested parties.
[943] Panel Report, *Guatemala – Cement II*, para. 8.143. (fn omitted)
[944] We note the European Union's reference to "technical and personnel constraints". (European Union's first written submission, para. 584). In relation to the third alleged delay, the European Union indicates that the European Commission was closed between 17 and 21 April 2014. (European Union's response to Panel question No. 107, para. 135).

consider that the time taken by the European Commission to make the evidence available to the requesting party is not consistent with the obligation to make the evidence available "promptly".

7.612. The European Union makes an additional argument with regard to the second alleged delay (request to see the file on 2 June and access granted on 16 June). According to the European Union, Articles 6.1.2 and 6.4 do not "concern 'access to the file' in the abstract; instead they relate to 'evidence' and 'information'."[945]

7.613. We note however that the obligation contained in Article 6.1.2 refers to "evidence presented in writing by one interested party", without specifying in what form an authority must give access to this evidence. We recall that the panel in *Guatemala – Cement II* stated:

> On their face, neither Article 6.1.2 nor Article 6.4 necessarily require access to the file. For example, if an investigating authority required each interested party to serve its submissions on all other interested parties, or if the investigating authority itself undertook to provide copies of each interested party's submission to other interested parties, there may be no need for interested parties to have access to the file. If, however, there is no service of evidence by interested parties, or no provision of copies by the investigating authority, access to the file may be the only practical means by which evidence presented by one interested party could be "made available promptly" to other interested parties (consistent with Article 6.1.2), or by which interested parties could have "timely opportunities" to see information relevant to the presentation of their cases (consistent with Article 6.4). Assuming access to the file is the only practical means of complying with Articles 6.1.2 and 6.4, access to the file need not necessarily be unlimited. Nor need the file be made available on demand. Provided access to the file is regular and routine, we consider that the requirements of Articles 6.1.2 and 6.4 would be satisfied.[946]

7.614. In the present case, the European Union does not argue that the evidence was available to representatives of Russian exporters in any other way than by requesting access to the file. Neither does the European Union argue that the European Commission routinely informs interested parties that a specific piece of evidence has been placed on the non-confidential file. Therefore, it is only through a regular and routine access to the non-confidential file that RFPA may learn which evidence has been placed on the file. It is thus only by granting regular and routine access to the file that the European Union could, in the circumstances of this case, fulfil its obligation to make the evidence available promptly.

7.615. We thus consider that the European Union, in the four instances raised by Russia, did not comply with the obligation contained in Articles 6.1.2 and 11.4 to make the evidence available promptly.

7.616. Since we have already ruled that the European Union was in breach of Article 6.1.2 of the Anti-Dumping Agreement, we do not find it necessary to examine Russia's claim under Article 6.4.

#### 7.7.6.2 Russia's claim that the European Union failed to provide to the interested parties the full text of the application received on 28 March 2013 (claim #17)

##### 7.7.6.2.1 Introduction

7.617. Russia submits that following the publication of a notice of impending expiry of the anti-dumping measures on ammonium nitrate, Fertilizers Europe filed a petition on behalf of EU domestic producers on 28 March 2013.[947] The review was initiated through the publication of a Notice of initiation dated 12 July 2013, which references the petition lodged by the domestic industry on 28 March. Russia submits however that RFPA obtained the petition only after the expiry review had been completed and after the EU Ombudsman made a recommendation to provide the relevant document.[948] Russia claims that, by not providing the full text of the petition upon initiation, the

[945] European Union's first written submission, para. 590.
[946] Panel Report, *Guatemala – Cement II*, para. 8.133.
[947] Russia's first written submission, para. 1126.
[948] Russia's first written submission, para. 1133.

European Union breached Articles 6.2, 6.4, and 6.1.3 of the Anti-Dumping Agreement, as well as Article 11.4.

7.618. The European Union responds that, following pre-initiation, discussions with the interested parties requesting the expiry review[949], Fertilizers Europe completed its initial request on 8 May 2013[950] and the request was inserted in the non-confidential file on 14 June 2013. The European Commission then initiated the expiry review on 12 July 2013. On 5 August 2013, the European Commission refused to provide to RFPA the text of the petition filed on 28 March because that complaint "was not final".[951]

7.619. According to the European Union, a "consolidated version" of Fertilizers Europe's requests was provided to the interested parties upon initiation of the expiry review: the European Union argues that the consolidated request "contained all of the 'text' and 'information' that the 28 March submission also contained". It also submits that providing the consolidated request was sufficient to comply with Articles 6.1.3 and 6.4 of the Anti-Dumping Agreement, since "neither Article 6.1.3 nor Article 6.4 refer to specific documents or submissions, in particular versions or forms, or dated on a particular day."[952]

#### 7.7.6.2.2 Analysis

7.620. We consider first Russia's claim under Article 6.1.3 and 11.4 of the Anti-Dumping Agreement.[953]

7.621. Article 6.1.3 of the Anti-Dumping Agreement provides in relevant part:

> As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received … to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved.[954]

7.622. As pointed out by Russia, the obligation imposed under Article 6.1.3 is relevant in the context of an expiry review by virtue of Article 11.4 of the Anti-Dumping Agreement, which provides that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out" under Article 11.3.[955] The obligation in Article 6.1.3 thus applies to the expiry review at issue.

7.623. The question for the Panel is therefore whether granting access to a "consolidated" version of the petition upon initiation of the expiry review was sufficient to comply with the requirement (under Article 6.1.3 of the Anti-Dumping Agreement) to "provide the full text of the written application received".

7.624. We note that the notice of initiation of the expiry review references the original petition of 28 March 2013 as the basis for initiating the investigation.[956] In addition, Russia demonstrates, in response to a question from the Panel, that the text of the consolidated petition was different from

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[949] European Union's second written submission, para. 228.
[950] European Union's first written submission, para. 606.
[951] Russia's first written submission, para. 1129 (quoting Decision dated 5 August 2013 from the European Commission, (Exhibit RUS-110)).
[952] European Union's second written submission, para. 230.
[953] We recall that Article 11.4 of the Anti-Dumping Agreement provides that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under [Article 11]." A breach of Article 6.1.3 would therefore necessarily constitute a breach of Article 11.4.
[954] Fn omitted.
[955] Russia's first written submission, para. 1118.
[956] Notice of initiation, (Exhibit RUS-48): "[t]he request was lodged on 28 March 2013 by a European association of fertilisers manufacturers, Fertilizers Europe (the applicant), on behalf of Union producers representing more than 25%, of the Union production of ammonium nitrate." The notice of initiation does not refer to the updated request presented by Fertilizers Europe on 8 May 2013. In this regard, we note that the European Union recognizes that "the 'request' which needs to be disclosed under Article 6.1.3, 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." (European Union's second written submission, para. 228).

the text of the original petition.[957] Further, contrary to what the European Union argues[958], Article 6.1.3 of the Anti-Dumping Agreement *does* refer to a specific document, namely the "*full text* of the written application received".[959]

7.625. For these reasons, we conclude that the European Union did not comply with its obligation to make the full text of the petition available to the interested parties upon initiation of the expiry review and therefore was in breach of Articles 6.1.3 and 11.4 of the Anti-Dumping Agreement.

