



11 November 2016

(16-6228)

Page: 1/8

Original: English

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

**REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE RUSSIAN FEDERATION**

The following communication, dated 7 November 2016, from the delegation of the Russian Federation to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 7 May 2015, the Russian Federation 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* ("ADA") with respect to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community,<sup>1</sup> in particular Articles 2.3 and 2.5 thereof, the cost adjustment methodology used by the European Union authorities in anti-dumping procedures, as well as anti-dumping measures imposed on imports of ammonium nitrate and certain welded tubes and pipes of iron or non-alloy steel originating in the Russian Federation (document WT/DS494/1, G/L/1115, G/ADP/D110/1, G/SCM/D107/1). The first round of consultations was held on 26 June 2015.

After the first round of consultations, the Russian Federation identified additional aspects in respect of the definitive anti-dumping measures on imports of ammonium nitrate originating in the Russian Federation and requested, on 29 March 2016, further consultations with the European Union pursuant to Articles 1 and 4 of the DSU, Article XXII:1 of the GATT 1994 and Articles 17.2 and 17.3 of the ADA (document WT/DS494/1/Add.1, G/L/1115/Add.1, G/ADP/D110/1/Add.1, G/SCM/D107/1/Add.1).

The second round of consultations was carried out on 19 May 2016. Those consultations, unfortunately, did not resolve the dispute.

Given the aforementioned, my authorities have instructed me to request 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

<sup>1</sup> OJ L 343, 22.12.2009, p. 51 (corrigendum OJ 2010 L 7, p. 22) codifying Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ L 56, 6.3.1996, p. 1) and its subsequent amendments including in particular Council Regulation (EC) No 2331/96 (OJ L 317, 6.12.1996, p. 1); Council Regulation (EC) No 905/98 (OJ L 128, 30.4.1998, p. 18); Council Regulation (EC) No 2238/2000 (OJ L 257, 11.10.2000, p. 2); Council Regulation (EC) No 1972/2002 (OJ L 305, 7.11.2002, p. 1); Council Regulation (EC) No 461/2004 (OJ L 77, 13.3.2004, p. 12); and Council Regulation (EC) No 2117/2005 (OJ L 340, 23.12.2005, p. 17) and corrigendum to Council Regulation (EC) No 1225/2009, OJ L 7, 12.1.2010, p. 22, as amended, including by Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012, OJ L 237, 3.9.2012, p.1; Regulation (EU) No 1168/2012 of the European Parliament and of the Council of 12 December 2012, OJ L 344, 14.12.2012, p.1 and Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014, OJ L18, 21.1.2014, p.1: codified by Regulation (EU) 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, OJ L 176, 30.6.2016, p. 21–54.

and 17.5 of the ADA with respect to the measures of the European Union identified below that affect imports from the Russian Federation.

**I. "AS SUCH" CLAIMS ON CERTAIN ASPECTS OF ARTICLE 2(3) AND ARTICLE 2(5) OF THE BASIC REGULATION AND COST ADJUSTMENT METHODOLOGY**

**A. FIRST SUBPARAGRAPH OF ARTICLE 2(3) OF THE BASIC REGULATION**

The first subparagraph of Article 2(3) of the Basic Regulation stipulates:

"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.*" (emphasis added)

The Russian Federation challenges the following part of the first subparagraph of Article 2(3) of the Basic Regulation: "provided that those prices are representative".

This measure appears to be inconsistent with Article 2.2 of the ADA because it requires that in the calculation of normal value of the like product only "representative" prices shall be applied to both alternative methods of determination of normal value of the like product.

**B. SECOND SUBPARAGRAPH OF ARTICLE 2(3) OF THE BASIC REGULATION**

The second subparagraph of Article 2(3) of the Basic 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 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 ADA 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.

**C. SECOND SUBPARAGRAPH OF ARTICLE 2(5) OF THE BASIC REGULATION**

The second subparagraph of Article 2(5) of the Basic Regulation stipulates:

"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.*" (emphasis added)

The Russian Federation challenges the following part of the second subparagraph of Article 2(5) of the Basic Regulation: "or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets".

