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

**NOTIFICATION OF AN APPEAL BY THE EUROPEAN UNION UNDER ARTICLE 16.4 AND ARTICLE 17.1
OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE
SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE
WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 28 August 2020, from the delegation of the European Union, is being circulated to Members.

Pursuant to Article 16.4 and Article 17.1 of the DSU the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)* (WT/DS494/R). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

The European Union is restricting its appeal to those errors that it believes constitute serious errors of law or legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify, or declare moot and of no legal effect, the findings, conclusions, rulings and recommendations of the Panel, with respect to the following errors of law or legal interpretations contained in the Panel Report:¹

1 THE ALLEGED "COST ADJUSTMENT METHODOLOGY" "AS SUCH"

1.1 Existence, precise content, attribution, general and prospective application

There is what may reasonably be described as a route through the decision tree of the Anti-Dumping Agreement that both parties and the Panel agree exists, since it results from the terms of the treaty and has been confirmed by the case law, consisting of the following steps: normal value is to be established not on the basis of domestic sales, but costs of production; the records of the investigated firm do not **reasonably reflect** the costs of production and sale of the investigated product for one or more items (**second condition** of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement); the recorded cost is rejected; the investigating authority uses information from a third country; that information is adjusted so that it represents the costs of production in the country of origin, without it being necessary to re-introduce the record previously rejected.

¹ Paragraph numbers provided in the following description of the legal errors of the Panel are intended to indicate the primary instance of the errors. These errors may also be reflected in or have consequences for other parts of the Panel Report, and the European Union also appeals all findings and conclusions deriving from or relying on the appealed errors. The European Union also emphasises that the paragraphs listed in this Notice of Appeal comprise only an "indicative list", pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review.

This same decision tree is re-stated in EU municipal anti-dumping law in certain provisions of the EU Basic Anti-Dumping Regulation that the Panel rightly found to be WTO consistent.

If one were to hypothetically consider the repeated application of these provisions by a particular WTO Member in, for example, a dozen cases, one could categorise them in different ways. However, two categories are relevant for the purpose of this appeal: those cases in which the "as applied" measure would be WTO consistent because it would comply with all of the above provisions; and those cases in which the "as applied" measure would be WTO inconsistent because the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement would have been wrongly applied (that is, the investigating authority would have found that a particular recorded cost does not reasonably reflect the cost associated with the production and sale of the product under investigation, whereas in reality it did reasonably reflect such cost).

Russia **defined** its alleged measure (the so-called "cost adjustment methodology") by describing the above route through the decision tree (in both WTO law and EU law) and by adding an additional element: the alleged **unlawful** application of the **second condition** of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Russia added this second element because otherwise Russia's alleged measure would just consist of the above route through the decision tree, which would mean that once the Panel would have confirmed that the relevant provisions of the EU Basic Anti-Dumping Regulation were WTO consistent (which it rightly did), Russia's "as such" claim would necessarily have to be dismissed, because no additional measure would exist. Furthermore, Russia's own municipal anti-dumping law foresees the above route through the decision tree as lawful, which is why Russia was obliged to add the alleged additional element of unlawfulness.

Russia was alleging much more than the existence of one or more "as applied" cases falling into the second category outlined above. Russia was alleging, in effect, that the Commission has secretly legislated (or adopted a measure akin to legislation) in a manner that directly contradicts both the Anti-Dumping Agreement and the EU Basic Anti-Dumping Regulation. As Russia would have it, it is as if there exists, secretly, somewhere inside the Commission, a document that somehow directs that, even in cases where the records **do reasonably reflect**, the investigating authority must determine that the records **do not reasonably reflect**. This is an extremely serious allegation, calling into question the good faith of the European Union. It is untrue. Manifestly, the facts referred to by the Panel are incapable of supporting such a legal characterisation.

The **consequence** that the Panel and Russia would appear to assume would be that the EU can never again follow the above particular route through the decision tree in a case relating to Russia (Panel Report, paragraph 7.37). That is manifestly incorrect. Each case depends on its facts. The European Union cannot be precluded in general and abstract terms from following a particular lawful path through the decision tree where that would be justified by the facts of a particular case.

The Panel addressed the question of whether or not Russia had demonstrated the existence and precise content of the alleged measure, as well as attribution and general and prospective application, in Section 7.2.2.3 of the Panel Report. It is this Section as a whole, and particularly the conclusion in paragraph 7.64 that Russia had demonstrated the existence and precise content of the alleged measure (as well as attribution and general and prospective application), that contain legal errors in the application of the law to the facts.