7.626. Since we have already ruled that the European Union was in breach of Article 6.1.3 of the Anti-Dumping Agreement, we do not find it necessary to examine Russia's claims under Articles 6.2 and 6.4.

#### 7.7.6.3 Russia's claim that the European Commission granted confidential treatment without a showing of good cause (claim #18)

##### 7.7.6.3.1 Introduction

7.627. Russia challenges the partially confidential treatment granted by the European Commission to two expert reports submitted as evidence by the domestic industry.

7.628. The first submission[960] at issue is dated 20 March 2014 and contains a "third party expert report relating to the capacity of the Russian AN industry".[961] While the report itself was made available, the party submitting the information did not disclose the identity of the author of the report because:

> [R]evealing its identity could "be harmful to the supplier of this information" because "the survey does identify the situation per Russian AN producer per plant, and not only the Russian plants surveyed/sampled by the European Commission"[962].

7.629. The second submission[963] is dated 14 May 2014. It contains a non-confidential version of a presentation, but indicates that its Annex I ("an independent expert report on N2O emissions from nitric acid production in key regions") is confidential.

7.630. According to Russia, "the EU did not request Fertilizers Europe to show good cause for confidential treatment of such information and thus failed to carry out an objective assessment as to whether such confidential treatment was warranted"[964]. For Russia such granting of confidential treatment without any showing of good cause amounts to a violation of Articles 6.5 and 11.4 of the Anti-Dumping Agreement.

7.631. We note that the parties disagree on the exact scope of Russia's claim under Article 6.5. According to the European Union[965], Russia's claim that the European Union violated Article 6.5 is "limited to the 'identity of the supplier' of the information at issue, *i.e.* to the source or author of the expert report." However, in response to questions posed by the Panel after the first substantive meeting, Russia indicates that the references to the identity of the experts were merely "examples … [which were] part of a 'non-exhaustive' list" of occasions in which the European Commission failed to request that good cause be shown.[966]

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[957] Russia's response to Panel question No. 53, para. 257.
[958] European Union's second written submission, para. 230.
[959] Emphasis added.
[960] Fertilizers Europe's submission (20 March 2014) (excerpts), (Exhibit RUS-117 (BCI)).
[961] Russia's first written submission, para. 1154.
[962] Email correspondence dated 29 April and 9 May 2014 between the Commission and Fertilizers Europe, (Exhibit EU-25).
[963] Fertilizers Europe's submission (14 May 2014) (excerpts), (Exhibit RUS-94 (BCI)).
[964] Russia's first written submission, paras. 1153-1154. The European Union asks the Panel to reject all other instances of alleged failure to show good cause, cited by the Russian Federation in its response to Panel question No. 55.
[965] European Union's first written submission, para. 624.
[966] Russia's response to Panel question No. 55.

7.632. Before turning to the substance of Russia's claim, we note that, in its first written submission, Russia provides a "non-exhaustive" list of occasions in which confidential treatment was granted by the European Commission without good cause.[967] This "non-exhaustive" list focuses on the alleged failure, by the European Commission to obtain a showing of good cause from Fertilizers Europe for not revealing the identity of the author of the expert reports.[968] We recall that section 3(1) of the Working Procedures of this Panel states that each party to the dispute shall:

> Before the first substantive meeting of the Panel with the parties, … 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.

7.633. We agree with the European Union[969] that Russia should not be permitted to make a non-exhaustive list of arguments in its first written submission and to complete this "list" in its responses to questions posed by the Panel. This would not be consistent with the Working Procedures of this Panel and would affect the ability of the European Union to prepare and present its defence. We therefore construe Russia's claim under Article 6.5 of the Anti-Dumping Agreement as being limited to the arguments presented in its first written submission, which concern the alleged failure of the European Union to request a showing of good cause from the domestic industry, when granting confidential treatment to the identity of the author of the two expert reports cited in Russia's first written submission. We will limit our examination to this aspect of Russia's claim.

#### 7.7.6.3.2 Analysis

7.634. Article 6.5 of the Anti-Dumping Agreement provides, in relevant part, that:

> Any information which is by nature confidential … or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities.

7.635. Showing good cause is thus a "condition precedent for according confidential treatment to information submitted to an authority".[970] Where an investigating authority treats as confidential information in respect of which no good cause has been shown, that investigating authority acts inconsistently with its obligation under Article 6.5.

7.636. We recall that, in reviewing whether an investigating authority has assessed and determined objectively that "good cause" for confidential treatment has been shown to exist, it is not for the panel to engage in a *de novo* review of the record of the investigation and determine by itself whether the existence of "good cause" has been sufficiently substantiated by the submitting party.[971] A panel must examine this issue on the basis of the investigating authority's published documents, in the light of the nature of the information at issue, and the reasons given by the submitting party for its request for confidential treatment.[972] We also recall that "good cause" must demonstrate the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information.

7.637. In the present case, information on the record of these proceedings indicates that:

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[967] Russia's first written submission, para. 1152.

[968] Russia states that the European Union "did not take into account the rights of defence of interested parties in accepting unwarranted confidentiality claims relating, *inter alia,* to the identity of the supplier which is by nature non-confidential". (Russia's first written submission, para. 1158). Russia also states that Fertilizers Europe did not "detail[] its claim that the disclosure of the identity of certain information provider may cause significantly adverse effect". (Russia's first written submission, para. 1160). Finally, Russia argues that "there was no basis to assert that the disclosure of the identity of the supplier of the information may have adverse effects". (Russia's first written submission, para. 1161).

[969] 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).

[970] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.38.

