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

**NOTIFICATION OF AN OTHER APPEAL BY THE RUSSIAN FEDERATION UNDER ARTICLE 16.4
AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING
THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 23(1) OF THE
WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 2 September 2020, from the delegation of the Russian Federation, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the DSU, the Russian Federation hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel and certain legal interpretations developed by the Panel in its Report 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 23(1) of the *Working Procedures for Appellate Review*, the Russian Federation simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

The Russian Federation restricts its appeal to those errors in the Panel report that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue, reasoning or finding does not signify or imply agreement therewith.

For the reasons to be further elaborated in its submissions to the Appellate Body, the Russian Federation appeals the following errors of law and legal interpretation contained in the Panel Report¹, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect the findings and conclusions of the Panel, and where indicated to complete the analysis.

I. Claims concerning the second subparagraph of Article 2(3) of the Basic AD Regulation

1. To resolve this dispute, the Panel's duty is to follow the DSU, including Articles 3.2-3.5, 7.1, 7.2, 11, and 19.2. In particular, Article 3.2 of the DSU directs panels to clarify provisions of the covered agreements in accordance with Articles 31-33 of the Vienna Convention on the Law of Treaties ("Vienna Convention"). The words of the treaty form the foundation for the interpretative process, and thus a treaty interpreter must read and interpret "the words actually used by the agreement under examination, not words the interpreter may feel should have been used".² Interpretation that reduces parts of the agreement to redundancy or inutility is not permitted.³

2. As agreed by all WTO Members in Articles 7 and 11 of the DSU, a panel is required to make an objective assessment of the matter before it, including conformity of the measure with the covered agreements, in order to fulfil its mandate. It is part of the Panel's duties to "thoroughly

¹ In the following descriptions of the legal errors of the Panel, the Russian Federation provides an indicative list of the paragraphs of the Panel Report, in particular paragraphs with 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 Russian Federation also appeals all findings and conclusions deriving from or relying on the appealed errors.

² Appellate Body Reports, *EC – Hormones*, para. 181; *Japan – Alcoholic Beverages II*, para. 24.

³ Appellate Body Report, *US – Gasoline*, para. 61.

scrutinize the measure before it", including its meaning, scope, design and operation, so the Panel can make its own objective, independent, detailed examination and assessment of the matter.⁴ While the starting point of the analysis of the measure is its face, i.e. text, other evidence also shows the meaning, scope, structure, and logic of the measure at issue.⁵ It follows that for the proper assessment of the matter, the Panel is required to examine all provided evidence, evaluate the relevance and probative force of each piece and consider all evidence in its totality.⁶

3. As to the burden of proof, this concept applies to issues of fact only. Consistent with the principle of *jura novit curia*, the burden of proof does not apply to questions of law or legal interpretation.⁷ It is also well known that requirement to prove a negative constitutes an "erroneous burden of proof".⁸

4. Since this dispute concerns anti-dumping, the Russian Federation recalls that the Anti-Dumping Agreement is focused on injurious "dumping" in trade in goods. The term "dumping" is understood as international price discrimination which "arises from the pricing practices of exporters as both normal values and export prices reflect their pricing strategies in home and foreign markets".⁹ In other words, "dumping" is "the result of the [international] pricing behaviour of individual exporters or foreign producers" of the product under consideration.¹⁰ Thus, any anti-dumping investigation is focused on the analysis of the pricing behaviour of the investigated exporter or producer of *the product under consideration*, i.e. *not* on input used to produce the product under consideration or the producer of that input. The investigated exporter or producer of the product under consideration can be accountable *only* for its own behavior in international trade in goods.

5. All said above is reflected in the DSU, the Anti-Dumping Agreement and WTO jurisprudence and helps to understand the Panel's errors described below.

6. The Russian Federation appeals the Panel's approach and analysis and conclusions, including the Panel's examination and rejection of Russia's rationales, and related descriptions, interpretation, reasoning and findings¹¹. In particular, the Russian Federation appeals the Panel's conclusion that Russia's arguments failed 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 and that Russia did not discharge its burden of demonstrating that its legal rationale regarding the interpretation of Article 2.2 provides a valid basis for this claim.¹² Accordingly, the Russian Federation also appeals the Panel's dismissal of Russia's claim.¹³ The Panel's conclusion and related findings are based, in particular, on the Panel's errors in its examination of Russia's claim, imposition of burden of proof, legal interpretation of Article 2.2 of the Anti-Dumping Agreement and its application, as well as errors in reasoning and the examination and evaluation of provided evidence.