There are different facets of the Panel's legal errors readily apparent from its analysis:

- The Panel appears to have understood that Russia was required to demonstrate: existence; precise content; attribution; and general and prospective application. But the Panel has **confounded** these distinct issues. At paragraph 7.25 the Panel opines that existence is demonstrated by establishing precise content, attribution and general and prospective application. That is incorrect. These matters are distinct. A complainant might provide a precise description of its alleged measure and a Panel might opine as to how the EU might act in the future. This is not the same thing as, and not to be equated with, existence. In the structure that follows, the Panel addresses precise content (7.2.2.3.1), attribution (7.2.2.3.2) and general and prospective application (7.2.2.3.3), but it never specifically and discretely addresses the central live issue (existence), before concluding that the alleged measure exists at paragraph 7.64.
- In the description of the supposed precise content of the alleged measure as defined by Russia, the Panel **toggles** between **excluding** the element of **unlawfulness** and **including** it. At paragraph 7.28 it is excluded; at paragraph 7.30 and footnote 92 it is included; at

paragraphs 7.44 and 7.57 it is again excluded. This alternation between one description and another is intolerable in what is supposed to be an analysis of "precise content".

- At paragraph 7.32 the Panel attempts to resolve this issue by "understanding Russia to mean" something "additional" and "unrelated" to the second condition in the first sentence of Article 2.2.1.1. However, the language used by the Panel ("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") is **capable** of fitting within the four corners of the second condition, depending on the facts of a particular case. In this respect, it cannot be reasonably contested that the record that might fail the second condition in the first sentence of Article 2.2.1.1 could be a record relating to an input cost. Nor can it be reasonably contested that such record might fail the requisite test because the amount is abnormally low, for example because of the existence of a non-arm's length relationship between the investigated firm and the supplier of the raw material. Nor can it be reasonably contested that the supplier could be either a private entity or the State or an entity whose behaviour is attributable to the State. The Anti-Dumping Agreement is concerned with whether or not dumping exists, as defined objectively by the treaty, not with the reasons why dumping might be occurring. Thus, the language used by the Panel does not disclose anything unlawful *per se*. Thus the Panel has not respected the central feature of the alleged measure as defined by Russia, namely the alleged additional element of unlawfulness.
- The Panel has considered the existence of a number of "as applied" measures **in itself sufficient** to establish the existence of an "as such" measure. This is apparent from paragraph 7.36 of the Panel Report. This is incorrect.
- In any event, such reasoning cannot be sustained when the measures referred to have not even been found to be WTO inconsistent (as is the case for all but one), especially when such inconsistency is part of the complainant's **definition** of the alleged measure. At paragraph 7.38 to 7.47 the Panel addresses 17 specific anti-dumping measures, but makes no finding that they are WTO inconsistent.²
- When it comes to consider **attribution** (at paragraph 7.48), the Panel opines that the "as applied" acts are attributable to the EU (which is true) and that they are **"part of"** the alleged "as such" measure. This is manifestly incorrect. Russia has never even alleged that the "as applied" acts are "part of" the alleged "as such" measure. Rather, Russia alleged that the "as applied" acts were instances of the application of the alleged "as such" measure. In doing so, Russia merely assumed the existence of the "as such" measure. As the EU explained to the Panel, the difficulty for Russia is that the alleged element of unlawfulness was part of Russia's own definition, but has not even been demonstrated with respect to the "as applied" measures (bar one, according to the Panel). The truth is that there was no evidence of attribution because the "as such" measure does not exist. The Panel was not entitled to avoid this truth through the manifestly erroneous device employed in paragraph 7.48.
- At paragraph 7.54 the Panel has clearly misunderstood the concept of **"general application"**. If an exporting Member does a particular thing several times, and an investigating authority in an exporting Member reacts accordingly, it does not follow that there is a measure of "general application" with that precise content. The measures of general application are the provisions of the Anti-Dumping Agreement and the EU Basic Anti-Dumping Regulation that set out the particular route through the decision tree. They are of general application because they **always apply** to future fact patterns, leading to one outcome or the other. Several "as applied" measures do not amount to generality in this sense.