[971] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.

[972] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.68-5.69.

a. contrary to what Russia argues[973], the investigating authority sought and obtained explanations from the party submitting the confidential information[974]; and

b. the information obtained from the author of the report indicates that revealing his or her identity could "be harmful to the supplier of this information" because "the survey does identify the situation per Russian AN producer per plant, and not only the Russian plants surveyed/sampled by the European Commission".[975]

7.638. Russia argues that the correspondence between the party submitting the evidence and the European Commission, reproduced in Exhibit EU-25, fails to meet the standard for showing good cause under Article 6.5 of the Anti-Dumping Agreement, because it "does not substantiate in which way the expert could be subject to retaliation, except for mere potential subjective concerns which do not constitute "good cause" being shown".[976]

7.639. The European Union responds that the separate correspondence between the expert and the European Commission explains in detail why the identity of the expert could not be disclosed and that a risk of retaliation was considered in a past dispute as good cause for providing confidential treatment under Article 6.5 of the Anti-Dumping Agreement.[977]

7.640. In this regard, we note that a risk of retaliation alleged by participants in an investigation was found to constitute "good cause".[978] The panel in *EU – Footwear (China)* considered that:

> [D]irect or concrete evidence substantiating concerns about potential retaliatory actions by customers is not likely to be obtainable. Thus, these concerns may well be evidenced only by the testimony of the submitter of the information for which confidential treatment is sought. Therefore, [in the panel's view] unless there is some reason to believe that the alleged risk of retaliation was unreasonable, unfounded or untrue, the absence of more concrete evidence supporting the alleged risk of retaliation does not, by itself, preclude the concern for possible retaliation from being good cause within the meaning of Article 6.5.[979]

7.641. Like the panel in *EU – Footwear (China)*, we believe that "direct or concrete evidence substantiating concerns about potential retaliatory actions by customers is not likely to be obtainable" and that the absence of more concrete evidence supporting the alleged risk of retaliation does not, by itself, preclude the concern for possible retaliation from being good cause within the meaning of Article 6.5.

7.642. It is well established that good cause must be assessed and determined objectively by the investigating authority and cannot be determined merely based on the subjective concerns of the submitting party. In making that assessment, the investigating authority must seek to balance the submitting party's interest in protecting its confidential information with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests.[980]

7.643. In view of the documents on the record and of the reasons given by the submitting party in Exhibit EU-25, we are of the view that the European Commission has assessed and determined objectively that the disclosure of the identity of the authors of the expert report attached to the

[973] Russia argues that "the EU failed to comply with its obligations under Article 6.5 of the Anti-Dumping Agreement by not requesting Fertilizers Europe to demonstrate the existence of good cause for the confidential treatment of the information it submitted in the course of the investigation." (Russia's first written submission, para. 1156).

[974] Email correspondence dated 29 April and 9 May 2014 between the Commission and Fertilizers Europe, (Exhibit EU-25). See also, European Union's first written submission, para. 630.

[975] Email correspondence dated 29 April and 9 May 2014 between the Commission and Fertilizers Europe, (Exhibit EU-25).

[976] Russia's second written submission, para. 1315.

[977] European Union's second written submission, para. 245 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 584).

[978] Panel Report, *EC – Fasteners (China)*, paras. 7.451-7.452.

[979] Panel Report, *EU – Footwear (China)*, para. 7.685.

[980] Appellate Body Report, *EC – Fasteners (China)*, paras. 5.37-5.39.

submission of 20 March 2014 would be detrimental to the person supplying the information and that "good cause" for confidential treatment had been shown to exist in this case.

7.644. Russia makes an additional argument with regard to the submission of 14 May 2014. Russia points out that the correspondence provided as Exhibit EU-25 only provides "good cause" in relation to the submission of 20 March 2014, but not in relation to the submission of 14 May 2014.[981] The European Union responds that "given that Russia appears to have understood from the underlying explanations that the same expert authored both reports, it was sufficient for the expert to show good cause for the confidential treatment of their identity once, with respect to both reports."[982] In addition, for the European Union, "Article 6.5 does not require a showing of good cause in respect of each item of confidential information. Instead, depending on the information and the documents in question, good cause may be shown in respect of general categories of information."[983]

7.645. We note that the correspondence provided by the European Union as Exhibit EU-25 concerns only the submission dated 20 March 2014. The submission dated 14 May 2014 explains that its Annex I is "limited" but does not provide any explanation as to why confidential treatment should be granted. In particular, contrary to what the European Union argues, the interested party submitting the report does not claim that the author of the two expert reports is the same, nor that confidential treatment should be granted for the reasons explained in the 20 March submission. We therefore cannot accept the statement by the European Union that the showing of good cause "made with respect to the earlier of those two reports … was equally relevant for the later one."[984]

#### 7.7.6.3.3 Conclusion

7.646. Based on the foregoing, we conclude that:

a. The European Union violated Articles 6.5 and 11.4 of the Anti-Dumping Agreement by granting confidential treatment to the identity of the author of the expert report in Annex I of the 14 May submission, without requesting or obtaining that the interested party submitting the information show good cause; in contrast;

b. Russia has failed to demonstrate that the European Union acted inconsistently with Article 6.5 in relation to the submission dated 20 March 2014.

### 7.7.6.4 Russia's claim that the European Commission failed to request a meaningful summary (claim #19)

#### 7.7.6.4.1 Introduction

7.647. Russia's claim #19 concerns four submissions made by the domestic industry in the course of the third expiry review[985]:

a. submission of the EU domestic industry dated 12 May 2014 (Exhibit RUS-83 (BCI));

b. submission dated 10 March 2014 (Exhibit RUS-119 (BCI));

c. submission dated 5 May 2014 (Exhibit RUS-120 (BCI)); and

d. submission dated 3 June 2014 (Exhibit RUS-121 (BCI)).

7.648. Russia recognizes that in each case, the domestic industry provided a non-confidential summary in the form of aggregated figures.

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[981] Russia's second written submission, para. 1310.
[982] European Union's second written submission, para. 242.
[983] European Union's second written submission, para. 243 (referring to Panel Report, *Russia – Commercial Vehicles*, para. 7.241).
[984] European Union's second written submission, para. 242.
[985] Russia's response to Panel question No. 57.