7. In its submissions to the Panel, the Russian Federation explained in detail its understanding of the meaning, scope, design and operation of the second subparagraph of Article 2(3) of the Basic AD Regulation and provided supporting evidence. Due to errors in Panel's analysis, it failed to engage in examination of Russia's arguments and provided evidence¹⁴, as illustrated by the Section 7.4 of the Panel Report. The Russian Federation appeals these omissions because, as a

⁴ Appellate Body Reports, *US – Hot-Rolled Steel*, paras. 54, 200; *India – Patents (US)*, para. 66; *US – Carbon Steel (India)*, para. 4.454.

⁵ Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Reviews*, para. 168; *US – Carbon Steel*, para. 157; *EU – Biodiesel (Argentina)*, para. 6.201; *China – Measure Affecting Imports of the Automobile Parts*, para. 171.

⁶ Appellate Body Report, *Korea – Dairy*, para. 137.

⁷ Appellate Body Report, *EC – Tariff Preferences*, para. 105 and ft 220.

⁸ Appellate Body Report, *Japan – Agricultural Products II*, para. 137.

⁹ Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 95.

¹⁰ Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 130 (referring to Appellate Body Reports, *US – Zeroing (Japan)*, paras. 111 and 156; *US – Zeroing (EC)*, para. 129; and *US – Stainless Steel (Mexico)*, paras. 94-95 and fn 208 to para. 94).

¹¹ In Section 7.4 of the Panel Report, the Panel's analysis is in paras. 7.173-7.201.

¹² Panel Report, paras. 7.201, 8.1.d.

¹³ *Ibid.*

¹⁴ See Panel Report, paras. 7.173-7.201.

result, the Panel did not fulfil its mandate and duties under Article 7 and other said provisions of the DSU.¹⁵

8. Instead of focusing on the measure at issue, ascertaining its meaning and examining its consistency with WTO rules, the Panel decided to first examine the "validity"¹⁶ and "capability"¹⁷ of arguments on the legal interpretation of Article 2.2 of the Anti-Dumping Agreement which Russia provided to explain its claim that the challenged measure is inconsistent with Article 2.2 of the Anti-Dumping Agreement. This decision on the approach and the following erroneous analysis, reflected in paragraphs 7.173-7.201 of the Report, resulted in the Panel's failure to fulfil its mandate and duties under the DSU, including Articles 3.3, 7.1, 7.2 and 11. Thus, the prompt settlement of the dispute is out of reach. The Russian Federation appeals the approach taken by the Panel, the burden of proof imposed on Russia and the Panel's failure to ascertain the meaning, scope, design and operation of the measure at issue and to make relevant findings, including on inconsistency of this measure with Article 2.2 of the Anti-Dumping Agreement.¹⁸ , the Russian Federation appeals, in particular, the Panel's findings and reasoning in paragraphs 7.173-7.175, 7.189, 7.193, 7.195, 7.197, 7.198, 7.199, 7.200, 7.201, 8.1.d of the Panel Report.

9. The Russian Federation also appeals the Panel's interpretation and application of the term "the particular market situation" in Article 2.2 of the Anti-Dumping Agreement.¹⁹ The Russian Federation also appeals the related statements, reasoning and intermediate findings²⁰, conclusion and dismissal of 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 Agreement²¹.

10. The Panel should have interpreted the term "the particular market situation" in accordance with Articles 31-33 of the Vienna Convention starting its analysis in the following order: to examine the ordinary meaning of the word "situation" and its three qualifiers "market", "particular" and the definite article "the" and then the ordinary meaning of the whole term in its context, and in light of the object and purpose of the Anti-Dumping Agreement. As part of the contextual analysis, the Panel should have examined, *inter alia*, the meaning of the words "when", "because of", the structure of Article 2.2 and the fact that the term "determine" is used in this provision only once, connection of Article 2.2 with other provisions related to determination of normal value, including Article 2.2.1 (ordinary-course-of-trade test by reason of price), Article 2.2.1.1 (calculation of costs), Article 2.7 (link with the second Ad Note). The Panel should have recognized that the wording "the particular market situation" is the term of art rather than a random "phrase". Considering the term "the particular market situation" in light of the object and purpose of the Anti-Dumping Agreement, the Panel should have taken into account that this Agreement provides detailed procedural rules and reflects a delicate balance of rights and obligations of WTO Members and their producers and exporters. A loose interpretation of procedural rules would relax them and permit their circumvention, and as a result such interpretation would upset the delicate balance and undermine the object and purpose of the Anti-Dumping Agreement.²²