² The European Union makes the following **conditional** appeal. If the Appellate Body considers that the Panel made findings of WTO-inconsistency with respect to the "as applied" measures (other than the "as applied" measure relating to welded tubes and pipes), for example (but not only) at paragraph 7.106 of the Panel Report (*quod non*), then the European Union appeals such findings, because these matters were clearly not within the Panel's terms of reference. Such matters are not covered by the panel request and any such findings would therefore be inconsistent with Article 6(2) of the DSU, which requires a panel request to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

- The Panel has also clearly misunderstood the concept of "**prospective**" (at paragraph 7.55 and following). It is correct that a particular outcome does not need to be certain; but the very essence of a measure of prospective application is that it will be applied to all future fact patterns, leading to one outcome or another. In this context, referring to case law of the European Court of Justice, the Panel rightly rejects the proposition that in its definition of the alleged "as such" measure Russia has identified a "principle of EU law", because it obviously has not (paragraph 7.61). However, the Panel also refers to the EU investigating authority relying on such case law. But the only things that have prospective application are the provisions of the Anti-Dumping Agreement and the EU Basic Anti-Dumping Regulation that trace the particular route through the decision tree; once again the Panel omits any reference to the alleged unlawful element of the measure as defined by Russia.

The WTO treaties make it clear that dispute settlement proceedings must concern a "measure" of another Member. This is clear, notably, but not only, from Article 3.3 of the DSU, which uses the terms "measures taken by another Member". As confirmed by the case law, a complainant must demonstrate that an alleged "measure" exists and what the precise content of such measure is supposed to be, as well as attribution to the defendant Member; and an alleged "as such" measure must also be demonstrated to be of general and prospective application.

For these reasons, the Panel's conclusions in paragraphs 7.64 (and 8.1(a)(i)) that Russia demonstrated existence, precise content, attribution and general and prospective application of the alleged "as such" measure, as defined by Russia, constitute legal errors in the application of the law (notably Article 3.3 of the DSU) to the facts, and should be reversed. Reversal on **any one of these five requirements** would require reversal of the Panel's findings on this "as such" claim in their entirety.

Consequently, reversal on any one or more of these five issues would require the Panel's subsequent findings and conclusions regarding the supposed WTO-inconsistency of the alleged "as such" measure to also be reversed or declared moot and of no legal effect (Section 7.2.4.3, in particular paragraph 7.107; Section 7.2.6.2, in particular paragraph 7.131; paragraphs 8.1(a)(ii) and 8.1(a)(iv)).

1.2 The legal standard under the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement

The European Union appeals the Panel's statement of the legal standard under the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement set forth in Section 7.2.4.2 of the Panel Report (and referenced at paragraph 7.238) because it is **incomplete**. This amounts to an error in the interpretation of the law. The following circumstances may result in abnormal and unreliable data and may be relevant to the application of the first sentence of Article 2.2.1.1:

- 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;³
- multiple currency practices that constitute a form of dumping by means of a partial depreciation of a country's currency, being practices by governments or sanctioned by governments;⁴
- an absence of domestic sales;⁵
- domestic sales not in the ordinary course of trade by reason of price;⁶
- domestic sales not in the ordinary course of trade other than by reason of price;⁷
- domestic sales that are otherwise not comparable;⁸
- a particular market situation;⁹

³ GATT 1994, Article VI:1, Ad Note to Paragraph 1, second paragraph.

⁴ GATT 1994, Ad Note to Paragraphs 2 and 3, second paragraph.

⁵ GATT 1994, Article VI:1(b); Anti-Dumping Agreement, Article 2.2.

⁶ GATT 1994, Article VI:1(a); Anti-Dumping Agreement, Articles 2.1, 2.2 and 2.2.1.

⁷ GATT 1994, Article VI:1(a); Anti-Dumping Agreement, Articles 2.1 and 2.2.

⁸ GATT 1994, Article VI:1(a); Anti-Dumping Agreement, Article 2.1.

⁹ Anti-Dumping Agreement, Article 2.2.