7.649. However, for Russia, these aggregated figures were insufficient to obtain a reasonable understanding of the information provided, mainly because the data was not presented by individual respondent and by sub-type of the product (AN, IGAN and stabilized AN).[986] Russia considers that this information should have been requested by the European Commission, in view of the importance of the product scope in this investigation. By not doing so, the European Union allegedly breached Articles 6.5.1 and 11.4 of the Anti-Dumping Agreement.

7.650. The European Union responds that:

> Because the analysis of likelihood of injury is only meant to assess the domestic industry as a whole, aggregate figures for the industry as a whole, referring to categories of producers and not listing all of them by name, were a perfectly sufficient non-confidential summary.[987]

7.651. The European Union further argues that "[d]ifferent methods of summarising confidential information are possible, and there is no requirement to prefer indexes over other methods".[988]

#### 7.7.6.4.2 Analysis

7.652. Article 6.5.1 of the Anti-Dumping Agreement provides, in relevant part, that:

> The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

7.653. The Appellate Body has previously found that the sufficiency of the non-confidential summary depends on the nature of the information summarized.[989] At the same time, such summaries "must permit a reasonable understanding of the substance of the information withheld in order to allow the other parties to the investigation an opportunity to respond and defend their interests." In *Argentina – Ceramic Tiles*, the panel found that "the purpose of the non-confidential summaries … is to inform the interested parties so as to enable them to defend their interests."[990] We share this understanding of the content of the obligation in Article 6.5.1.

7.654. We thus examine how the non-confidential information was presented in each one of the submissions at issue:

a. In relation to the submission dated 12 May 2014, which contains "injury indicators covering total AN"[991], Russia takes issue with the European Commission for not defining the term "technical AN", nor providing a list of products falling under this label, nor identifying the names of the companies whose data was included in the respective tables.[992] The non-confidential summary sets out the actual indicators, in an aggregated form, for each quarter of the review period.

b. In relation to the submission dated 10 March 2014, which contains "injury data for all the EU complainants"[993], Russia argues that the party submitting the information did not provide a non-confidential summary nor explain why such a summary could not be provided. Russia submits that "the information [was] simply left blank, whereas it could have been summarized, for instance, by providing indexes or ranges."[994] We note however that the submission at issue contains a non-confidential summary of the injury indicators, in an aggregated form, for each quarter of the review period. We also note that some

[986] Russia's first written submission, para. 1173 (in relation to the submission dated 12 May 2014); Russia's response to Panel question No. 57.
[987] European Union's second written submission, para. 252.
[988] European Union's second written submission, para. 254.
[989] Appellate Body Report, *EC – Fasteners*, para. 542.
[990] Panel Report, *Argentina – Ceramic Tiles*, para. 6.39. (emphasis omitted)
[991] Fertilizers Europe's submission (12 May 2014), (Exhibit RUS-83 (BCI), p. 1.
[992] Russia's first written submission, para. 1171.
[993] Fertilizers Europe's submission (10 March 2014), (Exhibit RUS-119 (BCI)).
[994] Russia's first written submission, para. 1173.

parts of the submission were left blank without any explanation in the cover letter nor in the text of the non-confidential version.[995] We find no indication in the submissions of the parties nor in the investigation record regarding the nature of the information left in blank. We are therefore not in a position to decide whether these sections contain confidential information which has already been summarized in the rest of the submission, or company specific information which has not been transformed into a non-confidential summary.

c. The same problem is identified by Russia in relation to the submission dated 5 May 2014 (which contains information on the domestic consumption of AN during the review period).[996] In relation to this submission, we note however that, as explained in the cover letter, a non-confidential summary of the confidential individual company data and of the confidential consumption survey is provided.[997] The cover letter also explains why the information is considered confidential.

d. Finally, the same problem is identified by Russia in relation to the submission dated 3 June 2014, which contains investment and employment indicators for ammonium nitrate.[998] We note however that the party submitting the information provided in the cover letter an aggregated version of the confidential individual company data as well as an explanation for the confidential nature of the data.

7.655. On the basis of our examination of the four submissions challenged by Russia, we thus find that the party submitting the information provided a non-confidential summary in the form of aggregated tables, as well as an explanation for the confidential nature of the information.

7.656. We are not convinced by Russia's argument that Article 6.5.1 requires the European Commission to request, instead of aggregated figures for each injury indicator, a non-confidential summary (for example in the form of ranges or indexes) of the injury data for each respondent and for each sub-product type. We find support for this finding in the panel's decision in *EU – Footwear* (China), which stated:

> Nothing in the text of Article 6.5.1 requires that the summary of the confidential information must correspond exactly to the format in which the information was requested or provided on a confidential basis.[999]

7.657. In addition, we recall that the analysis of the likelihood of recurrence of injury is made at the level of the domestic industry rather than on a company specific basis. We consider therefore that presenting the injury indicators in an aggregated form satisfies the obligation to provide non-confidential summaries in sufficient detail to guarantee both a reasonable understanding of the substance of the information submitted by the domestic industry and the confidentiality of the information provided by individual companies.

#### 7.7.6.4.3 Conclusion

7.658. For the foregoing reasons, we reject Russia's claim that the European Union violated Articles 6.5.1 and 11.4 of the Anti-Dumping Agreement by failing to request a meaningful summary in the four instances cited by Russia.

### 7.7.6.5 Russia's claim that the European Commission used facts available in a manner inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement (claim #20)

#### 7.7.6.5.1 Introduction

7.659. Russia submits that, in its evaluation of the production capacity of Russian producers of ammonium nitrate in the context of the third expiry review, the European Commission disregarded

[995] Fertilizers Europe's submission (10 March 2014), (Exhibit RUS-119 (BCI)), pp. 13-23.
[996] Fertilizers Europe's submission (5 May 2014), (Exhibit RUS-120 (BCI)); Russia's first written submission, fn 1072.
[997] On page 2 of the cover letter.
[998] Fertilizers Europe's submission (3 June 2014), (Exhibit RUS-121 (BCI)); Russia's first written submission, fn 1072.
[999] Panel Report, *EU – Footwear (China),* para. 7.794.

the data and methodologies provided by RFPA and Russian producers and instead adopted three different methodologies for determining capacity. According to Russia, "the EU has 'picked and chosen' the data it considered most suitable to increase to the furthest extent possible the spare capacity of Russian exporters."[1000] Russia claims that by disregarding information provided by Russian interested parties and using alternative ways of determining production capacity, the European Union relied on facts available in a manner inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.[1001]

7.660. The European Union responds that:

> Neither Article 6.8 nor Annex II of the AD Agreement apply, because the Commission did not base its determinations on "facts available". Instead, the Commission's determinations were entirely based on facts and evidence received from the Russian interested parties, including RFPA.[1002]

7.661. Our first task is therefore to decide whether there is enough evidence on the record to demonstrate, as argued by Russia, that the European Commission used facts available in its evaluation of production capacity. If this is the case, we will examine Russia's claim that the European Union breached Article 6.8 and Annex II of the Anti-Dumping Agreement.