This measure appears to be inconsistent with Articles 2.2.1.1 and 2.2 of the ADA since it authorizes the investigating authority of the European Union to use costs other than "cost of

production in the country of origin" for construction of the normal value as a result of adjustment or establishment of the costs associated with production and sale of the product under consideration without ensuring that such adjusted or established costs represent the cost of production in the country of origin.

#### **D. COST ADJUSTMENT METHODOLOGY**

The Russian Federation challenges the cost adjustment methodology used by the European Union authorities in anti-dumping procedures thereby the European Union:

- (i) rejects the costs reflected in the records that are kept by the exporter or producer under investigation in accordance with the generally accepted accounting principles of the exporting country and 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 and/or prices, in particular, input costs and/or prices are viewed by the European Union authorities as "artificially or abnormally low" due to alleged "distortions" or "market impediments" like government price regulation or the application of export duties in the country of origin; and
- (ii) replaces and/or adjusts such recorded costs data using the costs data obtained from other sources, including so called "representative markets", which are viewed 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.

The cost adjustment methodology appears to be inconsistent with:

- 1) Article 2.2.1.1 of the ADA because in applying the cost adjustment methodology the European Union rejects the costs reflected in the records that are kept by the exporter or producer under investigation in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration;
- 2) Article 2.2 of the ADA because in applying the cost adjustment methodology for construction of the normal value the European Union uses costs other than "cost of production in the country of origin";
- 3) Article 2.2.1.1 of the ADA because in applying the cost adjustment methodology the European Union uses costs other than "costs associated with the production and sale of the product under consideration" reasonably reflected in the records kept by the exporter or producer under investigation in accordance with the generally accepted accounting principles of the exporting country.

## **II. CLAIMS CONCERNING THE EXPIRY REVIEW AND THE DECISION ON EXTENSION OF ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF WELDED TUBES AND PIPES ORIGINATING IN THE RUSSIAN FEDERATION**

On 19 December 2008, the European Union imposed anti-dumping measures on imports of certain welded tubes and pipes of iron or non-alloy steel ("welded tubes and pipes") originating in the Russian Federation.<sup>2</sup> On 27 January 2015, as a result of the expiry review the European Union extended these measures for another 5-year period.<sup>3</sup>

<sup>2</sup> 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 (OJ L 343, 19.12.2008, p. 236-273).

<sup>3</sup> Commission Implementing Regulation (EU) 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

The Russian Federation considers that the above decision to extend the anti-dumping measures on welded tubes and pipes as a result of the expiry review and the underlying investigation are inconsistent with Articles 2.2.1.1, 2.2.1 and 11.3 of the ADA because the European Union in applying the ordinary course of trade test as part of its determination of the normal value in the course of the expiry review:

- 1) failed to calculate the cost of production of welded tubes and pipes on the basis of the records that are kept by the producer under investigation 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 by rejecting gas prices actually paid;
- 2) used costs other than "costs associated with the production and sale of the product under consideration" reasonably reflected in the records kept by the exporter or producer under investigation in accordance with the generally accepted accounting principles of the exporting country.

### **III. CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF AMMONIUM NITRATE FROM THE RUSSIAN FEDERATION AND THE UNDERLYING INVESTIGATIONS**

#### **A. MEASURES AT ISSUE**

On 24 September 2014, the European Union extended for another five years anti-dumping measures on imports of ammonium nitrate from the Russian Federation.<sup>4</sup>

These anti-dumping measures were originally imposed, subsequently reviewed and are currently levied pursuant to:

- 1) Council Regulation (EC) No 2022/95 of 16 August 1995 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia, OJ L 198, 23.8.1995, p. 1-14;
- 2) 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, OJ L 93, 26.3.1998, p. 1-7;
- 3) Council Regulation (EC) No 658/2002 of 15 April 2002 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia, OJ L 102, 18.4.2002, p. 1-11;
- 4) Council Regulation (EC) No 993/2004 of 17 May 2004 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 and collecting definitively the provisional duty imposed on imports of ammonium nitrate originating in Poland and Ukraine, and terminating the anti-dumping proceeding in respect of imports originating in Lithuania, OJ L 182, 19.5.2004, p. 28-33;
- 5) 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, OJ L 160, 23.6.2005, p. 1-9;

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 (OJ L 20, 27.1.2015, p. 6-30).