- a low volume of domestic sales;¹⁰
- a price to a third country that is not appropriate;¹¹
- a price to a third country that is not representative;¹²
- a price to a third country that is not in the ordinary course of trade by reason of price;¹³
- a price to a third country that is not in the ordinary course of trade other than by reason of price;¹⁴
- a price to a third country that is otherwise not comparable;¹⁵
- records that are not in accordance with the generally accepted accounting principles of the exporting country;¹⁶
- records that do not reasonably reflect the costs associated with the production and sale of the product under consideration;¹⁷
- records that do not suitably and sufficiently correspond to and 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;¹⁸
- records that are unreliable or inaccurate, or which do not capture all costs incurred, or which over- or understate the costs incurred, or which are not accurate and faithful within acceptable limits;¹⁹
- non-arms-length transactions that affect the reliability of the reported costs;²⁰
- other practices that affect the reliability of the reported costs;²¹
- cost allocations that have not been historically utilized by the exporter or producer;²²
- the use of inappropriate amortization and depreciation periods and allowances for capital expenditures and other development costs;²³
- non-recurring items of costs which benefit future and/or current production for which appropriate adjustments have not been made;²⁴
- circumstances in which costs during the period of investigation are affected by start-up operations for which appropriate adjustments have not been made;²⁵
- any differences affecting comparability for which due allowance has not been made;²⁶

¹⁰ Anti-Dumping Agreement, Article 2.2 and footnote 2.

¹¹ Anti-Dumping Agreement, Article 2.2.

¹² Anti-Dumping Agreement, Article 2.2.

¹³ Anti-Dumping Agreement, Articles 2.2 and 2.2.1.

¹⁴ GATT 1994, Article VI:1(b)(i); Anti-Dumping Agreement, Article 2.2.

¹⁵ GATT 1994, Article VI:1(b)(i); Anti-Dumping Agreement, Article 2.2.

¹⁶ Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1.

¹⁷ GATT 1994, Article VI:1(b)(ii); Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1. See also: Panel Report, *US – Softwood Lumber V*, paras. 7.250-324; Panel Report, *Egypt-Steel Rebar*, para. 7.393; Panel Report, *EC-Salmon (Norway)*, para. 7.481.

¹⁸ Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.

¹⁹ Appellate Body Report, paras. 6.56 (the Panel's interpretation does not conflict with the Appellate Body's understanding) and 6.41; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242 and footnote 400.

²⁰ Appellate Body Report, paras. 6.56 (the Panel's interpretation does not conflict with the Appellate Body's understanding) and 6.41; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242 and footnote 400. See also: Anti-Dumping Agreement, Article 2.3 ("association or a compensatory arrangement"); Appellate Body Report, *US – Hot-Rolled Steel*, paras. 159-180.

²¹ Appellate Body Report, paras. 6.56 (the Panel's interpretation does not conflict with the Appellate Body's understanding) and 6.41; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242 and footnote 400.

²² Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1.

²³ Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1.

²⁴ Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1.

²⁵ Anti-Dumping Agreement, Articles 2.2 and 2.2.1.1.

²⁶ GATT 1994, Article VI:1 and 2; Anti-Dumping Agreement, Article 2.4 and footnote 7.

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- fluctuations in exchange rates (which must be ignored);²⁷
 - sustained movements in exchange rates during the period of investigation during the preceding 60 days;²⁸
 - any other abnormal situation affecting comparability.²⁹

1.3 The application of the legal standard under the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement

The European Union appeals the Panel's application of the legal standard under the first sentence of Article 2.2.1.1 contained in Section 7.2.4.3 and paragraphs 7.97 to 7.107 and 8.1(a)(ii) of the Panel Report. In particular, the Panel was wrong to conclude that "the reasons underlying the rejection of the recorded costs under the Cost Adjustment Methodology are not distinguishable" from those considered in two prior "as applied" cases (paragraph 7.101); and that the alleged Cost Adjustment Methodology involves an assessment of the "reasonableness" of the relevant costs (paragraph 7.102).

1.4 The legal standard under Article 2.2 of the Anti-Dumping Agreement

The European Union appeals the Panel's statement of the legal standard under Article 2.2 of the Anti-Dumping Agreement set forth in Section 7.2.6.2 of the Panel Report because it is **incomplete**. This amounts to an error in the interpretation of the law. The Panel should have included a statement to the effect that, in adjusting information or data from a third country, an investigating authority is not required to re-use data or information that has already been lawfully rejected, or to return to a calculation or outcome that is the same as the calculation or outcome that would result from the use of such lawfully rejected data or information. The Panel should not have dismissed this aspect of the legal standard as "irrelevant", as it did in paragraph 7.130 (which paragraph is included in this appeal).