#### 7.7.6.5.2 Analysis

7.662. The main point of disagreement between the parties is whether using information provided by a respondent "albeit in a different way"[1003] can qualify as recourse to "best information available" within the meaning of the Anti-Dumping Agreement.

7.663. In the present case, as noted above in relation to our consideration of claim #8, the investigating authority assessed the production capacity of certain Russian producers on the basis of nameplate capacity, while it used the actual production figures for others.[1004] The European Union explains that:

> The data, corrected where necessary following the verification visits, showed that in some cases the actual production levels of the Russian producers (which is information provided by the interested parties) exceeded the reported name-plate capacity (also information provided by the interested parties). Obviously, when a producer actually produces a certain amount, it follows *ipso facto* that it is capable of producing (at least) that amount. Therefore, the Commission reasonably concluded that the reported capacity was underestimated, specifically because it had not been corrected "after the plants have had an update which resulted in an increase of their capacity". This does not mean that the Commission "disregarded" any data. It simply means that the Commission took into account the entirety of the information supplied by the interested parties, and came to the conclusion that production capacity is higher than reported.[1005]

7.664. Regulation 999/2014 also indicates that:

> Contrary to what was alleged by RFPA, the non-use of the reported nameplate capacities in some cases and their replacement with actual, mostly verified, production data does not mean that the Commission has applied the concept of best facts available in the sense of Article 18 of the basic Regulation. As regards the capacity, the Commission has made full use of the data provided by the Russian producers themselves, but applied a methodology to calculate the total production capacity, whereby not only the nameplate capacity but also the actual production and capacity was taken into account.[1006]

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[1000] Russia's first written submission, para. 1210.
[1001] Russia's first written submission, paras. 1235-1236.
[1002] European Union's first written submission, para. 649.
[1003] Russia's second written submission, para. 1338.
[1004] See para. 7.489 above.
[1005] European Union's first written submission, para. 652. (fn omitted)
[1006] Regulation 999/2014, (Exhibit RUS-66), recital 78.

7.665. Russia considers that "[i]n the case at hand, the EU did not merely draw different conclusions from the data than the interested parties. The EU simply disregarded specific information on capacity provided in response to requests by the investigating authority, because it did not consider them suitable. In so doing the EU applied 'facts available', regardless of how it now attempts to label such an approach."[1007] For Russia, the information on capacity provided by Russian exporters could have been replaced by other information available only if "the primary source" of information was (i) not verifiable, (ii) could not be used without undue difficulties, or (iii) was not provided in a timely manner.[1008]

7.666. We consider that Russia's claim under Article 6.8 and Annex II of the Anti-Dumping Agreement is not sufficiently supported by the evidence on the record. In particular, we disagree with Russia that the evidence on the record demonstrates that the production capacity of Russian producers/exporters was established by the European Commission on the basis of "facts available".

7.667. First, we note that the determination of production capacity is *not* cited in Regulation 999/2014 as one of the instances in which facts available were actually used by the investigating authority.[1009]

7.668. Second, the circumstances challenged by Russia do not correspond to any of the cases described in Article 6.8 "in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". The panel in *China – Broiler Products (Article 21.5 – US)* recalled that Article 6.8 establishes "a closed list of circumstances involving the unavailability of information in which an investigating authority is permitted to use facts available".[1010] In the present case, no information necessary to establish the production capacity was unavailable, deficient or not verifiable. On the contrary, the record indicates that information on nameplate capacity and on actual production was provided by sampled producers in their questionnaire responses and verified by the investigating authority. Additional information was also provided by RFPA for non-sampled producers.[1011]

7.669. Third, investigating authorities, in the performance of their duty to base their determination on positive evidence, routinely correct the information provided by interested parties. This is the case, in particular, in the context of verification visits where information provided in the written questionnaire response is verified and completed. We note for example that paragraph 7 of Annex I, which describes the procedures for on-the-spot investigations pursuant to Article 6.7 of the Anti-Dumping Agreement provides for the possibility that requests may be made "on the spot for further details to be provided in the light of information obtained." Such corrections, made to the questionnaire response of the investigated companies or to other information received by the investigating authorities, are different from circumstances which justify the use of facts available because the necessary information is "lacking"[1012]. We find support for this interpretation in the statement of the panel in *Guatemala – Cement II*, which distinguished between the application of facts available and the requirement under Article 6.6 of the Anti-Dumping Agreement that investigating authorities "satisfy themselves" as to the accuracy of the information provided by respondents. The panel stated:

> Once an investigating authority has determined what information is of substantive relevance to its investigation, Article 6.6 requires the investigating authority to satisfy itself (except when "best information available" is used) that the substantively relevant information is accurate.[1013]

7.670. Thus, in using the actual production volume rather than the nameplate capacity to establish the production capacity of certain Russian producers/exporters, the European Union did not use facts available but rather took into account information which was provided by the respondents. In our

[1007] Russia's second written submission, para. 1343. (fn omitted)
[1008] Russia's second written submission, para. 1347.
[1009] European Union's first written submission, para. 653 (quoting Regulation 999/2014, (Exhibit RUS-66), recital 33). See also Regulation 999/2014, (Exhibit RUS-66), recital 78.
[1010] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.340.
[1011] Regulation 999/2014, (Exhibit RUS-66), recitals 69-70.
[1012] European Union's first written submission, para. 648 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 77).
[1013] Panel Report, *Guatemala – Cement II*, para. 8.172.

view, this is consistent with the first sentence of paragraph 3 of Annex II to the Anti-Dumping Agreement which states that:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, … should be taken into account when determinations are made.

7.671. The issue of whether the investigating authority's determination, which relied on actual production rather than nameplate capacity was objective and based on positive evidence is a different question, which is addressed under claim #8 above.