<sup>4</sup> 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 (OJ L 280, 24.9.2014, p. 19-51).

- 6) 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, OJ L 75, 18.3.2008, p. 1-7;
- 7) Council Regulation (EC) No 661/2008 of 8 July 2008 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an expiry review pursuant to Article 11(2) and a partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96, OJ L 185, 12.7.2008, p. 1-34;
- 8) 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, OJ L 278, 23.10.2009, p. 1-2;
- 9) Commission Decision 2012/629/EU of 10 October 2012 amending Decision 2008/577/EC accepting the undertakings offered in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Russia, OJ L 277, 11.10.2012, p. 8-10;
- 10) 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, OJ L 280, 24.9.2014, p. 19-51;
- 11) Judgment of the Court of First Instance of 10 September 2008, Case T-348/05, JSC Kirovo-Chepetsky Khimichesky Kombinat v Council of the European Union, [2008] ERC II-159; and
- 12) Judgment of the Court of First Instance (Fourth Chamber) of 9 July 2009, Case T-348/05 INTP, JSC Kirovo-Chepetsky Khimichesky Kombinat v Council of the European Union, application for interpretation of the judgment of the Court of First Instance of 10 September 2008 in Case T- 348/05, [2009] ERC II-00116.

## **B. LEGAL BASIS FOR THE COMPLAINT**

### **Claims with Respect to the Scope of the Applicable Measures**

- 1) The European Union violated Articles 1, 2.1, 2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.3, 5.4, 9.1, 9.3 and 18.1 of the ADA and Articles I:1, II:1 (a) and (b), VI:1 and VI:2 of the GATT 1994 because it initiated an expiry review, made likelihood of recurrence of injury and dumping determinations, extended the anti-dumping measures, levied and continues levying anti-dumping duties on imports of stabilized ammonium nitrate, as well as industrial-grade ammonium nitrate, for which no anti-dumping investigation was ever conducted and no dumping and material injury determinations were ever made.
- 2) The European Union violated Articles 5.3 and 11.3 of the ADA by initiating the expiry review that led to the adoption of Regulation 999/2014.
- 3) The European Union acted contrary to Articles 1, 2.1, 2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 11.1, 11.3 and 18.1 of the ADA 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 JSC Kirovo-Chepetsky Khimichesky Kombinat 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.
- 4) The European Union acted contrary to Articles 11.3, 2.6, 3.1, 3.2, 3.4, 4.1, 6.8 and paragraphs 3, 5 and 7 of Annex II of the ADA 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.

#### **Claims with Respect to the Establishment of the Likelihood of Recurrence of Injury**

- 5) The European Union acted in breach of Articles 11.3, 3.1 and 3.2 of the ADA by failing to perform proper undercutting calculations.
- 6) The European Union violated Articles 11.3, 3.1, 3.4 and 4.1 of the ADA by:
  - a) making the likelihood of recurrence of injury determination based on data relating to a non-representative sample of the European Union domestic industry;
  - b) making the likelihood of recurrence of injury determination based on the incomplete, non-representative and erroneous data provided by the sampled European Union companies;
  - c) failing to examine and explain the significantly divergent economic performance between the sampled and non-sampled European Union domestic producers.
- 7) The European Union acted contrary to Articles 11.3 and 3.1 of the ADA by erroneously concluding that there were no indications that the non-injurious situation of the European Union domestic industry would be sustainable.
- 8) The European Union violated Articles 11.3 and 3.1 of the ADA by determining that the expiry of the measure would be likely to lead to recurrence of injury and recurrence or continuation of dumping without basing that determination 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.

#### **Claims with Respect to the Establishment of the Likelihood of Recurrence of Dumping**

- 9) The European Union acted in breach of Articles 2.1, 2.3, 6.8, 6.10 and 11.3 of the ADA by not drawing reasoned and adequate conclusions due to the failure to examine the impact of the absence of dumping by the largest Russian exporters during the period of review.
- 10) The 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.
- 11) The European Union failed to comply with Article 11.3, 2.1, 2.2 and 2.4 of the ADA, as well as Article VI:1 of the GATT 1994 by relying on a continuation of dumping without conducting proper dumping margin calculations that comply with Article 2 of the ADA.

#### **Claims with Respect to the Continuous Levying of the Anti-Dumping Duties**

- 12) The European Union failed to comply with Article VI:2 of the GATT 1994, Articles 1, 9.3 and 11.1 of the ADA, since by extending the anti-dumping measures against imports of ammonium nitrate it applied the anti-dumping duties that (i) were incorrectly established under Articles 2.2.1.1, 2.2.1 and 2.2 of the ADA and Articles VI:I and VI:2 of the GATT 1994, because:
  - the costs of production for calculation of dumping margins were not based on records kept by the producer under investigation in accordance with the generally accepted accounting principles of the exporting country and reasonably reflecting the costs associated with the production and sale of the product under consideration;



- for construction of normal value for the producers under investigation the European Union used costs other than "cost of production in the country of origin" of ammonium nitrate;

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

- 13) The European Union violated Article 11.3 of the ADA, since it has extended the duration of anti-dumping duties that were based on dumping margins calculated not in line with Articles 2.2.1.1, 2.2.1, 2.2 of the ADA.
- 14) The European Union imposed and continues levying anti-dumping duties on the product concerned from Russia based on a country-wide dumping margin pursuant to a methodology that does not conform to the provisions of Articles 1, 2.1, 2.2, 9.3 and 11.3 of the ADA, as well as Articles I:1, VI:1 and VI:2 of the GATT 1994 along with the second Supplementary Provision to Article VI:1 in Annex I to the GATT 1994 and thus acted in breach of said provisions, as well as Article 11.3 of the ADA.
- 15) The European Union violated Articles 1 and 18.1 of the ADA, because its anti-dumping measures in respect of ammonium nitrate originating in the Russian Federation are not in conformity with the provisions of Articles VI:1 and VI:2 of the GATT 1994, as interpreted by the ADA.

#### **Claims with Respect to the Conduct of the Expiry Review Investigation**

- 16) The European Union violated Articles 6.1.2, 6.4 and 11.4 of the ADA by delaying on numerous occasions access to the non-confidential file by the Russian exporters.
- 17) The European Union acted in breach of Articles 6.1.3, 6.2, 6.4 and 11.4 of the ADA by failing to provide to the interested parties the full text of the written application received on 28 March 2013, on the basis of which the European Union initiated the expiry review.
- 18) The European Union failed to comply with Articles 6.5 and 11.4 of the ADA by treating as confidential, without any good cause shown, information supplied by the domestic industry.
- 19) The European Union acted contrary to Articles 6.5.1 and 11.4 of the ADA by failing to require the domestic industry to furnish sufficiently detailed non-confidential summaries of the data submitted in confidence.
- 20) The European Union violated Articles 6.8 and 11.4 and paragraphs 3, 5, 6 and 7 of Annex II of the ADA by refusing to rely on information provided by Russian exporters, whereas the conditions to resort to facts available were not met.
- 21) The European Union breached Articles 6.9 and 11.4 of the ADA by not informing the interested parties of the essential facts under consideration which formed the basis for the decision to extend the anti-dumping measures.
- 22) The European Union acted in violation of Articles 12.2 and 12.2.2 of the ADA as it failed 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.

#### **IV. REQUEST FOR ESTABLISHMENT OF PANEL**

This request covers the measures set out above as well as any and all amendments, replacements, extensions, related and implementing measures and any act of the European Union authorities that would affect the measures at issue. This request also concerns any and all notices, disclosures and reports of the European Commission, Council of the European Union, the Court of Justice of the European Union and other European Union institutions, and any amendments thereof,

produced or to be produced in the future, in connection with any of the measures at issue including, but not limited to, all interim reviews, expiry reviews and other proceedings that have taken place to date.

The above European Union measures nullify or impair the benefits accruing to the Russian Federation directly or indirectly under the cited agreements.

Therefore, the Russian Federation requests, 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 ADA that the Dispute Settlement Body ("DSB") establish a panel to examine the matter, with the standard terms of reference, as forth in Article 7.1 of the DSU.

The Russian Federation requests that this request be placed on the agenda of the DSB meeting to be held on 23 November 2016.

---