The European Union also appeals the Panel's statement that the making of any such adjustment would not depend on whether such adjustments have been invoked and justified by the investigated companies (paragraph 7.129).

1.5 The application of the legal standard under Article 2.2 of the Anti-Dumping Agreement

The European Union appeals the Panel's application of the legal standard under Article 2.2 of the Anti-Dumping Agreement contained in Section 7.2.6.3 and paragraphs 7.124 to 7.131 and 8.1(a)(iv) of the Panel Report. In particular, although the Panel is supposed to be addressing the alleged "as such" measure, it conducts its assessment by reference to the "as applied" measures (paragraph 7.124, final sentence). The Panel asserts that there is no **explanation** about how out-of-country information is adjusted to reflect costs in the country of origin. However, it is entirely surreal for Russia to define an alleged measure (which does not exist) as not including something; and for the Panel to then find that the absence (or non-existence) of that something makes the alleged measure WTO inconsistent. There is no "as such" explanation because there is no "as such" measure. In the "as applied" measures the European Union explains that it uses out-of-country information as a proxy for the costs in the country of origin, which is then adjusted to remove elements specific to the third country (such as tax) resulting, by definition, in a proxy for the cost in the country of origin. The European Union is not required to adjust back to data that has been properly rejected.

The Panel should have included a statement to the effect that, in adjusting information or data from a third country, an investigating authority is not required to re-use data or information that has already been lawfully rejected, or to return to a calculation or outcome that is the same as the calculation or outcome that would result from the use of such lawfully rejected data or information. The Panel should not have dismissed this aspect of the legal standard as "irrelevant", as it did in paragraph 7.130 (which paragraph is included in this appeal).

²⁷ Anti-Dumping Agreement, Article 2.4.1.

²⁸ Anti-Dumping Agreement, Article 2.4.1.

²⁹ GATT 1994, Article VI:1 and 2; Anti-Dumping Agreement, Articles 2.1, 2.2 and 2.4.

The European Union also appeals the Panel's statement that the making of any such adjustment would not depend on whether such adjustments have been invoked and justified by the investigated companies (paragraph 7.129).

2 CLAIMS CONCERNING THE ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN WELDED TUBES AND PIPES

2.1 Claim of inconsistency with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement

The European Union appeals the Panel's findings that the measure at issue is inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement contained in Sections 7.6.2.2 and 7.6.2.3 and paragraphs 7.238 to 7.253 and 8.1(f)(i) of the Panel Report. These findings are vitiated by the same errors of interpretation and application that the Panel has committed in its assessment of the alleged "as such" measure. The European Union correctly applied the relevant provision in the measure at issue. The European Union did not apply a standard of "reasonableness" (paragraphs 7.242 to 7.243). The nature of the government measure was different from that in *EU - Biodiesel (Argentina)* (paragraph 7.246). The Panel has failed to properly appreciate the documents associated with Russia's Accession to the WTO (paragraph 7.251).

2.2 Claim of inconsistency with Article 2.1.1 of the Anti-Dumping Agreement

The European Union appeals the Panel's findings that the measure at issue is inconsistent with Article 2.1.1 of the Anti-Dumping Agreement contained in Sections 7.2.5.7 and 7.2.5.8 and paragraphs 7.259 to 7.262 and 8.1(f)(ii) of the Panel Report. These findings are vitiated by the same errors of interpretation and application that the Panel has committed in its assessment of the alleged "as such" measure. They are also grounded in and essentially consequential to the Panel's erroneous findings with respect to the preceding matter.

2.3 Claim of inconsistency with Article 11.3 of the Anti-Dumping Agreement

The European Union appeals the Panel's findings that the measure at issue is inconsistent with Article 11.3 of the Anti-Dumping Agreement contained in Section 7.6.4 and paragraphs 7.263 to 7.274 and 8.1(f)(iii) of the Panel Report. These findings are vitiated by the same errors of interpretation and application that the Panel has committed in its assessment of the alleged "as such" measure. They are also grounded in and essentially consequential to the Panel's erroneous findings with respect to the two preceding matters.

3 CLAIMS CONCERNING THE ANTI-DUMPING MEASURES ON IMPORTS OF AMMONIUM NITRATE FROM RUSSIA ("THE AN MEASURES")

3.1 The Preliminary Ruling of the Panel (Annex D-1 of the Report)

3.1.1 Unconditional appeals against the Preliminary Ruling

The European Union unconditionally appeals the Panel's Preliminary Ruling that, in respect of claim #2 against the AN measures, the panel request meets the requirements of Article 6.2 of the DSU.³⁰ By this ruling, the Panel erred in the interpretation and application of Article 6.2 of the DSU.