#### 7.7.6.5.3 Conclusion

7.672. For the foregoing reasons, we disagree with Russia that the European Union acted in a manner inconsistent with Articles 6.8 and Annex II of the Anti-Dumping Agreement when establishing the production capacity of Russian producers/exporters on the basis of actual production rather than on the basis of nameplate capacity. We therefore reject Russia's claim #20.

### 7.7.6.6 Russia's claim that the European Commission failed to disclose essential facts (claim #21)

#### 7.7.6.6.1 Introduction

7.673. Russia takes issue with the alleged failure, by the European Commission, to disclose certain essential facts pertaining to different sections of the definitive disclosure provided to RFPA on 13 June 2014.[1014] For Russia, this failure to disclose essential facts is a violation, by the European Union, of Articles 6.9 and 11.4 of the Anti-Dumping Agreement.

7.674. Russia submits that the disclosure was "blatantly insufficient". Russia points in particular to the fact that the European Union "did not specify its source of the EU domestic industry's injury data upon which it made its determination on the likelihood of recurrent injury."[1015] More specifically, Russia submits that the European Union "did not disclose the source on which it calculated the EU consumption, import volumes, as well as the dumping, undercutting and underselling calculations".[1016]

7.675. Russia lists five items[1017], which should have been disclosed as part of a disclosure of essential facts consistent with the provisions of Article 6.9 of the Anti-Dumping Agreement:

a. The Article 14(6) database mentioned in table 1 of the final disclosure (Union consumption);

b. Eurostat data and the Article 14(6) database mentioned in table 2 of the final disclosure (import volume, market share and prices for the product under investigation imported from Russia);

c. Eurostat data mentioned in table 3 of the final disclosure (import volume, market share and prices for the product concerned imported from other third countries);

d. Dumping calculations;

e. Price undercutting and underselling calculations.

7.676. 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

[1014] Final disclosure, (Exhibit RUS-78 (BCI)).
[1015] Russia's first written submission, para. 1244.
[1016] Russia's first written submission, para. 1247.
[1017] Russia's first written submission, para. 1246; second written submission, para. 1367.

European Commission did not provide the basis for its dumping margin and underselling/undercutting calculations.

7.677. The European Union responds that "Russia's claims are so vague and unspecified that it is not possible for the European Union to provide a meaningful response, or for the Panel to draw any reasonable conclusions other than to reject the claims".[1018]

#### 7.7.6.6.2 Analysis

7.678. Article 6.9 of the Anti-Dumping Agreement provides:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.679. It is well established that the obligation contained in Article 6.9 of the Anti-Dumping Agreement concerns the "essential facts" which form the basis for the decision. In order to make a *prima facie* case that an investigating authority is in breach of this provision, a complainant must therefore demonstrate that the information which is allegedly missing in the authority's disclosure constitute essential facts.

7.680. In the present case, and in view of our conclusions that the European Commission did not carry out dumping margin or undercutting calculations in the context of the third expiry review, we are of the view that such calculations could not "form the basis for the decision" and that they could not be part of the essential facts forming the basis of the decision. We thus reject Russia's claim with regard to these calculations.

7.681. On the other hand, the final disclosure shows that the European Commission did determine the Union consumption as part of its likelihood of recurrence of injury determination and evaluated imports from Russia and from third – countries as well as their respective market shares.[1019] In *China – GOES*, the Appellate Body stated that "essential facts" in the sense of Article 6.9 refer to:

> [T]hose facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Article 6.9 … is paramount for ensuring the ability of the parties concerned to defend their interests.[1020]

7.682. In the present case, the total consumption of the product under investigation in the importing country, including the evaluation of imports, their price and the respective market share of different imports during the period of review, were indeed essential facts which formed the basis of the likelihood of recurrence of injury determination reached by the European Union.[1021] In this regard, the final disclosure contains the following elements:

> a. Section E(1) of the disclosure is entitled "Union consumption" and states that:
>
> The Commission established the apparent Union consumption on the basis of (i) the volume of sales of the Union industry on the Union market based on data provided by the applicant and (ii) imports from third countries based on data extracted from the Article 14(6) database.[1022]

[1018] European Union's first written submission, para. 670. See also European Union's second written submission, para. 258.
[1019] Final disclosure, (Exhibit RUS-78 (BCI)), tables 1, 2, and 3.
[1020] Appellate Body Report, *China – GOES*, para. 240.
[1021] Final disclosure, (Exhibit RUS-78 (BCI)), paras. 66-72.
[1022] Fn omitted.

7.683. The nature of this database is then described in a footnote as "monthly import statistics based on actual data that is provided by customs authorities in Member States under Article 14(6) of the basic Regulation on products subject to anti-dumping measures". Regulation 999/2014 also indicates that sales data provided by the applicant was "partly verified"[1023]. Table 1 of the final disclosure sets the Union consumption over a period of four years and in the form of an index.

b. Sections E(2) and E(3) of the final disclosure present import and market share data over the same period of four years and in the form of an index. They also indicate that the source of this data is Eurostat and the Article 14(6) database.

7.684. In view of the content of the final disclosure on the points raised by Russia, we cannot agree with Russia that the final disclosure is "blatantly insufficient". The 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.

7.685. We consider therefore that the disclosure provides the relevant essential facts, so as to permit RFPA to understand the basis for the decision whether or not to apply definitive measures. In our view, the parties concerned obtained enough information on the essential facts under consideration forming the basis of the European Commission's determination, to defend their interests.

#### 7.7.6.6.3 Conclusion

7.686. For the foregoing reasons, we reject Russia's claim that the European Union breached Articles 6.9 and 11.4 of the Anti-Dumping Agreement by failing to disclose the essential facts under consideration which formed the basis of its likelihood-of-injury determination.

### 7.7.6.7 Russia's claim that the European Commission failed to explain the reasons which led to the imposition of the measures (claim #22)

#### 7.7.6.7.1 Introduction

7.687. Russia claims that Regulation 999/2014 "does not consist in a public notice complying with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, as the EU failed to disclose a number of relevant information on the matters of fact and law and reasons which have led to the imposition of final measures."[1024]

7.688. Russia clarifies that it "does not challenge the EU's failure to disclose information during the review proceedings"[1025] but rather the consistency of Regulation 999/2014 with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement on the following basis:

> (a) Regulation 999/2014 does not detail in any way the dumping and undercutting findings made by the EU, despite clear statements that such findings were made;
>
> (b) Regulation 999/2014 does not appropriately address the scope of the product concerned and of the like product, and how the EU treated FGAN, IGAN and Stabilized AN for the purpose of its dumping and injury findings, and
>
> (c) the arguments made by RFPA, in particular as regards the scope of the product concerned and of the like product, were not addressed at all in Regulation 999/2014.[1026]

[1023] Regulation 999/2014, (Exhibit RUS-66), recital 110.
[1024] Russia's first written submission, para. 1256.
[1025] Russia's second written submission, para. 1371.
[1026] Russia's response to Panel question No. 60. See also Russia's second written submission, para. 1373.