11. However, instead of following the described analysis, the Panel immediately provided its ostensibly "better explanation" for the use of the definite article "the" by relying on the "functional understanding of the application of Article 2.2"²³. The Panel erroneously conflated "the legal interpretation" and with the next step – "application". While Article 2.1 of the Anti-Dumping Agreement provides the definition of the term "dumping" and indeed applies to the entire Agreement, consideration of Article 2.1 should neither precede the examination of the ordinary meaning of the term "the particular market situation" nor negate the meaning of the definite article "the" and its role as a qualifier in this term.

¹⁵ Panel Report, paras. 7.173-7.201.

¹⁶ See Panel Report, paras. 7.175, 7.193, 7.198, 7.201.

¹⁷ See Panel Report, paras. 7.195, 7.196, 7.201.

¹⁸ Panel Report, paras. 7.173-7.201, in particular, 7.173-7.175, 7.194, 7.196, 7.198, 7.199-7.201.

¹⁹ Panel Report, paras. 7.175, 7.178-7.181, 7.183, 7.186-7.187, 7.189, 7.192-7.193, 7.195, 7.197-7.201.

²⁰ Panel Report, paras. 7.178-7.181, 7.183, 7.186-7.187, 7.189, 7.192-7.193, 7.195, 7.197-7.200.

²¹ Panel Report, paras. 7.201 and 8.1.d.

²² Appellate Body Report, *US – Softwood Lumber IV*, para. 64.

²³ Panel Report, para. 7.178.

12. The Panel erred when it indicated that "the choice of a definite or indefinite article" in the term "the particular market situation" is not significant²⁴ and preferred "understanding" that "avoids placing undue significance"²⁵ on the choice of the article in the legal text. The Panel also erred when it refused to resort to Article 32 (for reviewing the text of Article 2:4 of the Tokyo Round Anti-Dumping Code)²⁶, and to Article 33 of the Vienna Convention (for reconciliation of the use of definite articles in the English and French versions of the term "the particular market situation" in Article 2.2 with the use of indefinite article in the Spanish version of this term)²⁷. The Panel also erred when it rejected Russia's interpretation of the use of the article "the" as the qualifier for the term "particular market situation"²⁸.

13. In paragraphs 7.179-7.181, the Panel provided a very limited consideration of the terms "situation" (on its singular form) and "particular" ("it is not a general situation and is specific to the facts and circumstances as viewed on a case-by-case basis", erroneously assuming the use of article "a" instead of "the"). These words were not examined in their immediate context of all words in the term "the particular market situation". The word "market" was not considered in these paragraphs. The ordinary meaning of the term "the particular market situation" was not provided. This is not a proper interpretation, and thus the Panel's findings are in error.

14. In paragraph 7.186 the Panel found that "Article 2 and the second Ad Note should operate in conjunction without narrowing the scope or effect of the second Ad Note". This finding recognizes the existence of the link between these provisions. The fact is that Article 2 contains several provisions related to determination of normal value, including Article 2.2, and the inclusion to each of them an explicit reference to the second Ad Note would result in unnecessary repetition that is clearly avoided by putting Article 2.7 which already contains a clear link to the second AD Note to Article VI:1 of the GATT 1994. Furthermore, it cannot be denied that Article VI:1 of the GATT 1994 is linked with the second Ad Note and linked with Article 2, including Article 2.2, of the Anti-Dumping Agreement. However, in paragraphs 7.176, 7.183, the Panel mistakenly considered that a definition, explicit reference from the term "the particular market situation" in Article 2.2 to the second Ad Note or the use of identical wording are the only ways to show relations between these provisions. This is incorrect. As a result, the Panel's made erroneous finding in respect of the scope of the phrase "the particular market situation"²⁹. The errors in the Panel's interpretation of the term "the particular market situation" tainted the Panel's further analysis and its findings that Russia's interpretation "would restrict the second Ad Note ... or would nullify the mandatory nature of the provision relating to 'the particular market situation' in Article 2.2 in all cases in which it applies", and the related findings³⁰. In its consideration of the Appellate Body's statement in *EC – Fasteners (China)* (Article 21.5 – China), the Panel recognized the Appellate Body's statement "on the relation between Article 2.2 and the second Ad Note"; however, the Panel erred in finding that this statement does not "offer any support Russia's asserted interpretation"³¹. The Panel also erred in its interpretation of the word "market" in the term "the particular market situation", and statements in which the Panel stated and implied that "a situation pertaining to a market" "for the like product or its inputs" constitutes "the particular market situation" within the meaning of Article 2.2 of the Anti-Dumping Agreement.³² In its interpretation, the Panel read into the term "the particular market situation" of Article 2.2 of the Anti-Dumping Agreement words that are not there, i.e. "pertaining to a market", "for the like product or its inputs", and substituted the definite article "the" with article "a". This is incorrect legal interpretation. Instead of basing its interpretation on the legal text, the Panel was seeking "functional reason" and relied on the "operation" of Article 2.2 and as a result the Panel used an erroneous test, explained below. Accordingly, the related findings and conclusions of the Panel are also legally incorrect.³³