The Panel erred in the *interpretation* of Article 6.2 of the DSU by conflating the two distinct requirements to identify the "specific measures at issue" and to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The Panel, in essence, found that a panel request can identify the specific measure at issue by indicating the legal basis of the complaint. Under the Panel's approach, the respondent is required to guess, on the basis of the *claims*, which *measure* or which aspects of the measure are being challenged.³¹

³⁰ Annex D-1, paras. 4.38 and 5.1.

³¹ Annex D-1, paras. 4.30 – 4.32 (in particular, para. 4.31: "We read this as indicating that while the simple listing of provisions of the WTO Agreements is normally not sufficient to "present the problem clearly", the obligation contained in a particular provision may nevertheless be sufficiently specific, to allow the defendant to understand what is at stake and to prepare its defence.").

Furthermore, the Panel erred in the *application* of Article 6.2 of the DSU. When applying its flawed interpretation of Article 6.2, specifically with respect to the requirement to identify the specific measures at issue, the Panel accepted that the measure at issue can be identified simply as the "initiation" of an expiry review (a required step in any expiry review), without any indication whatsoever of any aspect of such initiation that is said to give rise to a WTO-inconsistency, and that the absence of any such indication can be remedied by reference to the legal claims made in the panel request and/or the first written submission.³²

3.1.2 Conditional appeals against the Preliminary Ruling

Next, the European Union appeals several further aspects of the Panel's Preliminary Ruling conditionally. This part of the appeal is conditioned upon a finding of WTO-inconsistency with respect to the relevant claim, based on any appeal by Russia. In the following paragraphs, the European Union indicates the specific aspects of the Preliminary Ruling subject to conditional appeal, as well as the relevant claims.

First, with respect to claims #1, #9 and #17 against the AN measures, the Panel erred in the application of Articles 4.4 and 6.2 of the DSU.

Specifically, the Panel erred by finding that the following forms part of its terms of reference:

1. Claim #1 (which is a claim dealing specifically with the product scope of the measures at issue) to the extent that it relates to IGAN, a set of products not mentioned at all in Russia's consultation request;
2. Claim #9, to the extent that it encompasses Article 6.10 of the Anti-Dumping Agreement, a provision that was not mentioned in Russia's consultation request at all;
3. Claim #17, to the extent that it encompasses Article 6.2 of the Anti-Dumping Agreement, a provision that was not mentioned in Russia's consultation request at all.

With respect to each of these aspects of the Preliminary Ruling, the Panel erred in finding that certain elements of Russia's case formed part of the measures at issue and/or of the legal basis of the complaint despite agreeing with the European Union that those elements were not mentioned in Russia's consultations request at all.³³ Furthermore, the Panel erred by simply assuming, without requiring any factual basis for such assertion or assumption, that these elements "reasonably evolved" during the consultations.³⁴ With respect to the expansion of claim #1 to IGAN, the Panel also erred by finding that there is no change in the essence of the dispute, despite the fact that the very essence of claim #1 is the investigating authority's alleged extension of the scope of the measures to certain products.³⁵ With respect to the expansion of claim #9 to Article 6.10, the Panel erred by finding that the dispute can be expanded to Article 6.10, not mentioned in the consultations request, on the mere basis that the Article 6.10 claim is "closely connected to the other claims made by Russia" and that "the issue in dispute and the factual circumstances leading to the alleged violation appear closely connected".³⁶ With respect to the expansion of claim #17 to Article 6.2, the Panel similarly erred by finding that the addition of Article 6.2 does not change the essence of the dispute on the mere basis that the obligations in Article 6.2 are "closely related" to those in Articles 6.1.3 and 6.4.³⁷

Through these errors, the Panel permitted Russia to unlawfully expand the scope of the dispute, in violation of the requirements of Article 4.4. and 6.2 of the DSU.

³² Annex D-1, paras. 4.36 – 4.38.

³³ The Panel agreed that these elements were not present in the consultations request: Annex D-1, paras. 3.7 (claim #1 and IGAN), 3.24 (claim #9 and Article 6.10) and 3.35 (claim #17 and Article 6.2). Nevertheless, the Panel concluded that they are within its terms of reference: Annex D-1, paras. 3.10 (claim #1 and IGAN), 3.25 (claim #9 and Article 6.10), and 3.39 (claim #17 and Article 6.2), as well as para. 5.1.