7.689. The European Union does not respond to Russia's arguments in its written submissions. Instead, it argues that Russia has failed to meet its burden of proof that the "public notice" (Regulation 999/2014 in this case) does not contain all relevant information.[1027]

#### 7.7.6.7.2 Analysis

7.690. Article 12.2 of the Anti-Dumping Agreement states in relevant part:

> Public notice shall be given of any preliminary or final determination, whether affirmative or negative, … Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

7.691. With regard to the first point raised by Russia (failure to provide the details of dumping margin and undercutting calculations), we disagree with Russia that Regulation 999/2014 should have provided details on dumping and undercutting calculations. Regulation 999/2014 clearly sets out why the European Commission declined to carry out such calculations.[1028] For this reason, we consider that there can be no breach of Articles 12.2 and 12.2.2 in relation to determinations that the investigating authority did not make.

7.692. Regarding the scope of the product concerned, we recall our conclusion that Regulation 999/2014 does not expand the product scope of the product concerned.[1029] Section 2 of Regulation 999/2014 ("Product concerned and like product") contains a detailed description of the scope of the product concerned and of the like product. In addition, Regulation 999/2014 contains a description of a claim made by RFPA regarding the product scope and explains why this claim was considered unfounded.[1030] Finally, with regard to the alleged lack of response (in the public notice) to RFPA's requests for additional disclosure[1031], we note that the request lodged by RFPA covers a total of 16 issues.[1032] In its written submissions to the Panel, Russia does not explain why it believes that these issues are not adequately addressed by the public notice, nor why the alleged lack of details provided by the Regulation would constitute a breach of Articles 12.2 or 12.2.2.

#### 7.7.6.7.3 Conclusion

7.693. For these reasons, we agree with the European Union that Russia has failed to make a *prima facie* case that the public notice contained in Regulation 999/2014 violates Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

### 7.7.7 Conclusion on Russia's claim concerning the conduct of the third expiry review

7.694. For the reasons set out above:

a. With regard to claim #16, the Panel finds that the European Union, in the four instances raised by Russia, did not comply with the obligation contained in Articles 6.1.2 and Article 11.4 to make the evidence available promptly.

b. With regard to claim #17, the Panel finds that the European Union did not comply with its obligation to make the full text of the petition available to the interested parties upon initiation of the expiry review and therefore was in breach of Articles 6.1.3 and 11.4 of the Anti-Dumping Agreement.

c. With regard to claim #18, the Panel finds that the European Union violated Articles 6.5 and 11.4 of the Anti-Dumping Agreement by granting confidential treatment to Annex I of

[1027] See, for example, European Union's second written submission, para. 261.
[1028] Regulation 999/2014, (Exhibit RUS-66), recitals 53, 60, 68, and 114.
[1029] See para. 7.318 above.
[1030] Regulation 999/2014, (Exhibit RUS-66), recital 22.
[1031] Russia's second written submission, para. 1386.
[1032] Comments by RFPA on the definitive disclosure (8 July 2014), (Exhibit RUS-79 (BCI)), pp. 316-324.

the 14 May submission, without requesting or obtaining that the interested party submitting the information show good cause.

7.695. Further, the Panel decided to reject Russia's claims #19 to #22 in their entirety.

## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. With respect to Russia's claims concerning the Cost Adjustment Methodology:

i. Russia has established the existence of the Cost Adjustment Methodology as a measure of general and prospective application attributable to the European Union.

ii. The Cost Adjustment Methodology is inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, by providing for the rejection of the costs reflected in the records of the exporter or producer under investigation in a manner inconsistent with the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

iii. Russia's claim that the Cost Adjustment Methodology is inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement because it uses costs other than "the costs associated with the production and sale of the product under consideration" lacks a valid basis in Article 2.2.1.1 of the Anti-Dumping Agreement. Therefore, we dismiss Russia's claim.

iv. The Cost Adjustment Methodology is inconsistent with Article 2.2 of the Anti-Dumping Agreement, by providing for the use of out-of-country input price information without establishing whether or explaining how such information is adequate to reflect or represent the costs of production in the country of origin.

b. Regulations 2017/2321 and 2018/825 are not within our terms of reference.

c. With respect to Russia's "as such" claim concerning the first subparagraph of Article 2(3) of the Basic AD Regulation, Russia has failed to demonstrate that this provision requires only "representative" prices be used in the construction of normal value of the like product. Accordingly, we do not consider it necessary to further examine additional aspects of Russia's "as such" claim in respect of the first subparagraph of Article 2(3) of the Basic AD Regulation.

d. With respect to Russia's "as such" claims concerning the second subparagraph of Article 2(3) of the Basic AD Regulation, 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, we dismiss Russia's claim that the second subparagraph of Article 2(3) of the Basic AD Regulation is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

e. With respect to Russia's "as such" claims concerning the second subparagraph of Article 2(5) of the Basic AD Regulation, Russia has failed to demonstrate its claims that the final part of the second subparagraph of Article 2(5) of the Basic AD Regulation is inconsistent with Article 2.2 and Article 2.2.1.1 of the Anti-Dumping Agreement.

f. With respect to the anti-dumping measures on imports of certain welded tubes and pipes:

i. The European Commission acted inconsistently with the Article 2.2.1.1, by rejecting the costs reflected in the records of the Russian producer in a manner inconsistent with the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

ii. The European Commission acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in its ordinary-course-of-trade determination

under this provision, it relied on costs that were calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.

iii. The European Commission acted inconsistently with Article 11.3 of the Anti-Dumping Agreement, by basing its conclusion that dumping was likely to recur on costs of production calculated inconsistently with Articles 2.2.1.1 and 2.2.1 of the Anti-Dumping Agreement.

iv. We exercise judicial economy on Russia's claim that the European Commission acted inconsistently with Article 2.2.1.1 by using costs other than "the costs associated with the production and sale of the product under consideration".