15. The Panel erred when it stated and implied that Article 2.2 provides for a determination of "whether or not [the particular market situation] causes the exporter's sales of the like product in

²⁴ Panel Report, ft 354 to para. 7.178.

²⁵ Ibid.

²⁶ This Article is the basis for the current text of Article 2.2 of the Anti-Dumping Agreement.

²⁷ Panel Report, ft 354 to para. 7.178.

²⁸ Panel Report, paras. 7.178, 7.180, 7.181.

²⁹ Panel Report, para. 7.183.

³⁰ Panel Report, paras. 7.186, 7.187, 7.189.

³¹ Panel Report, para. 7.192.

³² Panel Report, paras. 7.195, 7.197.

³³ Panel Report, paras. 7.195, 7.197, 7.201.

the domestic market to not permit a proper comparison"³⁴. Despite the Panel's clear acknowledgment that the words "when" and "because" are part of the immediate context for the term "the particular market situation" in Article 2.2, in its interpretation the Panel failed to examine them and in fact substituted these words with the words "whether", "where", "if" and "to cause", "causes" or "causing", respectively. The created test does not have textual support in Article 2.2 and fails to take into account the relevant context, in particular Articles 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement.

16. In paragraphs 7.197-7.198 the Panel erred when it rejected Russia's arguments regarding so called "artificially low prices" and found that Russia's arguments on the basis of the legal text of Article 2.2 were not sufficient. Several errors in the Panel's interpretation of Article 2.2 also tainted the Panel's findings in these paragraphs. In particular, the Panel referred to "condition" and read into Article 2.2 words "whether", "caused", "where", "if" which are not used in this provision. Furthermore, the Panel erred by requiring Russia to prove a negative. Accordingly, the Panel erred in its findings.

17. In paragraph 7.199 the Panel noted that in its examination of legal issues ("the interpretative issues ... in the course of addressing Russia's legal rationale for its claim"), the Panel "focused on the text and relevant context" of Article 2.2 of the Anti-Dumping Agreement. However, as stated above, the Panel's interpretation was not proper. In particular, some terms and provisions were disregarded, including such relevant context as Articles 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement. It follows that the Panel's interpretation cannot be in accord with the object and purpose of the Anti-Dumping Agreement as it upsets the delicate balance of rights and obligations of the WTO Members. The Panel's findings in paragraph 7.199 are in error.

18. In paragraph 7.200 the Panel "noted that the term 'the particular market situation' was recently examined by the panel in *Australia – Anti-Dumping Measures on A4 Copy Paper*". On the one hand, the Panel noted that "the measures, legal rationales and records at issue in these two disputes were substantially different", and, on the other hand, the Panel relied on the reasoning of that panel. In particular, the Panel made a loose assumption that its "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 A4 Copy Paper*". The Panel failed to justify such an assumption based on particular paragraphs, findings and reasoning of the panel in *Australia – Anti-Dumping Measures on A4 Copy Paper*. The Russian Federation provided extensive explanations to the Panel to the contrary; however, the Panel failed to engage in any analysis of these explanations as evidenced by the text of paragraph 7.200 of the Panel Report.

19. Should the Panel had acted in accordance with the relevant provisions of the DSU and considered all the evidence and arguments provided by the Russian Federation, the Panel should have arrived at different conclusions. In particular, the Panel should have found that correct interpretation of the term "the particular market situation" in Article 2.2 of the Anti-Dumping Agreement does not permit to read into this term words that are not there, for example, "a situation for a market of input".

20. The Russian Federation requests the Appellate Body to reverse³⁵ or modified the appealed conclusion, dismissal of Russia's claim and related findings and reasoning or to declare them moot and with no legal effect.

II. Claims concerning the second subparagraph of Article 2(5) of the Basic AD Regulation

21. The Russian Federation appeals the Panel's approach and analysis and conclusion, including the Panel's examination and rejection of Russia's rationales, and related descriptions, interpretation, reasoning and findings³⁶. In particular, the Russian Federation appeals the Panel's conclusion that Russia failed to demonstrate 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 of the Anti-Dumping Agreement. The

³⁴ Panel Report, paras. 7.195, 7.187, 7.179, 7.197, 7.198.

³⁵ This is without prejudice to the Russian Federation's appeal of the Panel's approach to its examination of Russia's claims and imposition of the burden of proof.

³⁶ See Panel Report, paras. 7.205, 7.206 (the last sentence), 7.207, 7.208, 7.211 (the last sentence), 7.212, 7.214 (the second sentence), 7.220 (except the first sentence), 7.221 (the first sentence with finding, and others with supporting reasoning), 7.222 (the last sentence), 7.223, 7.224, 7.225, 8.1.e.

Panel's conclusion and related findings are based, in particular, on the Panel's errors in its examination of Russia's claims, imposition of burden of proof, legal interpretation of Article 2.2 of the Anti-Dumping Agreement and its application, as well as errors in reasoning and the examination and evaluation of provided evidence.

22. To avoid unnecessary repetition, the Russian Federation refers to the previous section where, with reference to provisions of the DSU, Anti-Dumping and WTO jurisprudence, it described essential understanding on the Panel's duties in examination and assessment of the measure at issue and legal interpretation.

23. First, the Panel erred by imposing on Russia the burden of proof with respect to issues of law and legal interpretation.

24. Second, the Panel erred in its examination and assessment of Russia's claims on WTO-inconsistency of the last part of the second subparagraph of Article 2(5) of the Basic AD Regulation.

25. In its submissions to the Panel, the Russian Federation explained in detail its understanding of the meaning, scope, design and operation of the second subparagraph of Article 2(5) of the Basic AD Regulation and provided supporting evidence. However, the text of Section 7.5 of the Panel Report demonstrates that the Panel erroneously disregarded most of Russia's arguments on the meaning of the second subparagraph of Article 2(5) of the Basic AD Regulation, its scope and design. Supporting evidence was neither properly examined, nor evaluated, nor considered in its totality. Also, the Panel erroneously omitted that the scenario posited by Russia concerns costs which were incurred by the investigated producers of the product under consideration *in* the country of origin. The Russian Federation appeals these omissions because they resulted in the Panel's failure to fulfil its mandate and duties under Articles 3.3, 7.1, 7.2 and 11 of the DSU.³⁷

26. Instead of focusing on the measure at issue, ascertaining its meaning and examining its consistency with WTO rules, the Panel decided to first examine the "validity" of arguments which Russia provided to explain its claim that the challenged measure is inconsistent with Article 2.2 of the Anti-Dumping Agreement. The Panel found that two arguments lack a valid basis in Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement respectively and dismissed these arguments. As a result, the meaning of the challenged measure, in particular its certain essential elements for Russia's claim, was not ascertained by the Panel. Only where the Panel found that "Russia ha[d] presented a valid basis in Article 2.2 of the Anti-Dumping Agreement upon which to assert a claim of inconsistency"³⁸, the Panel considered the text of the challenged measure but only to the extent of that particular argument. Other arguments on the meaning of the challenged measure, in particular the phrase "or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets", the structure and logic of the second subparagraph of Article 2(5) were not examined. Thus, the ascertaining of the meaning of the measure at issue was, in fact, conditioned by the Panel on its finding that Russia's arguments have a valid basis in Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

27. This decision on the approach and the following erroneous analysis, reflected in paragraphs 7.206-7.225 of the Report, resulted in the Panel's failure to fulfil its mandate and duties under the DSU, including Article 7 and other stated above provisions of the DSU. The Russian Federation appeals the approach taken by the Panel, the burden of proof imposed on Russia and the Panel's failure to properly ascertain the meaning, scope, design and operation of the second subparagraph of Article 2(5) of the Basic AD Regulation, including its last part, and to make relevant findings, including on inconsistency of this measure with Article 2.2 of the Anti-Dumping Agreement.³⁹ Accordingly, the Russian Federation appeals the Panel's findings in paragraphs 7.208, 7.212, 7.222 (last sentence), 7.223, 7.225.

³⁷ Panel Report, paras. 7.205-7.225.

³⁸ Panel Report, para. 7.214.

³⁹ Panel Report, Section 7.5, paras. 7.205-7.225.

28. With respect to the errors described above in this section, the Russian Federation requests the Appellate Body to reverse⁴⁰ or modify the appealed conclusion and related findings and reasoning or to declare them moot and with no legal effect.

29. Second, the Panel erred in the legal interpretation and application of Article 2.2 of the Anti-Dumping Agreement.

30. The Panel erred in the formulation of the interpretative question⁴¹ related to Russia's claim that the measure at issue is inconsistent with Article 2.2 of the Anti-Dumping Agreement. In particular, the Panel disregarded the scenario described by Russia and the meaning of the measure at issue, and also erred in its characterization of the measure as "the allowance". In addition to being legal errors, these errors constitute a violation of Article 11 of the DSU and also result in violations of other said provisions of the DSU. Accordingly, the Panel also erred in its: finding that "Russia's claim lacks a valid basis in Article 2.2 of the Anti-Dumping Agreement"⁴²; dismissal of Russia's argument⁴³; and the final conclusion⁴⁴. The Russian Federation requests the Appellate Body: to modify or declare the appealed interpretative question moot and of no legal effect; to reverse⁴⁵ or declare the said finding and dismissal moot and of no legal effect; and to reverse the final conclusion. The Russian Federation also requests the Appellate Body to find that the second subparagraph of Article 2(5) of the Basic AD Regulation provides "the requirement" to "adjust" or "establish" costs.

31. The Panel erred when stated that "there is no hierarchy of sources upon which to base the cost of production in the country of origin".⁴⁶ This statement disregards that Article 2.2 does not provide that an investigating authority may use cost data from third countries and markets to construct normal value. Instead, Article 2.2 explicitly requires to use "the cost of production in the country of origin", and investigating authorities "naturally look for information on the cost of production 'in the country of origin' from sources inside the country".⁴⁷ After the records of the investigated producers which is "the preferred source of information"⁴⁸, the second preferred source of information is the cost of production of other exporter or producer in the country of origin, and the out-of-country cost data is the least preferred source. Accordingly, the Panel also erred in its: finding that "Russia's claim lacks a valid basis in Article 2.2 of the Anti-Dumping Agreement"; dismissal of Russia's argument⁴⁹; and the final conclusion⁵⁰. The Russian Federation requests the Appellate Body: to modify or declare the appealed statement moot and of no legal effect; to reverse⁵¹ or declare the said finding and dismissal moot and of no legal effect; and to reverse the final conclusion.

32. In its interpretation of Article 2.2 of the Anti-Dumping Agreement, the Panel was inconsistent in its reference to the requirement in this provision to use "the cost of production in the country of origin" in construction of normal value. In some parts of its Report, which also describe the Panel's "understanding and interpretation of Article 2.2", the Panel mistakenly referred to determination of "a" cost of production in the country of origin⁵². In contrast, Article 2.2 of the Anti-Dumping Agreement refers to "the cost of production in the country of origin". The Russian Federation requests the Appellate Body to modify the appealed statements and substitute the indefinite article "a" with the definite article "the".

⁴⁰ This is without prejudice to the Russian Federation's appeal of the Panel's approach to its examination of Russia's claims and imposition of the burden of proof.

⁴¹ Panel report, para. 7.206.

⁴² Panel report, para. 7.208.

⁴³ Panel report, para. 7.208, 7.225, 8.1.e.

⁴⁴ Panel report, paras. 7.225, 8.1.e.

⁴⁵ This is without prejudice to the Russian Federation's appeal of the Panel's approach to its examination of Russia's claims and imposition of the burden of proof.

⁴⁶ Panel report, para. 7.207.

⁴⁷ Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.70; *Ukraine – Ammonium Nitrate*, ft 415 to para. 6.121.

⁴⁸ Panel report, para. 7.211; Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.18; *EC – Tube or Pipe Fittings*, para. 99; See, e.g. Russia's FWS, para. 243.

⁴⁹ Panel Report, para. 7.208, 7.225, 8.1.e.

⁵⁰ Panel Report, paras. 7.225, 8.1.e.

⁵¹ This is without prejudice to the Russian Federation's appeal of the Panel's approach to its examination of Russia's claims and imposition of the burden of proof.

⁵² See Panel Report, paras. 7.207, 7.211, 7.214.

33. The Russian Federation also requests the Appellate Body to review the Panel's understanding of the Appellate Body's explanation on the obligation in Article 2.2 of the Anti-Dumping Agreement and findings on violations of this provision in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*.⁵³ The text of Article 2.2 contains the obligation to use "the cost of production in the country of origin" in construction of normal value; however, the Panel refers to the same obligation describing it as "the obligation to adapt information from outside the country of origin pursuant to Article 2.2".⁵⁴ It appears that the Panel also mischaracterized the Appellate Body's reasoning as final findings on inconsistencies of the EU and Ukraine with Article 2.2 in these disputes. These WTO Members acted inconsistently with Article 2.2 because they failed to calculate the cost of production in the country of origin.⁵⁵ Accordingly, the Panel's descriptions contain errors. The Russian Federation requests the Appellate Body to modify these Panel's descriptions.

34. Third, as stated above, the examination of the measure at issue was not properly conducted, evidence was not properly considered, and the scenario described by Russia was not taken into account. In paragraph 265 of Russia's FWS, the line of reasoning was focused on the text of the challenged measure, but it was mistakenly divided by the Panel. It is also not clear which exactly "adaptations" the Panel considered as "the required adaptations" in light of the posited scenario when the EU authorities reject the available cost of production **incurred in** the country of origin in order to eliminate the alleged "distortion". In other words, the EU authorities specifically select cost data from outside the country of origin precisely because it is **not** the cost of input in the country of origin of the product under consideration.⁵⁶

35. While the Panel observes that the European Commission was not prevented from making "such adjustments" as "adjustments for transport costs, customs export tax, value added tax, excise duty, local distribution costs, sea freight and fobbing costs"⁵⁷, the Panel provides no explanation whether "such adjustments" actually bring the surrogate input price or cost to the price or cost in the country of origin for domestic producers of the product under consideration.

36. As a result, the Panel erred in its findings and supporting reasoning⁵⁸ that provided evidence does not support, and Russia failed to demonstrate, that the challenged part of the second subparagraph of Article 2(5) of the Basic AD Regulation prevents adaptation of out-of-country information to arrive at the cost of production in the country of origin. The Panel also erred in its dismissal of Russia's claim. Accordingly, the Panel erred in its ultimate conclusion⁵⁹.

37. The Russian Federation requests the Appellate Body to reverse,⁶⁰ modify or to declare these findings and reasoning moot and with no legal effect. As a consequence, the Russian Federation also requests the Appellate Body to reverse the Panel's ultimate conclusion that Russia failed to demonstrate 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 of the Anti-Dumping Agreement⁶¹.

38. Finally, the Russian Federation requests the Appellate Body to complete the analysis⁶² and find that the challenged measure is inconsistent with Article 2.2 of the Anti-Dumping Agreement.

III. Claims concerning the European Union's anti-dumping measures on imports of ammonium nitrate originating in Russia:

39. With respect to claims concerning the European Union's anti-dumping measures on imports of ammonium nitrate originating in Russia, the Russian Federation respectfully requests the Appellate Body to reverse and declare moot and of no legal effect the findings and conclusions of

⁵³ Panel Report, para. 7.207.

⁵⁴ Ibid.

⁵⁵ Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.83; *Ukraine – Ammonium Nitrate*, paras. 6.123, 6.129, 7.8.

⁵⁶ Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.258-7.259.

⁵⁷ Panel Report, para. 7.221.

⁵⁸ Panel Report, paras. 7.220 (the second sentence), 7.221 (the first two sentences), 7.222 (the last sentence), 7.223, 7.224 (the second sentence).

⁵⁹ Panel Report, paras. 7.225 and 8.1.e.

⁶⁰ Without prejudice to the Russian Federation's appeal of the Panel's approach to its examination of Russia's claims.

⁶¹ Panel Report, paras. 7.225 and 8.1.e.

⁶² See Panel Report, para. 7.220 (the first sentence).

the Panel as set out in paragraphs 7.280, 7.284, 7.288, 7.293, 7.319-7.321, 7.338-7.339, 7.425, 7.591-7.599, 8.1.g.i, 8.1.g.iii and 8.1.g.xi, with respect to the following errors of law and legal interpretations, and to complete the analysis.⁶³

40. The Panel erred in law in its interpretation of Article 18.3 of the Anti-Dumping Agreement by concluding that Article 18.3 of the Anti-Dumping Agreement precludes Russia from challenging aspects of investigations or reviews which were initiated prior to its WTO accession. The Russian Federation respectfully requests the Appellate Body to reverse the Panel's findings in paragraphs 7.280, 7.284, 7.288, 7.293, 7.319-7.321, 7.338-7.339, 7.591-7.599, 8.1.g.i and 8.1.g.xi of the Report and to complete the analysis in relation to Claims #1, #2 first ground and #12-15.

41. Should the Appellate Body not reverse the Panels' findings mentioned in the preceding paragraph⁶⁴:

- The Panel committed a legal error in the application of the legal standard of "re-examination" to the facts on the Panel record. The Russian Federation respectfully requests the Appellate Body to reverse the Panel's findings in footnote 491 and paragraphs 7.319-7.321 and 7.338-7.339 of the Panel Report to the effect that no re-examination of the product scope occurred in the course of the third expiry review.
- The Panel committed a legal error and acted contrary to Article 11 of the DSU by treating Russia's GATT claims as consequential and by failing to determine whether the customs duties that the EU applies on Russian imports of Stabilized AN fall within the scope of the Anti-Dumping Agreement before proceeding to assess the consistency of these duties with the Anti-Dumping Agreement as well as GATT Articles I, II and VI. The Russian Federation respectfully requests the Appellate Body to reverse the Panel's findings in paragraph 7.321 of the Report.
- The Panel acted contrary to DSU Articles 12.7 and committed a legal error in the application of the legal standard to the facts on the Panel record by concluding 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. The Russian Federation respectfully requests the Appellate Body to reverse the Panel findings in paragraphs 7.338-7.339 of the Report.
- The Panel committed a legal error when applying the legal standard to the facts on the record as well as violated Articles 11 and 12.7 of the DSU when considering the evidence and providing rationale in relation to Claims #12-15 and thus erred when it found that Claims #12 to 15 could not be subject to WTO scrutiny, because the dumping determinations in Regulations 661/2008 and 658/2002 were made before the Russian Federation's WTO accession. The Russian Federation respectfully requests the Appellate Body to reverse the Panel's findings in paragraphs 7.591-7.599 and 8.1.g.xi of the Report.
- With regard to the claims listed in the preceding three sub-paragraphs, the Russian Federation also respectfully requests the Appellate Body to complete the analysis of Russia's claim #1, the first ground of Claim #2 and Claims #12-15.

42. The Panel violated Article 11 of the DSU when considering the evidence in relation to Claim #5, namely by concluding that the record of the investigation did not show where, in the investigation, the interested parties made a request for adjustments to the price of Russian exports to third countries. The Russian Federation respectfully requests the Appellate Body to reverse the Panel's findings in paragraphs 7.425 and 8.1.g.iii of the Panel's Report and complete the analysis in relation to Claim #5.

⁶³ As stated in ft 1 above, the Russian Federation provides an indicative list of the paragraphs of the Panel Report.

⁶⁴ Conditional appeal.

Pursuant to Rule 23(3) of the *Working Procedures for Appellate Review*, the Russian Federation files this Notice of Other Appeal together with its Other Appellant's Submission with the Appellate Body Secretariat.

The Russian Federation reserves the right, in addressing the EU appeal, to disagree with any statement in the Panel Report made in the context of matter on which the Russian Federation prevailed.

Pursuant to Rule 23(2)(c)(ii)(C) of the *Working Procedures for Appellate Review*, this Notice of Other Appeal provides an indicative list of the paragraphs of the Panel Report containing the errors of law and legal interpretation by the Panel, without prejudice to the Russian Federation's ability to rely on other paragraphs of the Panel Report in the context of its other appeal.

There is currently an insufficient number of Appellate Body Members to constitute a division for serving on appeal in this dispute. 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 *Working Procedures for Appellate Review*, the Russian Federation 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 Russian Federation in this appeal.

Filing of the Other Appellant's Submission by the Russian Federation should be without prejudice to its right to re-file it once the division becomes operational.