³⁴ Annex D-1, paras. 3.9 and 3.10 (claim #1 and IGAN), 3.19-3.22 and 3.25 (claim #9 and Article 6.10), 3.39 (claim #17 and Article 6.2).

³⁵ Annex D-1, para. 3.8.

³⁶ Annex D-1, para. 3.24.

³⁷ Annex D-1, paras. 3.37-3.39.

3.2 Claim #2 (alleged failure to ensure that the expiry review request was duly substantiated, in violation of Article 11.3 of the Anti-Dumping Agreement)

When finding, in respect of Russia's claim #2 against the AN measures, 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",³⁸ the Panel erred in the application of Article 11.3 of the Anti-Dumping Agreement.

The Panel erred by finding that, in order to ensure that the expiry review request was duly substantiated, the Commission was required to determine and indicate, in the notice of initiation, whether the normal value calculated by the applicant and put forward in its expiry review request was based on the cost of production in the country of origin, regardless of the relevance of that calculation to the Commission's assessment of the likelihood of recurrence of dumping.

In doing so, the Panel read into Article 11.3 a requirement that is not there (i.e. a requirement to elaborate on certain questions in the notice of initiation). Furthermore, the Panel contradicted its own correct statement of the legal standard under Article 11.3, according to which an expiry review 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."³⁹ For the Panel, in order to ensure that the expiry review request was duly substantiated, the Commission was required, at the initiation stage, to agree with each affirmation provided in the application and provide a reasoned explanation for each such agreement. Thus, the Panel conflated the evidentiary requirements imposed at the stage of initiation with those imposed at the stage of the final determination.

The Panel further erred by failing to even address the relevance of the dumping margin calculations submitted by the applicant to the Commission's decision to initiate the expiry review. The Panel simply assumed that "the European Commission accepted as evidence of "dumping" and "likelihood of recurrence of dumping" the calculation made by the petitioners"⁴⁰ and that thereby the Commission chose "to rely on assumptions made by the applicant."⁴¹ This approach plainly contradicts the Panel's own finding that "there was no dumping margin calculation made in the course of the expiry review".⁴² Given that, as the Panel itself found, the Commission's likelihood determination was not at all based on a dumping margin calculation (including a calculation of a constructed normal value in Russia), the Panel was, at the very least, wrong to assume that a dumping margin calculation provided by the application was relevant to the Commission's decision to initiate the expiry review.

Finally, the Panel erred by failing to explain why, even assuming *arguendo* that the applicants' dumping margin calculation was relevant to the Commission's decision to initiate the expiry review, it was necessary for the Commission to determine (and explain in the notice of initiation), already at the stage of initiation, that that calculation was based on the cost of production in the country of origin.

3.3 Claim #16 (alleged delays in making available evidence presented in writing by interested parties in violation of Article 6.1.2 of the Anti-Dumping Agreement)

The Panel erred in the interpretation and application of Article 6.1.2 of the Anti-Dumping Agreement by finding that the obligation to make promptly available "evidence presented in writing by one interested party" includes an obligation to promptly provide "access to file", in the abstract, regardless of any specific evidence.⁴³ In other words, the Panel concluded that Article 6.1.2 can be infringed by an alleged delay in providing "access to file" even when the alleged delay does not concern any specific evidence, indeed even when no (new) evidence has been submitted by an interested party at all.

³⁸ Paras. 7.349 and 8.1 (g) (ii).

³⁹ Para. 7.333.

⁴⁰ Para. 7.346.

⁴¹ Para. 7.348.

⁴² Paras. 7.525 – 7.528.

⁴³ Paras. 7.612-7.615.

Furthermore, the Panel erred in the interpretation and application of Article 6.1.2 of the Anti-Dumping Agreement by failing to examine or take into account, when deciding whether or not the evidence was "made available promptly", the fact that the interested parties were able to make presentations shortly after receiving the evidence at issue,⁴⁴ and thereby failing to give proper weight to the context of the proceeding in question and to the opportunities for the parties to participate in the investigation after the evidence has become available.⁴⁵

In addition, the Panel failed to make an objective assessment of the facts when agreeing with Russia's four individual claims of violation of Article 6.1.2 of the Anti-Dumping Agreement, for the following reasons:

- The Panel incorrectly counted, as part of the alleged delays, periods between the insertion of documents on the non-confidential file and the interested parties' actual consultation of those documents, which is not attributable to the Commission.⁴⁶ For example, the Panel counted the second alleged delay from RFPA's request to access the file to RFPA's actual consultation of the file;⁴⁷
- The Panel reversed the burden of proof by requiring the European Union to demonstrate which parts of the alleged delays should be attributed to the interested parties;⁴⁸
- With respect to the first alleged instance of delay, the Panel failed to take into account the actual possibilities of obtaining access to the two submissions at issue (dated 10 and 20 March) at the time of the initial request to access the file (10 March). Specifically, had access been granted in the week of 10 March, neither of those two submissions could have been included in the non-confidential file at that time.⁴⁹
- The Panel found delays in making evidence available to the interested parties even though no evidence had been identified by Russia at all;⁵⁰
- For the third and fourth alleged instances of delay, the Panel incorrectly, and with no basis in the evidence, equated RFPA's actual consultation of the relevant submission with the date of the insertion of the submission in the non-confidential file. The Panel also improperly counted the alleged delay from the date of the submission, and not from the date when the Commission received the submission.⁵¹
- For the fourth alleged delay, the Panel ignored the undisputed fact that the relevant submission (dated 12 May, received 14 May) was not yet even received by the Commission on the date of RFPA's first consultation of the non-confidential file (13 May).⁵²

3.4 Claim #17 (alleged failure to make the full text of the petition available to the interested parties upon initiation of the expiry review in violation of Article 6.1.3 of the Anti-Dumping Agreement)

The Panel erred in the interpretation and application of Article 6.1.3 of the Anti-Dumping Agreement when finding 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.⁵³

First, the Panel erred in the interpretation of Article 6.1.3 by finding that the disclosure obligation contained therein refers to a specific document (a certain version of the expiry review request), as opposed to the "text", i.e. the textual content, of the initiation request.⁵⁴

⁴⁴ Section 7.7.6.1.2.

⁴⁵ Panel Report, *EU – Footwear (China)*, para. 7.583.

⁴⁶ Paras. 7.609-7.611.

⁴⁷ Para. 7.609 (b).

⁴⁸ Para. 7.609 (b).

⁴⁹ Para. 7.609 (a).

⁵⁰ Paras. 7.609 (b), 7.612 – 7.615.

⁵¹ Para. 7.609 (c).

⁵² Para. 7.609 (c).

⁵³ Paras. 7.625, 8.1. (g) (xiii).

⁵⁴ Para. 7.624.

Second, the Panel erred in the application of Article 6.1.3 because it found that the document that the Commission was required to make available was the version of the petition dated 28 March 2013, regardless of whether or not this document was relied upon by the Commission in order to initiate the expiry review. Strikingly, the Panel made this finding even though it agreed with the European Union 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."⁵⁵

In the event of a cross-appeal by Russia, the European Union reserves the right, in addressing any such cross-appeal, to disagree with any statement in the Panel Report made in the context of a matter on which the European Union prevailed.

In commencing this appeal, in accordance with Article 16(4) of the DSU and Rule 20(1) of the Working Procedures for Appellate Review, the European Union is aware that, as a matter of fact, temporarily, there are currently an insufficient number of Appellate Body Members to constitute a division due to the obstruction of appointments by the United States. In these circumstances, the European Union stands ready, as it will always stand ready, to move, together with the Russian Federation, to final resolution of the dispute in appeal proceedings pursuant to Article 25 of the DSU, on a reciprocal basis, based on the Multiparty Interim Arrangement (MPIA) and an arbitration agreement as set forth in the standard agreed default procedures contained in Annex 1 of the MPIA.⁵⁶

In these exceptional circumstances, and in the interests of fairness and orderly procedure in the conduct of the appeal, in accordance with Rule 16(1) and (2) of the Appellate Body Working Procedures, the European Union will await further instructions from the division, when it may eventually be composed, or the Appellate Body, regarding any further steps to be taken by the European Union in this appeal.⁵⁷

⁵⁵ Paras. 7.623-7.624 and footnote 956.

⁵⁶ JOB/DSB/1/Add.12, 30 April 2020.

⁵⁷ Absent which, this document is deemed to also be the EU appellant submission.