g. With respect to the anti-dumping measures on imports of AN from Russia and the underlying investigations and reviews:

i. Russia has failed to demonstrate that the Anti-dumping Agreement and the GATT 1994 apply to its claim against the alleged extension of the product scope of the measures to stabilized AN. Russia has also failed to demonstrate that the European Union impermissibly extended the product scope of the review to IGAN in the context of the third expiry review. As a consequence, Russia has not demonstrated that the European Union 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 Anti-Dumping Agreement and Articles I:1, II:1 (a) and (b), VI:1, and VI:2 of the GATT 1994 (claim #1).

ii. The European Union acted inconsistently with Article 11.3 of the Anti-Dumping Agreement by failing to verify whether the constructed normal value included in the request was based on the cost of production in the country of origin, and, as a consequence, by failing to ensure that the review request was duly substantiated (claim #2).

iii. Russia has failed to demonstrate that the provisions of Article 3 of the Anti-Dumping Agreement applied to the expiry review at issue. Russia has also failed to demonstrate that the European Commission carried out undercutting calculations in a manner inconsistent with the provisions of Article 11.3 of the Anti-Dumping Agreement (claim #5).

iv. Russia has failed to demonstrate that the European Union violated Articles 4.1 and 11.3 of the Anti-Dumping Agreement by basing its likelihood of recurrence of injury determination (i) on data relating to a non-representative sample of the domestic industry; (ii) on the incomplete, non-representative and erroneous data provided by the sampled EU companies; and (iii) by failing to examine and explain the significantly divergent economic performance between the sampled and non-sampled EU domestic producers (claim #6).

v. Russia has failed to demonstrate that the European Union violated Article 11.3 by erroneously concluding that there were no indications that the non-injurious situation of the EU domestic industry would be sustainable (claim #7).

vi. Russia has failed to demonstrate that the European Commission's determination of likelihood of recurrence of injury was inconsistent with Article 11.3 of the Anti-Dumping Agreement because it was not based on positive evidence and on an objective examination of the level of production capacity available in Russia and of the capacity of absorption of Russian exports by third country markets (claim #8).

vii. Russia has failed to demonstrate that the provisions of Article 2 of the Anti-Dumping Agreement applied to the expiry review at issue. Russia has also failed to demonstrate that the European Union had breached Article 11.3 by failing to examine the impact of the alleged absence of dumping by the largest Russian exporters during the review investigation period and that the European Commission's determination of likelihood of recurrence of dumping was inconsistent with Article 6.10. Further, Russia's claim under Article 6.8 of the

Anti-Dumping Agreement is not sufficiently supported by the evidence on the record (claim #9).

viii. Russia's claim #11 under Article 11.3 and Article VI of the GATT 1994 is consequential on a finding that the European Union's determination of a likelihood of recurrence of dumping violated Articles 2.1, 2.2, and 2.4. Since Russia has failed to demonstrate any inconsistency with these provisions, we reject Russia's claim #11 in its entirety.

ix. Russia has failed to demonstrate that the European Union had violated Articles 11.3, 3.1, 11.1, 1 and 18.1 of the Anti-Dumping Agreement by conducting a single expiry review with regard to anti-dumping measures having different product scopes of application, combining within such review the likelihood of recurrence of injury and dumping determinations with regard to products subject to anti-dumping measures having different scopes of application and by extending the measures applicable to Kirovo based on the likelihood of injury and dumping determinations for the product other than that which formed the basis for the anti-dumping measures applied on products of this company. Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement are consequential to a finding of inconsistency with the provisions of Articles 3 and 11.3. Since Russia has failed to demonstrate any inconsistency with these provisions, we reject Russia's claim #3 insofar as it is based on these provisions. Further, we do not find it necessary to rule on Russia's claim under Article 11.1 (claim #3).

x. Russia has failed to demonstrate that the European Union had violated Articles 11.3, and 4.1 of the Anti-Dumping Agreement by making a recurrence of injury determination based on erroneous and incomplete data provided by the domestic industry and by incorrectly defining the domestic industry (claim #4).

xi. Claims #12 to #15 are consequential to a finding that various dumping determinations made prior to Russia's accession to the WTO were inconsistent with Article 2 of the Anti-Dumping Agreement. Russia has failed to demonstrate that these pre-WTO determinations could be challenged in these proceedings. Therefore, we reject Russia's claims #12 to #15 in their entirety.

xii. The European Union, in the four instances raised by Russia, acted inconsistently with the obligation contained in Articles 6.1.2 and 11.4 of the Anti-Dumping Agreement to make the evidence available promptly. Since we have already found the European Union in breach of Article 6.1.2, we do not find it necessary to examine Russia's claim under Article 6.4 (claim #16).

xiii. The European Union acted inconsistently with its obligation to make the full text of the expiry review request available to the interested parties upon initiation of the expiry review and therefore violated Articles 6.1.3 and 11.4 of the Anti-Dumping Agreement. Since we have already found the European Union in breach of Article 6.1.3, we do not find it necessary to examine Russia's claims under Articles 6.2 and 6.4 (claim #17).

xiv. The European Union acted inconsistently with Articles 6.5 and 11.4 of the Anti-Dumping Agreement by granting confidential treatment to the identity of the author of the expert report in Annex I of the 14 May submission, without requesting or obtaining that the interested party submitting the information show good cause; in contrast, Russia has failed to demonstrate that the European Union acted inconsistently with Article 6.5 in relation to the submission dated 20 March 2014 (claim #18).

xv. Russia has failed to demonstrate that the European Union violated 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 (claim #19).

xvi. Russia has failed to demonstrate that the European Union violated Articles 6.8, 11.4 and Annex II of the Anti-Dumping Agreement when establishing the production capacity of Russian producers/exporters on the basis of actual production rather than on the basis of nameplate capacity (claim #20).

xvii. Russia has failed to demonstrate that the European Union violated Articles 6.9 and 11.4 of the Anti-Dumping Agreement by failing to disclose the essential facts under consideration which formed the basis of its likelihood-of-injury determination (claim #21).

xviii. Russia has failed to make a *prima facie* case that the public notice contained in Regulation 999/2014 was inconsistent with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because it did not provide in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authority and to explain the reasons which led to the acceptance or rejection of the arguments of the interested parties (claim #22).

8.2. Pursuant to Article 19.1 of the DSU, we recommend that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement.