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UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

REPORT OF THE PANEL

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Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
Canada – Continued Suspension	Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
Canada – Welded Pipe	Panel Report, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS482/R and Add.1, adopted 25 January 2017
China – Broiler Products (Article 21.5 – US)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS427/RW and Add.1, adopted 28 February 2018
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3

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EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EU – Biodiesel (Argentina)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016
EU – Biodiesel (Argentina)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
Indonesia – Import Licensing Regimes	Panel Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/R, WT/DS478/R, Add.1 and Corr.1, adopted 22 November 2017, as modified by Appellate Body Report WT/DS477/AB/R, WT/DS478/AB/R
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
Russia – Commercial Vehicles	Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/AB/R and Add.1, adopted 9 April 2018
Russia – Commercial Vehicles	Panel Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/R and Add.1, adopted 9 April 2018, as modified by Appellate Body Report WT/DS479/AB/R
US – Anti-Dumping Methodologies (China)	Panel Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/R and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WT/DS244/AB/R, DSR 2004:I, p. 85
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027

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US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, p. 521
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – OCTG (Korea)	Panel Report, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WT/DS488/R and Add.1, adopted 12 January 2018
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Oil Country Tubular Goods Sunset Reviews	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R and Corr.1, adopted 17 December 2004, as modified by Appellate Body Report WT/DS268/AB/R, DSR 2004:VIII, p. 3421
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX, p. 3609
US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, p. 97
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
DDSR	Digital Dispute Settlement Registry
District Court	District Administrative Court of Ukraine
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EuroChem	JSC MCC EuroChem
GAAP	Generally accepted accounting principles
GATT 1994	General Agreement on Tariffs and Trade 1994
Gazprom	JSC Gazprom
ICIT	Intergovernmental Commission on International Trade
MEDT of Ukraine	Ministry of Economic Development and Trade of Ukraine
RIP	Review investigation period
SCM Agreement	Agreement on Subsidies and Countervailing Measures
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the Russian Federation

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

1.2. Consultations were held on 25 June 2015, but failed to resolve this dispute.

1.2 Panel establishment and composition

1.3. On 29 February 2016, Russia requested the establishment of a panel.[2] At its meeting on 22 April 2016, the Dispute Settlement Body (DSB) established a panel pursuant to Russia's request, in accordance with Article 6 of the DSU.[3]

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

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Russian Federation in document WT/DS493/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 23 January 2017, Russia requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 2 February 2017, the Director-General accordingly composed the Panel as follows:

Chairperson: Ms Andrea Marie Dawes

Members: Mr José Antonio Buencamino
Ms Penelope Jane Ridings

1.6. Argentina, Australia, Brazil, Canada, China, Colombia, the European Union, Japan, Kazakhstan, Mexico, Norway, Qatar, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, we adopted our Working Procedures[5] and timetable on 3 April 2017. We amended the Working Procedures on 21 September 2017[6] and the timetable on 12 September 2017.[7] We updated the timetable on 27 November 2017.

[1] Request for consultations by Russia, WT/DS493/1 (Russia's consultation request).
[2] Request for the establishment of a panel by Russia, WT/DS493/2 (Russia's panel request).
[3] DSB, Minutes of the meeting held on 22 April 2016, WT/DSB/M/377.
[4] Constitution note of the Panel, WT/DS493/3.
[5] See the Panel's Working Procedures in Annex A-1.
[6] Paragraph 26(a) of the Working Procedures provides that each party and third party shall submit all documents to the Panel by filing them via the Digital Dispute Settlement Registry (DDSR), and that the electronic version of the documents uploaded into the DDSR shall constitute the official version for the purpose of the record of the dispute. In our communication of 12 September 2017, and pursuant to Russia's communication on this matter, we invited the parties to comment on our proposal to modify paragraph 26(a) by adding a footnote that specifically addresses situations where a party uploads submissions or exhibits on the DDSR without facing any apparent technical difficulty, but other users, including the other party, do not have access to them due to, *inter alia*, technical issues relating to the DDSR. We amended the Working Procedures on 21 September 2017 after considering the parties' comments in this regard. Our communications in this regard are set out in Annexes D-4 and D-5 of this Report.

1.8. We held our first substantive meeting with the parties on 26 and 27 July 2017, and a session with the third parties on 27 July 2017. We held our second substantive meeting with the parties on 21 and 22 November 2017. We issued the descriptive part of our Report to the parties on 29 January 2017, the Interim Report on 24 April 2018, and the Final Report on 29 May 2018.

1.3.2 Additional Working Procedures on Business Confidential Information

1.9. After consultation with the parties, we adopted, on 3 April 2017, Additional Working Procedures on Business Confidential Information (BCI).

1.3.3 Request for a Preliminary Ruling

1.10. On 12 June 2017, Ukraine requested a preliminary ruling that certain claims and measures invoked by Russia fall outside our terms of reference.[8] Ukraine requested us to issue this ruling prior to 15 September 2017, but we declined to do so.[9] We address Ukraine's request for a preliminary ruling in our findings below.

1.3.4 Communications addressing procedural issues

1.11. We issued several communications to the parties addressing procedural issues arising in this dispute. These communications are set out in Annex D of this Report.[10]

2 FACTUAL ASPECTS

2.1. The Ukrainian authorities[11] originally imposed anti-dumping duties on imports of ammonium nitrate from Russia following an anti-dumping investigation on imports of this product into Ukraine. These duties were imposed by the Intergovernmental Commission on International Trade (ICIT) through its decision of 21 May 2008 (2008 original decision).[12] This 2008 original decision was successfully challenged by the Russian producer JSC MCC EuroChem (EuroChem) before the domestic courts in Ukraine. ICIT implemented these court judgments through an amendment decision on 25 October 2010, which amended the 2008 original decision (2010 amendment).[13]

2.2. The Ukrainian authorities subsequently initiated an interim and expiry review (underlying reviews) of these original measures. Pursuant to the underlying reviews, the Ministry of Economic Development and Trade of Ukraine (MEDT of Ukraine) issued its "[m]aterials" on interim and

[7] In our communication of 12 September 2017, we agreed to Russia's request to extend the deadline for the parties' second written submission as Ukraine's delay in filing its written response to Russia's questions following the first substantive meeting had deprived it of an adequate opportunity to prepare its rebuttal submission within the deadlines originally set in the timetable. Our communications of 23 August 2017 and 30 August 2017 set out the reasons for this delay on the part of Ukraine, and our decisions in this regard. These communications are set out in Annexes D-1, D-3, and D-4.

[8] Ukraine's first written submission, para. 72.

[9] Ukraine's opening statement at the first meeting of the Panel, para. 7.

[10] Russia objected to Ukraine's designation of UKR-53 (BCI), UKR-54 (BCI), and UKR-55 (BCI) as BCI in these proceedings. While we have cited these exhibits in footnote 263 below, we have not found it necessary to reproduce, or refer to any specific content from the exhibits in our report. Therefore, the question of redaction of references to such exhibits because they are BCI does not arise. We note that Russia has had access to these exhibits throughout the course of the proceedings, and Russia does not contend that its participation in these proceedings was affected by the designation of these documents as BCI. (Communication to the parties on 16 October 2017, (Annex D-6); Russia's response to Panel question No. 45, paras. 5-10). We do not consider it necessary to address this procedural objection in order to resolve this dispute.

[11] Under Ukrainian domestic law, the Intergovernmental Commission on International Trade (ICIT) has the power to initiate an anti-dumping investigation; to terminate or extend anti-dumping measures (as in the case of expiry reviews); or to terminate, extend, or change the extent of anti-dumping measures (as in the case of interim reviews). (Ukraine's response to Panel question No. 1, paras. 1-2). The Ministry of Economic Development and Trade of Ukraine (MEDT of Ukraine) is responsible for conducting the anti-dumping investigation or review, as well as drafting a final report containing its conclusions and recommendations. This report forms the basis for ICIT's final decision. (Ukraine's response to Panel question No. 1, para. 3). We use the term "Ukrainian authorities" to refer to both ICIT and MEDT of Ukraine.

[12] CIT, Decision on the application of definitive anti-dumping measures on imports of ammonium nitrate originating in Russia No. AD-176/2008/143-47 (21 May 2008) (2008 original decision), (Exhibit RUS-2b).

[13] ICIT, Decision implementing court orders regarding EuroChem (25 October 2010) (2010 amendment), (Exhibit RUS-8b).

expiry review of the anti-dumping measures on imports of ammonium nitrate originating in Russia (Investigation Report[14]), which contained its findings and recommendations for the continued imposition of anti-dumping duties, but at modified rates.[15] ICIT issued its notice on the changes and extension of anti-dumping measures on imports of ammonium nitrate originating in Russia (2014 extension decision) on the basis of this report, thereby continuing the imposition of anti-dumping duties on imports of ammonium nitrate from Russia at modified rates.[16]

2.3. Russia challenges in these panel proceedings the Ukrainian authorities' determinations in the underlying reviews, as well as their conduct during these reviews.[17] Russia also challenges certain aspects of the original anti-dumping measures imposed by ICIT.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATION

3.1. Russia requests us to find that[18]:

a. With respect to the Ukrainian authorities' dumping determinations in the underlying reviews, Ukraine acted inconsistently with:

i. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because in determining the constructed normal value, the Ukrainian authorities failed to calculate costs on the basis of records kept by the Russian producers and exporters, even though the costs associated with the production and sale of ammonium nitrate were accurately and reasonably reflected in these exporters' and producers' records, and the records were in accordance with the generally accepted accounting principles (GAAP) of the country of origin and export;

ii. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because the Ukrainian authorities replaced the cost of gas actually borne by the Russian producers and exporters for production of ammonium nitrate with data on gas prices outside Russia that did not reflect the cost of production in the country of origin, and used such prices subsequently for constructing the normal value;

iii. Article 2.2.1 of the Anti-Dumping Agreement because the Ukrainian authorities improperly treated the domestic sales of ammonium nitrate of the Russian producers and exporters as not being in the ordinary course of trade and disregarded them in determining normal value;

iv. Article 2.4 of the Anti-Dumping Agreement because the Ukrainian authorities failed to make a fair comparison between the export price and the constructed normal value by improperly calculating constructed normal value for ammonium nitrate produced in Russia;

v. Article 2.1 of the Anti-Dumping Agreement because the Ukrainian authorities failed to determine the dumping margins of the Russian producers and exporters by comparing the export price of ammonium nitrate exported from Russia to Ukraine with the domestic sales price of the like product in Russia; and

vi. Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because the Ukrainian authorities calculated and relied on dumping margins for ammonium nitrate which

[14] Russia objects to the use of the term "Investigation Report", and asks us to use the term "disclosure" to refer to this document. (Russia's second written submission, para. 5). We do not share Russia's concern regarding the use of this term "Investigation Report", and note that the paragraph makes it quite clear that we use this term as a shorthand. We use the term "disclosure" to refer to this document when reviewing Russia's claims under Articles 6.9 and 6.2 of the Anti-Dumping Agreement.

[15] MEDT of Ukraine, Materials on interim and expiry review of the anti-dumping measures on imports of ammonium nitrate originating in Russia (25 June 2014) (Investigation Report), (Exhibit RUS-10b).

[16] ICIT, Notice on the changes and extension of anti-dumping measures on imports of ammonium nitrate originating in Russia (8 July 2014) (2014 extension decision), (Exhibit RUS-4b).

[17] The documents relied upon with respect to these claims are the Investigation Report of MEDT of Ukraine, and the 2014 extension decision issued by ICIT.

[18] Russia's first written submission, para. 347.

were not established consistently with Articles 2.1, 2.2, 2.2.1, 2.2.1.1, and 2.4 of the Anti-Dumping Agreement.

b. Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because the Ukrainian authorities failed to terminate the original anti-dumping measures in respect of EuroChem, whose dumping margin was *de minimis*, and imposed a 0% anti-dumping duty on this exporter.[19]

c. Ukraine acted inconsistently with Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because the Ukrainian authorities included EuroChem, whose dumping margin was *de minimis*, in the scope of the underlying reviews and imposed anti-dumping duties on it following their determinations in these reviews.[20]

d. Ukraine acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because the Ukrainian authorities determined and relied on injury which was not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement, and in particular failed to establish facts and to conduct an unbiased and objective examination of these facts in its likelihood-of-injury determination.

e. With respect to the Ukrainian authorities' conduct in the underlying reviews, Ukraine acted inconsistently with:

   i. Article 6.8 and paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement because of the numerous procedural violations by the Ukrainian authorities.

   ii. Articles 6.2 and 6.9 of the Anti-Dumping Agreement because the Ukrainian authorities failed to adequately disclose the essential facts under consideration which formed the basis for the decision to apply anti-dumping measures, which included the essential facts underlying the:

      - determinations on the existence of dumping, the calculation of the dumping margins, including relevant data and formula applied;

      - determination of injury[21], including the price comparisons and the underlying data, information on import, and domestic prices used therein.

   iii. Article 6.9 of the Anti-Dumping Agreement because the Ukrainian authorities failed to give interested parties sufficient time to defend their interests by commenting on MEDT of Ukraine's disclosure.

f. Ukraine acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because the Ukrainian authorities failed to provide in sufficient detail in the 2014 extension decision and the Investigation Report the findings and conclusions reached on all issues of fact and law that they considered in making their preliminary and final determinations and failed to provide all relevant information and reasons which led to the imposition of the measure.

g. Ukraine violated Articles 1 and 18.1 of the Anti-Dumping Agreement as well as Article VI of the GATT 1994 as a consequence of violations under the Anti-Dumping Agreement.

[19] Russia's response to Panel question No. 24, paras. 57-58. Ukraine in its comments on the descriptive part of the report stated that Russia had not made this claim in its first written submission. We note, however, that as part of its request for a preliminary ruling in its first written submission, Ukraine asked us to find that this "claim", along with the measures challenged as part of this claim, were outside our terms of reference. (Ukraine's first written submission, paras. 72(i), 224-225, and 230-231). Whether this claim falls outside our terms of reference is a separate issue that we discuss below.

[20] Russia's response to Panel question No. 24, paras. 59, 60, and 65-66.

[21] In its request for findings Russia also alleged that there was no disclosure of essential facts regarding the determination of "causation". But no claim regarding the disclosure of such facts is presented in the arguments section of the first written submission, or subsequent submissions.

3.2. Ukraine requests us to reject Russia's claims in this dispute in their entirety while, as noted above, also contending that several claims as well as certain measures invoked as part of some of these claims fall outside our terms of reference.[22]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries as provided to us in accordance with paragraph 19 of the Working Procedures (see Annexes B-1 to B-4).[23]

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Australia, Brazil, China, Colombia, the European Union, Japan, Mexico, Norway, and the United States are reflected in their executive summaries, provided in accordance with paragraph 19 of the Working Procedures (see Annexes C-1 to C-10). Canada, Kazakhstan, and Qatar did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 24 April 2018, we issued our Interim Report to the parties. On 8 May 2018, Russia and Ukraine each submitted written requests for the Panel to review precise aspects of the Interim Report. Neither party requested for an interim review meeting. On 15 May 2018, both parties submitted comments on the other party's requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex E-1.

7 FINDINGS

7.1. In this section, we first set out the general principles regarding treaty interpretation, standard of review and burden of proof, as well as certain rules under Article 11 of the Anti-Dumping Agreement applicable to determinations made in interim and expiry reviews, which we apply in this dispute. We then set out our findings on issues raised by Ukraine regarding our terms of reference, and finally proceed to examine on substantive grounds the claims and measures that fall within our terms of reference. In making these findings, we first set out the relevant legal standard, and then apply that standard to resolve the jurisdictional and substantive issues before us.

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

7.1.1 Treaty interpretation

7.2. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.[24] It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.

[22] Ukraine's first written submission, paras. 72 and 396.

[23] In our communication of 23 August 2017, we noted that Ukraine submitted two separate executive summaries as part of its first integrated executive summary, namely: (a) an executive summary of its first written submission; and (b) an executive summary of its oral statement. However, inconsistently with paragraph 20 of our Working Procedures, the combined length of these documents exceeded 15 pages. We informed Ukraine that we would thus only accept one of the two executive summaries, which were within the page limit set out in paragraph 20, and asked it to identify the document we should use in this regard. Ukraine asked us to treat the executive summary of its oral statement as the first integrated executive summary. Our communications in this regard are set out in Annexes D-2 and D-3.

[24] Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

7.1.2 Standard of review

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

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

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

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

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute.

7.4. The Appellate Body has explained that where a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authority has provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported their factual findings; and (b) how those factual findings support the overall determination.[25] In reviewing an investigating authority's determination, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the investigation[26] and must take into account all such evidence submitted by the parties to the dispute.[27] At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[28]

7.5. In the context of Article 17.6(i) of the Anti-Dumping Agreement, the Appellate Body has clarified that while the text of this provision is couched in terms of an obligation on a panel, in effect it defines when an investigating authority can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of its "establishment" and "evaluation" of the relevant facts.[29] Therefore, a panel must assess if the establishment of the facts by the investigating authority was proper and if the evaluation of those facts by that authority was unbiased and objective.[30] If these broad standards have not been met, a panel must hold the investigating authority's establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement.[31]

[25] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.
[26] Article 17.5(ii) requires a panel to examine the matter based on the facts made available to the authorities.
[27] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[28] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[29] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[30] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[31] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.

7.1.3 Burden of proof

7.6. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[32] Therefore, as the complaining party in this proceeding, Russia bears the burden of demonstrating that the challenged aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement and the GATT 1994. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[33] Finally, it is generally for each party asserting a fact to provide proof thereof.[34]

7.2 Substantive and procedural rules under Article 11 of the Anti-Dumping Agreement applicable to interim and expiry reviews

7.7. Article 11.2 of the Anti-Dumping Agreement applies to interim reviews whereas Article 11.3 of this Agreement applies to expiry reviews. Several WTO panels have taken the view that these two Articles operationalize the general principle in Article 11.1 of the Anti-Dumping Agreement that an anti-dumping duty remain in force for as long as, and to the extent necessary to, counteract dumping which is causing injury.[35] Thus, according to these panels, Article 11.1 does not impose independent obligations on a Member.[36]

7.8. Article 11.2 provides for an examination of whether "continued imposition of the [anti-dumping] duty is necessary to offset dumping", "whether the injury would be likely to continue or recur if the duty were removed or varied", "or both". If as a result of a review under Article 11.2, the investigating authorities determine that the imposition of the anti-dumping duty is no longer warranted, the duty shall be terminated immediately. Article 11.3 requires termination of the anti-dumping duty no longer than five years from the date of its imposition unless the authorities determine, in a review, that expiry of this duty would be "likely to lead to continuation or recurrence of dumping and injury". The Appellate Body has concluded, based on its understanding of the words "review" and "determine" in Article 11.3, that in making a likelihood-of-dumping or likelihood-of-injury determination investigating authorities are obliged to act with an "appropriate degree of diligence" in order to arrive at a "reasoned conclusion".[37] Article 11.2 uses the same two words, and we consider that the same standard applies under this provision as well.[38]

7.9. With respect to procedural rules, Article 11.4 of the Anti-Dumping Agreement states that the provisions of Article 6 of this Agreement regarding evidence and procedure, which include Articles 6.2, 6.8, and 6.9 of this Agreement, would apply to Article 11 reviews.[39] Article 12.3 of the Anti-Dumping Agreement states that Article 12 of this Agreement, which sets out public notice obligations, shall apply *mutatis mutandis* to Article 11 reviews.

7.3 Findings on terms of reference

7.10. In its request for a preliminary ruling, Ukraine asked us to find that Russia's panel request was deficient and inconsistent with Article 6.2 of the DSU, insofar as it concerned the claims set out in the following item numbers of this request:

[32] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:1, p. 337.
[33] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[34] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:1, p. 337.
[35] Panel Reports, *US – Shrimp II (Viet Nam)*, para. 7.364; *EC – Tube or Pipe Fittings*, para. 7.113; and *US – DRAMS*, para. 6.41.
[36] Panel Reports, *US – Shrimp II (Viet Nam)*, para. 7.363; *EC – Tube or Pipe Fittings*, para. 7.113.
[37] Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 111; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 283-284.
[38] See, e.g. Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.367.
[39] See, e.g. Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 152; Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, fn 78.

a. item number 1, concerning claims under Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement[40];

b. item number 4, concerning claims under Article 6.8 and paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement[41]; and

c. item number 17, concerning claims under Articles 11.1, 11.2, 11.3, 3.1, and 3.4 of the Anti-Dumping Agreement.[42]

7.11. Ukraine also contended that the 2008 original decision *as amended* by the 2010 amendment of ICIT and the 2010 amendment were outside the scope of the panel request.[43] Ukraine asserted that the determinations made by the Ukrainian authorities in relation to the original investigation fall outside our terms of reference because in its panel request Russia only challenged the determinations made by these authorities in the interim and expiry reviews.

7.12. Further, Ukraine asked us to find that claims set out in the following item numbers of the panel request were not subject to consultations, and did not reasonably evolve from the legal basis set out in the consultation request:

a. item number 7, concerning claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement[44]; and

b. item number 17, insofar as it concerned the claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[45]

7.13. Ukraine asked us to find, on this basis, that the aforementioned claims and measures fall outside our terms of reference. We will first consider Ukraine's submissions regarding the consistency of Russia's panel request with Article 6.2 of the DSU, and then examine its submissions regarding claims that it alleges are outside our terms of reference because they were outside the scope of the consultation request.

7.3.1 Consistency of Russia's panel request with Article 6.2 of the DSU

7.3.1.1 Legal Standard

7.14. Pursuant to our terms of reference, set out in paragraph 1.4 above, we must examine the "matter" referred to the DSB by Russia in its panel request. We recall that the terms of reference, and the panel request on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response.[46] However, due process is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction, and therefore a deficient panel request cannot be cured by a complainant's subsequent written submissions.[47] Article 6.2 of the DSU requires that a panel request:

> [I]ndicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.15. Article 6.2 imposes two distinct requirements, which a panel request needs to comply with: (a) identify the specific measures at issue; and (b) provide a brief summary of the legal

[40] See also Russia's first written submission, para. 347(7).
[41] See also Russia's first written submission, para. 347(9).
[42] See also Russia's first written submission, para. 347(8).
[43] Ukraine's first written submission, paras. 30-32.
[44] See also Russia's first written submission, para. 347(12).
[45] Russia's first written submission, para. 347(8).
[46] Appellate Body Report, *US – Continued Zeroing*, para. 161.
[47] Appellate Body Report, *China – Raw Materials*, para. 233 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640).

basis of the complaint.[48] These two elements i.e. the measures and the claims together comprise the matter referred to the DSB, which we are required to examine.[49] Compliance with these Article 6.2 requirements must be demonstrated on the face of the panel request.[50] Further, compliance must be determined on the merits of each case, based on a consideration of the panel request as a whole, and in light of the attendant circumstances.[51]

7.3.1.1.1 Specific measures at issue

7.16. Article 6.2 of the DSU requires identification of the "specific" measures at issue. This specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request.[52] However, as long as each measure is discernible from the panel request, a complainant is not required to identify each challenged measure independently from other measures in order to comply with this specificity requirement.[53]

7.3.1.1.2 Brief summary of the legal basis of the complaint

7.17. To be consistent with Article 6.2 of the DSU, a panel request must: (a) set out the legal basis of the complaint; and (b) provide a brief summary of that legal basis sufficient to present the problem clearly. The "legal basis" of the complaint pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated.[54] A "brief summary" of the legal basis of the complaint aims to succinctly explain *how* or *why* the measure at issue is considered by the complainant to be violating the WTO obligation in question, and the narrative part of the panel request serves this function.[55] The brief summary must be sufficient to present the problem clearly.[56] Moreover, the panel request must also plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.[57]

7.3.1.2 Measures Ukraine alleges were outside the scope of Russia's panel request

7.18. Russia, as noted earlier, challenges certain aspects of the original anti-dumping measures imposed by the Ukrainian authorities on imports of ammonium nitrate from Russia. We recall in this regard that following the original investigation, ICIT imposed anti-dumping duties on ammonium nitrate exported to Ukraine by certain Russian producers, including EuroChem. ICIT imposed these duties through its decision of 21 May 2008, which we refer to as the 2008 original decision.[58] EuroChem challenged this decision, and specifically the dumping determinations made for EuroChem, before the domestic courts in Ukraine. The Ukrainian courts ruled in favour of EuroChem.[59]

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[48] See, e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.39; and *US – Carbon Steel*, para. 125.

[49] See, e.g. Appellate Body Reports, *Guatemala – Cement I*, paras. 69-76; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; and *EC and certain member States – Large Civil Aircraft*, para. 639.

[50] Appellate Body Report, *US – Carbon Steel*, para. 127.

[51] Appellate Body Report, *US – Carbon Steel*, para. 127.

[52] Appellate Body Report, *US – Continued Zeroing*, para. 168. See also ibid. para. 169. The Appellate Body stated that the identification of a measure needs be framed only with sufficient particularity to indicate the nature of the measure and the gist of what is at issue.

[53] Appellate Body Report, *US – Continued Zeroing*, para. 170.

[54] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

[55] Appellate Body Reports, *EC – Selected Customs Matters*, para. 130; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.26.

[56] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

[57] Appellate Body Report, *China – Raw Materials*, para. 220 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

[58] 2008 original decision, (Exhibit RUS-2b).

[59] See, e.g. Judgment of the Kiev District Administrative Court No. 5/411 (6 February 2009) (Judgment of the District Court 2009), (Exhibit RUS-6b). This judgment of the District Court was upheld by higher courts in Ukraine (Judgment of the Kiev Appellate Administrative Court No. 2-a-8850/08 (26 August 2009) (Judgment of the Appellate Court 2009), (Exhibit RUS-5b); Judgment of the Higher Administrative Court of Ukraine No. K-42562/09 (20 May 2010) (Judgment of the Higher Court), (Exhibit RUS-7b)).

7.19. In pursuance of these court judgments, ICIT issued the 2010 amendment, which amended the 2008 original decision[60] by reducing the anti-dumping duty rate for EuroChem from 10.78% to 0%.[61] Ukraine contends that the 2008 original decision as amended by the 2010 amendment of ICIT (2008 amended decision), and the 2010 amendment were not identified in Russia's panel request as the "specific measures at issue", and therefore, they fall outside our terms of reference.

7.20. Russia does not challenge the 2008 original decision in and of itself.[62] Instead, Russia challenges the 2008 amended decision as well as the 2010 amendment.[63] Thus, we must consider whether Russia's panel request covered the: (a) 2008 amended decision; and (b) the 2010 amendment.[64]

7.21. Article 6.2 of the DSU requires, *inter alia*, that the panel request "identif[ies] the specific measures at issue". Measures not properly identified in the panel request fall outside a panel's terms of reference[65], and cannot be the subject of panel findings or recommendations. The measures at issue must be identified with sufficient precision so that what is referred to adjudication may be discerned from the panel request.[66] A panel request will satisfy this requirement where it identifies the measure at issue with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue.[67] Therefore, the issue that we have to consider is whether the panel request, read as a whole, identified the 2008 amended decision and the 2010 amendment with sufficient precision, in a manner consistent with Article 6.2 of the DSU.

7.22. We note that the opening paragraph of the panel request refers to the measures subjected to WTO consultations between Ukraine and Russia. The opening paragraph states that Russia requested consultations with respect to:

> Ukraine's measures imposing anti-dumping duties on imports of ammonium nitrate originating in the Russian Federation in connection with expiry and interim reviews. These measures are set forth in the Decision of the Intergovernmental Commission on International Trade No. AD-315/2014/4421-06 of 1 July 2014 and Notice "On the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate, origin from the Russian Federation", published on 8 July 2014 in "Uryadoviy Courier", No 120, including any and all annexes, notices, communications and reports of the Ministry of Economic Development and Trade of Ukraine and any amendments thereof.[*][68]

> [*fn original][2] The definitive anti-dumping measures were imposed through the **Decision of the Intergovernmental Commission on International Trade No. AD-176/2008/143-47 of 21 May 2008 "On the Application of the Definitive Anti-Dumping Measures on Import into Ukraine of Ammonium Nitrate Originating in the Russian Federation", as amended by the Decision No. AD-245/2010/4403-47 of 25 October 2010**. The expiry review was initiated pursuant to the Decision of the Intergovernmental Commission on International Trade No. AD-294/2013/4423-06 of 24 May 2013. According to this Decision, the anti-dumping duties on import of ammonium nitrate originating in the Russian Federation were to remain in force pending the outcome of the review. The interim review was initiated pursuant to the Decision of the Intergovernmental Commission on International Trade No. AD-296/2013/4423-06 of 2 July 2013. As a result of the simultaneously conducted expiry and interim reviews, the definitive anti-dumping duty rates on imports of ammonium nitrate from the Russian Federation, that were initially imposed by the Decision No. AD-176/2008/143-47 of 21 May 2008, were increased and extended for the duration of five years by the Decision of the Intergovernmental Commission on International Trade No. AD-315/2014/4421-06 of 1 July 2014, which came into force on 8 July 2014.

[60] 2010 amendment, (Exhibit RUS-8b).
[61] 2010 amendment, (Exhibit RUS-8b).
[62] See, e.g. Russia's opening statement at the second meeting of the Panel, para. 153; response to Panel question No. 24, para. 57.
[63] Russia's opening statement at the second meeting of the Panel, para. 153; response to Panel question No. 24, para. 57.
[64] As Russia does not independently challenge the 2008 original decision, we do not find it necessary to rule on whether the 2008 original decision falls within our terms of reference.
[65] Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 120; *EC and certain member States – Large Civil Aircraft*, para. 790.
[66] Appellate Body Report, *US – Continued Zeroing*, para. 168.
[67] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[68] Emphasis added; certain fns omitted.

7.23. Then, item number 1 of the panel request states:

> [Russia] considers that the measures at issue are inconsistent with Ukraine's obligations under the following provisions of the Anti-Dumping Agreement and the GATT:
>
> 1. Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement, because Ukraine failed to exclude a certain Russian exporter whose dumping margin was *de minimis* from the anti-dumping measures [*] and because Ukraine subjected this exporter to expiry and interim reviews [.][69]

> [*fn original][3] The following decisions of Ukrainian authorities determined that in the original investigation a dumping margin of JSC MHK EuroChem was *de minimis*: the Decision of the District Administrative Court of the City of Kiev of 6 February 2009 No 5/411, the Decision of the Kiev Appellate Administrative Court of 26 August 2009 No. 2-a-8850/08 and the Decision of the Higher Administrative Court of Ukraine of 20 May 2010 No. K-42562/09 and No. K-42568/09, the **Decision of the Intergovernmental Commission on International Trade No. AD-245/2010/4403-47 of 25 October 2010 "On reversal of Decision of the Intergovernmental Commission on International Trade No. AD-176/2008/143-47 of 21 May 2008 "On the Application of the Definitive Anti-Dumping Measures on Import into Ukraine of Ammonium Nitrate Originating in the Russian Federation" in respect of JSC MHK EuroChem**".

7.24. The part of footnote 2 marked in bold above refers to the 2008 amended decision. Item number 1 of the panel request states that Russia claims violations under Articles 5.8, 11.1, 11.2, and 11.3 because of the alleged failure of the Ukrainian authorities to exclude a certain Russian exporter from the "anti-dumping measures". The reference to the "anti-dumping measures" here is followed by footnote 3, which refers to the 2010 amendment, and notes that it amended the 2008 original decision. Thus, the references to the 2008 amended decision and the 2010 amendment in footnotes 2 and 3 show that Russia took issue, in its panel request, with the alleged failure to exclude the Russian exporter from the 2008 amended decision. Thus, in our view, Russia's panel request was sufficiently precise to identify the measures, i.e. 2008 amended decision, and the 2010 amendment, which were being referred for adjudication.

7.25. Ukraine argues that these references were not sufficient to identify these measures as the specific measures at issue because:

a. the phrase "in connection with the expiry and interim reviews" in the opening paragraph of the panel request restricted the scope of Russia's challenge to the underlying reviews[70]; and

b. measures could not have been identified in footnotes 2 and 3 of the panel request, because footnotes do not "ha[ve] the value, or the substance, to determine the terms of reference of the Panel".[71]

7.26. With respect to Ukraine's first argument, the opening paragraph of the panel request cannot be read in isolation from other parts of the panel request, including item number 1 of this request, as a panel request needs to be read as a whole. We already noted in paragraph 7.24 above that footnote 2 of the panel request and the reference to "anti-dumping measures" in item number 1 of the panel request covered both the 2008 amended decision, and the 2010 amendment. Therefore, we disagree with Ukraine that the phrase "in connection with the expiry and interim reviews" in the opening paragraph of the panel request restricted the scope of Russia's challenge to the underlying reviews.

7.27. With respect to the second argument, we note that nothing in Article 6.2 of the DSU specifically prohibits the identification of the specific measures in the footnotes of a panel request. Therefore, we are not persuaded by Ukraine's argument that the measures identified in a footnote of the panel request fall outside our terms of reference. We also note that the Appellate Body in *US – Countervailing and Anti-Dumping Measures (China)* found that "footnotes are part of the text

[69] Emphasis added.
[70] Ukraine's opening statement at the first meeting of the Panel, para. 12.
[71] Ukraine's opening statement at the first meeting of the Panel, para. 19.

of a panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint".[72]

7.28. Based on the foregoing, we find that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in the panel request, and thus do not fall outside our terms of reference.

7.3.1.3 Claims that Ukraine alleges were not presented in Russia's panel request in conformity with Article 6.2 of the DSU

7.29. Ukraine argues that item numbers 1, 4, and 17 of the panel request do not meet the requirement under Article 6.2 of the DSU as the claims in these item numbers were not set out in sufficient detail in this request. We understand Ukraine's arguments to be based on the view that Russia failed to provide in each of these item numbers a brief summary of the legal basis of the complaint that was sufficient to present the problem clearly. Hence, in Ukraine's view, the claims presented in these item numbers, and set out in paragraph 7.10 above, fall outside our terms of reference.

7.3.1.3.1 Claims presented in item number 1 of Russia's panel request

7.30. Ukraine argues that item number 1 of the panel request, which concerns Russia's claims under Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement, is inconsistent with Article 6.2 of the DSU as it does not clearly state which of the multiple obligations in these provisions the claims relate to.[73] The question before us therefore is whether Russia's panel request sets out these claims with adequate clarity, and specifically whether it provides a "brief summary" of these claims which is sufficient to present the problem clearly. We recall that the brief summary would be sufficient to present the problem clearly when, as stated in paragraph 7.17 above, it succinctly explains *how* or *why* the measure at issue is considered by the complainant to be violating the WTO obligation in question. Moreover, the panel request must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.

7.31. Item number 1 of the panel request states in this regard:

> [Russia] considers that the measures at issue are inconsistent with Ukraine's obligations under the following provisions of the Anti-Dumping Agreement and the GATT:
>
> 1. Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement, ***because*** Ukraine failed to exclude a certain Russian exporter whose dumping margin was *de minimis* from the anti-dumping measures[*] and ***because*** Ukraine subjected this exporter to expiry and interim reviews[.][74]

7.32. The word "because" is used twice in item number 1. This suggests that in this item number, Russia challenged two aspects of the measures at issue: first, that Ukraine failed to exclude a certain Russian exporter whose dumping margin was *de minimis* from the "anti-dumping measures"; second, that Ukraine subjected this exporter to expiry and interim reviews.

7.33. Regarding the first aspect, in the narrative part of the panel request, Russia claimed that Ukraine failed to exclude a certain Russian exporter whose dumping margin was *de minimis* from the "anti-dumping measures". The reference to anti-dumping measures, as stated in paragraph 7.24 above, is followed by footnote 3, which refers to the 2010 amendment and notes that it amended the 2008 original decision. These are the determinations made in the original investigation phase. Footnote 3 also identifies the court decisions as well as the 2010 amendment as the decisions of the Ukrainian authorities pursuant to which they allegedly determined a *de minimis* dumping margin for EuroChem in the original investigation. This suggests, as noted above, that the first aspect of item number 1 concerns Ukraine's failure to exclude a Russian

[72] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.39; see also Panel Report, *Indonesia – Import Licensing Regimes*, preliminary ruling of the panel, para. 3.15.

[73] Ukraine's first written submission, para. 43; second written submission, para. 13.

[74] Emphasis added; fn omitted.

exporter from the scope of the original anti-dumping investigation phase. The second sentence of Article 5.8 states that"[t]here shall be immediate termination [of an investigation] in cases where the authorities determine that the margin of dumping is *de minimis*". In claiming in item number 1 that Ukraine failed to exclude a certain Russia exporter from the anti-dumping measures *whose dumping margin was de minimis* Russia relies on this text of the second sentence of Article 5.8. The narrative part of the request does make it clear that this first aspect is concerned with Ukraine's failure to exclude an exporter with a *de minimis* dumping margin from the original investigation phase, which in Russia's view was contrary to the requirements under the second sentence of Article 5.8.

7.34. Regarding the second aspect, the narrative part in item number 1 identifies the issue as Ukraine's subjection of an exporter to an interim and expiry review, when it should have excluded this exporter from the "anti-dumping measures", i.e. determinations made in the original investigation phase. Russia invokes Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement in this regard. All these Articles could be potentially relevant to the issue identified by Russia. The second sentence of Article 5.8, as stated above, requires the "immediate termination" of the investigation in respect of an exporter with a *de minimis* margin of dumping. Article 11.2 sets out obligations concerning interim reviews, while Article 11.3 sets out obligations concerning expiry reviews. Specifically, Article 11.2 provides that the authorities shall review the "need for the continued imposition of the [anti-dumping] duty". Article 11.3 provides that an authority shall determine whether "the expiry of the duty" would be likely to lead to continuation or recurrence of dumping and injury. Articles 11.2 and 11.3 have been understood in past cases to operationalize the general principle set out in Article 11.1, which provides that an "anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury". Therefore, the narrative part of the panel request, coupled with the references to Articles 5.8, 11.1, 11.2, and 11.3, makes it sufficiently clear that Russia intended to challenge under these provisions Ukraine's decision to subject an exporter to the interim and expiry reviews when it should have terminated the investigation against it.

7.35. Based on the foregoing, we find that item number 1 of Russia's panel request was consistent with Article 6.2 of the DSU as it provided a brief summary of the legal basis which was sufficient to present the problem clearly. Thus, we find that the claims presented in this item number are within our terms of reference.

7.3.1.3.2 Claims presented in item number 4 of Russia's panel request

7.36. Ukraine argues that item number 4 of the panel request, in which Russia claims that Ukraine violated Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement, is inconsistent with Article 6.2 of the DSU as it does not indicate which aspects of the investigation were in violation of these provisions.[75] Ukraine contends that it was "completely blindsided" by Russia's arguments in its first written submission that took issue with MEDT of Ukraine's decision to reject the gas prices set out in the records of the investigated Russian producers, and replace it with the average price of gas exported from Russia at the German border.[76]

7.37. Russia's claims under Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement are presented in item number 4 of the panel request, which states:

> [Russia] considers that the measures at issue are inconsistent with Ukraine's obligations under the following provisions of the Anti-Dumping Agreement and the GATT:
>
> 4. Article 6.8 and Annex II, in particular paragraphs 3, 5 and 6, of the Anti-Dumping Agreement, because:
>
> (i) Ukraine failed to take into account *all information pertaining to the determination of the dumping margins* which was verifiable, supplied in a timely fashion and appropriately submitted so that it could be used in the investigation without undue difficulties;

[75] Ukraine's first written submission, para. 44; second written submission, para. 13.
[76] Ukraine's first written submission, para. 44.

> (ii) Ukraine failed to inform the Russian exporters and producers of the reasons why the supplied information and evidence were not accepted;
>
> (iii) Ukraine failed to give the Russian exporters and producers an opportunity to provide further explanations within a reasonable period of time[.][77]

7.38. We note that Russia's panel request identified the relevant legal provisions that it invoked, namely, Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement. Ukraine's argument that Russia simply referred to the legal provisions at issue in its panel request, and did not indicate in any detail what aspects of the investigation were conducted in violation of these provisions, takes issue with the degree of clarity with which Russia presented its claims. Thus, the issue before us is whether Russia's panel request, insofar as this item number is concerned, provided a brief summary of the legal basis that was sufficient to present the problem clearly.

7.39. We consider that the italicized part of the quoted extract in item number 4(i) of Russia's panel request, set out in paragraph 7.37 above, makes it clear that Russia took issue with the Ukrainian authorities' alleged failure to take into account *all information* pertaining to the determination of dumping. This includes information furnished by these producers with respect to their cost of production, including the gas prices that they paid, which was rejected by MEDT of Ukraine.[78] Thus, contrary to Ukraine's argument, the panel request, and specifically item number 4(i), does identify the aspect of the investigation that Russia took issue with, namely, the Ukrainian authorities' alleged failure to take into account all information pertaining to dumping determinations.

7.40. Item numbers 4(ii) and (iii) have to be understood in this context. The panel request could have been clearer if Russia were to additionally explain that it took issue with the rejection of certain information pertaining to constructed normal value, or that it took issue with the rejection of gas prices paid by the investigated Russian producers. However, we consider it to be sufficiently clear to meet the obligations under Article 6.2 of the DSU to provide a "brief summary" that was sufficient to clearly present the "problem", i.e. MEDT of Ukraine's alleged failure to take into account all information pertaining to its dumping determinations. Therefore, this request covers claims regarding the alleged use of facts available in constructing the normal value by rejecting the gas prices reported by the investigated Russian producers in their records.

7.41. Based on the foregoing, we find that item number 4 of Russia's panel request sets out a brief summary of the legal basis that is sufficient to present the problem clearly. Thus, we find the claims presented in this item number to be within our terms of reference.

7.3.1.3.3 Claims presented in item number 17 of Russia's panel request

7.42. Ukraine argues that item number 17 of the panel request does not clearly state which of the multiple obligations in Articles 11.1, 11.2, 11.3, 3.1, and 3.4 of the Anti-Dumping Agreement its claims relate to.[79] The issue before us is whether Russia's panel request, insofar as the claims presented in item number 17 of the panel request are concerned, provides a brief summary of the legal basis sufficient to present the problem clearly. We must address this question based on a review of the panel request as a whole.

7.43. In terms of the structure of the panel request, item numbers 14, 15, and 16 precede item number 17, and state:

> [Russia] considers the measures at issue are inconsistent with Ukraine's obligations under the following provisions of the Anti-Dumping Agreement and the GATT:
>
> ...

[77] Emphasis added.

[78] Ukraine notes that these gas prices were the only information pertaining to the dumping determinations that were rejected by MEDT of Ukraine. (Ukraine's response to Panel question No. 29, para. 97).

[79] Ukraine's first written submission, para. 43.

> 14. Articles 3.1 and 3.2 of the Anti-Dumping Agreement because Ukraine's determination on injury was not based on positive evidence and did not involve an objective examination of the volume of the allegedly dumped imports and the effect of those imports on prices in the domestic market for like products.
>
> 15. Articles 3.1 and 3.4 of the Anti-Dumping Agreement because Ukraine failed to base findings on injury on positive evidence and to conduct an objective examination of all relevant factors and indices having a bearing on the state of the domestic industry.
>
> 16. Articles 3.1 and 3.5 of the Anti-Dumping Agreement because Ukraine failed to conduct an objective examination of factors other than the allegedly dumped imports and attributed the alleged injury to the allegedly dumped imports.

7.44. Each of these item numbers set out the relevant provisions of Article 3 that Russia alleges the Ukrainian authorities infringed through the actions or omissions identified therein. In our view, item number 17 needs to be read in conjunction with item numbers 14, 15, and 16. Item number 14, which refers to Articles 3.1 and 3.2, and item number 15, which refers to Articles 3.1 and 3.4, set out the aspects of the alleged injury analysis made by MEDT of Ukraine, that Russia took issue with, namely: (a) the considerations regarding the volume of allegedly dumped imports and the effect of those imports on domestic like product prices; and (b) the examination of the state of the domestic industry. Paragraph 16 refers to causation-related issues under Article 3.5. These are the aspects of the relevant measures that Russia took issue with in its panel request.[80]

7.45. Item number 17 immediately follows item numbers 14, 15, and 16, and states that the measures were inconsistent with Ukraine's obligations under:

> 17. Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement because Ukraine determined and relied on injury which was not established in accordance with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

7.46. Item number 17 refers to the provisions at issue, namely Articles 11.1, 11.2, and 11.3. It does not specifically identify the textual obligations under these provisions that Russia invokes in its claims. However, considering item number 17 immediately follows item numbers 14, 15, and 16, cross-refers to the Article 3 injury provisions discussed in these item numbers, and states that the violations under Articles 11.1, 11.2, and 11.3 occurred because Ukraine "determined and relied on *injury*"[81] not established in accordance with these Article 3 injury provisions, it is clear that Russia was invoking the injury related provisions of Articles 11.2 and 11.3. In particular, Articles 11.2 and 11.3, while worded differently, both refer to the likelihood of continuation or recurrence of injury, and these cross references, along with the reference to "injury" in item number 17 make it clear that it is this aspect of Articles 11.2 and 11.3 that Russia sought to challenge. Articles 11.2 and 11.3 operationalize the general principle under Article 11.1, and thus a failure to follow these provisions could lead to a failure to ensure that anti-dumping duty remains in force only as long as and to the extent necessary to counteract dumping which is causing injury. Thus, when read as a whole, the panel request plainly connects the relevant aspects of the measures with the legal basis of its complaint, and succinctly explains *how* or *why* Russia considers Ukraine to have acted inconsistently with these provisions.

7.47. Based on the foregoing, we find that item number 17 of Russia's panel request sets out a brief summary of the legal basis that is sufficient to present the problem clearly. Thus, to the extent Russia's claims in item number 17 of the panel request are based on the premise that the Ukrainian authorities acted inconsistently with Articles 11.1, 11.2, and 11.3 because they determined and relied on injury not established in accordance with Articles 3.1, 3.2, 3.4, and 3.5, this request is not inconsistent with Article 6.2 of the DSU.

[80] However, Russia does not pursue any causation-related claims in its first written submission.
[81] Emphasis added.

7.3.1.4 Overall conclusion

7.48. Based on the foregoing, we find that the claims presented in the following item numbers fall within our terms of reference:

a. item number 1 of the panel request with respect to the claims specified under Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement;

b. item number 4 of the panel request with respect to claims under Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement; and

c. item number 17 of the panel request with respect to claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement insofar as they are based on the view that the Ukrainian authorities determined and relied on injury which was not established in accordance with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement.

7.3.2 Claims that Ukraine alleges were outside the scope of the consultation request

7.3.2.1 Legal standard

7.49. Article 4.4 of the DSU provides that a consultation request shall be "submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint". The issue before us concerns the indication of the legal basis of the complaint in Russia's consultation request. The language of Article 4.4 in this regard has been understood to impose a less stringent standard than Article 6.2 of the DSU, where a mere "indication" of the legal basis would not suffice.[82]

7.50. The Appellate Body has clarified in this regard that a claim specified in the panel request will not necessarily fall outside a panel's terms of reference because they are not specified in the consultation request.[83] In particular, there is no need for a precise and exact identity between a consultation request and a panel request.[84] The rationale is that consultations may lead to reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant.[85] The panel request may thus refer to additional provisions that are not invoked in the consultation request.

7.51. However, the legal basis or claims set out in the panel request still need to reasonably evolve from the legal basis that formed the subject of consultations.[86] The panel request must thus not change the essence of the measures and the legal basis set out in the consultation request.[87] In examining the sufficiency of the request for consultations, a panel should examine the consultation request, and not consider what happened in the consultations.[88]

7.3.2.2 Whether Russia's "public notice" claims under Articles 12.2 and 12.2.2 fall outside our terms of reference in light of its consultation request

7.52. In item number 7 of its panel request, Russia stated:

> [Russia] considers that the measures at issue are inconsistent with Ukraine's obligations under the following provisions of the Anti-Dumping Agreement and the GATT:
>
> ...

[82] Panel Report, *EC – Fasteners (China)*, para. 7.206.
[83] See, e.g. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[84] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 137 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 132).
[85] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[86] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[87] Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, paras. 137-138; *Brazil – Aircraft*, para. 132.
[88] Appellate Body Report, *US – Upland Cotton*, para. 287.

> 7. Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, because Ukraine failed to provide in sufficient detail in the Decision of the Intergovernmental Commission on International Trade No. AD-315/2014/4421-06 of 1 July 2014, as referred to in Notice "On the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate, origin from the Russian Federation", and in the Communication of the Ministry of Economic Development and Trade of Ukraine No. 4421-10/21367-07 of 25 June 2014 the findings and conclusions reached on all issues of fact and law it considered in making its preliminary and final determinations and failed to provide all relevant information and reasons, which have led to the imposition of the measure. Ukraine did not provide the calculations used to determine the dumping margins in the final determination and the data it relied upon in order to make the calculations.

7.53. Russia's consultation request does not refer either to Articles 12.2 and 12.2.2 or the subject matter governed under Article 12, such as the adequacy of the public notice issued by an investigating authority. However, Russia contends that its claims under Articles 12.2/12.2.2 in the panel request naturally evolved from the legal basis set out in item number 10 of the consultation request, which deals with its claims under Article 6.9 of the Anti-Dumping Agreement. In item number 10, Russia stated:

> The measures at issue appear to be inconsistent with Ukraine's WTO obligations, in particular, under the following provisions of the Anti-Dumping Agreement and the GATT 1994:
>
> ...
>
> 10. Article 6.9 of the Anti-Dumping Agreement because Ukraine failed to adequately disclose the essential facts under consideration which form the basis for the decision to impose antidumping measures, including the essential facts underlying the determinations of the existence of dumping and the calculation of the margins of dumping, the determination of injury, and the casual link. Ukraine failed to provide sufficient time for all interested parties to review and response to the essential facts under consideration in order to defend their interests.

7.54. Russia asserts that both Article 6.9 and Articles 12.2/12.2.2 conceptually relate to the obligation to disclose information underlying an investigating authority's decision.[89] Further, Russia notes that the issuance of a public notice within the meaning of Articles 12.2/12.2.2 is an event that follows the disclosure of essential facts, and asserts that a failure to "provide sufficient details" in the public notice, as required under Articles 12.2/12.2.2 is a logical consequence of, and closely connected to, the failure to disclose essential facts.[90] The question before us is whether Russia's claims in the panel request under Articles 12.2 and 12.2.2 reasonably evolved from the legal basis of the consultation request, including its claims under Article 6.9 of the Anti-Dumping Agreement set out in item number 10 of that request, or whether it changed its essence.

7.55. We recall that the Appellate Body in *China – GOES* as well as *Russia – Commercial Vehicles* distinguished between the obligations under Article 12.2.2 and Article 6.9 of the Anti-Dumping Agreement, by noting that Article 12.2.2 governs the disclosure of matters of fact and law and reasons at the conclusion of the anti-dumping investigations, while Article 6.9 requires the disclosure of "facts" in the course of the investigation itself.[91] We consider that these provisions are distinct in the following important ways[92]:

a. they govern different aspects of the investigation process as Article 6.9 applies before a final determination is made, while Articles 12.2 and 12.2.2 apply once that determination is made;

[89] Russia's comments on Ukraine's preliminary ruling request, para. 125.
[90] Russia's comments on Ukraine's preliminary ruling request, paras. 123 and 125.
[91] Appellate Body Reports, *China – GOES*, para. 240; *Russia – Commercial Vehicles*, para. 5.177.
[92] Thus, while both Article 6.9 and Articles 12.2/12.2.2 could be characterized as transparency obligations, such characterization is not dispositive of the issues before us.

b. Article 6.9 requires disclosure to interested parties, whereas Articles 12.2 and 12.2.2 require notice to the "public", which is broader than interested parties[93]; and

c. the scope and legal standard under these provisions are different, with Article 6.9 in certain cases requiring disclosure of facts that need not be disclosed in a public notice pursuant to Articles 12.2 and 12.2.2.[94]

7.56. Taking into account these differences between Article 6.9 and Articles 12.2/12.2.2, we do not consider that Russia's public notice claims under Articles 12.2 and 12.2.2 could be said to have reasonably evolved from its claims under Article 6.9 in item number 10 of the consultation request. Moreover, the factual basis of Russia's claims under Article 6.9 and Articles 12.2/12.2.2 is not identical. In particular, Russia challenges ICIT's 2014 extension decision as part of its Articles 12.2/12.2.2 claims, but this document is not a disclosure document, and hence not relevant to its Article 6.9 claims.[95] Further, as Russia contends, item number 7 of the panel request covers claims under Articles 12.2/12.2.2 challenging the Ukrainian authorities' alleged failure to disclose in sufficient detail the data underlying its injury margin calculations.[96] However, Russia does not make any claim under Article 6.9 regarding the disclosure of the data underlying the injury margins. In these circumstances, we do not consider that Russia's claims under Articles 12.2/12.2.2 reasonably evolved from its claims under Article 6.9.

7.57. We note that Russia also contends that in describing the measures in the consultation request, it challenged "all annexes, notices and reports" of MEDT of Ukraine.[97] Russia states that the reference to "notices" in the plural in its consultation request covers the "public notice" of the final determination.[98] It is not entirely clear to us whether Russia refers to this description of the measures in the consultation request in support of a view that its public notice claims under Articles 12.2/12.2.2 evolved from its consultation request. If so, we do not consider that such a vague reference to "notices" in the description of the measures at issue could have indicated that Russia intended to raise public notice claims under Articles 12.2 and 12.2.2.

7.58. Based on the foregoing, we find that Russia's claims in the panel request under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement fall outside our terms of reference because they did not reasonably evolve from the legal basis set out in its consultation request.[99]

7.3.2.3 Whether Russia's "claims" under Articles 3.1 and 3.4 fall outside our terms of reference in light of its consultation request

7.59. In its request for a preliminary ruling, Ukraine contended that Russia's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement were outside our terms of reference because they were not mentioned in the consultation request, and their addition in the panel request

[93] The panels in *China – HP-SSST (Japan) / China – HP-SSST (EU)* stated that the object of Article 6.9 is to provide interested parties with sufficient factual information to defend their interests during the investigation. By contrast, the object of Article 12.2.2 is to ensure that the investigating authorities' reasons for concluding as it did can be discerned and understood by the public. (Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.275)

[94] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.274-7.275.

[95] Russia's first written submission, para. 328.

[96] Russia's second written submission, paras. 724-727 and 730.

[97] Russia's comments on Ukraine's preliminary ruling request, para. 126.

[98] Russia's comments on Ukraine's preliminary ruling request, para. 127.

[99] We note that a similar decision was made by the panel in *EC – Fasteners (China)*. In that case, the panel examined whether a claim under Article 6.9 regarding the disclosure of the EU authorities' dumping determinations in an anti-dumping investigation on fasteners was within its terms of reference. The claim was made in the panel request, but there was no reference to Article 6.9 in the consultation request, or a narrative description indicating that China might intend to raise a claim under Article 6.9 in this context. (Panel Report, *EC – Fasteners (China)*, para. 7.506). China, while acknowledging that it did not invoke Article 6.9 in the consultation request, noted that in the context of presenting its claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement it had referred to the EU authorities' failure to provide opportunity to the interested parties to see all relevant information, including information relating to dumping margin calculations. (Panel Report, *EC – Fasteners (China)*, para. 7.503; China's consultation request in *EC – Fasteners (China)*, para. 2(xiv)). Noting the differences in the nature of obligations set forth in Articles 6.2 and 6.4, and that set out in Article 6.9, the panel concluded that China's claims under Article 6.9 could not have reasonably evolved from these claims under Articles 6.2 and 6.4. (Panel Report, *EC – Fasteners (China)*, para. 7.508).

broadened the scope of this dispute.[100] In response to Russia's clarification that it is not making independent claims under Articles 3.1 and 3.4, and not requesting independent findings in this regard, Ukraine acknowledged that its request had become moot.[101]

7.60. Based on the foregoing, we find Ukraine's request for a ruling that Russia's "claims" under Articles 3.1 and 3.4 in item number 17 of Russia's panel request fall outside our terms of reference to be moot, and do not make any findings in this regard.

7.3.2.4 Overall conclusion

7.61. Based on the foregoing, we find that the claims presented under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement in item number 7 of the panel request fall outside our terms of reference because they did not reasonably evolve from the legal basis set out in its consultation request. We do not make any findings on whether Russia's "claims" presented under Articles 3.1 and 3.4 of the Anti-Dumping Agreement in item number 17 of the panel request fall outside our terms of reference.

7.4 Dumping and likelihood-of-dumping determinations

7.62. Russia contends that MEDT of Ukraine's dumping determinations in the underlying reviews were inconsistent with Articles 2.1, 2.2, 2.2.1, 2.2.1.1, and 2.4 of the Anti-Dumping Agreement.[102] Russia submits that in addition to violating these provisions of Article 2, MEDT of Ukraine acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because it relied on these Article 2-inconsistent dumping determinations to make its likelihood-of-dumping determination.[103] Russia asserts that MEDT of Ukraine also acted inconsistently with Article 11.1 of the Anti-Dumping Agreement because in its view this provision does not permit the continued imposition of anti-dumping duty if no dumping exists.[104] Russia argues that if MEDT of Ukraine had properly calculated the dumping margin in the underlying reviews, no dumping would have been found to exist, and no anti-dumping duties could have been imposed.[105] Ukraine asks us to dismiss all of Russia's claims.

7.63. In making our findings, we first examine Russia's claims under Articles 2.2.1.1 and 2.2 (cost adjustment claims), then its claims under Articles 2.2.1, 2.1, and 2.4, and finally those under Articles 11.1, 11.2, and 11.3.

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[100] Ukraine's first written submission, paras. 66 and 70.

[101] Ukraine's response to Panel question No. 51(a), para. 21.

[102] There is no dispute between the parties that Article 2 of the Anti-Dumping Agreement applies in the context of the underlying reviews, and that we can make findings under the relevant provisions of Article 2. We recall in this regard that in *US – Corrosion-Resistant Steel Sunset Review* the Appellate Body stated that should investigating authorities choose to rely upon dumping margin calculations in making their likelihood-of-dumping determination in an expiry review, these margins must be calculated consistently with Article 2.4 of the Anti-Dumping Agreement. If they are not consistent with Article 2.4, this "could give rise to an inconsistency *not only with Article 2.4*, but also with Article 11.3" of the Anti-Dumping Agreement. (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127 (emphasis added)). We understand this statement of the Appellate Body to suggest that if dumping margins are calculated inconsistently with Article 2 obligations in the context of a review, there could be independent violations under the relevant provisions of Article 2 of the Anti-Dumping Agreement, in addition to any violation under Article 11.2 or Article 11.3. We note that in *EU – Footwear (China)* the panel adopted a different approach. The EU authorities in that case had calculated dumping margins in an expiry review, and relied on those margins to make their likelihood-of-dumping determination. The panel took the view that Article 2 is not directly applicable to a determination under Article 11.3, and thus it would review the likelihood-of-dumping determination in order to consider whether the complainant had shown a violation under Article 11.3 of the Anti-Dumping Agreement, and not in order to make findings as to whether those determinations were inconsistent with Article 2. (Panel Report, *EU – Footwear (China)*, para. 7.157). In this case, however, we see no reason why we should not make findings under Article 2. We find it relevant to note that the dumping margins that MEDT of Ukraine calculated in the underlying reviews formed the basis of revisions in the anti-dumping duty rate imposed on the investigated Russian producers, and these margins were not used purely for the purposes of making a likelihood-of-dumping determination under Articles 11.2 and 11.3.

[103] Russia's first written submission, paras. 147 and 151; second written submission, para. 408.

[104] Russia's second written submission, para. 409.

[105] Russia's second written submission, paras. 409-410.

7.4.1 Cost adjustment claims under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement

7.64. Russia claims that:

a. MEDT of Ukraine acted inconsistently with Articles 2.2.1.1 and 2.2 because in calculating the cost of production of the investigated Russian producers, as part of its dumping determinations, it *rejected* the price of gas that they paid, and reported in their records (reported gas cost).[106]

b. MEDT of Ukraine acted inconsistently with Articles 2.2 and 2.2.1.1 because it *replaced* the reported gas cost with gas prices outside Russia, specifically the price of gas exported from Russia to the German border, adjusted for transportation expenses (surrogate price of gas).[107]

7.4.1.1 Legal standard

7.65. Article 2.2.1.1 of the Anti-Dumping Agreement, in relevant part, provides:

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

7.66. "[P]aragraph 2" in Article 2.2.1.1 refers to Article 2.2 of the Anti-Dumping Agreement, which states that:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production *in the country of origin* plus a reasonable amount for administrative, selling and general costs and for profits.[108]

7.67. The first sentence of Article 2.2.1.1 states that costs shall "normally" be calculated on the basis of the records kept by the exporter or producer under investigation, provided that such records are: (a) in accordance with the GAAP of the exporting country (first condition); and (b) reasonably reflect the costs associated with the production and sale of the product under consideration (second condition).

7.68. Even though the question whether the use of the word "normally" in the opening sentence permits investigating authorities to reject the record costs even when these two conditions are met has been alluded to in previous disputes, neither a panel nor the Appellate Body has made findings on this issue. In *EU – Biodiesel (Argentina)*, for instance, noting that the investigating authority relied explicitly on the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement in rejecting the record costs, the panel and the Appellate Body did not consider if the use of the word "normally" suggested there could be some basis other than these two conditions to reject the record costs.[109]

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[106] Russia's first written submission, paras. 76-77.

[107] Russia's first written submission, paras. 104-105. Ukraine submits that this price represented the price at the German border (Waidhaus), adjusted back to represent costs in Russia. (Ukraine's first written submission, para. 186; opening statement at the first meeting of the Panel, paras. 105 and 109; and opening statement at the second meeting of the Panel, para. 147).

[108] Emphasis added; fns omitted.

[109] Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 120; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.227.

7.69. With respect to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement, the Appellate Body in *EU – Biodiesel (Argentina)* understood the focus of this condition to be on whether the records of the exporter or producer reasonably reflect their costs, rather than whether the costs incurred by them are reasonable.[110] Thus, the second condition does not permit investigating authorities to reject the record costs because the costs do not pertain to the production and sale of the product under consideration in what the authorities consider to be "normal circumstances".[111] Instead, the Appellate Body found that the records of an exporter or producer could be said to reasonably reflect the costs associated with the production and sale of the product under consideration, when the records suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration.[112]

7.70. Both the panel and the Appellate Body in *EU – Biodiesel (Argentina)* recognized that there may be circumstances where records that meet the first condition of Article 2.2.1.1, and are thus GAAP compliant, may not reasonably reflect the costs associated with the production and sale of the product under consideration. This may be the case, for instance, when transactions involving inputs purchased by the exporter or producer are not at arm's length.[113]

7.71. Regarding Article 2.2, the issue in this dispute is whether the cost of production determined for the investigated Russian producers in the underlying reviews was the cost "in the country of origin". The Appellate Body has noted that Article 2.2 does not specify the type of evidence or information that must be used to determine the cost of production in the country of origin, and does not preclude the possibility that the authority may have to use out-of-country evidence for this purpose.[114] However, the reference to "in the country of origin" indicated to the Appellate Body that the information or evidence used by the authorities to determine the cost of production, must be apt to or capable of yielding the cost of production in the country of origin.[115] This suggested to the Appellate Body that information or evidence from outside the country of origin may need to be *adapted* in order to ensure that it is suitable to determine the cost of production in the country of origin.[116]

7.4.1.2 MEDT of Ukraine's cost assessments in the underlying reviews

7.72. MEDT of Ukraine calculated the dumping margins for two of the investigated Russian producers.[117] In calculating these dumping margins, MEDT of Ukraine constructed the normal value of the investigated Russian producers on the basis of their cost of production. However, in doing so, MEDT of Ukraine rejected their reported gas cost, and replaced it with the surrogate price of gas.

7.73. MEDT of Ukraine stated in this regard that "the price for gas indicated in the accounting records of [the] Russian producers [could not] be used to analyse the production expenses incurred" by them.[118] This is because their "records" did "not completely reflect the costs associated with production and sale of the [product under consideration], in particular, the gas expenses".[119] The parties do not dispute that the reported gas cost was the price actually paid by the investigated Russian producers for gas. MEDT of Ukraine concluded, however, that their records did not completely reflect the costs associated with the production and sale of ammonium

[110] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.20 and 6.37.
[111] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.30. In that case, the European Union had argued that the EU authorities were permitted to consider whether costs in the records pertained to the product and sale of biodiesel in normal circumstances, i.e. in the absence of the alleged distortion caused by Argentina's export tax system.
[112] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.26.
[113] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.232 and fn 400.
[114] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70 and 6.73.
[115] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.
[116] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70 and 6.73.
[117] Ukraine's first written submission, para. 342; Investigation Report, (Exhibit RUS-10b), pp. 27-28.
[118] Investigation Report, (Exhibit RUS-10b), p. 23.
[119] Investigation Report, (Exhibit RUS-10b), p. 23.

nitrate because the gas price in those records was distorted.[120] It reached this conclusion on the following grounds:

a. the gas price in the domestic Russian market was not a market price, as the state controlled the price for gas[121];

b. due to the existence of state control, the price of gas for the investigated Russian producers was much lower than the selling price of gas exported from Russia and the prices for producers in other countries, as well as the market price in certain countries such as the United States, Canada, Japan, or the European Union[122];

c. calculations that showed that JSC Gazprom (Gazprom), a Russian supplier of gas, was selling below its cost of production and that the profitability of this supplier was due to export sales.[123]

7.74. With respect to allegations of government regulation of the price of gas in Russia, Ukraine acknowledges that it is the price of Gazprom, and not that of other independent domestic suppliers, that was subject to price control in Russia.[124] However, Ukraine submits that the prices set by other independent gas suppliers in Russia were aligned with the regulated price of Gazprom due to the dominant position of this supplier in the domestic Russian market.[125] In addition, though Ukraine confirms that MEDT of Ukraine did not ask the investigated Russian producers to provide information regarding their suppliers of gas[126], it asserts that MEDT of Ukraine "logically inferred" that Gazprom was virtually the sole supplier of gas.[127] However, Ukraine acknowledges that there was no relationship between Gazprom and the investigated Russian producers[128], and we note that MEDT of Ukraine did not make any finding that the reported gas cost was affected by any relationship between the investigated Russian producers and their gas suppliers.

7.75. Even though Russia questions Ukraine's assertion that MEDT of Ukraine found Gazprom to be virtually the sole supplier of gas, the substance of its claims is that the findings made by MEDT of Ukraine, as set out in the Investigation Report, did not constitute an adequate basis to conclude that the records of the investigated Russian producers, insofar as the reported gas cost was concerned, did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.[129] To address Russia's claims under Articles 2.2.1.1 and 2.2, therefore, we examine whether MEDT of Ukraine's findings in the Investigation Report constituted an adequate basis to meet the requirements under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement.

7.4.1.3 Rejection of the reported gas cost

7.76. Russia makes claims under Article 2.2.1.1 as well as Article 2.2 challenging MEDT of Ukraine's rejection of the reported gas cost, but its arguments focus on alleged violations of Article 2.2.1.1. In presenting its claim under Article 2.2, for example, Russia contends that MEDT of Ukraine constructed the normal value of the investigated Russian producers inconsistently with this provision because it used costs that were calculated inconsistently with Article 2.2.1.1.[130]

[120] Investigation Report, (Exhibit RUS-10b), p. 23.
[121] Investigation Report, (Exhibit RUS-10b), pp. 21-22.
[122] Investigation Report, (Exhibit RUS-10b), p. 22.
[123] Investigation Report, (Exhibit RUS-10b), pp. 22-23. Ukraine does not contend that Gazprom was an interested party in the underlying reviews, or participated in the review in any manner.
[124] See, e.g. Ukraine's response to Panel question No. 10(a), para. 34.
[125] Ukraine's response to Panel question No. 10(a), para. 35.
[126] Ukraine's response to Panel question No. 9, para. 31.
[127] Ukraine's response to Panel question No. 9, para. 31.
[128] Ukraine's response to Panel question No. 8, para. 30. Ukraine asserts that MEDT of Ukraine "logically inferred" that Gazprom was virtually the sole supplier of gas to the investigated Russian producers, but states that though the relations between Gazprom and these producers were examined no demonstrable link could be established between them. (Ukraine's responses to Panel question No. 8, para. 17, and No. 8.2, para. 30).
[129] See, e.g. Russia's first written submission, paras. 59-78. While questioning Ukraine's argument that Gazprom was virtually the sole supplier of gas, Russia submits that even if MEDT of Ukraine had properly established the identity of the Russian gas suppliers it would still have violated Articles 2.2.1.1 and 2.2. (Russia's second written submission, para. 102).
[130] Russia's first written submission, para. 77.

Therefore, we find it useful to first examine Russia's claim under Article 2.2.1.1, and then turn to its claim under Article 2.2.

7.77. With respect to Article 2.2.1.1, Russia asserts that MEDT of Ukraine relied on the second condition of Article 2.2.1.1 to reject the reported gas cost, but it did not properly meet this condition.[131] Further, Russia submits that because MEDT of Ukraine relied on this second condition in the underlying reviews, arguments that it advances in the panel proceedings on other legal bases, such as the use of the word "normally" in the first sentence of Article 2.2.1.1, constitute *ex post facto* rationalizations which we must reject.[132]

7.78. Ukraine relies on two alternative bases under Article 2.2.1.1 of the Anti-Dumping Agreement to justify MEDT of Ukraine's rejection of the reported gas cost.[133] First, Ukraine contends that the second condition of Article 2.2.1.1 permits rejection of costs reported in an exporter's or producer's records when the records do not reasonably reflect the costs associated with the production and sale of the product under consideration, here, ammonium nitrate.[134] Ukraine submits that the records of the investigated Russian producers, insofar as the reported gas cost was concerned, did not meet this second condition, and hence MEDT of Ukraine was justified in rejecting it.[135] Second, relying on the use of the word "normally" in the first sentence of Article 2.2.1.1, Ukraine asserts that MEDT of Ukraine was permitted to depart from the obligation to "normally" calculate the cost of production of the product under consideration on the basis of the exporter's or producer's records because the gas price in the domestic Russian market was fixed by the state, not of a commercial nature, and below the cost of production of gas.[136] In particular, Ukraine notes that "normally" means "under normal or ordinary conditions; as a rule", and submits that the use of this word in the first sentence of Article 2.2.1.1 suggests that the use of an exporter's or producer's records to calculate its cost of production is not mandatory in every case where the two conditions of Article 2.2.1.1 are met.[137]

7.4.1.3.1 Ukraine's arguments based on the use of the word "normally"

7.79. We note that though Ukraine relies on the use of the word "normally" in Article 2.2.1.1, MEDT of Ukraine rejected the reported gas cost based on the italicized part of the following provision of Ukrainian law (Article 7(9) of Ukraine's anti-dumping law):

> For the purpose of this Article, costs shall be generally calculated on the basis of accounting reports of the party, a subject to an anti-dumping investigation, under condition such accounting report is made according to the principles and norms of bookkeeping, generally accepted in the country which is a subject of consideration *and completely reflects the costs, related to the production and sale of products subject to consideration*.[138]

7.80. While this italicized part is not identical, in terms of its wording, to the second condition of Article 2.2.1.1, Ukraine does not argue that the scope and purpose of this part of Ukrainian law is different from the second condition of Article 2.2.1.1. Instead, Ukraine itself relies on the second condition of Article 2.2.1.1 to justify MEDT of Ukraine's rejection of the reported gas cost. Further, MEDT of Ukraine's finding, as set out in paragraph 7.73 above, that the *records* of the investigated Russian producers "[did] not completely reflect the costs associated with production and sale of the Products, in particular, the gas expenses" shows that MEDT of Ukraine's decision was based on perceived problems with the records of these producers insofar as they did not completely reflect

[131] Russia's first written submission, para. 63; opening statement at the first meeting of the Panel, para. 59.
[132] Russia's opening statement at the first meeting of the Panel, paras. 59-60.
[133] Ukraine does not dispute that the records of the investigated Russian producers were GAAP-compliant, and thus complied with the first condition under Article 2.2.1.1.
[134] Ukraine's first written submission, paras. 166-167.
[135] Ukraine's first written submission, paras. 144-145.
[136] Ukraine's first written submission, para. 162.
[137] Ukraine's first written submission, para. 91.
[138] Law "On Protection of the National Producer from the Dumped Import", N 330-XIV (with changes and amendments) (22 December 1998), (Exhibit UKR-9) (emphasis added); Ukraine's responses to Panel question No. 6(a), para. 12, and No. 6(b), para. 14; and Confidential version of the Investigation Report, (Exhibit UKR-52b (BCI)), p. 26.

the gas expenses.[139] MEDT of Ukraine did not conclude in the Investigation Report, for example, that though the records were maintained consistently with the first and the second conditions of Article 2.2.1.1 or analogous provisions of domestic law, it would nevertheless reject this cost because of the perceived distortions in the domestic Russian market for gas. Therefore, we find that Ukraine's arguments based on the use of the word "normally" in Article 2.2.1.1 constitute *ex post facto* rationalizations, which we cannot consider.[140] Instead, we will limit our review to the parties' arguments on the second condition of Article 2.2.1.1.[141]

7.4.1.3.2 Rejection of the reported gas cost pursuant to the second condition of Article 2.2.1.1

7.81. The specific question before us is whether MEDT of Ukraine provided an adequate basis to reject the reported gas cost of the investigated Russian producers because their records did not meet the second condition of Article 2.2.1.1, i.e. they did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.

7.82. Russia argues that while the second condition of Article 2.2.1.1 permits investigating authorities to examine whether the records of the exporter or producer *reasonably* reflect their costs, it does not permit them to examine whether the reported costs are *reasonable*.[142] However, in Russia's view, in rejecting the reported gas cost of the investigated Russian producers based on a finding that the price of gas in Russia was regulated by the government, and lower than the export price of Russian gas, and prices in third countries, MEDT of Ukraine essentially examined the reasonableness of the reported gas cost.[143] Thus, it acted inconsistently with the second condition of Article 2.2.1.1, as interpreted by the Appellate Body in *EU – Biodiesel (Argentina)*. Further, noting that Ukraine relies on the panel's and the Appellate Body's statement in *EU – Biodiesel (Argentina)* that the second condition permits investigating authorities to examine *non-arm's length transactions* or *other practices* which may affect the reliability of the record costs, Russia submits that MEDT of Ukraine did not reject the reported gas cost because of any alleged effect of "non-arm's length" transactions and "other practices" on the records of the investigated Russian producers.[144] Therefore, in Russia's view, Ukraine's arguments based on the terms "non-arm's length" and "other practices" are *ex post facto* rationalizations as MEDT of Ukraine did not itself make its determination by relying on these terms.

7.83. In Ukraine's view, "non-arm's length transactions" and "other practices" are "legal exceptions" carved out by the Appellate Body in *EU – Biodiesel (Argentina)* under Article 2.2.1.1. Ukraine argues that MEDT of Ukraine was justified in rejecting the reported gas cost because such non-arm's length transactions and other practices affected the reliability of the reported gas cost. In support of its argument, Ukraine proposes definitions of the term "arm's length", and presents its interpretation of the term "other practices".[145] Based on these definitions and interpretation,

[139] Investigation Report, (Exhibit RUS-10b), p. 23.

[140] Pursuant to Article 17.5(ii) of the Anti-Dumping Agreement, a WTO panel should examine the matter based on "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". This precludes us from considering *ex post facto* rationalizations that have no basis in the determinations made by the investigating authority. Moreover, the manner in which Ukraine presents its argument on this issue further confirms that its submissions based on the use of the word "normally" constitute *ex post facto* rationalizations. In particular, instead of providing any proper basis in the underlying determination that could suggest that MEDT of Ukraine relied on the word "normally" in Article 2.2.1.1 to reject the reported gas cost, it states that there is "no[] need to get to the discussion of 'normally'", but should "the Panel deem it useful" it would "be pleased to discuss" why MEDT of Ukraine was justified, in light of the use of the word "normally" in Article 2.2.1.1, in rejecting the reported gas cost. (Ukraine's opening statement at the first meeting of the Panel, para. 103; second written submission, para. 49).

[141] We find our view to be consistent with that taken by the panel and the Appellate Body in *EU – Biodiesel (Argentina)*, where, having noted that the investigating authority relied on a provision analogous to the second condition of Article 2.2.1.1 under domestic law to reject the record costs, the panel and the Appellate Body did not examine whether the authority's decision to reject such costs could be justified based on the word "normally" in the first sentence of Article 2.2.1.1. (Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 120; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.227).

[142] Russia's first written submission, paras. 51 and 66 (referring to Panel Report, *EU – Biodiesel (Argentina)*, fn 400; and Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41).

[143] Russia's first written submission, para. 67.

[144] Russia's opening statement at the first meeting of the Panel, paras. 51-52; response to Panel question No. 7, paras. 12-13.

[145] Ukraine's opening statement at the first meeting of the Panel, paras. 94-100.

Ukraine submits that the reported gas cost was affected by non-arm's length transactions and other practices because the gas price in the domestic Russian market was distorted due to governmental regulation. Specifically, Ukraine contends that the reported gas cost was purchased at non-arm's length prices because the domestic prices were set pursuant to governmental decree, rather than profit maximization motivations of the gas suppliers, and were below cost.[146] Ukraine asserts that alternatively, if the transactions between the investigated Russian producers and their suppliers cannot be categorized as non-arm's length transactions, they qualify as "other practices" affecting the reliability of the records.[147] In response to Russia's statement that Ukraine's arguments based on these terms constitute *ex post facto rationalizations*, Ukraine submits that while MEDT of Ukraine may not have specifically mentioned in the Investigation Report that it was rejecting the reported gas cost because of the effect of "non-arm's length" or "other practices" on the records of the investigated Russian producers, it did meet the substance of these two "exceptions".[148] On this basis, Ukraine justifies MEDT of Ukraine's rejection of the reported gas cost.

7.84. Considering how heavily the parties, and especially Ukraine relies on the observations of the panel in *EU – Biodiesel (Argentina)* that investigating authorities are free pursuant to the second condition of Article 2.2.1.1 to "examine non-arms-length transactions or other practices which may affect the reliability of the reported costs", we find it useful to commence our analysis by setting out the panel's observations in their proper context. We recall that in making these observations in footnote 400 of its report, the panel in *EU – Biodiesel (Argentina)* stated[149]:

> [W]e do not understand the phrase "reasonably reflect" to mean that whatever is recorded in the records of the producer or exporter must be automatically accepted. Nor does it mean, as argued by Argentina, that the words "reasonably reflect" are limited only to the "allocation" of costs. The investigating authorities are certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters, and thus, whether those records "reasonably reflect" such costs. In particular, the investigating authorities are free to examine whether all costs incurred are captured and none has been left out; they can examine whether the actual costs incurred have been over or understated; and they can examine if the allocations made, for example for depreciation or amortization, are appropriate and in accordance with proper accounting standards. *They are also free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs*. But, in our view, the examination of the records that flows from the term "reasonably reflect" in Article 2.2.1.1 does not involve an examination of the "reasonableness" of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful.[150]

7.85. We consider these observations to reflect that panel's view that in certain cases the records of an exporter or producer under investigation, while otherwise consistent with the first condition of Article 2.2.1.1, and thus GAAP-compliant, may not reasonably reflect the costs associated with the production and sale of the product under consideration.[151] We recognize that investigating authorities are free to examine the reliability and accuracy of the costs in the records of the investigated exporter or producer. However, we do not find it necessary to consider, in the abstract, whether the conditions in the domestic Russian market and the conditions of sale of gas

[146] Ukraine's opening statement at the first meeting of the Panel, para. 98.
[147] Ukraine's opening statement at the first meeting of the Panel, para. 100.
[148] Ukraine's second written submission, para. 36.
[149] The Appellate Body reproduced these observations in questioning the European Union's reading of the panel report. (Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41).
[150] Emphasis added.
[151] The Appellate Body in *EU – Biodiesel (Argentina)* also discussed other situations where GAAP-compliant records may not reasonably reflect the costs associated with production and sale of the product under consideration. For instance, it noted that although the product under consideration in a particular anti-dumping investigation may be limited to a single model, size, type, or specification of a product, the exporter or producer under investigation may export or produce a number of different products. However, the records of such exporter or producer may include costs that concern multiple products without allocating them on a product-by-product or model-by-model basis. Thus, the manner in which an exporter or producer registers its costs may not reasonably reflect the costs associated with the production and sale of the product under consideration in a specific anti-dumping investigation. (Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 127).

met the definitions of "non-arm's length transactions" proposed by Ukraine, or its interpretation of what it refers to as an "other-practices" "exception".[152] Instead, the question is whether the records of the exporters or producers reasonably reflect the costs associated with production and sale of the product under consideration. This is a question which needs to be assessed on a case-by-case basis, taking into account the evidence before the investigating authority, and the determination that it makes.

7.86. In light of this, we must examine whether MEDT of Ukraine provided an adequate basis in the Investigation Report to find that the records of the investigated Russian producers, insofar as the reported gas cost was concerned, did not reasonably reflect the costs associated with the production and sale of ammonium nitrate, as is provided for under the second condition of Article 2.2.1.1. In making this examination, we will consider Ukraine's argument that the reliability of the reported gas cost was affected due to the conditions that MEDT of Ukraine found to exist in the domestic Russian market for gas.

7.87. We note in this regard that Article 2.2.1.1 forms part of the disciplines set out in Article 2 of the Anti-Dumping Agreement. Article 2 provides the relevant rules governing the "determination of dumping". Dumping arises from the pricing behavior of individual exporters or foreign producers.[153] The first sentence of Article 2.2.1.1 is concerned with establishing the costs for these individual exporters or producers under investigation.[154] The Appellate Body has stated that the phrase "costs associated with the production and sale of the product under consideration" in the second condition of Article 2.2.1.1 means the costs *incurred* by the producer or exporter that are genuinely related to the production and sale of the product under consideration.[155] The phrase "reasonably reflect" in Article 2.2.1.1 refers to the "records" of the individual exporter or producer under investigation, while the term "reasonably" qualifies the reproduction or correspondence of the costs in those records.[156] To the extent the costs are genuinely related to the production and sale of the product under consideration in a particular anti-dumping investigation, there is no additional standard of reasonableness that applies to "costs" in the second condition under Article 2.2.1.1.[157]

7.88. We set out in paragraph 7.73 above the factual basis on which MEDT of Ukraine found that the records of the investigated Russian producers did not meet the second condition of Article 2.2.1.1. We recall that MEDT of Ukraine found that the gas price in the domestic Russian market was not a market price as the state controlled this price, that this price was artificially lower than the export price of gas from Russia as well as the price of gas in other countries, and that it was below the cost of production.[158] MEDT of Ukraine concluded on this factual basis that the records of the investigated Russian producers did not completely reflect the costs associated with the production and sale of ammonium nitrate, insofar as the reported gas cost was concerned. Thus, MEDT of Ukraine found that these records did not meet the second condition of Article 2.2.1.1.

7.89. We do not consider this factual basis to have been adequate for MEDT of Ukraine to conclude that the records of the investigated Russian producers did not reasonably reflect the costs associated with the production and sale of ammonium nitrate. MEDT of Ukraine examined whether due to government regulation of gas price in Russia, the costs incurred by these producers were lower compared to prices in other countries, or export prices of gas from Russia. This shows that MEDT of Ukraine's enquiry was focused on whether the cost of gas incurred by these producers in the production and sale of ammonium nitrate was reasonable, or was the cost they would incur under what it considered to be normal circumstances, i.e. in the absence of the alleged distortions in the domestic Russian market for gas. However, that is not the purpose of the enquiry under the second condition of Article 2.2.1.1. This second condition permits investigating authorities to examine whether the records reasonably reflect the costs associated with the production and sale of the product under consideration. This is different from an examination on

[152] We do not consider that either the panel or the Appellate Body in *EU – Biodiesel (Argentina)* "carved out" an open-ended "exception" for "non-arm's -length transactions or other practices" as Ukraine appears to suggest. (Ukraine's opening statement at the first meeting of the Panel, para. 91).
[153] Appellate Body Reports, *US – Zeroing (Japan)*, para. 111; *US – Stainless Steel (Mexico)*, para. 98.
[154] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.17.
[155] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.30.
[156] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.20.
[157] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37.
[158] Investigation Report, (Exhibit RUS-10b), pp. 21-23; Ukraine's second written submission, para. 31.

whether the costs contained in the records are not reasonable because, for instance, they are lower than those in other countries, which is what MEDT of Ukraine examined in the underlying reviews.

7.90. In addition, MEDT of Ukraine took the view in its Investigation Report that Gazprom sells gas in the domestic Russian market below cost. However, there is nothing in this report that shows that this affected the reliability of the records of the investigated Russian producers, such that the records did not reasonably reflect the costs associated with production and sale of ammonium nitrate. In particular, we note that MEDT of Ukraine did not find that Gazprom was affiliated with these producers, and Ukraine has not pointed to anything in the Investigation Report that suggests that MEDT of Ukraine even considered who these producers' suppliers were.[159] Further, we note that Article 2.2.1.1 forms part of Article 2, which sets out the relevant rules regarding the determination of dumping. Article 2 is concerned with the pricing behaviour of individual exporters and producers. The exporters and producers may source inputs used to produce the product under consideration from multiple unrelated suppliers. The prices paid by the producer to these unrelated suppliers would form part of the costs that it incurs to produce the product under consideration. We do not consider that the investigated Russian producers' own records could be said to be unreliable, or not reasonably reflect the costs associated with the production and sale of the product under investigation, because its unrelated suppliers' prices are government regulated, lower than the prices prevailing in other countries, or allegedly priced below their cost of production. In these circumstances, we do not consider that the factual findings relied upon by MEDT of Ukraine, and set out in paragraph 7.73 above, provided a sufficient basis for MEDT of Ukraine to conclude that the records of the investigated Russian producers did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.

7.91. Our conclusions in this regard are consistent with the legal findings and interpretation developed by the panel and the Appellate Body in *EU – Biodiesel (Argentina)*. We recall that in that case, the EU authorities had found that the domestic prices of the main input (soybeans and soybean oil) used by the biodiesel producers in Argentina were artificially lower than international prices due to distortions created by Argentina's export tax system, and consequently the costs of these inputs were not reasonably reflected in the records of the investigated Argentinian producers.[160] First, the panel, and then the Appellate Body, found that this was not a sufficient factual basis under the second condition of Article 2.2.1.1 to reject the reported cost of these inputs. We note Ukraine's argument in this regard that the factual circumstances in *EU – Biodiesel (Argentina)* and those before us are different, because in that case the investigating authority did not find any evidence of direct state intervention in regulating the costs of input and the distortion was not appreciable, even though the Argentinian export tax system had a price depressing effect on input prices.[161] However, nothing in the panel or the Appellate Body report in *EU – Biodiesel*

[159] We note Russia's argument that MEDT of Ukraine presumed that Gazprom was the only company that produced and supplied gas in Russia. (Russia's second written submission, para. 111). Ukraine acknowledges that MEDT of Ukraine did not ask the investigated Russian producers the names of their gas suppliers. (See, e.g. Ukraine's response to Panel question No. 9, para. 31). Instead, Ukraine contends that MEDT of Ukraine "logically inferred" that Gazprom was the main and virtually sole supplier of gas. However, it does not point to anything in MEDT of Ukraine's own findings to support that view, and its argument is undermined by its own acknowledgment that EuroChem had other suppliers. (Ukraine's response to Panel question No. 8, fn 10). There is no reference to such suppliers of EuroChem in the Investigation Report, or any finding that the records of the investigated Russian producers, insofar as they reflected the prices paid to these suppliers, were unreliable. Further, while Ukraine contends that EuroChem did not cooperate with MEDT of Ukraine in this regard, we note that it does not argue, and the Investigation Report does not show, that MEDT of Ukraine found EuroChem to be a non-cooperating exporter pursuant to the criteria in Article 6.8 and Annex II of the Anti-Dumping Agreement. (See, e.g. Ukraine's opening statement at the second meeting of the Panel, paras. 63-64). In addition, while it contends that prices of suppliers other than Gazprom were affected by prices of Gazprom, which allegedly accounted for 56% of Russian gas sales, there is, again, nothing in MEDT of Ukraine's finding to support this view. (Ukraine's response to Panel question No. 10(a), para. 35). Such arguments are therefore, *ex post facto* rationalizations, and there is no correlation in MEDT of Ukraine's findings between alleged below-cost sales by Gazprom and the reliability of the records of the investigated Russian producers.

[160] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.221. The EU authorities found that the export taxes on soybeans and soybean oil depressed the domestic price of soybeans and soybean oil to an artificially-low level which, as a consequence, affected the costs of the biodiesel producers. Specifically, the EU authorities found that the difference between the international and domestic prices of soybeans and soybean oil was equivalent to export taxes on the product and the expenses involved in exporting them. (Panel Report, *EU – Biodiesel (Argentina)*, para. 7.181).

[161] Ukraine's first written submission, paras. 116-118 and 138.

(Argentina) suggests that the economic level, and the direct or indirect nature of the regulation in question, were relevant to the panel's or Appellate Body's analysis of the second condition under Article 2.2.1.1. Instead the legal findings and interpretation developed in that dispute are relevant to the facts before us.[162] Therefore, we do not consider that MEDT of Ukraine had a proper basis under the second condition of Article 2.2.1.1 to reject the reported gas cost of the investigated Russian producers.[163]

7.92. Based on the foregoing, we find that MEDT of Ukraine acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because it did not provide an adequate basis under the second condition of Article 2.2.1.1 to reject the reported gas cost of the investigated Russian producers.[164] In light of this finding under Article 2.2.1.1, we do not find it necessary to resolve Russia's claim under Article 2.2 of the Anti-Dumping Agreement. We therefore exercise judicial economy with respect to this claim.

7.4.1.4 Replacement of reported gas cost with surrogate price of gas

7.93. Russia makes claims under Articles 2.2 and 2.2.1.1 challenging MEDT of Ukraine's calculation of the cost of production of the investigated Russian producers on the basis of the surrogate price of gas. Russia contends that MEDT of Ukraine acted inconsistently with Articles 2.2 and 2.2.1.1 because in using a surrogate price of gas that did not represent the cost in Russia it failed to calculate the cost of production in the "country of origin".[165] Article 2.2 specifically requires investigating authorities to calculate the cost of production in the country of origin. Russia's claim raises the question as to whether the surrogate price of gas used by MEDT of Ukraine reflected costs in the "country of origin", i.e. Russia. We thus find it useful to first examine Russia's claim under Article 2.2 of the Anti-Dumping Agreement, and then turn to its claim under Article 2.2.1.1 of the Anti-Dumping Agreement.

7.94. We recall that the surrogate price of gas was the export price of Russian gas at the German border, adjusted for transportation expenses. Russia asserts that MEDT of Ukraine could not have used this surrogate price of gas to calculate the cost in the country of origin as it was a price charged outside Russia and was determined under market conditions different from those in

[162] Ukraine also distinguishes the panel and the Appellate Body Report in *EU – Biodiesel (Argentina)* by contending that "governmental price-fixing" of the domestic Russian gas prices was WTO-inconsistent, specifically invoking Article XVII:1(b) and the second Ad Note to Article VI:1 of the GATT 1994 in this regard. (Ukraine's opening statement at the first meeting of the Panel, paras. 76-79). We do not find these arguments to be relevant to our analysis, considering that our terms of reference require us to review MEDT of Ukraine's determinations, and not Russia's compliance with its own WTO obligations. Similarly, Ukraine argues that MEDT of Ukraine found that the gas prices were set inconsistently with Russia's WTO commitments, as set out in its Working Party Report. (Ukraine's opening statement at the second meeting of the Panel, paras. 36-37 and 41). We note that while there is a discussion in the Investigation Report on statements and concerns raised by WTO Members about the domestic gas prices in Russia, the report does not as such identify any WTO-commitment that was violated by Russia. In any case, Ukraine does not contend that Russia's Working Party Report or its Accession Protocol provides legal justification for MEDT of Ukraine's decision to reject the reported gas cost. To the extent Ukraine alleges that Russia failed to comply with its own WTO commitments, we note that such issues have to be resolved through the DSU. (Appellate Body Report, *Canada – Continued Suspension*, para. 371).

[163] Ukraine also relies, as context, on Articles 2.3 and 2.2.1 of the Anti-Dumping Agreement and the second Ad Note to Article VI:1 of the GATT 1994 to advance the view that prices that are not of a "commercial nature" are unreliable. (Ukraine's first written submission, paras. 151-152). We note that the provisions cited by Ukraine permit rejection of prices only in the specific circumstances set out therein. Those circumstances are not applicable here. Article 2.3, for example, permits construction of export prices where, *inter alia*, it appears to the authorities concerned that the export price is unreliable because of "association or a compensatory arrangement" between the exporter and the importer or a third party. Article 2.2.1 permits investigating authorities to reject domestic sales as a basis for calculating normal value, only when the specific circumstances set out therein are met. The second Ad Note of Article VI:1 applies only to certain types of non-market economies, specifically those economies in which the country has a complete or substantially complete monopoly on its trade and the State fixes all prices. (Appellate Body Report, *EC – Fasteners (China)*, fn 460). It is not alleged that Russia meets these criteria.

[164] Our findings in this dispute are limited to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement, which we found was invoked by MEDT of Ukraine to reject the gas prices of the investigated Russian producers.

[165] Russia's first written submission, para. 96; second written submission, para. 326; and opening statement at the second meeting with the Panel, para. 99.

Russia.[166] In addition, Russia asserts that MEDT of Ukraine did not adapt the surrogate price of gas to reflect the price of gas in Russia.[167] Ukraine does not argue that the price of gas exported from Russia to the German border was in and of itself a price in the "country of origin", but contends that this price was *adapted* to ensure that the resulting surrogate price of gas reflected the price in Russia.[168] In particular, Ukraine argues that it *adapted* the price of gas exported from Russia to the German border by making an adjustment for transport expenses.[169]

7.95. The question before us is whether the surrogate price of gas used by MEDT of Ukraine in calculating the cost of production of the investigated Russian producers was the cost in the "country of origin", i.e. Russia. We note that the panel and the Appellate Body in *EU – Biodiesel (Argentina)* addressed a similar claim under Article 2.2.

7.96. In that case, having found that the domestic price of soybean used in the production of biodiesel was artificially lower than international soybean prices due to distortions created by Argentina's export tax system, the EU authorities replaced this domestic price with the price that it considered Argentinian producers would have paid in the absence of the distortions created by this tax system.[170] In particular, they replaced this price with the average reference price of soybeans published by Argentina's Ministry of Agriculture for export during the investigated period, free-on-board, minus fobbing cost.[171] The question before that panel was whether this average reference price represented the cost of Argentinian producers in the "country of origin". The panel found that it did not.

7.97. The panel noted that the EU authorities specifically selected this average reference price to remove the perceived distortions in the domestic price of soybeans, and thus they selected this price precisely because it was not the cost of soybeans in Argentina.[172] Moreover, the panel found it irrelevant that the average reference price was published by Argentina's Ministry of Agriculture as this cost did not represent the cost of soybeans for domestic purchasers of soybean in Argentina.[173] Accordingly, the panel concluded that the EU authorities acted inconsistently with Article 2.2 because this average reference price did not constitute the cost in the "country of origin".

7.98. On appeal, the European Union argued, *inter alia*, that the subtraction of the fobbing costs from the average reference price published by Argentina's Ministry of Agriculture rendered the surrogate price for soybeans used by the EU authorities a reasonable proxy for the undistorted price of soybeans in Argentina.[174] The Appellate Body noted that other than pointing to the deduction of fobbing costs, the European Union had not asserted that the EU authorities adapted, or even considered adapting, the information used in their calculation in order to ensure that it represented the cost of production in Argentina.[175] Instead, like the panel, the Appellate Body found that the EU authorities specifically selected the surrogate price for soybeans to remove the perceived distortion in the cost of soybeans in Argentina.[176]

7.99. In the underlying reviews, MEDT of Ukraine concluded that the export price from Russia at the German border was representative, and could be used to calculate the cost of production because Germany was the biggest consumer of Russian natural gas, and this price was revised according to market conditions in 2012.[177] Ukraine does not argue in these proceedings that this export price was in and of itself the cost in the country of origin.[178] Indeed, the export price from Russia to Germany was not the cost of gas for the investigated Russian producers in Russia. Instead, Ukraine's argument is that MEDT of Ukraine adapted this export price to ensure that this

[166] Russia's first written submission, para. 99.
[167] Russia's second written submission, para. 343.
[168] Ukraine's response to Panel question No. 12(c), para. 57.
[169] Ukraine's response to Panel question No. 12(c), para. 57.
[170] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.257.
[171] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.257.
[172] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.258.
[173] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.259.
[174] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.79.
[175] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.81.
[176] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.81.
[177] Investigation Report, (Exhibit RUS-10b), p. 23.
[178] Ukraine's response to Panel question No. 12(c), para. 57.

price reflected the cost of gas in Russia.[179] We recognize that investigating authorities may use out-of-country evidence to calculate the cost of production in the country of origin provided they adapt this evidence to reflect the cost in the country of origin. However, except for an adjustment for transportation expenses, the record does not show how MEDT of Ukraine adapted this export price to reflect the prices in Russia. We do not see any explanations in the Investigation Report as to why adjustments for such transportation expenses were adequate to adapt the out-of-country evidence, i.e. export price from Russia at the German border, to reflect the cost of the investigated Russian producers in the country of origin. Instead, MEDT of Ukraine's explanation suggests that it selected this price because the export price was an out-of-country benchmark, and that it did not adapt this price to reflect costs in Russia. In these circumstances, we do not consider that the adjustment for transportation expenses made by MEDT of Ukraine was sufficient to adapt the export price from Russia to reflect the cost of gas in the country of origin, i.e. Russia. We note that the panel and the Appellate Body in *EU – Biodiesel (Argentina)* reached a similar conclusion under Article 2.2. In particular, as stated above, the panel and the Appellate Body found that adjustments for fobbing costs were not sufficient to adapt the average reference price of soybeans published by Argentina's Ministry of Agriculture for export to prices in the "country of origin" under Article 2.2.

7.100. We note in this regard Ukraine's argument that it could not use gas price in the domestic market in Russia to calculate the cost of production of the investigated Russian producers because there was no undistorted domestic market for gas in Russia.[180] Ukraine relies on the Appellate Body report in *US – Softwood Lumber IV* in support of its arguments.[181] Specifically, Ukraine relies on the Appellate Body's finding under Article 14(d) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) that investigating authorities may use out-of-country benchmarks when private prices in a country are distorted due to the government's predominant role in the market.[182] Ukraine submits that the Appellate Body's findings support the view that the obligations of investigating authorities should not be interpreted in a manner that undermines the right of Members to countervail subsidies, or, as is allegedly the case here, counteract injurious dumping.[183]

7.101. We disagree with Ukraine's argument that MEDT of Ukraine could not use the gas price in the domestic Russian market to calculate the cost of production of these producers in the underlying reviews. As noted above, we have found that MEDT of Ukraine did not provide a proper basis to reject the reported gas cost of the investigated Russian producers. We also consider Ukraine's reliance on the Appellate Body's finding under Article 14(d) of the SCM Agreement in *US – Softwood Lumber IV* to be inapposite. We note that Article 14 of the SCM Agreement is titled "[c]alculation of the amount of a subsidy in terms of the benefit to the recipient". Article 14(d) is concerned with the assessment of the "benefit" granted to an exporter or producer due to governmental provision of goods and services. In interpreting the text of Article 14(d), the Appellate Body stated that a government's role in providing a financial contribution, in terms of provision of goods and services, may be so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, thereby making the entire domestic market distorted.[184] The Appellate Body considered that in these circumstances, the comparison of the price at which the government provides goods with the price at which private suppliers sell these goods in the domestic market could indicate a benefit that was artificially low, or even zero, such that the full extent of the subsidy would not be captured, thereby undermining the rights of Members under the SCM Agreement to countervail subsidies.[185]

7.102. Article 2.2 of the Anti-Dumping Agreement concerns the calculation of the cost of production of an investigated producer in its country of origin to construct normal value, for the purpose of ultimately ascertaining whether this producer is dumping, and the dumping margin. Unlike Article 14(d), the purpose of Article 2.2 is not to ascertain the benefit conferred on such a producer by the governmental provision of goods and services, and the extent of such benefit. Thus, the purpose of cost calculation under Article 2.2 of the Anti-Dumping Agreement, and benefit calculation under Article 14(d) of the SCM Agreement is different, and should not be

[179] Ukraine's response to Panel question No. 12(c), para. 57.
[180] Ukraine's opening statement at the first meeting of the Panel, para. 105.
[181] Ukraine's first written submission, paras. 176-179.
[182] Ukraine's first written submission, para. 179.
[183] Ukraine's first written submission, para. 183.
[184] Appellate Body Report, *US – Softwood Lumber IV*, paras. 93 and 101.
[185] Appellate Body Report, *US – Softwood Lumber IV*, para. 100.

conflated. Considering the underlying reviews concern a determination in an anti-dumping proceeding, rather than an anti-subsidy proceeding, the question of ascertaining the benefit granted to a producer through the governmental provision of goods and services does not arise. Therefore, we disagree with Ukraine that the Appellate Body's findings under Article 14(d) are relevant to our interpretation of Article 2.2 of the Anti-Dumping Agreement. We also do not consider that our findings undermine the rights of a Member to countervail subsidies in a manner consistent with the relevant provisions of the SCM Agreement or the GATT 1994, as neither the SCM Agreement nor the subsidy-related aspects of the GATT 1994 are before us.

7.103. Based on the foregoing, we conclude that MEDT of Ukraine acted inconsistently with Article 2.2 of the Anti-Dumping Agreement because it failed to calculate the cost of production of the investigated Russian producers "in the country of origin". Having found that MEDT of Ukraine acted inconsistently with Article 2.2 of the Anti-Dumping Agreement, we do not find it necessary to resolve Russia's claim under Article 2.2.1.1 of the Anti-Dumping Agreement in this regard. Therefore, we exercise judicial economy with respect to this claim.

7.4.2 Claims under Articles 2.2.1 and 2.1 of the Anti-Dumping Agreement regarding MEDT of Ukraine's ordinary-course-of-trade test

7.104. Russia claims that MEDT of Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement in finding that the investigated Russian producers' domestic sales of ammonium nitrate were outside the ordinary course of trade by reason of price because[186]:

a. in conducting its ordinary-course-of-trade test under Article 2.2.1, MEDT of Ukraine used a cost of production that was calculated inconsistently with Article 2.2.1.1;

b. it failed to analyse whether alleged below-cost domestic sales were made "within an extended period of time", "in substantial quantities", or "at prices which [did] not provide for the recovery of all costs within a reasonable period of time", as is required under Article 2.2.1; and

c. even if it conducted this analysis, the use of costs that were calculated inconsistently with Article 2.2.1.1 infected the results of its ordinary-course-of-trade test.

7.105. Russia also claims that MEDT of Ukraine acted inconsistently with Article 2.1 of the Anti-Dumping Agreement, because it should have determined the dumping margin of the investigated Russian producers by comparing their export price with their domestic sales price of ammonium nitrate.[187] According to Russia, MEDT of Ukraine failed to do so because it conducted an ordinary-course-of-trade test inconsistently with its obligations under Articles 2.2.1 and 2.2.1.1.[188]

7.106. Ukraine asks us to dismiss Russia's Article 2.2.1 claim, asserting that:

a. even if we find that the costs of the investigated Russian producers were calculated inconsistently with Article 2.2.1.1, we cannot on that basis find consequential violations under Article 2.2.1, as these two provisions contain different obligations and Russia has not demonstrated that the domestic sales of these producers would have been found to be in the ordinary course of trade if the reported gas cost was used to calculate the cost of production[189]; and

b. contrary to Russia's arguments, MEDT of Ukraine analysed whether alleged below-cost domestic sales were made "within an extended period of time", "in substantial quantities", or "at prices which do not provide for the recovery of all costs within a reasonable period of time".[190]

[186] Russia's first written submission, paras. 118-120; second written submission, para. 353.
[187] Russia's first written submission, paras. 140-141.
[188] Russia's first written submission, paras. 139-141; second written submission, para. 405.
[189] Ukraine's first written submission, para. 197; second written submission, paras. 65-66; and opening statement at the second meeting of the Panel, para. 168.
[190] Ukraine's response to Panel question No. 14, para. 59; second written submission, paras. 62-63.

7.107. Ukraine also asks us to dismiss Russia's Article 2.1 claim, contending that this is a definitional provision that does not impose independent obligations.

7.4.2.1 Legal standard

7.108. Article 2.2.1 of the Anti-Dumping Agreement states:

> Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[*] *determine that such sales are made within an extended period of time[**] in substantial quantities[***] and are at prices which do not provide for the recovery of all costs within a reasonable period of time.* If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.[191]
>
> [*fn original][3] When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.
> [**fn original][4] The extended period of time should normally be one year but shall in no case be less than six months.
> [***fn original][5] Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

7.109. Article 2.2.1 describes a methodology for determining whether below-cost sales may be treated as not being made in the ordinary course of trade.[192] The first sentence of Article 2.2.1 refers to the "[s]ales of the like product in the domestic market of the exporting country or sales to a third country at prices *below per unit (fixed and variable) costs of production* plus administrative, selling and general costs".[193] It states that "such sales", i.e. below-cost sales, may be treated as not being in the ordinary course of trade by reason of price, and disregarded in determining normal value, only if the requirements set out in Article 2.2.1 are met. The methodology under the first sentence of Article 2.2.1 involves two steps.[194]

7.110. First, the below-cost sales that may potentially be treated as not being in the ordinary course of trade by reason of price must be ascertained.[195] This requires investigating authorities to identify sales that are made at prices below "per unit (fixed and variable) costs of production plus administrative, selling and general costs". Second, the investigating authorities must determine whether such below-cost sales display the following three specific characteristics, i.e. they are made: (a) within an extended period of time; (b) in substantial quantities; and (c) at prices which do not provide for the recovery of all costs within a reasonable period of time.[196] Only when the below-cost sales are found to exhibit all three of these characteristics, they can be treated as not being made in the ordinary course of trade by reason of price.[197] Though these three specific characteristics show that investigating authorities may act inconsistently with Article 2.2.1 in different ways, Article 2.2.1 does not contain multiple and distinct obligations in this regard.[198] Instead, Article 2.2.1 sets out a single obligation whereby investigating authorities may disregard below-cost sales of the like product only if it determines the below-cost sales display these three characteristics.[199]

[191] Emphasis added.
[192] Panel Report, *EC – Salmon (Norway)*, para. 7.231.
[193] Emphasis added.
[194] Panel Report, *EC – Salmon (Norway)*, para. 7.232.
[195] Panel Report, *EC – Salmon (Norway)*, para. 7.232.
[196] Panel Report, *EC – Salmon (Norway)*, para. 7.233.
[197] Panel Report, *EC – Salmon (Norway)*, para. 7.233.
[198] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.22.
[199] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.22.

7.111. Article 2.1 of the Anti-Dumping Agreement states:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

7.112. The Appellate Body in *US – Zeroing (Japan)* found Article 2.1 to be a definitional provision that does not impose independent obligations, stating that:

> Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 are definitional provisions. They set out a definition of "dumping" for the purposes of the Anti-Dumping Agreement and the GATT 1994. The definitions in Article 2.1 and Article VI:1 are no doubt central to the interpretation of other provisions of the *Anti-Dumping Agreement*, such as the obligations relating to, *inter alia*, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping. But, Article 2.1 and Article VI:1, read in isolation, do not impose independent obligations.[200]

7.4.2.2 Evaluation

7.4.2.2.1 Claim under Article 2.2.1

7.113. We noted in paragraphs 7.109-7.110 above that the methodology under the first sentence of Article 2.2.1 involves two steps. We understand Ukraine to argue that MEDT of Ukraine conducted its ordinary-course-of-trade test in the underlying reviews on the basis of these two steps. First, MEDT of Ukraine found that the domestic selling prices of the investigated Russian producers were "lower than [the] reasonable per unit costs for its production *(taking into account the natural gas value adjustment)*".[201] As the italicized part of MEDT of Ukraine's finding shows, and Ukraine confirms, MEDT of Ukraine did not use the reported gas cost of the investigated Russian producers when ascertaining whether their domestic sales were below cost.[202] Second, Ukraine submits that MEDT of Ukraine assessed whether these below-cost sales met the three characteristics set out in the first sentence of Article 2.2.1, and found that:

a. Considering this determination was made for the period of review, which was 12 months, below-cost sales were made over an extended period of time (i.e. the first characteristic).

b. Below-cost sales were made in substantial quantities (i.e. the second characteristic) because the weighted average selling price of the transactions under consideration for the determination of the normal value was "*below weighted average per unit costs*".[203]

c. Below-cost sales were at prices which did not provide for the recovery of all costs within a reasonable period of time (i.e. the third characteristic), because the weighted average selling price was below the *weighted average costs* during the period of review.[204]

7.114. Ukraine confirms that the weighted average costs used as part of this assessment were calculated on the basis of the surrogate price of gas, and not the reported gas cost of the investigated Russian producers.[205] Thus, MEDT of Ukraine used the surrogate price of gas, rather than the reported gas cost, first, to identify the below-cost sales, and second, to assess whether the below-cost sales exhibited the characteristics set out in the first sentence of Article 2.2.1, specifically the second and the third characteristics. We have already found that MEDT of

[200] Appellate Body Report, *US – Zeroing (Japan)*, para. 140 (fn omitted). See also, Panel Report, *EU – Footwear (China)*, para. 7.260.
[201] Investigation Report, (Exhibit RUS-10b), pp. 25-26. (emphasis added)
[202] Ukraine's response to Panel question No. 50, paras. 17-18.
[203] Ukraine's response to Panel question No. 14, paras. 59, 61, and 63 (emphasis added); Investigation Report, (Exhibit RUS-10b), pp. 25-26.
[204] Ukraine's responses to Panel question No. 14, paras. 59, 61, and 63, and No. 49, paras. 5-16.
[205] Ukraine's response to Panel question No. 50, paras. 17-18.

Ukraine's rejection of the reported gas cost was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement. Thus, the use of costs that were calculated inconsistently with Article 2.2.1.1 tainted MEDT of Ukraine's ordinary-course-of-trade test.

7.115. Ukraine takes the view that a finding that MEDT of Ukraine calculated costs inconsistently with Article 2.2.1.1 cannot lead to a violation of Article 2.2.1. In this regard, Ukraine puts forth two arguments. First, Ukraine argues that cost calculations under Article 2.2.1.1 and the ordinary-course-of-trade test under Article 2.2.1 are separate and sequential obligations, and to find a consequential violation under Article 2.2.1 due to inconsistencies with Article 2.2.1.1 would "greatly diminish[]" the importance of this provision, and create systemic problems.[206] Second, Ukraine asserts that Russia has not made a *prima facie* case that if costs were not calculated on the basis of the methodology adopted by MEDT of Ukraine, the results of the ordinary-course-of-trade test under Article 2.2.1 would be different.[207] We disagree with Ukraine's arguments.

7.116. With respect to its first argument, we note that Article 2.2.1.1 applies to "[p]aragraph 2". The reference to "[p]aragraph 2" covers not just Article 2.2 but also Article 2.2.1. The panel in *EC – Salmon (Norway)* recognized that the rules for calculating the costs used in a determination under Article 2.2.1 are found in Article 2.2.1.1.[208] It would follow, in our view, that costs used in the ordinary-course-of-trade test under Article 2.2.1 must be consistent with Article 2.2.1.1. Further, if we were to accept Ukraine's arguments, we would essentially be concluding that the investigating authority was free to disregard the specific rules under Article 2.2.1.1 when calculating the cost of production used for the purposes of the ordinary-course-of-trade test under Article 2.2.1. However, there is nothing in the text of Article 2.2.1 or Article 2.2.1.1 to support such a view. Such an interpretation is also likely to create systemic problems as in conducting their ordinary-course-of-trade test under Article 2.2.1 investigating authorities would be free to use a cost of production calculated inconsistently with Article 2.2.1.1, thereby frustrating the very purpose of this test.[209]

7.117. As regards Ukraine's second argument, we are not permitted to examine whether the results of MEDT of Ukraine's ordinary-course-of-trade test would have been different if it had calculated the costs consistently with its obligations under Article 2.2.1.1 as such an examination would be outside our mandate, and would require us to conduct a *de novo* review of the record evidence. Thus, Russia is not obligated to show that the results of MEDT of Ukraine's ordinary-course-of-trade test would have been different if the reported gas cost was used. We note that Ukraine's argument is that the outcome of the ordinary-course-of-trade test would not have changed if MEDT of Ukraine had calculated the costs of the investigated Russian producers consistently with Article 2.2.1.1 and thus essentially argues that the violations under Article 2.2.1 constituted harmless error. We do not consider such an argument of harmless error to be relevant to our analysis.[210]

7.118. Based on the foregoing, we find that MEDT of Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because in making its determinations under this provision it relied on costs that were calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.

[206] Ukraine's response to Panel question No. 15, paras. 67-70.
[207] Ukraine's response to Panel question No. 15, paras. 71-72.
[208] Panel Report, *EC – Salmon (Norway)*, para. 7.252.
[209] Ukraine also makes a contextual argument under Article 2.2.2 of the Anti-Dumping Agreement, contending that if the use of costs calculated inconsistently with Article 2.2.1.1 in the ordinary-course-of-trade test could lead to a violation under Article 2.2.1, then any mistake in the determination of administrative, selling, and general costs or profits under Article 2.2.2 in the ordinary-course-of-trade test could also lead to a violation under Article 2.2.1. Such a result, in Ukraine's view, will be "undesirable and *de facto* absurd" because it would not clarify what authorities should rectify under Article 2.2.1. (Ukraine's response to Panel question No. 15, para. 70). We disagree. While we do not address a claim under Article 2.2.2 in this dispute, in our view, a violation under Article 2.2.1 due to an investigating authority's failure to follow the specific rules set out in the Anti-Dumping Agreement would not be undesirable or absurd.
[210] See, e.g. Panel Reports, *EC – Salmon (Norway)*, fn 763; and *US – Anti-Dumping Methodologies (China)*, para. 7.92. These panels have taken a similar view with respect to parties' arguments based on the concept of harmless error.

7.4.2.2.2 Claim under Article 2.1 of the Anti-Dumping Agreement

7.119. Russia asserts that if in calculating the cost of production, MEDT of Ukraine had used the reported gas cost of the investigated Russian producers, instead of the surrogate price of gas, it would not have been able to conclude that the domestic sales of these producers were outside the ordinary course of trade by reason of price.[211] Thus, it would not have had a proper basis under Article 2.2 of the Anti-Dumping Agreement to disregard the domestic sales of the investigated Russian producers in calculating normal value, and would not have been able to construct the normal value.[212] Therefore, in Russia's view, MEDT of Ukraine should have calculated the dumping margins of these producers by comparing the export price with the comparable price of the like product destined for consumption in Russia, as provided in Article 2.1. Russia submits that MEDT of Ukraine acted inconsistently with Article 2.1 by failing to do so.[213] With respect to the Appellate Body's finding in *US – Zeroing (EC)* that Article 2.1 is a definitional provision, and read in isolation, does not impose independent obligations, Russia asserts that it strongly disagrees with the approach set out in this finding.[214] Russia argues that nothing in the text of Article 2.1 indicates that it does not contain an independent obligation.[215] Ukraine argues that Article 2.1 is a definitional provision and does not impose obligations in isolation.[216] Further, Ukraine submits that Article 2.1 does not apply to the facts of the present case as there were no sales of ammonium nitrate in Russia in the ordinary course of trade.[217]

7.120. Article 2.1 stipulates that a product is to be considered as being dumped i.e. introduced into the commerce of another country at less than its normal value, "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". We share the Appellate Body's view, set out in paragraph 7.112 above, that Article 2.1 is a definitional provision, which when read in isolation, does not impose independent obligations.

7.121. We note that while Russia expresses strong disagreement with the Appellate Body's view in this regard, it does not properly show how MEDT of Ukraine could be said to have acted inconsistently with this provision in the underlying reviews. In particular, Russia's Article 2.1 claim is premised on its view that if MEDT of Ukraine had complied with its obligations under Articles 2.2.1.1 and 2.2.1 in the manner proposed by Russia, it would not have found any basis to conclude that the domestic sales of the investigated Russian producers were not in the ordinary course of trade by reason of price. However as we noted in paragraph 7.117 above, it is not for us to conduct a *de novo* review of the record evidence to ascertain what the results of MEDT of Ukraine's ordinary-course-of-trade test under Article 2.2.1 would have been if the WTO-inconsistencies that we have found with respect to MEDT of Ukraine's determination in this regard were removed. Further, Russia's claim is essentially based on a hypothesis that if MEDT of Ukraine conducted its dumping determinations in the manner proposed by Russia, it would not have any basis to construct the normal value, but would have used domestic sales instead. Even if one assumes that were true, Russia does not show how that makes MEDT of Ukraine's dumping determinations in the underlying reviews inconsistent with Article 2.1 of the Anti-Dumping Agreement. In any case, our role is to resolve this dispute based on the determinations actually made by the investigating authority, and not on the basis of hypothetical situations.

7.122. Based on the foregoing, we find that Russia has not shown that MEDT of Ukraine acted inconsistently with Article 2.1 of the Anti-Dumping Agreement, and reject Russia's claim.

7.4.3 Fair comparison under Article 2.4 of the Anti-Dumping Agreement

7.123. Russia contends that a comparison of the investigated Russian producers' export price with a constructed normal value, which was inflated due to the replacement of the reported gas cost with the surrogate price of gas, was not "fair" within the meaning of the first sentence of

[211] Russia's first written submission, para. 140.
[212] Russia's response to Panel question No. 16, para. 32; second written submission, para. 405; and first written submission, para. 140.
[213] Russia's second written submission, para. 405.
[214] Russia's opening statement at the second meeting of the Panel, para. 132.
[215] Russia's opening statement at the second meeting of the Panel, para. 136.
[216] Ukraine's first written submission, para. 19.
[217] Ukraine's first written submission, paras. 20-22.

Article 2.4.[218] Russia clarifies that its claim is under the first sentence of Article 2.4, and not the second or third, and thus Russia is not arguing that adjustments should have been made to the export price or constructed normal value to ensure a fair comparison between them.[219] Ukraine states that the substance of Russia's claim concerns MEDT of Ukraine's calculation of the constructed normal value based on the surrogate price of gas.[220] Ukraine submits that this is an issue governed under Article 2.2.1.1, not Article 2.4.[221]

7.124. The first sentence of Article 2.4 of the Anti-Dumping Agreement provides that "[a] fair comparison shall be made between the export price and the normal value". This is an independent obligation under Article 2.4.[222]

7.125. We have already found that MEDT of Ukraine acted inconsistently with Articles 2.2, 2.2.1.1, and 2.2.1 of the Anti-Dumping Agreement by rejecting the reported gas cost and replacing it with the surrogate price of gas in calculating the cost of production of the investigated Russian producers. Thus, MEDT of Ukraine constructed the normal value of ammonium nitrate in a WTO-inconsistent manner.

7.126. Russia's claim under Article 2.4 is that MEDT of Ukraine failed to make a "fair" comparison between the export price and normal value because the constructed normal value was "inflated" due to the use of the surrogate price of gas, instead of the reported gas cost. Thus, Russia's claim takes issue with the manner in which MEDT of Ukraine constructed the normal value. Having already concluded that MEDT of Ukraine constructed the normal value of ammonium nitrate in a WTO-inconsistent manner, we do not find it necessary to additionally consider whether by comparing such a constructed normal value with the export price of the investigated Russian producers, MEDT of Ukraine also acted inconsistently with the fair comparison obligation under Article 2.4.

7.127. Based on the foregoing, we exercise judicial economy with respect to Russia's claim under Article 2.4 of the Anti-Dumping Agreement.[223]

7.4.4 Claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement

7.128. Russia, as noted in paragraph 7.62 above, argues that MEDT of Ukraine acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement because in making its likelihood-of-dumping determinations it relied on dumping margins that were calculated inconsistently with Articles 2.1, 2.2, 2.2.1, 2.2.1.1, and 2.4 of the Anti-Dumping Agreement.[224] Russia also makes an independent claim under Article 11.1 in this regard.[225] Ukraine asks us to dismiss these claims based on its view that MEDT of Ukraine calculated the dumping margins consistently with Article 2 of the Anti-Dumping Agreement.[226]

7.129. We recall that Article 11.2 provides that interested parties shall have the right to request the authorities to examine whether the continued imposition of the anti-dumping duty is necessary to offset dumping, and if the authorities determine that the anti-dumping duty is no longer warranted, they shall terminate it immediately. Article 11.3 requires a determination that the expiry of the anti-dumping duty would be likely to lead to, *inter alia*, continuation or recurrence of

[218] Russia's first written submission, para. 133.
[219] Russia's response to Panel question No. 17, para. 34.
[220] See, e.g. Ukraine's second written submission, para. 70.
[221] Ukraine's second written submission, para. 71.
[222] See, e.g. Appellate Body Reports, *US – Zeroing (Japan)*, para. 168; *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142. The Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* found, for example, that the manner in which the dumping margin was calculated by the investigating authority was not impartial, even-handed or unbiased, and thus did not satisfy the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement. (See also Panel Report, *US – Zeroing (Japan)*, para. 7.154).
[223] We note that the Appellate Body in *EU – Biodiesel (Argentina)*, having upheld the panel's finding that the EU authorities acted inconsistently with Articles 2.2.1.1 and 2.2 in calculating the cost of production used for the purpose of constructing normal value, found it unnecessary to examine whether the EU authorities acted inconsistently with the obligation under Article 2.4 to make a fair comparison between the export price and the constructed normal value. (Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.89).
[224] Russia's first written submission, para. 147; second written submission, para. 408.
[225] Russia's first written submission, para. 152; second written submission, paras. 409-410.
[226] Ukraine's first written submission, para. 209.

dumping. These determinations must rest on a sufficient factual basis that allows the investigating authorities to draw reasoned and adequate conclusions.

7.130. Past panels and the Appellate Body have held that if investigating authorities rely on dumping margin calculations as part of their determinations under Article 11.2 or Article 11.3, they must ensure that the margins are calculated consistently with Article 2.[227] If the dumping margins relied on in this regard are calculated inconsistently with the relevant provisions of Article 2, this inconsistency would lead to a violation not just under the relevant provisions of Article 2, but also Articles 11.2 or 11.3 of the Anti-Dumping Agreement.[228] We agree with these findings, and find no reason to adopt a different approach in these proceedings.

7.131. We note that MEDT of Ukraine made a likelihood-of-dumping determination as part of the underlying reviews. It is undisputed that MEDT of Ukraine relied on the dumping margins that it calculated for the investigated Russian producers to make affirmative determinations regarding the likelihood of dumping.[229] We have already found that MEDT of Ukraine calculated the dumping margins inconsistently with Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement in the underlying reviews. Therefore, we find that MEDT of Ukraine also acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement.

7.132. With respect to Article 11.1 of the Anti-Dumping Agreement, while Russia asserts that its claim under this provision is independent of its claims under Articles 11.2 and 11.3[230], we do not consider additional findings under Article 11.1 to be necessary to resolve this dispute.[231] Thus, we exercise judicial economy with respect to this claim under Article 11.1.

7.133. Based on the foregoing, we find that the Ukrainian authorities acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement in relying on dumping margins calculated inconsistently with Articles 2.2, 2.2.1 and 2.2.1.1 to make their likelihood-of-dumping determinations. We exercise judicial economy with respect to Russia's claim under Article 11.1 of the Anti-Dumping Agreement.

7.5 Non-termination of investigation against EuroChem

7.134. We recall, as stated in paragraph 2.1 above, that the Ukrainian authorities originally imposed anti-dumping duties on imports of ammonium nitrate from Russia through the 2008 original decision. EuroChem successfully challenged this decision before the domestic courts in Ukraine. ICIT, as discussed in more detail in paragraph 7.137 below, implemented the judgments of these courts through the 2010 amendment to the 2008 original decision, thereby reducing the anti-dumping duty on EuroChem to 0%. The Ukrainian authorities, however, included EuroChem within the scope of the underlying reviews, and imposed an anti-dumping duty of 36.03% on it pursuant to the 2014 extension decision.[232]

[227] Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.393; Appellate Body Report, *US – Corrosion-Resistant Sunset Steel Review*, para. 127.

[228] Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.393; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[229] Russia's response to Panel question No. 18, para. 37; Ukraine's response to Panel question No. 18, para. 74.

[230] Russia's response to Panel question No. 5, para. 3.

[231] Russia claims that MEDT of Ukraine violated Article 11.1 because the dumping determinations were inconsistent with the relevant provisions of Article 2. (Russia's second written submission, para. 408). This issue is adequately resolved through our findings under Articles 11.2 and 11.3. Further, Russia contends that MEDT of Ukraine would have determined negative dumping margins for the investigated Russian producers if it had used their reported gas cost to calculate these dumping margins, and thus would not have imposed anti-dumping duties. (Russia's second written submission, para. 410). We cannot find a violation under Article 11.1 on this basis as we are not permitted to speculate on whether MEDT of Ukraine would have found these margins to be negative if it calculated them consistently with its WTO obligations.

[232] 2014 extension decision, (Exhibit RUS-4b).

7.135. Russia claims that the Ukrainian authorities acted inconsistently with their WTO obligations in respect of their treatment of EuroChem in the original investigation phase[233] as well as in the underlying reviews, stating in particular that:

a. With respect to determinations made in relation to the original investigation, the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because[234]:

   i. the 2008 decision, as amended by the 2010 amendment, which we refer to as the 2008 amended decision, failed to terminate the investigation against EuroChem; and

   ii. the 2010 amendment imposed a 0% anti-dumping duty on EuroChem, rather than terminate the investigation against it.

b. With respect to the underlying reviews, the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because they[235]:

   i. included EuroChem within the scope of the underlying reviews, instead of excluding it from the scope of such measures; and

   ii. imposed an anti-dumping duty on this producer following the determinations made in the underlying reviews.

c. With respect to the underlying reviews, the Ukrainian authorities' inclusion of EuroChem within the scope of the underlying reviews, as well as subsequent duty imposition, also resulted in violations under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement.[236]

7.5.1 Treatment of EuroChem in the original investigation phase

7.136. MEDT of Ukraine calculated an above *de minimis* dumping margin of 10.78% for EuroChem in the original investigation on imports of ammonium nitrate from Russia.[237] ICIT accepted the recommendations and dumping margins proposed by MEDT of Ukraine, and on this basis imposed an anti-dumping duty of 10.78% on EuroChem, through its 2008 original decision. EuroChem challenged this decision before the District Administrative Court of Ukraine (District Court), contending that the authorities had made errors in calculating its dumping margin. The District Court concluded:

> The case files reaffirm the calculations of the normal value presented by the plaintiff, the export price and the dumping margin which has a **negative value/rate**.
>
> ...
>
> Based on the evidence collected and examined in the court session in the aggregate, the court comes to the conclusion on the **absence of dumping**, and, therefore, on the need to satisfy the claims of the plaintiff for declaring unlawful and partial reversal of the [2008 original decision].[238]

[233] We use the term "original investigation phase" to refer collectively to the original investigation before MEDT of Ukraine/ICIT, domestic court proceedings where the Ukrainian authorities' original determinations were challenged under domestic law, and ICIT's order implementing the judgment of these domestic courts.

[234] Russia's response to Panel question No. 24, paras. 56-58; second written submission, para. 455.

[235] Russia's response to Panel question No. 24, paras. 56 and 59-60; second written submission, para. 455.

[236] Russia's second written submission, para. 461; response to Panel question No. 47, para. 33.

[237] Ukraine's response to Panel question No. 19(a), para. 75; Russia's response to Panel question No. 19(a), para. 38.

[238] Judgment of the District Court 2009, (Exhibit RUS-6b) (emphasis added). In addressing EuroChem's petition, the District Court found that MEDT of Ukraine erroneously considered in the original investigation that EuroChem had provided a discount on domestic sales prices that were used in calculation of the normal value, and thus incorrectly adjusted this normal value by adding the value of the discount to the

7.137. This judgment was upheld on appeal by the higher courts in Ukraine.[239] ICIT implemented these court judgments, noting in its 2010 amendment that "in pursuance of" the judgments of the Ukrainian courts, including the District Court, it had decided:

> 1. To **terminate** in regards of [EuroChem], Commission decision of 21.05.2008 number AD-176/2008 / 143-47 "\On the Application of the Definitive Anti-Dumping Measures on Import into Ukraine of Ammonium Nitrate Originating in the Russian Federation "[i.e. the 2008 decision].
>
> 2. The third paragraph of Section. 2.4 [of the 2008 decision] shall be read as follows:
>
> "For the exporter JSC MCC EuroChem, which is located at: 115114, Russian Federation, m. Moscow Kozhevnicheskiy travel, 4, d. 1.2 - **0%** ".[240]

7.138. Both parties take the view that though the 2010 amendment specifically refers to ICIT's decision to "terminate" the 2008 original decision with regard to EuroChem, there was no termination within the meaning of Article 5.8 of the Anti-Dumping Agreement, which requires "immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*".[241] Ukraine acknowledges that EuroChem, despite imposition of a 0% duty, was not formally excluded from the scope of the original anti-dumping measures.[242] The Ukrainian authorities subsequently included EuroChem in the scope of the underlying reviews; MEDT of Ukraine calculated an above *de minimis* dumping margin for this producer in these reviews; and ICIT imposed an anti-dumping duty on this basis.[243]

7.5.2 Legal standard

7.139. Article 5.8 of the Anti-Dumping Agreement states:

> An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. **There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price.** The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the

domestic sales prices when calculating the dumping margin. The District Court found that no such discount had, in fact, been given by EuroChem, and thus the adjustment to the normal value was not correct.

[239] Judgment of the Appellate Court 2009, (Exhibit RUS-5b). In upholding the judgment of the District Court, the Kiev Appellate Administrative Court concluded that the District Court "correctly established the circumstances of the case, the court's decision was rendered pursuant to the norms of substantive and procedural law, the respondent did not prove the lawfulness of the issued decision [i.e. the 2008 original decision] and acted contrary to the Constitution and the laws of Ukraine". The Higher Administrative Court of Ukraine, which heard appeals against the judgment of the District Court, and the Kiev Appellate Administrative Court concluded, *inter alia*:

> It also follows from the case files that no discounts were granted by the claimant [i.e. EuroChem] in the ordinary course of trade operations, the conclusion of the first instance court that [MEDT of Ukraine] did not have any grounds for adjustment is lawful.
>
> Under such circumstances, the panel of judges is of the opinion that the first instance court and the court of appeal correctly established the actual circumstances of the case, thoroughly investigated the existing evidence, correctly evaluated them and made a lawful and grounded decision in accordance with the requirements of substantive and procedural law.

(Judgment of the Higher Court, (Exhibit RUS-7b))

[240] 2010 amendment, (Exhibit RUS-8b). (emphasis added)

[241] Russia's response to Panel question No. 20, para. 41; Ukraine's response to Panel question No. 20, para. 78.

[242] Ukraine's response to Panel question No. 20, para. 79.

[243] Investigation Report, (Exhibit RUS-10b), p. 28; 2014 extension decision, (Exhibit RUS-4b).

importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.[244]

7.140. The second sentence of Article 5.8 requires "immediate termination" of the investigation where investigating authorities determine that the margin of dumping is *de minimis*, i.e. less than 2%. The second sentence has been interpreted by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. Based on the text of the second sentence, and in light of the context provided by other provisions of the Anti-Dumping Agreement, it concluded that Article 5.8 requires immediate termination of the investigation in respect of producers for which a zero or *de minimis* dumping margin is determined in the original investigation.[245] The Appellate Body also stated that the only way to terminate immediately an investigation in respect of such producers is to exclude them from the scope of the anti-dumping duty order.[246] Investigating authorities cannot impose anti-dumping duties – including duties at 0% – on producers excluded from such measures.[247] Indeed, the issuance of an order imposing anti-dumping duty is the ultimate step of an "investigation" contemplated under Article 5.8, and follows the final determination made by the investigating authority.[248] Therefore, if the investigation itself were to be terminated, there could be no order imposing anti-dumping duty, even at 0% rates.[249] The parties do not dispute this interpretation of the second sentence of Article 5.8 by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, or ask us to revisit it.

7.141. Past panels or the Appellate Body have not made any specific findings under Articles 11.1, 11.2, or 11.3 of the Anti-Dumping Agreement regarding the inclusion of a producer found to have had *de minimis* dumping margin in the original investigation, within the scope of an interim or expiry review. But in addressing claims under Article 5.8 of the Anti-Dumping Agreement and Article 11.9 of the SCM Agreement, the panel in *Mexico – Anti-Dumping Measures on Rice* examined the WTO-consistency of a domestic law provision that required an annual review of producers that were found not to have engaged in, *inter alia*, dumping during the original investigation.[250] The panel in that case found that the logical consequence of terminating an investigation against a producer that was found not to be dumping in the original investigation is that this producer cannot be subjected to administrative or changed circumstances reviews, the latter being a review conducted under Article 11.2 of the Anti-Dumping Agreement.[251] The panel concluded on this basis that this domestic law provision was inconsistent with Article 5.8 of the Anti-Dumping Agreement.[252] On appeal, the Appellate Body agreed with the panel's finding, noting, *inter alia*, that because changed circumstances reviews under Article 11.2 examine "the need for the *continued imposition* of the duty", producers excluded from the anti-dumping measure by virtue of their *de minimis* dumping margins in the original investigation cannot be subjected to changed circumstances reviews.[253] The Appellate Body added that if investigating authorities were to undertake a review of producers that were excluded from the anti-dumping measure by virtue of their *de minimis* margins, those producers effectively would be made subject to the anti-dumping measure, inconsistently with Article 5.8.[254]

7.5.3 Evaluation

7.142. We will first examine Russia's claim under Article 5.8 alleging that the Ukrainian authorities acted inconsistently with the second sentence of this provision in the context of the original investigation phase. Then we will examine its claim under Article 5.8 challenging EuroChem's inclusion in the underlying reviews as well as the subsequent imposition of

[244] Emphasis added.
[245] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 217; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140.
[246] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219.
[247] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 305.
[248] See, e.g. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219.
[249] See, e.g. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219. The Appellate Body found that given that the order establishing anti-dumping duties necessarily occurs after the final determination is made, the only way to terminate immediately an investigation in respect of producers for which a *de minimis* dumping margin is determined is to exclude them from the scope of the anti-dumping duty order.
[250] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.250-7.251.
[251] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.251.
[252] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.251.
[253] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 305. (emphasis added)
[254] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 305.

anti-dumping duty on it pursuant to the reviews. Finally, we will examine Russia's claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement.

7.5.3.1 Claim under Article 5.8 of the Anti-Dumping Agreement concerning the determinations in the original investigation phase

7.143. Russia contends that the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because in implementing the Ukrainian court judgments that found that EuroChem had a negative dumping rate in the original investigation, ICIT: (a) failed to exclude, through the 2008 amended decision, EuroChem from the scope of the original anti-dumping measures; and (b) imposed anti-dumping duty of 0% on EuroChem through the 2010 amendment rather than terminate the measure against it by excluding it from the scope of these measures. Russia argues, relying on the Appellate Body Report in *Mexico – Anti-Dumping Measures on Rice*, that the only way to terminate an investigation *immediately* in respect of a producer with a *de minimis* margin of dumping, as required by Article 5.8 of the Anti-Dumping Agreement, is to exclude it from the scope of the anti-dumping duty order.[255] The Ukrainian authorities failed to do so, and thus, according to Russia, acted inconsistently with Article 5.8.

7.144. Russia disputes in this regard Ukraine's argument that the obligations under Article 5.8 do not apply to the present case because the Ukrainian courts did not have the legal competence under domestic law to calculate EuroChem's dumping margin, and the Ukrainian authorities themselves never calculated a *de minimis* dumping margin for EuroChem in the original investigation. Russia asserts that such an argument is based on Ukrainian domestic law, and is not relevant in WTO proceedings.[256] Russia asserts that considering ICIT implemented the orders of Ukrainian courts that found absence of dumping by EuroChem, the combined effect of the Ukrainian court judgments, and their implementation by ICIT's 2010 amendment, was that the dumping margin in the original investigation phase for EuroChem was found to be *de minimis*.[257]

7.145. Ukraine, in rebutting Russia's arguments, does not dispute that if a *de minimis* dumping margin is determined for a producer in the original investigation, pursuant to the second sentence of Article 5.8, the investigating authority would have to terminate the investigation against this producer. Ukraine acknowledges that the imposition of a 0% anti-dumping duty on EuroChem is evidence that its authorities did not terminate, within the meaning of Article 5.8, the investigation against EuroChem.[258] However, it argues that the "central aspect" of the Appellate Body's finding in *Mexico – Anti-Dumping Measures on Rice* was that there should be a legally valid determination of a *de minimis* dumping margin in respect of a given producer.[259] Ukraine also contends that in the original determination, the Ukrainian authorities calculated an above *de minimis* dumping margin for EuroChem because: (a) the Ukrainian courts did not have the authority under domestic law to recalculate EuroChem's dumping margin; (b) ICIT imposed an anti-dumping duty of 0% on EuroChem to implement the court orders, but never recalculated its dumping margin.[260] Therefore, in Ukraine's view, the obligations under the second sentence of Article 5.8 of the Anti-Dumping Agreement were not triggered in the present case.[261]

7.146. We note that the parties do not disagree on the legal interpretation of the second sentence of Article 5.8, which requires "immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*". Instead, they disagree on whether these obligations were triggered in the present case, as Ukraine contends no legally valid *de minimis* dumping margin was determined for EuroChem in the original investigation phase. Thus, the question that we have to address is a factual one: Was a *de minimis* dumping margin determined for EuroChem in the original investigation phase? If it was, then the obligations under the second sentence of Article 5.8 of the Anti-Dumping Agreement would apply, and we would rule that the Ukrainian authorities were required to terminate the original investigation against EuroChem.

[255] Russia's first written submission, para. 175.
[256] Russia's second written submission, para. 479.
[257] Russia's second written submission, para. 474; opening statement at the second meeting of the Panel, para. 171.
[258] Ukraine's response to Panel question No. 20, paras. 78-79.
[259] Ukraine's first written submission, para. 238.
[260] Ukraine's first written submission, para. 253; response to Panel question No. 21, para. 83; and opening statement at the first meeting of the Panel, para. 138.
[261] Ukraine's first written submission, para. 256.

7.147. In this regard, we note, as set out in paragraph 7.136 above, that the District Court concluded that there was "absence of dumping" by EuroChem in the original investigation. Further, the District Court found that the case files reaffirmed the calculations presented by EuroChem showing that its dumping margin had a "negative value/rate". This District Court judgment was upheld by higher courts, which found that the District Court had correctly established the circumstances of the case, and thoroughly investigated the existing evidence.[262] ICIT itself implemented these court judgments, stating that in "pursuance" of the court judgments it had decided to, *inter alia*, make the anti-dumping duty on EuroChem 0%. We find nothing in this 2010 amendment, or other evidence on record that would suggest to us that in implementing the court judgments, ICIT disputed the finding of the courts that EuroChem had a negative value/rate of dumping.[263] Indeed, Ukraine submits that it does not question the legal validity of the rulings made in the court judgments for EuroChem.[264] In these circumstances, we agree with Russia that the combined effect of the Ukrainian court judgments, and their implementation by ICIT's 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*.[265]

7.148. Further, Ukraine's argument as to why no "legally valid" dumping margin was calculated for EuroChem in the original investigation phase is based on the following principal grounds:

a. the courts made their findings based on dumping margin calculations presented by EuroChem alone, and ICIT itself could not provide refuting evidence to the Ukrainian courts as it has a policy of not disclosing confidential dumping margin calculations in court proceedings, which in Ukraine are open to the public[266];

b. the Ukrainian courts were not permitted to calculate any dumping margins as only MEDT of Ukraine and ICIT have the authority under Ukrainian law to calculate dumping margins[267];

c. ICIT's 2010 amendment only enforced the rulings of the Ukrainian courts that EuroChem's dumping margin was not correctly determined, and ICIT itself did not recalculate the dumping margin originally determined[268]; and

d. in the absence of any specific instructions by the court to reopen the investigation and apply a particular methodology for calculating the dumping margin, ICIT could not recalculate the dumping margin, but had to bring down the duty to 0%.[269]

7.149. These grounds, however, are essentially matters under Ukrainian domestic law. It is up to each WTO Member to decide how it implements decisions of its domestic courts, but these arrangements or classifications under domestic law are not determinative of issues raised in WTO

[262] See fn 239 above.

[263] Ukraine submits in this regard that ICIT did not accept that EuroChem had a negative or *de minimis* dumping margin because it did not exclude EuroChem from the original anti-dumping measures but merely assigned it a 0% duty. (Ukraine's response to Panel question No. 21, para. 82). We do not see how ICIT's conduct in this regard, which Russia alleges is WTO-inconsistent, is proof that ICIT did not accept the courts' finding (which it implemented) that EuroChem had a negative rate of dumping. Moreover, Ukraine submits that Exhibits UKR-53 (BCI), UKR-54 (BCI), UKR-55 (BCI), and UKR-56 (BCI) show that the Ukrainian authorities did not recalculate the dumping margin, and did not endorse any dumping margin calculated by the Courts. (Ukraine's second written submission, para. 99). However, Ukraine does not attempt to show what in these exhibits supports Ukraine's submission in this regard.

[264] Ukraine's first written submission, para. 253.

[265] We also find it relevant to note that accepting Ukraine's argument essentially means that if investigating authorities correctly calculate the dumping margin in an original investigation, and find the dumping margin to be *de minimis*, they would be required, pursuant to the second sentence of Article 5.8, to immediately terminate the investigation against an exporter. But, if the margins are calculated as above *de minimis* due to substantive or clerical errors in the authorities' determination, and these errors are successfully challenged in domestic courts, investigating authorities may rely on domestic law provisions to avoid complying with the obligations under this second sentence. We do not consider that such an asymmetrical application of the second sentence of Article 5.8 is rational, or intended under the Anti-Dumping Agreement.

[266] Ukraine's response to Panel question No. 21, paras. 84-85.

[267] Ukraine's opening statement at the first meeting of the Panel, paras. 138 and 142; response to Panel question No. 21, para. 83.

[268] Ukraine's opening statement at the first meeting of the Panel, para. 138.

[269] Ukraine's second written submission, para. 97; response to Panel question No. 22, paras. 92-93.

dispute settlement proceedings.[270] Thus, we are not persuaded that the grounds advanced by Ukraine show that no *de minimis* dumping margin was determined for EuroChem in the original investigation phase.

7.150. We note, for instance, Ukraine's assertion that because court hearings are open to the public in Ukraine, ICIT could not provide its own dumping calculations, or refuting evidence to the courts. Thus, the courts' judgments were based on submissions made by EuroChem alone. Even if this was true, such supposed restraints on ICIT arise under domestic law. We do not see how they affect the probative value of the court judgments, as implemented by ICIT, in these panel proceedings.[271] Further, considering ICIT implemented court judgments that found that EuroChem had a negative rate of dumping, we do not see on what basis Ukraine now argues that no negative or *de minimis* dumping margin was found for EuroChem in the original investigation phase. The fact that in implementing the court judgments which found negative rate of dumping, ICIT did not, or could not, recalculate the dumping margin itself is, again, a matter of domestic law, and does not diminish the probative value of these court judgments or ICIT's order implementing it.[272] Ukraine thus has failed to rebut Russia's submission that the record evidence in the original investigation phase shows the absence of dumping by EuroChem.

7.151. Therefore, we agree with Russia that the obligation under the second sentence of Article 5.8 applies in this case because EuroChem had a *de minimis* dumping margin in the original investigation phase. In these circumstances, the Ukrainian authorities would have been required pursuant to the second sentence of Article 5.8 to immediately terminate the investigation against EuroChem. As stated in paragraph 7.140 above, the only way to terminate the investigation against a producer found to have *de minimis* dumping margin in the original investigation is to exclude that producer from the scope of the anti-dumping measures, and not to impose any anti-dumping duty on it, even at a 0% rate. However, as Ukraine acknowledges, the Ukrainian authorities failed to exclude EuroChem from the scope of the original anti-dumping measures, specifically the 2008 amended decision. They also imposed a 0% anti-dumping duty on EuroChem through the 2010 amendment. Thus, the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement.

7.152. Based on the foregoing, we find that the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because they:

a. failed to exclude EuroChem from the scope of the original anti-dumping measures, specifically the 2008 amended decision; and

b. imposed a 0% anti-dumping duty on EuroChem through the 2010 amendment, instead of excluding it from the scope of the anti-dumping duty order.

[270] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 82.

[271] See, e.g. Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, fn 452. The Appellate Body noted in this case that restrictions under domestic law on the executive branch from taking any action on a matter during the pendency of domestic judicial proceedings could not provide a basis for delaying compliance with the DSB's recommendations and rulings beyond the reasonable period of time.

[272] In any event, we observe that Ukraine has changed its factual arguments over the course of the proceedings on whether, as a matter of Ukrainian domestic law, the Ukrainian authorities could recalculate the dumping margin pursuant to the court judgments. In its first written submission, Ukraine stated that "under the Ukrainian Anti-Dumping Law and the Constitution of Ukraine (Article 19), a re-calculation of a dumping margin can be performed only in course of a review of an anti-dumping duty". (Ukraine's first written submission, fn 85). However, in subsequent responses it stated that "[i]t is only when the Court specifically instructs ICIT to reopen the investigation and adopt a particular methodology" can ICIT recalculate the dumping margin. (Ukraine's response to Panel question No. 22, para. 94). These two descriptions appear to contradict each other. The first description suggests that the Ukrainian authorities can only calculate the dumping margins in a review, and thus cannot do so pursuant to a court judgment. The second description suggests that the Ukrainian courts can ask ICIT to recalculate dumping margins even in the absence of a review. In this regard, we also observe that in support of its argument that absent court instructions to reopen the investigation and to apply a particular methodology to calculate the dumping margin, ICIT had no other option under Ukrainian law but to reduce the anti-dumping duty down to zero, Ukraine cites Articles 258-259 of the Code of Administrative Procedure of Ukraine (Exhibit UKR-43) and Article 4 of Ukraine's Law on enforcement proceedings, (Exhibit UKR-44). (Ukraine's second written submission, para. 97; response to Panel question No. 22, para. 92). Ukraine does not show how these provisions of Ukrainian law support its argument.

7.5.3.2 Claim under Article 5.8 of the Anti-Dumping Agreement concerning the underlying reviews

7.153. Russia argues that the Ukrainian authorities' inclusion of EuroChem within the scope of the underlying reviews, and their decision to impose an anti-dumping duty on this producer through the 2014 extension decision was inconsistent with the obligation under Article 5.8 to "immediately terminate" an investigation against a producer found not to be dumping in the original investigation.[273] We note that Ukraine makes two main arguments as to why the Ukrainian authorities did not violate the second sentence of Article 5.8 in including EuroChem in the underlying reviews, and then imposing an anti-dumping duty on it following the review determinations. First, it argues that no legally valid *de minimis* dumping margin was determined for EuroChem in the original investigation phase.[274] Second, it submits, relying on the panel reports in *US – Corrosion-Resistant Steel Sunset Review* and *US – DRAMS*, that Article 5.8 does not apply to review determinations, and thus Russia's claim under this provision fails.[275] Thus, Ukraine contends that even if the dumping margin calculated in a review is *de minimis*, Article 5.8 does not impose an obligation on investigating authorities to terminate such a review. In any case, Ukraine notes that the margin calculated for EuroChem in the underlying reviews was not *de minimis*.

7.154. We have already rejected in paragraph 7.151 above Ukraine's first argument that no legally valid *de minimis* dumping margin was determined for EuroChem in the original investigation phase. With respect to its second argument, we note Russia's submission that Ukraine's reliance on the panel reports in *US – Corrosion-Resistant Steel Sunset Review* and *US – DRAMS* is inapposite because the question before the Panel is not whether a *de minimis* threshold applies in review determinations, as was discussed by the panels in these two cases.[276] Instead, the question in Russia's view concerns the consequences of a finding that a producer had a *de minimis* dumping margin in the original investigation phase on the subsequent interim or expiry review.[277] We agree.

7.155. The interpretative issue before us is indeed not the same as that before the panels in *US – Corrosion-Resistant Steel Sunset Review* and *US – DRAMS*. The issue in those cases was whether the *de minimis* standard of Article 5.8 applies in the context of determinations made in expiry and other types of reviews. The panels found in this context that the *de minimis* standard of Article 5.8 applies to original investigations, not such types of reviews.[278] In contrast, the issue before us is whether Article 5.8 permits investigating authorities to include in a review a producer found to have had a *de minimis* dumping margin in the *original* investigation and impose anti-dumping duties on it pursuant to such review.

7.156. We consider that once an investigation is terminated, or brought to an end against a producer, it cannot subsequently be revived through an interim or expiry review. We find support for this view in the panel and the Appellate Body reports in *Mexico – Anti-Dumping Measures on Rice* which stated that the logical consequence of terminating an investigation against a producer that was found not to be dumping in the original investigation is that this producer cannot be subjected to administrative or changed circumstances reviews.[279] The inclusion of such a producer in an interim or expiry review as well as the subsequent anti-dumping duty imposition on it following such reviews would be inconsistent with the obligation under the second sentence of Article 5.8 to immediately terminate the original investigation against it. Therefore, we reject Ukraine's second argument as well.

7.157. Based on the foregoing, we find that the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement in including EuroChem within the scope of the review determinations, and in imposing anti-dumping duties on it through the 2014 extension decision.

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[273] Russia's response to Panel question No. 24, paras. 59-60.
[274] Ukraine's first written submission, para. 238.
[275] Ukraine's second written submission, paras. 90-91.
[276] Russia's opening statement at the second meeting of the Panel, para. 160.
[277] Russia's opening statement at the second meeting of the Panel, para. 160.
[278] Panel Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.85; *US – DRAMS*, paras. 6.89-6.90.
[279] See para. 7.140 above.

7.5.3.3 Claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement concerning the underlying reviews

7.158. Russia's claims under Articles 11.1, 11.2, and 11.3 are based on the "link" between these provisions and Article 5.8.[280] Russia contends that the Ukrainian authorities acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement by including EuroChem within the scope of the underlying reviews and imposing anti-dumping duties on it following these reviews.[281] Russia also submits that the Ukrainian authorities acted inconsistently with Article 11.1 of the Anti-Dumping Agreement because if there should have been no anti-dumping duty to start with, the question of that duty remaining in force to the extent necessary to counteract dumping, as provided in Article 11.1 does not arise.[282] Ukraine argues that Russia's claims under Articles 11.1, 11.2, and 11.3 must be rejected because they are purely consequential to its claims under Article 5.8; that, in its first written submission, Russia merely cited the provisions of Articles 11.1, 11.2, and 11.3 without specifying any action or inaction of the Ukrainian authorities that resulted in a violation under these provisions; and that Russia has failed to make a *prima facie* case as to why these provisions were violated.[283]

7.159. We note that Russia's claims under Articles 11.1, 11.2, and 11.3 arise from the same basis as its claims under Articles 5.8 with respect to the underlying reviews, namely, the inclusion of EuroChem within the scope of the underlying reviews and imposition of anti-dumping duty on it following the determinations made in the underlying reviews. In these circumstances, we do not consider that additional findings under these provisions would contribute towards the positive resolution of this dispute.

7.160. Based on the foregoing, we exercise judicial economy with respect to Russia's claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement.

7.6 Likelihood-of-injury determination

7.161. In its panel request, and its request for findings in the first written submission, Russia claimed that Ukraine acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because the Ukrainian authorities "determined and relied on" injury which was not established in accordance with Articles 3.1 and 3.4 of this Agreement.[284] Russia explains that this request covers the following two separate claims[285]:

a. MEDT of Ukraine violated Articles 11.2, 11.3, and 3.1 of the Anti-Dumping Agreement because it failed to exclude imports of the Russian producer EuroChem, which had negative dumping margin in the original investigation phase, from the volume of dumped imports[286]; and

b. MEDT of Ukraine violated Articles 11.2, 11.3, and 3.4 of the Anti-Dumping Agreement because its evaluation of economic factors and indices having a bearing on the state of the Ukrainian domestic industry was not based on an objective examination of positive evidence.[287]

[280] Russia's first written submission, paras. 172 and 177.
[281] Russia's first written submission, para. 177; second written submission, para. 520.
[282] Russia's response to Panel question No. 26, para. 73.
[283] Ukraine's first written submission, para. 235; second written submission, paras. 112 and 115.
[284] Russian's panel request, item number 17; first written submission, para. 347(8).
[285] In addition to these two claims, Russia made what it described as an "argument" challenging MEDT of Ukraine's analysis in a section of the Investigation Report titled "[p]ossibility of new types of dumping that will cause injury to the national producer". (Russia's response to Panel question No. 37, para. 110). In this section, MEDT of Ukraine considered certain arguments regarding the possible increase of imports from Russia into Ukraine because, for instance, other countries had already imposed anti-dumping duties on Russian exports of ammonium nitrate, and Ukraine was one of the key consumers of ammonium nitrate from Russia. (Investigation Report, (Exhibit RUS-10b), p. 16). Russia clarified that this "argument" does not pertain to any of the two claims made by Russia in these proceedings. (Russia's response to Panel question No. 53, para. 45). Therefore, we have no basis to address this argument.
[286] Russia's response to Panel question No. 33, para. 94.
[287] Russia's response to Panel question No. 33, para. 94.

7.162. In response to Ukraine's submission that MEDT of Ukraine made a likelihood-of-injury determination in the underlying reviews, and that Article 11, not Article 3, applies to such a determination, Russia states that when investigating authorities assess the *current* state of the domestic industry in a review to ascertain whether the industry is suffering injury, this assessment has to comply with the relevant provisions of Article 3.[288] Russia asserts that MEDT of Ukraine made such an assessment in the underlying reviews, and thus made an injury determination within the meaning of Article 3, but this determination did not comply with Articles 3.1 and 3.4.[289] However, Russia clarifies that it is not actually making independent claims under Articles 3.1 and 3.4, in the sense that it is not asking us to make independent findings under these provisions.[290] Instead, it is contending that because MEDT of Ukraine relied on an injury assessment that did not comply with Article 3 to make its likelihood-of-injury determination, it acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement.[291]

7.163. Ukraine states that MEDT of Ukraine was neither required to nor made an injury determination under Article 3 of the Anti-Dumping Agreement.[292] Instead, it made a likelihood-of-injury determination within the meaning of Articles 11.2 and 11.3. Ukraine asks us to dismiss Russia's injury-related claims because they suffer from a legal error inasmuch as Russia asks us to review MEDT of Ukraine's likelihood-of-injury determination under Article 3, rather than Article 11 of the Anti-Dumping Agreement.[293]

7.6.1 Legal standard

7.164. The enquiries relating to injury under Article 11.2 and Article 11.3 of the Anti-Dumping Agreement, while worded differently, are similar. Article 11.2 states that interested parties shall have the right to request the authorities to examine, *inter alia*, "whether the injury would be likely to continue or recur if the [anti-dumping] duty were removed or varied". If pursuant to a review conducted under Article 11.2, the authorities determine that the anti-dumping duty is no longer warranted, they shall terminate this duty immediately. Article 11.3 refers to a determination on whether the expiry of the existing anti-dumping duty "would be likely to lead to continuation or recurrence of dumping and injury". Article 11.3 requires investigating authorities to terminate the existing anti-dumping duty unless the authorities find a likelihood of injury (and dumping) in the expiry review.

7.165. Neither Article 11.2 nor Article 11.3 prescribes a specific methodology that investigating authorities must follow when making a likelihood-of-injury determination. Thus, investigating authorities have some discretion in this regard. However, like in the context of likelihood-of-dumping determinations, the use of the words "review" and "determine" in Article 11.3 suggests that the investigating authorities' likelihood-of-injury determination must rest on a sufficient factual basis that allows the authorities to draw reasoned and adequate conclusions.[294] Considering the use of the words "review" and "determine" in Article 11.2, as stated above, the same standard may be said to apply to likelihood-of-injury determinations made in the context of interim reviews conducted pursuant to this provision.[295] Moreover, as we noted above, investigating authorities are also under a general obligation, pursuant to Article 17.6(i) of the Anti-Dumping Agreement, to establish facts properly and evaluate them in an unbiased and objective manner, and this obligation applies in reviews as well. Therefore, if the authorities' conclusions regarding the likelihood of injury are not reasoned and adequate, or based on a sufficient factual basis, thus showing that their determination was not based on an objective and unbiased evaluation of properly established facts, the determination would be inconsistent with Articles 11.2 and 11.3 of the Anti-Dumping Agreement.

7.166. With respect to the application of Article 3 of the Anti-Dumping Agreement to likelihood-of-injury determinations made in the context of Article 11 reviews, the Appellate Body

[288] Russia's response to Panel question No. 32(b), para. 93.
[289] Russia's responses to Panel question No. 32(a), para. 92; and No. 31, para. 91.
[290] Russia's responses to Panel question No. 32(a), para. 92; and No. 51, para. 35.
[291] Russia's responses to Panel question No. 32(a), para. 92; and No. 51, para. 35; opening statement at the second meeting of the Panel, para. 200.
[292] Ukraine's first written submission, paras. 269 and 274.
[293] Ukraine's first written submission, paras. 264 and 305.
[294] See, e.g. Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.
[295] Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.367 and 7.375. This panel took a similar view with respect to the obligations under Article 11.2 of the Anti-Dumping Agreement.

has noted that Article 3 is titled "[d]etermination of injury" and lays down the steps involved and the evidence to be examined in order to make an injury determination.[296] This determination is mandatory in the context of an original investigation where investigating authorities must demonstrate, pursuant to such a determination, that the domestic industry is facing injury or a threat thereof at the time of this investigation.[297] However, the Appellate Body has clarified that such an injury determination under Article 3 is not required in an expiry review, which requires a likelihood-of-injury determination, not an injury determination.[298]

7.167. The Appellate Body's clarification was based on the fact that there are no cross-references to Article 3 in the text of Article 11.3, and Article 3 itself does not indicate that the investigating authorities must make an injury determination in a review.[299] The Appellate Body also explained that the lack of a textual basis to apply Article 3 in likelihood-of-injury determinations makes sense in light of the different nature and purpose of original investigations on one hand, and reviews on the other. In particular, unlike in the case of an original investigation, investigating authorities are not required to demonstrate in an interim or expiry review that the domestic industry is suffering material injury at the time of the review. Instead, to allow authorities to maintain an existing anti-dumping duty, Article 11.3 requires them to review an anti-dumping duty order that has already been established − following the prerequisite determinations of dumping and injury − so as to determine whether that order should be continued or revoked.[300] Similarly, Article 11.2 gives interested parties the right to request investigating authorities to, *inter alia*, examine whether the injury would be likely to continue or recur if the anti-dumping duty were removed, or varied, or both.

7.168. While injury determinations are not required in the context of reviews, certain of the analyses mandated by Article 3 may prove to be probative, or possibly even required, in order for investigating authorities to arrive at a "reasoned conclusion".[301] Factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination.[302] The necessity of conducting such an analysis in a given case results from the requirements imposed by Article 11.3 (or Article 11.2) − not Article 3 − that a likelihood-of-injury determination rest on a sufficient factual basis so as to allow the authorities to draw reasoned and adequate conclusions.[303]

7.169. While there is no obligation to make an injury determination under Articles 11.2 and 11.3, past panels have dealt with situations where the investigating authorities were alleged to have made an injury determination under Article 3 in a review. In *EU − Footwear (China)*, there was no dispute between the parties that the investigating authority had made an injury determination, and relied on it in making its likelihood-of-injury determination.[304] The panel stated that if investigating authorities make an injury determination in a review that is inconsistent with Article 3, and rely on that injury determination to make a likelihood-of-injury determination, the inconsistency with Article 3 would taint the likelihood determination.[305] The panel's rationale was that in such a case the likelihood determination would not rest on a sufficient factual basis, and thus not allow the investigating authorities to draw reasoned and adequate conclusions regarding the likelihood of injury.[306] Thus, the likelihood-of-injury determination would be inconsistent with

[296] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 277.
[297] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 279. See, e.g. Article 3.5 of the Anti-Dumping Agreement, which requires investigating authorities to "demonstrate[] that the dumped imports are … causing injury … to the domestic industry".
[298] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 279.
[299] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 278. The Appellate Body's findings were under Article 11.3, not Article 11.2, but considering the similar text and nature of enquiry on injury in both of these provisions, we consider that the Appellate Body's finding is equally relevant to determinations under Article 11.2.
[300] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 279.
[301] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 284.
[302] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 284.
[303] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 284. While the Appellate Body reached its conclusions with respect to Article 11.3, considering the similar text and purpose of Article 11.2 of the Anti-Dumping Agreement, the same standards may be said to apply to likelihood-of-injury determinations in interim reviews as well.
[304] Panel Report, *EU − Footwear (China)*, paras. 7.334 and 7.338.
[305] Panel Report, *EU − Footwear (China)*, para. 7.337.
[306] Panel Report, *EU − Footwear (China)*, para. 7.337.

Article 11.3. On the basis of this understanding, that panel considered whether the investigating authority had failed to act in accordance with Article 3 of the Anti-Dumping Agreement when it made its injury determination in the review.[307] However, it clarified that it would make its findings under Article 11.3, not Article 3 *per se*, as Article 3 is not directly applicable to likelihood-of-injury determinations.[308] In *US – Oil Country Tubular Goods Sunset Reviews*, the panel stated that it would address the complainant's claims under Article 3 only to the extent it found that the investigating authority had made an injury determination, as opposed to a likelihood-of-injury determination in the expiry review.[309] Having concluded that the investigating authority did not make an injury determination, the panel confined its review to claims under Article 11.3, and declined those relating to Article 3.[310]

7.6.2 Evaluation

7.170. We must consider two threshold questions before examining the substantive aspects of Russia's injury-related claims. First, we must decide whether, as a legal matter, we can examine the consistency of injury-related aspects of MEDT of Ukraine's determinations in an interim and expiry review with Article 3 of the Anti-Dumping Agreement. We acknowledge Russia's clarification that it is not making independent claims under Article 3, and thus we are not expected to make independent findings of violations with respect to Article 3 provisions.[311] But, Russia claims that MEDT of Ukraine acted inconsistently with Articles 11.1, 11.2, and 11.3 "because it determined and relied on injury which was not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement".[312] Russia asks us to conclude, as part of its Article 11 claims, that MEDT of Ukraine's determinations did not comply with Articles 3.1 and 3.4 (without making independent findings in this regard).[313] Therefore, we must consider whether MEDT of Ukraine made a determination in the underlying reviews that is governed under Article 3, and specifically Articles 3.1 and 3.4.

7.171. In this regard, Russia acknowledges the Appellate Body's finding in *US – Oil Country Tubular Goods Sunset Reviews* that Article 3 does not apply to expiry reviews, and does not ask us to deviate from these findings of the Appellate Body.[314] However, it asserts that if investigating authorities make a determination of injury under Article 3, they must ensure that this injury determination complies with the relevant provisions of Article 3.[315] Russia contends that MEDT of Ukraine made such an injury determination in the underlying reviews.[316] In our view, the issue that we have to resolve is a factual one: Did MEDT of Ukraine make an injury determination under Article 3 of the Anti-Dumping Agreement?

7.172. If we find that MEDT of Ukraine did not make such an injury determination, then the second question that we must address is whether we can, consistent with our terms of reference, examine Russia's injury-related claims under Articles 11.1, 11.2, and 11.3. In particular,

[307] Panel Report, *EU – Footwear (China)*, para. 7.340.
[308] Panel Report, *EU – Footwear (China)*, para. 7.157.
[309] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.276.
[310] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.279.
[311] Russia's response to Panel question No. 51(a), para. 35.
[312] Russia's first written submission, para. 347(8), opening statement at first meeting of the Panel, para. 125; and second written submission, para. 551.
[313] See, e.g. Russia's first written submission, para. 347(8); second written submission, paras. 551 and 553; and opening statement at the second meeting of the Panel, para. 200.
[314] Russia's second written submission, para. 569. Russia appears to distinguish the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews* by arguing that provisions other than Articles 3.7 and 3.8 were not subject to detailed analysis in this case. (Russia's second written submission, paras. 563-565). But it ultimately concludes, based on its understanding of the panel's and the Appellate Body's finding in this case, that Article 3 generally does not apply to expiry reviews, but if investigating authorities make an examination falling within Article 3, then they are bound by Article 3. (Russia's second written submission, para. 569). We do not preclude the possibility that investigating authorities may, on their own volition, make an injury determination under Article 3 in the context of a review, in which case they would have to follow the obligations under Article 3. But, contrary to Russia's assertion, the Appellate Body's finding is not limited to Articles 3.7 and 3.8 of the Anti-Dumping Agreement. The Appellate Body specifically upheld the panel's finding that Article 3 does not apply to likelihood-of-injury determinations, and declined to make any findings under Articles 3.1, 3.2, 3.4, and 3.5. (Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 285).
[315] Russia's second written submission, paras. 566 and 569; opening statement at the first meeting of the Panel, paras. 133-134.
[316] Russia's response to Panel question No. 31, para. 91.

considering Russia claimed in the panel request that the Ukrainian authorities acted inconsistently with these Article 11 provisions because they "determined and relied on injury" which was not established in accordance with provisions of Article 3, should Russia's claim fail if we find that MEDT of Ukraine did not make such an injury determination?

7.6.2.1 Whether MEDT of Ukraine made an injury determination under Article 3 in the underlying reviews

7.173. Russia bears the burden of establishing that MEDT of Ukraine made an injury determination under Article 3 in the underlying reviews.[317] Ukraine denies that MEDT of Ukraine made such an injury determination, and submits instead that MEDT of Ukraine only examined, as part of its likelihood-of-injury determination, whether the domestic industry had completely recovered from the material injury it was found to suffer in the original investigation.[318] Russia contends, however, that MEDT of Ukraine made such an injury determination because it assessed the *current* state of the domestic industry in the underlying reviews, and did not make a purely prospective analysis.[319] Russia makes two main arguments in support of its view.

7.174. First, noting that Articles 11.2 and 11.3 refer to the likelihood of *continuation* or *recurrence* of injury to the domestic industry, Russia states that MEDT of Ukraine made a likelihood-of-*continuation*-of-injury determination in the underlying reviews, and not a likelihood-of-*recurrence*-of-injury determination, though Ukraine disputes this statement.[320] Russia asserts that considering only existing injury can continue, investigating authorities can make a positive determination of likelihood of *continuation* of injury only when they find that the domestic industry is suffering material injury during the period of review, or currently suffering injury.[321] Therefore, in Russia's view, MEDT of Ukraine must have examined the existing or current state of the domestic industry, and thus made an injury determination under Article 3. Second, Russia points to MEDT of Ukraine's statements in several parts of the Investigation Report that allegedly show that it made such an injury determination.[322]

7.175. Regarding Russia's first argument, as we stated above, whether or not MEDT of Ukraine made an injury determination is a factual issue that has to be resolved based on an examination of its Investigation Report. Thus, we cannot assume that MEDT of Ukraine made an injury determination, even assuming that MEDT of Ukraine made a determination regarding the likelihood of continuation, not recurrence of injury, to the domestic industry.[323] We thus turn to Russia's second argument, i.e. the Investigation Report shows that MEDT of Ukraine made an injury determination under Article 3.

7.176. Russia quotes from parts of the Investigation Report that allegedly show that MEDT of Ukraine made an injury determination. Russia notes in this regard that:

a. MEDT of Ukraine examined and evaluated such factors qualifying the state of the domestic industry as the volume of dumped imports, production and sales of ammonium nitrate by domestic producers, capacity utilization and stock reserves, productivity of

[317] Russia as the complainant has the burden of making a *prima facie* case with respect to its claims. Moreover, as the party asserting that MEDT of Ukraine made an injury determination, it has the burden to prove it.

[318] Ukraine's first written submission, para. 270.

[319] See, e.g. Russia's response to Panel question No. 32(a), para. 92.

[320] Russia's response to Panel question No. 35(b), para. 104; Ukraine's second written submission, para, 137. Ukraine states that MEDT of Ukraine made a determination regarding the *recurrence*, not *continuation*, of injury to the domestic industry.

[321] Russia's response to Panel question No. 35(b), para. 105.

[322] Russia's response to Panel question No. 31, paras. 88-91.

[323] Russia does not argue that MEDT of Ukraine was *required* to make an injury determination because it made a likelihood-of-continuation-of-injury determination. (Russia's response to Panel question No. 55, para. 49). Instead, Russia's argues that MEDT of Ukraine made a likelihood-of-continuation-of-injury determination in support of its factual assertion that MEDT of Ukraine made an injury determination. Considering, as stated above, we have to examine, as a factual matter, whether MEDT of Ukraine made an injury determination, we do not find it necessary to resolve the disagreement between the parties as to whether MEDT of Ukraine made a determination regarding the *continuation*, or *recurrence*, of injury to the domestic industry.

labour, investments, the financial performance of the domestic producers, and the liquidity of assets.[324]

b. It assessed through such an examination whether the conditions of the domestic industry had deteriorated due to dumped imports.[325]

c. Based on this analysis of the current state of the domestic industry, MEDT of Ukraine concluded that injury to the domestic industry was not completely eliminated, and further when making its recommendations stated that the level of anti-dumping measures "was not sufficient to eliminate injury to the [domestic industry]".[326]

7.177. Russia takes the view that MEDT of Ukraine could only have reached a conclusion that injury to the domestic industry was not completely eliminated by examining the current state of the domestic industry, and this examination was not conducted in accordance with Article 3 of the Anti-Dumping Agreement.[327] In addition, Russia submits that the following references in the Investigation Report show that MEDT of Ukraine made an injury determination:

a. MEDT of Ukraine stated in section 11.3 of the Investigation Report that it would conduct an "analysis of the state of the Ukrainian [domestic] industry"[328];

b. considered "the changes in the situation of the Ukrainian domestic industry since the imposition of the anti-dumping measures"[329]; and

c. concluded that "the Ukrainian industry had not completely recovered from the injury".[330]

7.178. Russia states that there is no difference between a finding that the domestic industry did not completely recover from injury, and a finding that the domestic industry was suffering material injury caused by dumped imports.[331]

7.179. To ascertain whether MEDT of Ukraine made an injury determination, we must holistically review its injury analysis, and consider the references relied upon by Russia in their proper context. We note that MEDT of Ukraine's analysis on injury-related issues is contained in section 11 of the Investigation Report, specifically sub-sections 11.1, 11.2, 11.3, and 11.4. Russia quotes mainly from section 11.3 in support of its view that MEDT of Ukraine made an injury determination.

7.180. Section 11.3 is titled "[e]xamination of the effect the dumping import had on the Claimant [i.e. the domestic industry]".[332] MEDT of Ukraine stated here that "[b]ased on information obtained during the [period of] [r]eview", it "determined whether the [domestic industry's] conditions [had] deteriorated due to the dumped imports". Based on its consideration of the performance of the domestic industry across various economic factors and indices having a bearing on the state of the domestic industry, it concluded:

> The analysis of the information provided demonstrated that the *consequence of the anti-dumping measures* in respect of the import into Ukraine of Product originating from the Russian Federation was the opportunity of the national producers to increase the production volumes, the percentage of the used production capacity, the growth of sales of the Products and the share in the domestic market of Ukraine, and retain the number of employees on the Claimant's payroll.

[324] Russia's response to Panel question No. 31, para. 88.
[325] Russia's second written submission, para. 590.
[326] Russia's response to Panel question No. 31, paras. 89-90. See also opening statement at the second meeting of the Panel, paras. 215-216.
[327] Russia's second written submission, para. 593.
[328] Russia's response to Panel question No. 31, para. 91; second written submission, para. 598.
[329] Russia's response to Panel question No. 31, para. 91; second written submission, para. 598.
[330] Russia's response to Panel question No. 31, para. 91; second written submission, para. 598.
[331] Russia's second written submission, para. 588.
[332] Investigation Report, (Exhibit RUS-10b), p. 34.

> However, *the financial performance of the Claimant and the ratio of coverage of the current liabilities precludes the Ministry from concluding that the injury is completely eliminated* that was caused to the national producer due to the definitive anti-dumping measures in respect of the import into Ukraine of the Product originating from the Russian Federation.[333]

7.181. Having reviewed section 11.3 of the Investigation Report as a whole, it appears to us that MEDT of Ukraine was assessing in this section the effectiveness of the anti-dumping measures already in place, rather than establishing that the domestic industry was suffering material injury during the period of review. For instance, in setting out its conclusions in section 11.3, quoted above, MEDT of Ukraine considered "the consequence of the anti-dumping measures", which were put in place following the dumping and injury determinations in the original investigations, on the performance of the domestic industry. It acknowledged the improvement in performance in light of the existence of such measures, while also noting the negative performance in profitability. Similarly, in concluding that "the injury [was] [not] completely eliminated" "due to the definitive anti-dumping measures", MEDT of Ukraine was reviewing the effectiveness of the original anti-dumping measures in eliminating the injury established in the original investigation. These are precisely the sort of analyses that investigating authorities could be expected to make to determine whether the expiry of the anti-dumping duty, or change in its rate thereof, would lead to the continuation or recurrence of injury to the domestic industry. We do not see why such an analysis should be understood to be an injury determination, as opposed to an analysis of the possible impact on the domestic industry if the anti-dumping duties originally imposed were to expire, or be varied.[334]

7.182. Further, we find it conceivable that in assessing the effectiveness of the anti-dumping measures already in force, and considering whether the existing anti-dumping duty had the desired effect of mitigating the material injury that the domestic industry was found to suffer in the original investigation, investigating authorities would consider the current state of the domestic industry. It is also conceivable that as a result of the anti-dumping measure already in force, the situation of that domestic industry may have improved relative to the original period of investigation, but the likelihood of continuation or recurrence of injury to the domestic industry persists. Thus, some of the analyses that would be relevant in an injury determination, such as the effect of subject imports on prices, or the impact of those imports on the domestic industry, may also be relevant in a likelihood-of-injury determination. Indeed, it may be difficult to make an objective and unbiased examination of the likelihood of injury without considering to some extent the effect of imports from the subject countries on the current state of the domestic industry. However, such a consideration does not show that the investigating authorities were making an injury determination, as opposed to a likelihood-of-injury determination. We consider our views to be consistent with that taken by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, where it stated:

> [W]e are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on "positive evidence" and an "objective examination" would be equally relevant to likelihood determinations under Article 11.3. It seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination. But the necessity of conducting such an analysis in a given case results from the requirement imposed by *Article 11.3*

[333] Investigation Report, (Exhibit RUS-10b), p. 35. (emphasis added)

[334] We note that, at first glance, and when read in isolation, certain statements in the Investigation Report may suggest that MEDT of Ukraine was making an injury determination. For instance, the above-quoted title of section 11.3 reads" [e]xamination of the effect the dumping import had on the Claimant". However, when read in proper context, it is clear that MEDT of Ukraine was not making such an injury determination, i.e. a determination that dumped imports caused material injury to the domestic industry during the period of review. For example, as is clear from the conclusion of section 11.3, MEDT of Ukraine was focused on the impact of the original anti-dumping measures on the economic state of the domestic industry.

> − not Article 3 − that a likelihood-of-injury determination rest on a "sufficient factual basis" that allows the agency to draw "reasoned and adequate conclusions".[335]

7.183. The Appellate Body's statement recognizes that factors such as the impact of dumped imports on the domestic industry, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination.[336] However, the necessity of conducting such an analysis arises from Article 11.3 of the Anti-Dumping Agreement, which governs likelihood-of-injury determinations, and not Article 3, which governs injury determinations. Hence, just because an investigating authority considers the existing state of the domestic industry, based, *inter alia*, on various factors and indices showing the performance of that industry, does not mean that it was seeking to establish that the domestic industry was suffering material injury during the period of review.

7.184. Moreover, in assessing whether MEDT of Ukraine made an injury determination, we must consider the totality of its injury-related analysis in the underlying reviews, including that contained in sections 11.1, 11.2, and 11.4 of the Investigation Report. In section 11.1, MEDT of Ukraine considered the impact of the definitive anti-dumping measures already in force, and noted that these measures had the "expected result" considering the changes in the volume and price of dumped imports during the examined period.[337] It considered that in case of termination of the existing anti-dumping measures, the volume of the imports from Russia could increase.[338] In section 11.2, in considering the price effects of subject imports on the domestic industry, MEDT of Ukraine evaluated the effect of subject imports on domestic industry prices during the time the anti-dumping measures were applied.[339] In section 11.4, MEDT of Ukraine focused on whether imports from Russia could increase if the existing anti-dumping duties were suspended or reduced, by considering facts such as the production capacity and export orientation of Russian producers of ammonium nitrate.[340] These references show that MEDT of Ukraine's analysis was focused on the impact of the anti-dumping measures already in force, and the likelihood of injury to the domestic industry continuing or recurring if such measures were terminated. This further confirms our view that MEDT of Ukraine was making a likelihood-of-injury determination in the underlying reviews.

7.185. Based on the foregoing, we find that Russia has not established that MEDT of Ukraine made an injury determination under Article 3 of the Anti-Dumping Agreement in the underlying reviews. Considering Article 3 governs injury determinations, and not likelihood-of-injury determinations, we cannot examine whether MEDT of Ukraine's determinations in the underlying reviews were consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.6.2.2 Whether Russia can claim violations under Articles 11.1, 11.2, and 11.3 even if MEDT of Ukraine did not determine injury under Articles 3.1 and 3.4

7.186. We set out in paragraph 7.161 above the two claims that Russia makes with respect to MEDT of Ukraine's injury analysis in the underlying reviews. These claims are derived from item number 17 of the panel request. We stated in paragraph 7.44 above that item number 17 of the panel request needs to be read in conjunction with item numbers 14-16 of that request. In item numbers 14-16, Russia stated how different aspects of the Ukrainian authorities' "determination" and "findings" on injury were inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement. In item number 17, Russia cross-referred to the Article 3 violations alleged in item numbers 14-16, and stated that Ukrainian authorities acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because they "*determined and relied on injury* which

[335] Appellate Body Report, *US − Oil Country Tubular Goods Sunset Reviews*, para. 284. (emphasis original)

[336] We understand the Appellate Body's statement in *US − Oil Country Tubular Goods Sunset Reviews* that the fundamental requirement of Article 3.1 that an injury determination be based on "positive evidence" and an "objective examination" would be equally relevant to likelihood determinations under Article 11.3 to mean that likelihood determinations should rest on a sufficient factual basis so as to allow the investigating authorities to draw reasoned and adequate conclusions. This does not mean that a likelihood-of-injury determination can be found to be inconsistent with Article 3.1 of the Anti-Dumping Agreement. We recall, as set out in footnote 314 above, the Appellate Body itself decided not to make a finding under, *inter alia*, Article 3.1 of the Anti-Dumping Agreement.

[337] Investigation Report, (Exhibit RUS-10b), p. 32.

[338] Investigation Report, (Exhibit RUS-10b), pp. 32-33.

[339] Investigation Report, (Exhibit RUS-10b), pp. 33-34.

[340] Investigation Report, (Exhibit RUS-10b), pp. 38-39.

was not established in accordance with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement".[341] Russia did not invoke Articles 3.2 and 3.5 in its first written submission, but, closely reflecting its panel request, asked us to find that:

> Ukraine acted inconsistently with Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement because it *determined and relied on injury* which was not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In particular, Ukraine failed to properly establish facts and to conduct an unbiased and objective examination of these facts in its likelihood of injury determination[.][342]

7.187. In our view, Russia's claims, as presented in its panel request, clearly showed that its claims under Articles 11.1, 11.2, and 11.3 were dependent on the premise that MEDT of Ukraine determined, and then relied on, injury not established in accordance with Articles 3.1 and 3.4. However, in response to our questions at the second substantive meeting, Russia argued that its two claims did not depend, or did not entirely depend, on a conclusion that MEDT of Ukraine failed to act in compliance with Articles 3.1 and 3.4.[343]

7.188. Russia's first claim, as set out in paragraph 7.161 above, is that MEDT of Ukraine violated Articles 11.2, 11.3, and 3.1 of the Anti-Dumping Agreement because it failed to exclude imports of the Russian producer EuroChem, which had a negative dumping margin in the original investigation phase, from the volume of dumped imports. Russia explains that Article 11.3 itself obligates investigating authorities to make an objective examination of positive evidence, and thus we need not examine this aspect of the measure under Article 3.1 as well.[344] Therefore, Russia contends that we may examine pursuant to Article 11.3 whether MEDT of Ukraine's action to include imports from EuroChem in the volume of subject imports was objective and unbiased, even if we do not examine whether MEDT of Ukraine acted in accordance with Article 3.1 in this regard.[345]

7.189. Russia's second claim, as also set out in paragraph 7.161 above, is that MEDT of Ukraine violated Articles 11.2, 11.3, and 3.4 of the Anti-Dumping Agreement because its evaluation of the economic factors and indices having a bearing on the state of the Ukrainian domestic industry was not based on an objective examination of positive evidence. Russia states that this second claim is premised on Russia's view that MEDT of Ukraine acted inconsistently with Article 3.4 of the Anti-Dumping Agreement.[346] However, it qualifies this acknowledgment by stating that its claims of violations under Articles 11.2 and 11.3 do not "entirely depend[]" on violation of Article 3.4, as the obligation under Article 11.3 to make an objective examination based on positive evidence applies to expiry reviews even if the panel cannot find any inconsistency under Article 3.4.[347] Therefore, Russia appears to argue that because the objectivity standard under Article 11.3 applies, even if we do not examine whether MEDT of Ukraine acted in accordance with Article 3.4 in this regard, its claim under Article 11.3 should succeed.

7.190. While we find Russia's responses somewhat confusing in certain respects[348], the main point that it makes is that a WTO panel *can* review the objectivity of an investigating authority's likelihood-of-injury analysis under Article 11.3 (and Article 11.2), even if it did not make an injury determination under Article 3. We, of course, agree. Articles 11.2 and 11.3 are precisely the provisions setting out the rules applicable to a likelihood-of-injury determination.

[341] Emphasis added.

[342] Russia's first written submission, para. 347(8) (emphasis added). Russia reiterated in its opening statement at the first substantive meeting, as well as its second written submission, how MEDT of Ukraine's determination and reliance on injury not established in accordance with Articles 3.1 and 3.4 had led to violations under these Article 11 provisions. (Russia's opening statement at first meeting of the Panel, para. 125; second written submission, para. 551).

[343] Russia's response to Panel question No. 52, paras. 40 and 42.

[344] Russia's response to Panel question No. 52, para. 38.

[345] See, e.g. Russia's response to Panel question No. 52, paras. 38 and 40.

[346] See, e.g. Russia's response to Panel question No. 52, para. 41.

[347] See, e.g. Russia's response to Panel question No. 52, para. 42.

[348] It is not clear to us for example how Russia reconciles its statement that its second claim is premised on its view that MEDT of Ukraine acted inconsistently with Article 3.4, with its statement that this claim does not "entirely depend[]" on our conclusion regarding any violation under Article 3.4. (Russia's response to Panel question No. 52, paras. 41-42). Moreover, while Russia invokes the standard of objectivity under Article 11.3, it does not specifically invoke Article 11.1 or Article 11.2 in its responses, though it makes claims under these provisions as well. (See, e.g. Russia's response to Panel question No. 52, paras. 38-39 and 42).

However, the question before us is not whether a panel *can* review a likelihood-of-injury determination under Articles 11.2 and 11.3, but whether, having claimed violations under Articles 11.1, 11.2, and 11.3 in its panel request because MEDT of Ukraine determined, and relied on, injury not established in accordance with Articles 3.1 and 3.4, Russia can now claim violations under these Article 11 provisions even if MEDT of Ukraine did not make an injury determination under Article 3.

7.191. It is well established that the panel request delineates the scope of the claims that the complainant may pursue before a panel, and that a panel's terms of reference do not extend to matters that fall outside this scope. Nothing in Russia's panel request suggests that it intended to challenge MEDT of Ukraine's likelihood-of-injury determination on its own terms under Articles 11.1, 11.2, and 11.3. Indeed, the panel request does not even refer to a determination regarding the likelihood of continuation or recurrence of injury to the domestic industry, as is provided for in Articles 11.2 and 11.3. Instead, item number 17 of Russia's panel request clearly states that Russia claims violations under Articles 11.1, 11.2, and 11.3 because MEDT of Ukraine determined and relied on injury not established in accordance with Articles 3.1 and 3.4. Russia's request for findings in paragraph 347(8) of its first written submission further confirms our understanding of the nature of Russia's Article 11 claims in this regard.[349] It follows, that if MEDT of Ukraine did not make an injury determination under Article 3, as we found that it did not, Russia's Article 11 claims must also fail.[350]

7.6.2.3 Conclusion

7.192. Based on the foregoing, we find that Russia has not established that MEDT of Ukraine acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because it determined and relied on injury not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[351]

7.7 Facts available

7.193. Russia challenges under Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement MEDT of Ukraine's rejection of the reported gas cost of the investigated Russian producers, and its use of the surrogate price of gas instead, to calculate the cost of production of these producers.[352] Russia submits that by doing so, MEDT of Ukraine *de facto* resorted to "facts available".[353] Russia asserts that the conditions under Article 6.8 for use of "facts available" were not met in this case, and that MEDT of Ukraine acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in rejecting the costs data of the investigated Russian producers because[354]:

a. First, it resorted to "facts available" though the investigated Russian producers cooperated and provided necessary information within a reasonable period of time.

b. Second, it failed to inform the investigated Russian producers of the reasons for the rejection of submitted evidence and information and also failed to give them an opportunity to provide such explanations within a reasonable period of time.

[349] In any case, defects in a panel request cannot be cured in subsequent submissions made by the parties in panel proceedings. (Appellate Body Report, *US – Carbon Steel*, para. 127).

[350] We also disagree with the distinction that Russia draws between its first and second claims, inasmuch as it states that its first claim does not depend on whether MEDT of Ukraine relied on an injury determination that was not made in accordance with Article 3.1, even if its second claim could be said to be premised on the view that MEDT of Ukraine relied on an injury determination not made in accordance with Article 3.4. Both of these claims are derived from item number 17 of the panel request and paragraph 347(8) of the request for findings section of its first written submission, and Russia did not make the sort of distinction in its panel request or the first written submission that it now seeks to make.

[351] We find our views to be consistent with taken by past panels. (See, e.g. Panel Report, *US – OCTG (Korea)*, paras. 7.320-7.324).

[352] Russia's first written submission, paras. 249 and 275-276.

[353] Russia's opening statement at the second meeting of the Panel, para. 249.

[354] Russia's response to Panel question No. 28, paras. 78-80; first written submission, para. 270.

c. Third, although the investigated Russian producers fully cooperated and submitted verifiable information in a timely fashion so that it could be used in the underlying reviews without undue difficulties, this information was rejected.

7.194. Ukraine submits that MEDT of Ukraine rejected the reported gas cost on substantive grounds, pursuant to the rules set out in Article 2.2.1.1 of the Anti-Dumping Agreement, and did not take a decision to resort to facts available under Article 6.8 to reject this cost.[355] Ukraine contends that considering MEDT of Ukraine did not use facts available under Article 6.8, Russia's claim in this regard is devoid of any factual basis.[356]

7.195. We note that Article 6.8 states that "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of facts available". Article 6.8 further states that the "provisions of Annex II [of the Anti-Dumping Agreement] shall be observed in the application of this paragraph". Article 6.8 identifies the circumstances in which investigating authorities may overcome a lack of information in responses of interested parties, by using "facts" which are otherwise "available" to the investigating authorities.[357] In particular, it permits investigating authorities, under certain circumstances, to fill in the gaps in the information necessary to arrive at conclusions regarding dumping and injury.[358]

7.196. In reviewing the factual basis of Russia's claims, we note that Russia has not alleged the rejection of any information other than the reported gas cost. Thus, the factual basis of Russia's claims in this regard is limited to the rejection of the reported gas cost.[359] With respect to the rejection of this cost, the Investigation Report shows that MEDT of Ukraine rejected the reported gas cost after finding, pursuant to a domestic law provision analogous to the second condition of Article 2.2.1.1, that the records of the investigated Russian producers did not completely reflect the costs associated with the production and sale of ammonium nitrate, insofar as the reported gas cost was concerned.[360] Russia has not pointed to anything in the Investigation Report that suggests that MEDT of Ukraine rejected the reported gas cost pursuant to the criteria set forth in Article 6.8 or Annex II of the Anti-Dumping Agreement. Thus Russia has not shown that MEDT of Ukraine resorted to the facts available mechanism under Article 6.8. In these circumstances, we agree with Ukraine that Russia's claims do not have a proper factual basis, and therefore, must fail.[361]

7.197. In this regard, we note our finding above that MEDT of Ukraine's rejection of the reported gas cost was inconsistent with Article 2.2.1.1 because it did not provide a sufficient basis under the second condition to justify such rejection. However, that finding does not mean that we can also find a violation with respect to a determination (under Article 6.8 or Annex II of the Anti-Dumping Agreement) that was never made by MEDT of Ukraine.[362]

[355] Ukraine's first written submission, para. 311.
[356] Ukraine's first written submission, para. 312.
[357] Appellate Body Report, *US – Hot-Rolled Steel*, para. 77.
[358] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.
[359] See e.g. Russia's responses to Panel question No. 28, paras. 77-80, and No. 29, para. 81.
[360] Investigation Report, (Exhibit RUS-10b), p. 23.
[361] Russia argues that Article 6.8 applies not only when investigating authorities reject information submitted by investigated exporters or producers on evidentiary grounds, but also when such rejection is for substantive reasons. (Russia's opening statement at the second meeting of the Panel, para. 246). In our view, the question of whether an investigating authority acted inconsistently with Article 6.8 of the Anti-Dumping Agreement has to be necessarily assessed on a case-by-case basis considering, *inter alia*, the specific nature and scope of the findings made by these authorities, and the information rejected. However, when, as here, it is clear that the investigating authority did not make a determination based on the criteria set forth in Article 6.8 or Annex II, but rather rejected the reported gas cost based on its view that the records did not meet the analogous domestic law provisions of the second condition of Article 2.2.1.1, we see no factual basis to find a violation under Article 6.8, or paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement. We find support for our view in the panel report in *US – Shrimp II (Viet Nam)*, where, having concluded that the investigating authority did not make a determination based on facts available, the panel rejected the claims under Article 6.8 and Annex II of the Anti-Dumping Agreement. (Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.233).
[362] The Anti-Dumping Agreement recognizes that in certain situations it may not be possible for investigating authorities to use an exporter's or producer's data for substantive reasons. For example, in

7.198. Based on the foregoing, we find that Russia has not established that MEDT of Ukraine acted inconsistently with Article 6.8, and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement.

7.8 Disclosure of essential facts

7.199. In the underlying reviews, the disclosure took place through the issuance of the Investigation Report by MEDT of Ukraine. This report contained MEDT of Ukraine's draft findings and recommendations regarding the continued imposition of anti-dumping duty on imports of ammonium nitrate from Russia, at modified rates. ICIT subsequently issued its notice accepting the findings and recommendations made in this report.

7.200. MEDT of Ukraine prepared a confidential and a non-confidential version of its Investigation Report. It made the non-confidential version of the Investigation Report available to the interested parties. In this section, we refer to this document as the "disclosure". We also refer, where relevant, to the Confidential Version of the Investigation Report. The disclosure was issued on 25 June 2014, and MEDT of Ukraine gave interested parties time until 27 June 2014, i.e. two days, to file their comments on the disclosure.

7.201. Russia claims that this disclosure was inconsistent with Articles 6.9 and 6.2 of the Anti-Dumping Agreement because MEDT of Ukraine failed to set out in this disclosure the essential facts underlying its likelihood-of-injury and dumping determinations (disclosure claims).[363] Russia also claims that MEDT of Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because it failed to give the interested parties "sufficient time" to respond to the disclosure.[364] Ukraine asks us to dismiss all of Russia's claims.

7.8.1 Legal standard

7.202. Article 6.9 of the Anti-Dumping Agreement, which sets out the specific obligations that apply to the disclosure of essential facts, states:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.203. As the first sentence makes clear, Article 6.9 requires the disclosure of *essential* facts, and not *all* the facts that are before an investigating authority.[365] The context provided by the last part of the first sentence of Article 6.9, and its second sentence clarifies that essential facts are those facts that "form the basis for the decision whether to apply definitive measures", and the disclosure of which ensures the ability of the interested parties to defend their interests.[366] These are the facts that are significant in the process of reaching a decision on whether or not to apply definitive measures, and include facts that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome.[367] Thus, essential facts are not only those facts that support the decision ultimately reached by the investigating authorities, but include those facts that are necessary to the process of analysis and decision-making by the investigating authorities.[368] Whether a particular fact is significant in the process of reaching such decisions, and thus essential, would depend on the nature and scope of the substantive obligations that investigating authorities need to meet to apply definitive measures, the content of a particular

addition to Article 2.2.1.1, which permits rejection of costs in an exporter's or producer's records if the conditions set out therein are not met, Articles 2.2.2 (ii) and (iii) of the Anti-Dumping Agreement refer to situations where profit is determined on the basis of the data of "other exporters or producers subject to investigation". If an investigating authority acts inconsistently with the rules set out in these provisions, a panel may find violations under these particular provisions. However, we do not see any textual basis to conclude that findings of violations under these provisions could automatically lead to violations under Article 6.8 or paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement.

[363] Russia's first written submission, para. 347(10); response to Panel question No. 38, para. 111.
[364] Russia's first written submission, para. 347(11).
[365] Appellate Body Report, *China – GOES*, para. 240.
[366] Appellate Body Report, *China – GOES*, para. 240.
[367] Appellate Body Report, *China – GOES*, para. 240.
[368] Panel Report, *EC – Salmon (Norway)*, para. 7.807.

finding needed to satisfy the substantive obligation at issue, and the factual circumstances of each case, including the arguments and evidence submitted by the interested parties.[369]

7.204. In the context of an original investigation, where investigating authorities may take an affirmative decision to apply definitive measures only when dumping, injury, and causal link between dumping and injury exist, the Appellate Body has stated that essential facts would include those facts that form the basis of the authorities' conclusions on dumping, injury, and causal link. Essential facts would also include those facts that would be necessary to understand the factual basis of the intermediate findings that form the basis of the authorities' conclusions on dumping, injury, and causal link.[370] Such facts could include the data forming the basis for these intermediate findings.[371]

7.205. In our view, in the context of a review carried out under Article 11.3 of the Anti-Dumping Agreement, where definitive measures must be terminated unless the investigating authorities find a likelihood of continuation or recurrence of dumping and injury to the domestic industry, the essential facts would include those facts that form the basis for the authorities' likelihood-of-dumping and likelihood-of-injury determinations. They would also include the facts that would be necessary to understand the factual basis of the intermediate findings that form the basis of these determinations.

7.206. Where there is a revision in the dumping margins pursuant to interim reviews under Article 11.2 of the Anti-Dumping Agreement, and subsequent modification in the anti-dumping duty rate, the essential facts would include those facts that are necessary to understand the factual basis of the new dumping determinations. The Appellate Body has clarified in this regard that with respect to dumping determinations, investigating authorities are expected to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, and the calculation methodology that they applied to determine the dumping margin.[372]

7.207. These essential facts must be disclosed in a coherent manner so as to permit an interested party to understand the basis for the decision to apply definitive measures.[373] This means that the interested party must be able to clearly understand what data was used by the investigating authorities in their determinations, and how, so that it can defend its interests.[374] It also means that the disclosure should allow the interested parties to comment on the completeness and correctness of the conclusions reached by the investigating authorities from the facts being considered, to provide additional information or correct perceived errors, and to comment on or make arguments as to the proper interpretation of those facts.[375]

7.208. When the essential facts are confidential, investigating authorities may meet their disclosure obligations through the disclosure of non-confidential summaries of those facts.[376] The Appellate Body has clarified in this regard, however, that even if a WTO panel finds that essential facts redacted from a disclosure on grounds of confidentiality were not properly treated as confidential under Article 6.5 of the Anti-Dumping Agreement the panel cannot presume that such inconsistencies with Article 6.5 will also lead to inconsistencies with Article 6.9.[377] Instead, the panel must examine whether *any* disclosure made, including that made through non-confidential summaries, meet the legal standard under Article 6.9.[378] All disclosures should take place in sufficient time for the parties to defend their interests.

7.209. The question whether the failure to disclose essential facts leads to a violation under Article 6.9 as well as Article 6.2 has been discussed in past cases. The panels in *EC – Salmon*

[369] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.
[370] See, e.g. Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.
[371] See, e.g. Appellate Body Report, *China – GOES*, para. 248; and Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.241.
[372] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.
[373] Appellate Body Reports, *China – GOES*, para. 240; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.
[374] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.131 and 5.133.
[375] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131; *China – GOES*, fn 390; and Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[376] Appellate Body Reports, *China – GOES*, para. 247; *Russia – Commercial Vehicles*, para. 5.183.
[377] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.183.
[378] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.183 and 5.189.

(Norway) and *Guatemala – Cement II*, for instance, examined the claims regarding failure to disclose essential facts under Article 6.9. Based on their conclusions under Article 6.9, they exercised judicial economy on the Article 6.2 claims, or rejected them.[379]

7.8.2 Evaluation

7.210. We will first consider Russia's claims under Articles 6.2 and 6.9 of the Anti-Dumping Agreement concerning MEDT of Ukraine's alleged failure to disclose the essential facts under consideration, specifically those concerning its likelihood-of-injury and dumping determinations. Then, we will consider Russia's claim under Article 6.9 concerning MEDT of Ukraine's alleged failure to give the interested parties "sufficient time" to comment on the disclosure.

7.8.2.1 Disclosure claims

7.211. Russia contends that MEDT of Ukraine's failure to provide the investigated Russian producers with the essential facts deprived them of an "opportunity to defend their interests".[380] Thus, in the view of Russia, MEDT of Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement.[381] While Russia makes claims under Article 6.2 and Article 6.9, it does not raise any factual issues with respect to its Article 6.2 claims that are additional to, or distinct from, those it presents with respect to its Article 6.9 claims. Instead, it confirms that the factual basis of its claims under Articles 6.2 and 6.9 with respect to the disclosure of essential facts is the same.[382] Nonetheless, Russia submits that its claims under Article 6.2 are independent of, and not consequential to, its claims under Article 6.9.[383]

7.212. Considering the factual basis of Russia's claims concerns the disclosure of essential facts, which is an issue specifically addressed under Article 6.9, and it does not provide any separate basis for us to make independent findings under Article 6.2, we will not make any findings under Article 6.2.[384] To the extent we find a violation under Article 6.9 of the Anti-Dumping Agreement, we will exercise judicial economy with respect to Russia's corresponding claim under Article 6.2 of the Anti-Dumping Agreement. If we find no violation under Article 6.9, we will reject Russia's corresponding claim under Article 6.2 as well. Our approach is consistent with that taken by past panels.[385]

7.8.2.1.1 Disclosure of essential facts forming the basis of the likelihood-of-injury determination

7.213. Russia claims that MEDT of Ukraine failed to disclose the essential facts underlying its likelihood-of-injury determination[386], specifically the facts underlying its conclusions regarding:

a. the negative impact of dumped imports on domestic industry prices, or price effects[387]; and

b. the economic state of the domestic industry.[388]

[379] Panel Reports, *EC – Salmon (Norway)*, para. 7.809; *Guatemala – Cement II*, para. 8.232.
[380] Russia's second written submission, para. 668; opening statement at the first meeting of the Panel, para. 148.
[381] Russia's second written submission, para. 667. See also first written submission, para. 313.
[382] Russia's response to Panel question No. 38, para. 111.
[383] Russia's second written submission, para. 666; opening statement at the first meeting of the Panel, paras. 146-147.
[384] Russia explains that "[e]ven if certain information [were] not considered as essential facts" there would "still [be] a broader obligation under Article 6.2 to provide interested parties with a full opportunity to defend their interests". Thus, in the view of Russia, investigating authorities "may" violate this obligation under Article 6.2 if they fail to disclose information that does not qualify as essential facts but nevertheless, enables interested parties to defend their interests. (Russia's second written submission, para. 667). However, Russia does not show why the situation it hypothesizes is relevant to the facts of this case.
[385] Panel Reports, *EC – Salmon (Norway)*, para. 7.809; *Guatemala – Cement II*, para. 8.232.
[386] Russia's first written submission, para. 298.
[387] Russia's first written submission, para. 300.
[388] Russia's first written submission, para. 301.

7.214. In its second written submission, Russia also contended that MEDT of Ukraine's failure to disclose the export price of the domestic industry in the disclosure resulted in a violation of Article 6.9.[389] Russia asserts that this particular information formed part of the essential facts that MEDT of Ukraine was required to disclose, but makes no argument showing why this information was relevant to the conclusions set out in the paragraph above, or why it constituted an essential fact. In the absence of any arguments from Russia in this regard, we decline to address this issue in our analysis below.

7.8.2.1.1.1 Disclosure on price effects

7.215. Russia contends that the disclosure does not contain any figures or analysis on price effects, or any substantial facts supporting the conclusion that the alleged dumped imports had a negative impact on domestic industry prices.[390] In particular, Russia asserts that the level of price-undercutting, price-suppression, or price-depression (if any) is unclear from the disclosure.[391] Ukraine argues that Russia has not made a *prima facie* case that these facts were "essential".[392] In Ukraine's view, investigating authorities are not obligated to make a price effects analysis as part of their likelihood-of-injury determinations, and thus the analysis on price effects or the facts underlying them is not "essential".[393] The issue before us is whether the analysis and figures on price effects were "essential", and if so, whether MEDT of Ukraine disclosed them consistently with Article 6.9 of the Anti-Dumping Agreement.

7.216. To the extent Russia's reference to the "analysis" on price effects refers to the reasoning based on which MEDT of Ukraine reached its conclusions, we agree with Ukraine that investigating authorities are not required to disclose them. Investigating authorities need to disclose the essential facts under Article 6.9, not their reasoning.[394]

7.217. However, as stated in paragraph 7.205 above, investigating authorities are required to disclose the essential facts underlying their likelihood-of-injury determination, including the facts necessary to understand the basis of intermediate findings or analysis on which this determination is based. MEDT of Ukraine's price effects analysis, in section 11.2 of the disclosure, formed one of the bases for its overall likelihood-of-injury determination in section 11 of the disclosure. Thus, as part of its disclosure of the essential facts underlying its likelihood-of-injury determination, MEDT of Ukraine would have been required to disclose the facts necessary to understand the factual basis of its price effects analysis, irrespective of whether it was required under the Anti-Dumping Agreement to conduct such an analysis in the first place.[395]

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[389] Russia's second written submission, para. 688.
[390] Russia's first written submission, para. 300.
[391] Russia's first written submission, para. 300.
[392] Ukraine's first written submission, para. 325.
[393] Ukraine's first written submission, paras. 326-327.
[394] See, e.g. Panel Reports, *China – GOES*, para. 7.407; *Argentina – Poultry Anti-Dumping Duties*, paras. 7.227-7.228; and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.148.
[395] The panel and the Appellate Body report in *China – GOES* support this view. In *China – GOES*, the issue was the disclosure of essential facts underlying a price effects analysis made under Article 3.2 of the Anti-Dumping Agreement. Article 3.2 states that "[w]ith regard to the effect of the dumped imports on prices" the investigating authority shall consider whether there has been a significant price undercutting by dumped imports, or whether the effect of such imports is to depress or suppress domestic prices. The panel in this dispute agreed with China that its authorities had not made any specific finding that the subject imports were significantly undercutting the prices of domestically produced like products. (Panel Report, *China – GOES*, para. 7.553). But it found that in reaching an affirmative conclusion on the existence of price suppression and price depression, the investigating authority had relied on its finding of low prices of subject imports relative to domestic like product prices. For this reason, the panel considered that the investigating authority was required to disclose information on the price comparisons underlying the finding regarding the low prices of subject imports, or price undercutting. (Panel Report, *China – GOES*, paras. 7.568-7.569). This finding of the panel was upheld by the Appellate Body. (Appellate Body Report, *China – GOES*, paras. 250-251). Thus, the panel and the Appellate Body found that to the extent the investigating authority made its price depression and suppression analysis by relying on its findings of price undercutting by subject imports, it would have to disclose the factual basis of this finding, irrespective of whether it was required to make a price undercutting analysis under Article 3.2 in the first place. This finding confirms our view that the relevant issue is not whether MEDT of Ukraine was required to make a price effects analysis in a review. Instead, even assuming there was no such requirement, to the extent MEDT of Ukraine made such an analysis, and it formed the basis of its likelihood-of-injury determination, the facts underlying that analysis would be essential.

7.218. In the underlying reviews MEDT of Ukraine conducted its price effects analysis by comparing the export price of the investigated Russian producers (subject import prices) with the domestic selling prices and cost of production of the domestic industry.[396] This analysis is set out in section 11.2 of the disclosure.

7.219. Table 11.2.1 in this section sets out the subject import prices, domestic industry prices and domestic industry costs, in 2010, 2011, 2012, and the period of review. The actual figures on domestic industry prices and costs were set out in the Confidential Version of the Investigation Report, but redacted from the disclosure. Instead, growth/drop percentage rates were provided as follows:

Table 1: Table 11.2.1

	2010	2011	2012	RIP
Average price of Product originating in the Russian Federation	**186.2**	**265.1**	**260**	**274.8**
Growth/drop rate, %	-	42.37	39.63	47.58
Average price of ammonium nitrate of the national producers	[ ]	[ ]	[ ]	[ ]
Growth/drop rate, %	-	42.12	46.47	45.39
Cost of sales of the domestic producers, USD/t	[ ]	[ ]	[ ]	[ ]
Growth/drop rate, %	-	29.33	61.19	58.76

Source: Investigation Report, (Exhibit RUS-10b), p. 33; Ukraine's translation of Table 11.2.1 (Exhibit UKR-17).

7.220. In the accompanying text in section 11.2, MEDT of Ukraine stated that:

> During the examination period, *the prices of import of the Product to Ukraine were lower than the sales price* and *the production cost of like products sold by the Claimant* in the domestic market of Ukraine.
>
> ...
>
> These conditions of the import into Ukraine of the Product under the Review negatively influenced the construction of sale prices for like products of the national manufacturers in the domestic market of Ukraine and deprived them of the opportunities to sell their own Products at the prices proportionate to the increased production cost, which led to losses by the national producer in 2012 and the [review investigation period] from the sales of the Product in the domestic market of Ukraine.[397]

7.221. The italicized part in the first paragraph of the quoted excerpt shows that MEDT of Ukraine found that:

a. subject import prices were *lower* than the prices at which the domestic industry sold the like product in the Ukrainian market; and

b. subject import prices were *lower* than the cost of production of the domestic industry.

7.222. The second paragraph of the quoted excerpt shows that MEDT of Ukraine relied, *inter alia*, on this finding of lower-priced subject imports to conclude that these conditions negatively affected the domestic producers' sales prices for the like products, and deprived them of the opportunity to sell their products at prices proportionate to the increased production cost, which in turn led to losses.[398] MEDT of Ukraine went on to conclude based on this analysis that imports

[396] Ukraine's response to Panel question No. 42, para. 106.
[397] Investigation Report, (Exhibit RUS-10b), p. 33. (emphasis added)
[398] Investigation Report, (Exhibit RUS-10b), p. 33.

from Russia, during the time-frame the original anti-dumping measures were applied, adversely affected the sales price of the domestic industry, leading to losses in their sales in the domestic Ukrainian market.[399] This shows that the existence of lower-priced subject imports formed the basis of MEDT of Ukraine's price effects analysis. Therefore, interested parties would have required access to information regarding the price comparison between subject import prices, domestic industry prices, and domestic industry costs to understand the factual basis of its price effects analysis. If this information was confidential, an adequate non-confidential summary would be required.

7.223. However, as Russia argues, the disclosure does not contain any information regarding the level of price-undercutting or price-suppression, or any price comparisons.[400] Specifically, Table 11.2.1 does not disclose this information. While it does disclose the year-on-year growth/drop percentage rates, such rates do not provide any indication of the prices of subject imports relative to domestic industry prices and costs.[401] Specifically, they do not indicate whether subject imports were higher or lower than domestic industry prices or costs during the examined period.[402] Thus, such rates were not sufficient to understand the factual basis of MEDT of Ukraine's conclusion that subject imports were priced lower than domestic industry prices and costs.

7.224. Ukraine additionally argues that MEDT of Ukraine disclosed the factual basis of its conclusions regarding the differences between subject import prices and domestic industry costs through the disclosure of injury margins. MEDT of Ukraine determined these injury margins pursuant to domestic law requirements, to calculate the amount of anti-dumping duty rate sufficient to avoid injury to the domestic industry.[403]

7.225. There are important differences in the comparison figures on domestic industry costs and subject imports discussed in Table 11.2.1 of the disclosure, and relied upon by MEDT of Ukraine to make its price effects analysis, and the injury margins. First, unlike Table 11.2.1, these margins were calculated only for the period of review, and not 2010-2012. Second, MEDT of Ukraine calculated, for the period of review, exporter-specific injury margin of 20.51% for one producer, and 36.03% for the other. It also calculated an injury margin of 36.03% at a country-wide level. Third, while Table 11.2.1 represented the differences between subject imports and domestic industry costs, Ukraine does not appear to argue that the injury margins disclosed these differences as such. Instead, the injury margins represented the differences between subject import prices and a target price, which, in turn was based on the domestic industry costs.[404] To calculate the target price, MEDT of Ukraine added a 10% profit margin to the cost of production.[405]

7.226. Ukraine takes the view that the knowledge of injury margins would have allowed interested parties to understand the differences between subject import prices and domestic industry costs during the period of review.[406] In particular, Ukraine asserts that the disclosure of injury margins for the period of review would have allowed the investigated Russian producers to know that their prices were lower than the cost of production of the domestic industry by 10-20%,

[399] Investigation Report, (Exhibit RUS-10b), pp. 33-34.
[400] Russia's first written submission, paras. 300 and 347(10).
[401] See, e.g. Appellate Body Report, *China – GOES*; paras. 246-247; and Panel Reports, *China – X-Ray Equipment*, para. 7.409; and *China – GOES*, para. 7.572. In *China – GOES*, for example, China argued that its investigating authority disclosed the essential facts regarding its price depression and suppression analysis, which was found to be based on the low-price of subject imports relative to domestic industry prices, by disclosing percentage changes in average domestic prices as well as costs over a given period. The panel as well as the Appellate Body found that the disclosure of such trends was not sufficient to meet the authorities' obligation to disclose the essential facts regarding its price depression analysis.
[402] For example, assume in a hypothetical situation, the domestic industry prices and cost increased or decreased in the period of review relative to what they were in the year before, but remained higher than the subject import prices. In such a situation, the growth/drop percentage rates showing changes in domestic industry prices and costs would not provide any indication on whether the subject import prices were lower or higher than those prices and costs.
[403] Investigation Report, (Exhibit RUS-10b), p. 29. MEDT of Ukraine explained in the disclosure that pursuant to Ukrainian domestic law, the amount of final anti-dumping duty rate may not exceed the amount of dumping margin, and may be lower than this margin, if such a lower rate was sufficient to avoid the injury suffered by the domestic industry. (Investigation Report, (Exhibit RUS-10b), p. 30).
[404] Ukraine's response to Panel question No. 56(a)(i), para. 29.
[405] Ukraine's response to Panel question No. 56(a)(i), para. 29.
[406] Ukraine's response to Panel question No. 56(a)(i), para. 29.

though it does not show how.[407] Further, in Ukraine's view, once the Russian producers had knowledge of the injury margin during the period of review, they could assess the differences between the subject import prices and cost of production over 2010-2012 as well because Table 11.2.1 provided the growth/drop percentage rates, representing the year-on-year changes in subject import imports and domestic industry cost.[408] Finally, Ukraine submits that because the two exporting Russian producers for which injury margins were calculated made up 100% of Russian exports to Ukraine, the disclosure of injury margins effectively led to a disclosure of the basis of MEDT of Ukraine's finding that subject imports were lower-priced than domestic industry costs.[409] We disagree with Ukraine's arguments.

7.227. Investigating authorities are required to disclose essential facts in a coherent manner. Thus, interested parties are not expected to engage in back-calculations and inferential reasoning, or piece together a puzzle to derive the essential facts. To derive, on the basis of these injury margins, the differences between subject import prices and domestic industry costs for the period 2010-2012 and the period of review based on which MEDT of Ukraine reached its conclusions on price effects, the interested parties would have to do precisely that. We are not convinced that interested parties should have had to derive the essential facts through such kind of back-calculations and inferential reasoning when MEDT of Ukraine could just as well have disclosed these facts in a coherent manner. Therefore, we find that the disclosure of such injury margins was not sufficient to understand the factual basis of MEDT of Ukraine's price effects analysis.

7.228. Based on the foregoing, we find that MEDT of Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because it failed to disclose the essential facts that were required to understand the factual basis of its conclusions on price effects in section 11.2 of the Investigation Report, and which formed one of the bases of its affirmative determination on the likelihood of injury. We exercise judicial economy on Russia's claim under Article 6.2 of the Anti-Dumping Agreement insofar as it arises from the same factual basis as this claim under Article 6.9 of the Anti-Dumping Agreement.

7.8.2.1.1.2 Disclosure of essential facts regarding the economic state of the domestic Ukrainian industry

7.229. In section 11.3 of the disclosure, MEDT of Ukraine analysed and made findings regarding the economic state of the domestic industry. In its analysis, it examined various economic factors and indices (indices) having a bearing on the state of the domestic industry. The section contains six tables that show the performance of the domestic industry across these indices for the period 2010, 2011, 2012, and the period of review (Injury Tables 11.3.1 to 11.3.6). Tables 11.3.1 to 11.3.6 of the Confidential Version of the Investigation Report set out the absolute figures showing the domestic industry's performance for the period 2010-2012 and the period of review across the different indices examined in these tables.[410] It also provided a growth/drop percentage rate, which shows, in percentage form, the year-on-year changes in the performance of the domestic industry from 2010 up to the period of review. The absolute figures were redacted from the disclosure, and the growth/drop percentage rates were provided instead. The tables were also accompanied by narrative text.[411] The domestic industry, whose performance these Injury Tables

[407] Ukraine's response to Panel question No. 56(a)(i), para. 29.
[408] Ukraine's response to Panel question No. 56(a)(i), paras. 29-30.
[409] Ukraine's response to Panel question No. 56(b), paras. 31-32.
[410] MEDT of Ukraine examined the following indices in the Injury Tables: Table 11.3.1 – (a) sales of ammonium nitrate by domestic producers in the domestic market, (b) domestic consumption, (c) share of sales by the domestic producers in domestic consumption; Table 11.3.2 – (a) production volumes of the product of the national producer, (b) capacity utilization, (c) warehouse stock balance of the national producers at the end of the period; Table 11.3.3 – (a) average number of employees of domestic producers, (b) average monthly salaries in companies of the domestic producers, (c) employees engaged in production, sales and management, (d) employed in production of the product, (e) labour productivity; Table 11.3.4 – (a) domestic producers' investments; Table 11.3.5 – (a) financial result (profit/loss) of the domestic producers from sales of the ammonium nitrate in the internal market, (b) profitability on sales of ammonium nitrate by the domestic producers; Table 11.3.6 – absolute liquidity. (Investigation Report, (Exhibit RUS-10b), pp. 34-36; Confidential Version of the Investigation Report, (Exhibit UKR-52b (BCI)), pp. 41-43).
[411] Investigation Report, (Exhibit RUS-10b), pp. 34-36.

represented, comprised the following domestic producers: JSC Azot OJSC, JSC Rivneazot, CJSC Severodonetsk Azot Association, and JSC Concern Stirol.[412]

7.230. Russia contends that the absolute figures redacted from Injury Tables 11.3.1 to 11.3.6 constituted the essential facts underlying MEDT of Ukraine's likelihood-of-injury determination, which it should have disclosed.[413] Russia asserts that these figures represented aggregate figures of four different producers, and thus could not have been redacted for reasons of confidentiality.[414] Further, Russia submits that MEDT of Ukraine did not comply with Article 6.5 of the Anti-Dumping Agreement when treating these figures as confidential, as this provision permits confidential treatment of information only when "good cause" is shown, but no such good cause was shown by the domestic industry.[415]

7.231. Ukraine asserts that Russia has not made a *prima facie* case showing why the data in the Injury Tables constituted essential facts.[416] Ukraine submits in this regard that the sufficiency of the disclosure should be assessed taking into account the determinations made by the investigating authority.[417] Ukraine contends that in the underlying reviews, MEDT of Ukraine made its determinations on the basis of the trends in the various economic indices examined in the Injury Tables, rather than the absolute figures, and disclosed these trends through the growth/drop percentage rates.[418] Thus, in Ukraine's view, MEDT of Ukraine disclosed the essential facts forming the basis of its likelihood-of-injury determination, specifically its analysis of the state of the domestic industry.

7.232. Further, Ukraine notes that Article 6.9 does not require the disclosure of essential facts that benefit from confidential treatment under Article 6.5 of the Anti-Dumping Agreement, and when essential facts are properly treated as confidential under Article 6.5, disclosure obligations can be met through the issuance of non-confidential summaries of such essential facts.[419] Ukraine submits that absolute figures redacted from the Injury Tables were confidential, as they represented the aggregated figures of producers belonging to a single group of companies, namely, the Ostchem Group, and these producers sought confidential treatment for these aggregated figures.[420] Ukraine points to a collective submission made by these four domestic producers (Exhibit UKR-51b) in support of its view. Ukraine notes that in any case Russia did not make a claim under Article 6.5 of the Anti-Dumping Agreement, and therefore cannot question the confidential treatment of these absolute figures under this provision. Ukraine asserts that MEDT of Ukraine met its disclosure obligations through the issuance of non-confidential summaries, namely, the growth/drop percentage rates.[421]

7.233. We begin our analysis by noting that Russia has not made any claim under Article 6.5 challenging the confidential treatment of the absolute figures, and thus, we cannot examine whether MEDT of Ukraine acted inconsistently with this provision in treating these absolute figures as confidential.[422] We also note that Ukraine has asserted that the domestic industry sought confidential treatment for the absolute figures in the Injury Tables, and except information pertaining to certain indices in Injury Table 11.3.3[423], has substantiated its assertion by pointing to

[412] Investigation Report, (Exhibit RUS-10b), p. 7.
[413] Russia's first written submission, para. 301; second written submission, para. 684.
[414] Russia's response to Panel question No. 39, para. 114.
[415] Russia's opening statement at the second meeting of the Panel, paras. 264 and 265-266.
[416] Ukraine's first written submission, para. 328.
[417] Ukraine's first written submission, para. 339.
[418] Ukraine's first written submission, paras. 340-341.
[419] Ukraine's first written submission, para. 335.
[420] Ukraine's response to Panel question No. 40, para. 102; second written submission, para. 181.
[421] Ukraine's first written submission, para. 337.
[422] Our decision in this regard is consistent with that taken by other panels, which, in the absence of a claim under Article 6.5, have declined to examine whether the confidential treatment of essential facts was justified under this provision. (See, e.g. Panel Report, *Korea – Certain Paper*, para. 7.327). See also Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.327.
[423] Table 11.3.3 sets out figures pertaining to, *inter alia*, the following indices: (a) average monthly salaries in companies of the domestic producers; (b) employees engaged in production, sales and management; (c) employment in production of the product; and (d) labour productivity. Ukraine, as stated above, relied on Exhibit UKR-51b, to show that the domestic industry requested confidential treatment for aggregate figures pertaining to the indices set out in the Injury Tables. But Exhibit UKR-51b does not contain any request for confidential treatment for figures pertaining to these indices contained in Injury Table 11.3.3.

the relevant evidence on the record.[424] In addition, as clarified by the Appellate Body in its recent report in *Russia − Commercial Vehicles* "regardless of whether or not the essential facts at issue [are] treated [by the investigating authority] as confidential consistently with the requirements of Article 6.5, a panel must examine whether *any* disclosure made − including that made through non-confidential summaries under Article 6.5.1 − meets the requirements of Article 6.9".[425] Therefore, even if we were to assume that MEDT of Ukraine did not treat the essential facts at issue as confidential consistently with Article 6.5, as is argued by Russia, we would still have to examine whether *any* disclosure made, which includes in this case the growth/drop percentage rates disclosed by MEDT of Ukraine, was sufficient to discharge its obligations under Article 6.9. Thus, the question before us is not whether MEDT of Ukraine acted inconsistently with Article 6.9 in failing to disclose the absolute figures redacted from the Injury Tables, but whether the disclosure that it made was sufficient to meet the requirements of Article 6.9.

7.234. Ukraine, as noted earlier, makes two main (and alternative) arguments in this regard. First, it contends that MEDT of Ukraine made its determinations based on trends, rather than absolute figures, and the growth/drop percentage rates were sufficient to disclose the factual basis of the determinations actually made. Thus, in Ukraine's view, the growth/drop percentage rates, not the absolute figures, were the essential facts that needed to be disclosed. Russia does not respond to this argument. Instead, noting Ukraine's argument that the absolute figures redacted from the tables do not amount to essential facts, Russia simply asserts that "exactly those numbers [i.e. the absolute figures] that are missing precluded the Russian producers from a proper defence".[426]

7.235. Second, Ukraine contends that these rates constituted an adequate non-confidential summary of confidential facts, i.e. the absolute figures. Russia, instead of properly responding to this argument, continued to assert throughout these proceedings that the failure to disclose the absolute figures led to a violation of Article 6.9, and insisted that MEDT of Ukraine was required to disclose these figures to comply with its obligations in this regard.[427] These arguments, however,

[424] Ukraine's response to Panel question No. 58(b), para. 34 and Annex I. Exhibit UKR-51b did not contain any request for confidential treatment for absolute figures pertaining to the following indices: (a) domestic consumption and share of sales by the domestic industry in Table 11.3.1; or (b) production volumes of the domestic industry in Table 11.3.2. However, with respect to domestic consumption and share of sales, we note Ukraine's argument that domestic consumption was calculated as the sum of total import sales (which was disclosed) and domestic sales of the domestic industry (for which confidential treatment was requested), and thus disclosure of absolute figures pertaining to these indices would have allowed interested parties to calculate the domestic sales volume of the domestic industry, thereby compromising its confidential treatment. Having reviewed the Confidential Version of the Investigation Report and the disclosure, we agree with Ukraine that, as a matter of fact, the disclosure of absolute figures with respect to domestic consumption would have compromised the confidential treatment of domestic sales of the domestic industry as interested parties could simply subtract figures on total volume of import sales from the volume of total domestic consumption. Similarly, the disclosure of the percentage market share of the domestic industry in domestic consumption would have also allowed interested parties to calculate the volume of domestic sales of the domestic industry in absolute terms. With respect to production volumes of the domestic industry, we note that this information was disclosed in another section of the disclosure (Table 4.1.1). Thus, while we could agree that this particular information could have been presented in a more organized manner in the disclosure, having reviewed the narrative part of Table 4.1.1, we consider that interested parties should have been able to understand that these figures pertained to the domestic production of the domestic industry, and make their comments on the disclosure on the basis of this information.

[425] Appellate Body Report, *Russia − Commercial Vehicles*, para. 5.189. The panel in that case had found that if confidential treatment was granted to information that constitutes essential facts without complying with the requirements of Article 6.5, the obligations under Article 6.9 may not be met through the disclosure of non-confidential summaries within the meaning of Article 6.5.1 of the Anti-Dumping Agreement. (Appellate Body Report, *Russia − Commercial Vehicles*, para. 5.188; Panel Report, *Russia − Commercial Vehicles*, paras. 7.268-7.269). The panel accordingly did not consider it necessary to examine the alleged disclosure of essential facts made through the non-confidential summaries of confidential information. (Appellate Body Report, *Russia − Commercial Vehicles*, para. 5.188; Panel Report, *Russia − Commercial Vehicles*, para. 7.269). The Appellate Body noted that the panel understood that where essential facts are not properly treated as confidential in accordance with Article 6.5, this would automatically lead to an inconsistency with Article 6.9. The Appellate Body found this understanding to be erroneous and reversed the panel's findings in this regard. (Appellate Body Report, *Russia − Commercial Vehicles*, para. 5.189).

[426] Russia's opening statement at the first meeting of the Panel, para. 152.

[427] For example, even as late as in its second written submission, Russia argued that "[w]ithout the knowledge of concrete figures", the Russian producers were unable to meaningfully address the issue by commenting on the figures, and that the information in the "blank space", i.e. redacted figures in the Injury Tables, should be treated as essential facts that MEDT of Ukraine failed to disclose. (Russia's second written

do not fully address Ukraine's point that the growth/drop percentages rates were adequate non-confidential summaries of confidential facts that it could not disclose. In response to our question to Russia as to why the growth/drop percentage rates did not constitute an adequate non-confidential summary Russia simply stated:

> [Russia] is of a strong opinion that the knowledge of the rate of increase/decrease across the factors is not enough to enable interested parties to properly defend their interests in accordance with the Anti-Dumping Agreement. These data do not give a concrete picture as to how the figures relate to each other, nor are they helpful to assess the state of the domestic industry. Taken alone, they might be indicative for one factor but together the figures do not add up to the sufficient degree of clarity to understand whether the likelihood-of-injury determination rests on objective examination of positive evidence.
>
> As an illustrative example, the absence of figures on sales in combination with the absence of figures on production volumes precludes interested parties from understanding the ratio between these numbers. In this regard, [Russia] recalls Appellate Body's understanding that essential facts are not only "those that are salient for a decision to apply definitive measures", but also "those that are salient for a contrary outcome."[428]

7.236. Ukraine contends that this response of Russia is substantially equal to a failure to respond.[429] Ukraine states that instead of providing a concrete response to the Panel's questions, Russia argues, essentially, that absolute figures should have been provided because such figures are generally more informative than a rate of increase/decrease, and that Russia cannot calculate the ratio of sales to production.[430] Ukraine submits that while absolute figures may well be more informative, to the extent they could not be disclosed on grounds of confidentiality, Russia does not present any argument as to why such rates could not constitute sufficient disclosure of the confidential figures.[431] We agree.

7.237. We note for instance that Russia argues that the absence of figures on sales and production volumes precluded interested parties from understanding the ratio between these numbers. However, Russia does not at all substantiate why such information was necessary to understand the factual basis of MEDT of Ukraine's determinations. It also does not substantiate why such information was salient for a decision to apply definitive measures, or salient to a contrary outcome. Similarly, in the opening statement that it presented at the second meeting of the Panel, Russia asserted that the non-confidential summaries provided in the Injury Tables were not consistent with Article 6.5.1 of the Anti-Dumping Agreement because these Tables did not show how the information across the different tables were related, in particular, the information on sales (Table 11.3.1) and that on production volumes (Table 11.3.2).[432] Russia, we note, has not pursued any claim under Article 6.5.1 in these proceedings. In addition, Russia's statement is extremely unclear. It is not clear to us, for instance, what kind of relation Russia expects between the information in the different Injury Tables for the growth/drop percentage rates to constitute an adequate non-confidential summary, and why.

7.238. We cannot make the case for Russia by considering, without adequate arguments from it, why: (a) the growth/drop percentage rates were not sufficient to meet MEDT of Ukraine's disclosure obligations though Ukraine contends that taking into account the nature of the determination made by MEDT of Ukraine (i.e. a determination based on trends, rather than absolute figures) the growth/drop percentages were sufficient to meet these disclosure obligations; and (b) the growth/drop percentage rates did not constitute an adequate

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submission, paras. 683-684). We note that these arguments were made under a subheading of the written submission titled "[t]he information provided does not constitute an effective non-confidential summary". But the arguments presented under this subheading focus on why MEDT of Ukraine needed to disclose absolute figures to comply with its obligation under Article 6.9. (Russia's second written submission, paras. 681-684).

[428] Russia's response to Panel question No. 39(b), paras. 118-119. See also second written submission, para. 683.

[429] Ukraine's second written submission, para. 188.

[430] Ukraine's second written submission, para. 188.

[431] Ukraine's second written submission, para. 189.

[432] See also Russia's second written submission, para. 683.

non-confidential summary, which was sufficient to understand the factual basis of MEDT of Ukraine's determinations. That was the task for Russia, which it has failed to fulfil.

7.239. Based on the foregoing, we find that Russia has not established that MEDT of Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement with respect to the disclosure of the essential facts underlying its analysis of the state of the domestic industry. We thus reject Russia's corresponding claim under Article 6.2 of the Anti-Dumping Agreement as well.

7.8.2.1.2 Disclosure of essential facts forming the basis of the dumping determinations

7.240. Russia contends that MEDT of Ukraine failed to disclose the essential facts underlying its dumping determinations, particularly the relevant data and formula applied in making the dumping calculations, and the precise figures used.[433] Russia submits that the disclosure does not set out the calculation methodology, whether in the form of worksheets and computer output or in details of the data and formulas applied.[434] Ukraine does not deny that the precise figures or the data underlying MEDT of Ukraine's dumping determinations, specifically, constructed normal value, export price, and adjustments, were not disclosed to the investigated Russian producers. Instead, Ukraine takes the view that this data was already in the possession of the investigated producers, and MEDT of Ukraine provided sufficient details in the narrative part of the disclosure to enable these producers to know which specific data in their possession was used to calculate their dumping margins, and how.[435]

7.241. We note that Russia's claim concerns the disclosure of the precise figures, data, and formulas used for dumping determinations. In the underlying reviews MEDT of Ukraine calculated separate dumping margins for the Russian producers EuroChem and JSC Dorogobuzh.[436] MEDT of Ukraine did not provide in the disclosure the actual figures showing the constructed normal value, export price, and adjustments.[437] The actual figures were instead replaced with an empty bracket. Ukraine also does not deny that MEDT of Ukraine did not disclose the data underlying its calculations of constructed normal value, export price, and adjustments to the interested parties, though it contends that this data was already in the possession of the concerned producers. With respect to the formulas, the specific formulas that Russia alleges were not disclosed are certain formulas applied by MEDT of Ukraine in calculating the cost of production of the product under consideration, and subsequently used in constructing normal value. Specifically, MEDT of Ukraine set out in the Confidential Version of the Investigation Report certain formulas used for calculating the cost of ammonia and nitric acid, but the disclosure does not refer to these formulas.[438]

7.242. Ukraine does not dispute that the figures, data, and formulas that MEDT of Ukraine did not disclose were essential facts. Instead, its arguments are based on the form in which such facts need to be disclosed. Thus, the question before us is whether MEDT of Ukraine disclosed, in a coherent manner, the facts necessary to understand the factual basis of its dumping determinations.

7.243. In addressing this question, we recall, as stated in paragraph 7.207 above, that the disclosure should allow the interested parties to comment on the completeness and correctness of the conclusions the investigating authorities reached from the facts being considered, to provide additional information or correct perceived errors, and to comment or make arguments as to the proper interpretation of those facts.[439] Moreover, the disclosure must allow the interested party to clearly understand what data the investigating authority has used, and how, to determine the dumping margin.[440] We consider in this regard Ukraine's argument that though MEDT of Ukraine did not disclose the precise figures, it did provide sufficient details in the disclosure to enable these

[433] Russia's first written submission, paras. 347(10), 304, and 308-310.
[434] Russia's first written submission, para. 310.
[435] Ukraine's first written submission, paras. 349, 355, and 358.
[436] Ukraine's first written submission, para. 342.
[437] Investigation Report, (Exhibit RUS-10b), pp. 19-21 and 24-28. It is not argued that company-specific disclosures were provided to the investigated Russian producers disclosing these details. Thus, this report is the only document relevant to our review.
[438] Investigation Report, (Exhibit RUS-10b), pp. 24-27; Confidential version of the Investigation Report, (Exhibit UKR-52b (BCI)), pp. 31-34.
[439] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131; *China – GOES*, fn 390; and Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[440] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.

producers to know which specific data in their possession was used to calculate their dumping margins, and how. The issue before us is similar to that discussed by the panel and the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*.

7.244. In that dispute, noting that the basic data underlying dumping determinations constitutes essential facts, the panel focused on the manner in which these facts were disclosed.[441] The panel found that the investigating authority had described, in the narrative part of its disclosure, the sales data under consideration, the basis for determining normal value and export price, and the adjustments made thereto.[442] Moreover, the investigating authority had specified when it used data or made adjustments requested by the exporters, and in addition, disclosed actual data when it departed from the data submitted by the exporters.[443] The panel found that the complainants had not shown why these narrative descriptions were not sufficient to meet the investigating authority's obligations under Article 6.9.[444]

7.245. The Appellate Body reversed the panel's findings. It found that such a disclosure was not sufficient to meet an investigating authority's obligation under Article 6.9 of the Anti-Dumping Agreement.[445] In particular, it found that the mere fact that an investigating authority refers in its disclosure to data that is in the possession of an interested party does not mean that the investigating authority has:

a. disclosed the factual basis for its determination in a manner that enables interested parties to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, and to comment on or make arguments as to the proper interpretation of those facts[446]; and

b. disclosed the essential facts that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures, and to defend its interests.[447]

7.246. Ukraine seeks to distinguish these findings by arguing that the dispute in *China – HP-SSST (Japan) / China – HP-SSST (EU)* concerned a situation where the investigated producers submitted various data, and it was not clear which data was selected by the investigating authority to calculate the dumping margins.[448] Ukraine submits that by contrast in the present case MEDT of Ukraine specifically identified the data used to determine the dumping margins in the narrative part of the disclosure.[449]

7.247. Contrary to Ukraine's arguments, however, the Appellate Body's finding in *China – HP-SSST (Japan) / China – HP-SSST (EU)* is not limited to cases where investigating authorities select some data, from amongst various data furnished by the investigated producers. The Appellate Body also raised other concerns. In particular, it said that such a type of disclosure would not allow the investigated producers to correct clerical and mathematical errors in dumping margin calculations or confirm that the investigating authority determined the dumping margin in the manner it purported to do.[450] Moreover, it stated that mere references to the data in possession of the investigated producer in the narrative part of a disclosure would not result in the disclosure of such essential facts to interested parties other than this producer.[451] Thus, we do not agree with Ukraine's understanding of the scope of the Appellate Body's findings in *China – HP-SSST (Japan) / China – HP-SSST (EU)*.

7.248. Instead, we find the concerns raised by the Appellate Body to be fully applicable to the situation before us. In particular, we do not consider that in the absence of precise figures or the

[441] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.235.
[442] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.236.
[443] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.236.
[444] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.236.
[445] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.131 and 5.133.
[446] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.
[447] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.133.
[448] Ukraine's first written submission, para. 348.
[449] Ukraine's first written submission, paras. 349, 355, and 358.
[450] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, fn 323.
[451] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, fn 325.

underlying data used for constructed normal value, export price, and adjustments, interested parties would be able to comment on the accuracy of the calculations made by MEDT of Ukraine or confirm that it actually did what it purported to do. We also find that MEDT of Ukraine's failure to disclose certain formulas used in calculating the cost of production deprived the interested parties of an opportunity to understand the basis for this calculation and comment on it.

7.249. Based on the foregoing, we find that MEDT of Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because it failed to disclose in a coherent manner the facts necessary to understand the factual basis of its dumping determinations, including the precise figures and data underlying its calculation of constructed normal value, export price, and adjustments thereto. Moreover, insofar as MEDT of Ukraine failed to disclose certain formulas that it used to calculate the cost of production, and constructed normal value, it also acted inconsistently with Article 6.9 of the Anti-Dumping Agreement. We exercise judicial economy on Russia's claim under Article 6.2 of the Anti-Dumping Agreement insofar as it arises from the same factual basis as this claim under Article 6.9.

7.8.2.2 Sufficiency of time given to respond to disclosure

7.250. MEDT of Ukraine gave the interested parties two days to comment on the disclosure. Russia considers this to be an "outrageous violation" of Article 6.9, which requires investigating authorities to give interested parties "sufficient time" to comment on the disclosed essential facts.[452] Russia states that taking into account the complexity of the issues discussed in the disclosure, the time of two days was insufficient.[453] Further, according to Russia, MEDT of Ukraine's decision to reject EuroChem's comments on the disclosure on the ground that they were filed after business hours on the due date was inconsistent with Article 6.9.[454] Ukraine considers that the time of two days was sufficient in this case, and notes that two of the three Russian producers filed comments on the disclosure.[455] With respect to EuroChem, Ukraine notes that it filed its comments on the disclosure after working hours on the due date and thus MEDT of Ukraine could not accept them.[456]

7.251. Article 6.9 stipulates that the disclosure of essential facts should take place in sufficient time for the parties to defend their interests. Thus, while Article 6.9 does not prescribe any particular time-frame, it does suggest that the time should be sufficient for the parties to defend their interests. We consider that the sufficiency of the time that investigating authorities give to parties to comment on the disclosure has to be assessed on a case-by-case basis considering, *inter alia*, the nature and complexity of the issues to which the parties have to respond in order to defend their interest.

7.252. Russia notes in this regard that the disclosure covered several issues regarding the product under consideration, export price and normal value determinations, dumping margin calculations as well as analyses on the injury suffered by the domestic industry.[457] Russia states that interested parties needed time to prepare a proper response regarding each part of these analyses.[458] Moreover, Russia observes that the investigated Russian producers became aware of MEDT of Ukraine's proposed rejection of the reported gas cost only when they received the disclosure, and would have needed time to make comments in this regard.[459] Ukraine does not deny that the investigated Russian producers became aware of MEDT of Ukraine's rejection of the reported gas cost only when the disclosure was issued.[460] But Ukraine contends that the investigated Russian producers were on notice prior to the issuance of the disclosure that MEDT of Ukraine would reject their reported gas cost for two reasons. First, these producers were aware that the domestic industry had requested MEDT of Ukraine to reject this reported gas cost.[461] Second, an investigating authority in another jurisdiction that initiated anti-dumping investigations on imports

[452] Russia's first written submission, paras. 321-324; second written submission, paras. 695-697 and 699.
[453] Russia's second written submission, paras. 698-699.
[454] Russia's second written submission, para. 707.
[455] Ukraine's first written submission, paras. 362 and 367.
[456] Ukraine's first written submission, para. 368.
[457] Russia's opening statement at the second meeting of the Panel, para. 271.
[458] Russia's opening statement at the second meeting of the Panel, para. 271.
[459] Russia's first written submission, para. 321
[460] Ukraine's response to Panel question No. 41, para. 104.
[461] Ukraine's first written submission, para. 364.

of ammonium nitrate, and in which the same producers had participated, had done the same.[462] Ukraine also asserts that the disclosure was quite short, and thus two days was sufficient for the parties to respond to it.

7.253. We agree with Russia that "two days" was insufficient time for the parties to comment on this disclosure, and thus not sufficient to defend their interests before the Ukrainian authorities. Besides the broad range of issues to which the investigated Russian producers had to respond, the disclosure was the first time that the investigated Russian producers were made aware of the factual basis of MEDT of Ukraine's dumping determinations, including the facts based on which the surrogate price of gas (rather than the reported gas cost) would be ascertained.[463] This added to the complexity of the issues to which the investigated Russian producers had to respond.

7.254. We disagree in this regard with Ukraine's argument that the investigated Russian producers were on notice that MEDT of Ukraine would reject the reported gas cost because that is what the domestic industry had requested, and that is what certain other anti-dumping authorities had done. The purpose of a disclosure under Article 6.9 is to disclose the essential facts that form the basis of an investigating authority's decision to apply definitive measures in sufficient time for the parties to defend their interests. Investigating authorities cannot forego this obligation simply because their decision to impose definitive measures is based on grounds that are similar or identical to that taken by investigating authorities in other jurisdictions, or based on a request made by the domestic industry.[464] Moreover, timely disclosure would also have been necessary to allow the interested parties to comment on the appropriateness or correctness of the facts that MEDT of Ukraine decided to use to calculate the surrogate price of gas, which could not have been communicated to them earlier than the disclosure. In any case, our findings are based on a review of the disclosure as a whole, and not just the disclosure regarding the gas prices used for normal value construction.

7.255. Based on the foregoing, we find that MEDT of Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to give the parties "sufficient time" to defend their interests.[465]

7.9 Consequential claims

7.256. Russia contends that as a consequence of violations under the Anti-Dumping Agreement, the Ukrainian authorities acted inconsistently with Articles 1 and 18.1 of the Anti-Dumping Agreement as well as Article VI of the GATT 1994.[466] Ukraine asks us to reject these claims.[467]

7.257. With respect to Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement, we note that these claims are consequential to findings of violations under other provisions of the Anti-Dumping Agreement. Having found substantive violations under various provisions of the Anti-Dumping Agreement, we do not find it necessary to address Russia's consequential claims in

[462] Ukraine's first written submission, para. 365.
[463] Ukraine's response to Panel question No. 41, para. 104.
[464] We note that Ukraine contends that in *EU – Footwear (China)*, the investigating authority gave the interested parties only five days to comment on the disclosure, and this time was considered by the panel to be "sufficient" within the meaning of Article 6.9. (Ukraine's first written submission, para. 361). We do not share Ukraine's understanding of the panel report in *EU – Footwear (China)*. In that case, the investigating authority first issued a general disclosure, and subsequently sent an additional disclosure document, which reflected revisions made by the authority in response to comments received on the general disclosure. The authority gave interested parties five days to respond to this additional disclosure document. It is the time given to the interested parties to respond to this more limited additional disclosure document that was challenged in *EU – Footwear (China)*. (Panel Report, *EU – Footwear (China)*, para. 7.833). Unlike in *EU – Footwear (China)*, MEDT of Ukraine issued only one disclosure, and gave interested parties only two days to respond to that disclosure. Thus, we find Ukraine's reliance on *EU – Footwear (China)* to be inapposite.
[465] We note Russia's argument that MEDT of Ukraine's refusal to accept comments from EuroChem on the due date for submissions also led to a violation of Article 6.9. (Russia's opening statement at the second meeting of the Panel, para. 281). We have already found that the time given to the interested parties to comment on the disclosure was not sufficient for them to defend their interests. We thus need not separately address Russia's arguments challenging MEDT of Ukraine's decision to not accept EuroChem's comments on the disclosure.
[466] Russia's first written submission, paras. 345 and 347(13).
[467] Ukraine's first written submission, paras. 25-26.

this regard to secure a positive resolution of this dispute. Thus, we exercise judicial economy with respect to Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement.

7.258. With respect to Russia's claims under Article VI of the GATT 1994, we note that Russia simply presented a claim under Article VI, without identifying either in its panel request or in its written submissions the specific paragraphs or the specific obligations under these paragraphs that it seeks to challenge.[468] This was Russia's task, which it has failed to undertake.[469] Therefore, we reject Russia's claim under Article VI of the GATT 1994.

7.259. Based on the foregoing, we exercise judicial economy on Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement, but reject its claim under Article VI of the GATT 1994.

8 FINDINGS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, with respect to Ukraine's request for a preliminary ruling on our terms of reference, we find that:

a. ICIT's 2008 amended decision and the 2010 amendment are within our terms of reference;

b. the claims identified in the following item numbers of Russia's panel request are within our terms of reference:

   i. item number 1 of the panel request with respect to the claims under Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement;

   ii. item number 4 of the panel request with respect to claims under Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement;

   iii. item number 17 of the panel request with respect to claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement insofar as they are based on the view that the Ukrainian authorities determined and relied on injury which was not established in accordance with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement;

c. the claims identified in item number 7 of Russia's panel request under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement fall outside our terms of reference because they did not reasonably evolve from the legal basis set out in the consultation request, and thus we do not consider these claims; and

d. Ukraine's request for a ruling that the alleged claims identified in item number 17 of the panel request under Articles 3.1 and 3.4 of the Anti-Dumping Agreement fall outside our terms of reference is moot.

8.2. For the reasons set forth in this Report, with respect to Russia's claims concerning the Ukrainian authorities' dumping and likelihood-of-dumping determinations in the underlying reviews, we find that:

a. the Ukrainian authorities acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement in rejecting the reported gas cost of the investigated Russian producers without providing an adequate basis under the second condition of Article 2.2.1.1;

[468] Russia's panel request, item number 19; first written submission, paras. 341, 344-346, and 347(13).
[469] See, e.g. Panel Report, *US – OCTG (Korea)*, para. 7.337. The panel in *US – OCTG (Korea)* reached a similar conclusion with respect to a claim of consequential violation under Article VI. We note that some panels have made findings of consequential violations under Article VI without identifying the specific obligation under this provision which was violated. (See, e.g. Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.336; and *Canada – Welded Pipe*, para. 7.223). However, we do not consider this approach is warranted in the present case.

b. the Ukrainian authorities acted inconsistently with Article 2.2 of the Anti-Dumping Agreement in using a cost for gas that did not reflect the cost of the product under consideration "in the country of origin", i.e. Russia;

c. the Ukrainian authorities acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement by relying on costs that were calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement to make their determinations under Article 2.2.1;

d. the Ukrainian authorities acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement in relying on dumping margins calculated inconsistently with Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement to make their likelihood-of-dumping determinations;

e. Russia has failed to establish that the Ukrainian authorities acted inconsistently with Article 2.1 of the Anti-Dumping Agreement in connection with the Ukrainian authorities' decision to not use the domestic sales price of the like product in Russia to calculate normal value of the investigated Russian producers;

f. we do not need to address, and exercise judicial economy on, Russia's claim under Article 2.2 in connection with the Ukrainian authorities' rejection of the reported gas cost of the investigated Russian producers;

g. we do not need to address, and exercise judicial economy on, Russia's claim under Article 2.2.1.1 of the Anti-Dumping Agreement in connection with the Ukrainian authorities' use of the export price of gas from Russia at the German border to calculate the cost of production of the investigated Russian producers;

h. we do not need to address, and exercise judicial economy on, Russia's claim under Article 2.4 of the Anti-Dumping Agreement in connection with the Ukrainian authorities' alleged failure to make a fair comparison between the export price and the constructed normal value; and

i. we do not need to address, and exercise judicial economy on, Russia's claim under Article 11.1 of the Anti-Dumping Agreement.

8.3. For the reasons set forth in this report, with respect to Russia's claims concerning the non-termination of the investigation against EuroChem, we find that:

a. the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement by:

   i. failing to exclude EuroChem from the scope of the original anti-dumping measures, specifically the 2008 amended decision;

   ii. imposing a 0% anti-dumping duty on EuroChem through the 2010 amendment, instead of excluding it from the scope of the anti-dumping duty order;

   iii. including EuroChem within the scope of the review determinations, and imposing anti-dumping duties on it through the 2014 extension decision;

b. we do not need to address, and exercise judicial economy on, Russia's claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement.

8.4. For the reasons set forth in this Report, we find that Russia has not established that the Ukrainian authorities acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement in connection with the Ukrainian authorities' alleged determination of and reliance on injury not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in making their likelihood-of-injury determination.

8.5. For the reasons set forth in this Report, with respect to Russia's claims challenging the Ukrainian authorities' conduct in the underlying reviews, we find that:

a. the Ukrainian authorities acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in failing to disclose the essential facts underlying:

   i. MEDT of Ukraine's price effects analysis, which formed part of the determinations on likelihood of injury;

   ii. MEDT of Ukraine's dumping determinations;

b. the Ukrainian authorities acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in failing to give interested parties sufficient time to comment on MEDT of Ukraine's disclosure;

c. Russia has failed to establish that the Ukrainian authorities acted inconsistently with Article 6.8, and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in connection with alleged procedural violations by the Ukrainian authorities;

d. Russia has failed to establish that the Ukrainian authorities acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in connection with the disclosure of essential facts underlying its analysis of the economic state of the domestic industry, as part of the likelihood-of-injury determination;

e. Russia has failed to establish that the Ukrainian authorities acted inconsistently with Article 6.2 of the Anti-Dumping Agreement in connection with the disclosure of essential facts underlying its analysis of the economic state of the domestic industry, as part of the likelihood-of-injury determination; and

f. we do not need to address, and exercise judicial economy on, Russia's claims that the Ukrainian authorities acted inconsistently with Article 6.2 of the Anti-Dumping Agreement in failing to disclose the essential facts underlying:

   i. MEDT of Ukraine's price effects analysis, which formed part of its determinations on likelihood of injury;

   ii. MEDT of Ukraine's dumping determinations.

8.6. For the reasons set forth in this Report, with respect to the Russia's claims of consequential violations, we find that:

a. Russia has failed to establish that the Ukrainian authorities acted inconsistently with Article VI of the GATT 1994 as a consequence of alleged violations under the Anti-Dumping Agreement; and

b. we do not need to address, and exercise judicial economy on, Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement.

8.7. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Anti-Dumping Agreement, they have nullified or impaired benefits accruing to Russia under this agreement.

8.8. Pursuant to Article 19.1 of the DSU, we recommend that Ukraine bring its measures into conformity with its obligations under the Anti-Dumping Agreement.

WORLD TRADE ORGANIZATION

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UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

REPORT OF THE PANEL

Addendum

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

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS493/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 3 April 2017 and revised on 21 September 2017

1.1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

1.2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

1.3. The parties and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel.

1.4. The Panel shall meet in closed session. The parties and third parties shall be present at the meetings only when invited by the Panel to appear before it.

1.5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

1.6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

1.7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the Russian Federation requests such a ruling, Ukraine shall submit its response to the request in its first written submission. If Ukraine requests such a ruling, the Russian Federation shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

1.8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

1.9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

1.10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by the Russian Federation could be numbered RUS-1, RUS-2, etc. If the last exhibit in connection with the first submission was numbered RUS-5, the first exhibit of the next submission thus would be numbered RUS-6.

1.11. Each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1, to the extent that it is practicable to do so.

Questions

1.12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

1.13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

1.14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the Russian Federation to make an opening statement to present its case first. Subsequently, the Panel shall invite Ukraine to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the Russian Federation presenting its statement first.

1.15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Ukraine if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Ukraine to present its opening statement, followed by the Russian Federation. If Ukraine chooses not to avail itself of that right, the Panel shall invite the Russian Federation to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

1.16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

1.17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

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

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in

writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

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

1.20. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

1.21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

1.22. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

1.23. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

1.24. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

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

Service of documents

1.26. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them via the Digital Dispute Settlement Registry (DDSR) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute. Upload into the DDSR shall also constitute electronic service on the Panel, the other party, and the third parties.[1] In case any party or third party is unable to meet the 5.00 p.m. deadline

[1] When a party uploads a document into the DDSR, in accordance with this paragraph, it shall send a notification to the Panel and the other party via e-mail, identifying the document, including the number of exhibits uploaded. The notification to the Panel should be addressed to DSRegistry@wto.org. The Panel shall also notify the parties via e-mail when it uploads a document into the DDSR. If a party does not have access to a document identified in the e-mail sent by the other party or the Panel, it shall inform the DS Registry and the other party via e-mail, promptly, and in any case, no later than 5 p.m. the next working day.

because of technical difficulties in uploading these documents into the DDSR, the party or third party concerned shall contact the DS Registry without delay and provide an electronic version of all documents to be submitted to the Panel by e-mail, except for any exhibits. The e-mail shall be addressed to DSRegistry@wto.org and the other party and, where appropriate, the third parties. The documents sent by email shall be filed no later than 5.30 p.m. on the date due.The exhibits shall also be filed with the DS Registry (office No. 2047) and provided to the other party and, where appropriate, the third parties by no later than 5:30 p.m., but shall be submitted on a CD-ROM, DVD, or USB stick, together with the DDSR E-docket template.

b. By 5 p.m. the next working day following the electronic filing, each party and third party shall file one paper copy of all documents it submits to the Panel, including the exhibits with the DS Registry. The DS Registrar shall stamp the documents with the date and time of the filing.

c. The Panel shall provide the parties with the descriptive part, the interim report and the final report, as well as of other documents as appropriate, via the DDSR. When the Panel provides the parties or third parties both paper and electronic versions of a document, the electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute.

1.27. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 3 April 2017

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS493.

1. For the purposes of these Panel proceedings, BCI includes:

   a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

   b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute may not be designated as BCI if the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.

3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

4. No person may have access to BCI except a member of the Secretariat assisting the Panel or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.

5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The

first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

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

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF RUSSIA

I. INTRODUCTION

1. In this dispute, the Russian Federation challenges Ukraine's measures imposing anti-dumping duties on imports of ammonium nitrate originating in the Russian Federation. These measures are set forth in several decisions of the Intergovernmental Commission on International Trade (Intergovernmental Commission): the 2008 Decision, as amended by the 2010 Decision, the 2010 Decision itself and the Decision No. AD-315/2014/4421-06 of 1 July 2014 and Notice "On the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate, origin from the Russian Federation", published on 8 July 2014 in *Uryadoviy Courier*, No. 120, including all annexes, notices, communications and reports of the Ministry of Economic Development and Trade of Ukraine (Investigating Authority) and any amendments thereto.[1]

II. SUMMARY OF FACTS

2. On 21 May 2008 the Intergovernmental Commission adopted Decision No. AD-176/2008/143-47 imposing definitive anti-dumping measures on imports of ammonium nitrate originating in Russia. The anti-dumping duties were set at 10.78% for JSC MCC EuroChem, 9.76% – for JSC Dorogobuzh, and 11.91% – for all other.

3. On 6 February 2009 the District Administrative Court of Kiev issued Decision No 5/411 annulling the anti-dumping measure for one producer (JSC MCC EuroChem). The District Court ruled that the Investigating Authority incorrectly applied a downward level of trade adjustment to the company's export price and adjustments to the normal value and that the correct dumping margin for sales made by that producer amounted to minus 0.12%. This Decision was upheld by higher Ukrainian courts. In order to implement the Ukrainian Courts' Judgments the Intergovernmental Commission adopted the 2010 Decision, that changed the anti-dumping duty assigned to that producer to 0%.

4. In 2013, the Intergovernmental Commission launched interim and expiry reviews of these anti-dumping measures and included the Russian producer with negative dumping margin in the scope of both interim and expiry reviews.

5. In the course of the reviews, despite full cooperation of the Russian producers and exporters, the Investigating Authority rejected some data on production costs of ammonium nitrate submitted by them in their questionnaire responses. The price for gas, i.e. the major input in the manufacture of the product under consideration, which was actually paid by the companies, was disregarded. The Investigating Authority used instead the average export price for gas charged at the border with Germany, net of transport costs.

6. Accordingly, the adjusted gas price was used for the calculation of production costs. The sales of ammonium nitrate in the Russian domestic market were found to be lower than "reasonable" per unit costs for its production plus administrative, selling and general costs. The Investigating Authority came to a conclusion that domestic sales of ammonium nitrate were not "in

[1] The definitive anti-dumping measures were imposed through the Decision of the Intergovernmental Commission on International Trade No. AD-176/2008/143-47 of 21 May 2008 "On the Application of the Definitive Anti-Dumping Measures on Import into Ukraine of Ammonium Nitrate Originating in the Russian Federation" (2008 Decision), as amended by the Decision No. AD-245/2010/4403-47 of 25 October 2010 (2010 Decision). The expiry review was initiated pursuant to the Decision of the Intergovernmental Commission on International Trade No. AD-294/2013/4423-06 of 24 May 2013. The interim review was initiated pursuant to the Decision of the Intergovernmental Commission on International Trade No. AD-296/2013/4423-06 of 2 July 2013. As a result of the simultaneously conducted expiry and interim reviews, the definitive anti-dumping duty rates on imports of ammonium nitrate from the Russian Federation, that were initially imposed by the Decision No. AD-176/2008/143-47 of 21 May 2008, were increased and extended for the duration of five years by the Decision of the Intergovernmental Commission on International Trade No. AD-315/2014/4421-06 of 1 July 2014, which came into force on 8 July 2014.

the ordinary course of trade" by reason of price. The Investigating Authority constructed the normal value using the adjusted gas price that is three times higher than the price actually paid by the Russian producers and exporters.

7. On 25 June 2014, the Investigating Authority circulated to the interested parties its "Materials provided according to the results obtained in the process of reviews of the anti-dumping measures (interim review and in relation to their expiry) against the imports into Ukraine of ammonium nitrate originating in the Russian Federation" (Disclosure). Only two calendar days were provided for the interested parties to comment on this document.

8. On 1 July 2014, the Intergovernmental Commission adopted Decision No. AD-315/2014/4421-06 extending the anti-dumping measures on imports of ammonium nitrate originating in Russia for the next five years.[2] The Decision also modified the anti-dumping duties as follows: JSC Dorogobuzh − 20.51%; JSC MCC EuroChem − 36.03%; all others − 36.03%, and therefore, levied the anti-dumping duty on the said Russian producer found to have negative dumping margin by the Ukrainian courts.

III. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

A. Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate costs on the basis of records kept by the Russian producers and exporters while determining the constructed normal value

9. Article 2.2.1.1 of the Anti-Dumping Agreement provides for the obligation to calculate costs by using records of the investigated producer or exporter. Under this rule, an investigating authority examines records on whether they: 1) are in accordance with the generally accepted accounting principles of the exporting country; and 2) reasonably reflect the costs associated with the production and sale of the product under consideration.

10. As a matter of systemic relevance, the Russian Federation wishes to note that the panel's and the Appellate Body's legal interpretations of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b) of the GATT 1994 are relevant to this dispute as they provide interpretative guidance for future panels. It is further submitted that it is appropriate for the Panel in this dispute to rely on the Appellate Body's legal interpretations and reasoning in *EU − Biodiesel* of the provisions of the Anti-Dumping agreement applicable in this dispute.

11. Following these interpretations, the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement does not include a general standard of "reasonableness". Nor is there any legal basis for an investigating authority to use an additional or abstract standard to assess if the recorded costs are "reasonable" or "representative" through a comparison with hypothetical costs that might have been incurred under a different set of circumstances or any other costs not associated with the production and sale of the product under consideration in the country of origin. Indeed, the Appellate Body has already found that the second condition "relates to whether the records … suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".[3]

12. During the interim and expiry reviews, Investigating Authority, relying on the second condition under Article 2.2.1.1, deemed Russian producers' records as not reasonably reflecting the costs associated with the production and sale of gas. While ultimately rejecting the gas prices actually paid by them, it did not argue that these prices in the investigated producers' records do not represent the actual prices incurred by those producers in manufacturing ammonium nitrate. Instead, the Investigating Authority explained that Russian domestic gas prices are lower than export prices or key international markets' prices for gas due to government regulation. The sole reason to reject the recorded costs of production was the fact that in Ukraine's view these costs were considered as "affected by administrative and political factors". However, the issue as to

[2] Notice of Decision of the Intergovernmental Commission on International Trade No. AD-315/2014/4421-06, 1 July 2014 on the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate, origin from the Russian Federation, 08 July 2014 (2014 Extension Decision).

[3] Appellate Body Report, *EU − Biodiesel*, paras. 6.22, 6.30, 6.56.

whether Russian domestic selling prices of gas are set by law does not affect reasonable reflection of actually incurred gas costs in investigated producers' records.

13. Besides, the Appellate Body explained that "the inquiry envisaged under Article 2.2.1.1 is one relating to the circumstances of each investigated exporter or producer in the exporting country".[4] Hence, the investigated producer can be accountable only for its own behaviour and its recording of the actually incurred manufacturing costs of the product under consideration.

14. Accordingly, since the costs of production of ammonium nitrate were calculated not on the basis of records kept by Russian producers which were in accordance with the generally accepted accounting principles in the Russian Federation and reasonably reflected the costs associated with the production and sale of the ammonium nitrate, Ukraine acted in breach of its obligations under Article 2.2.1.1 of the Anti-Dumping Agreement.

15. The proper interpretation of Article 2.2.1.1 is relevant for the calculation of costs for normal value construction under Article 2.2 of the Anti-Dumping Agreement as the adjusted costs were used to construct the normal value. Since these costs were calculated in breach of Article 2.2.1.1 of the Anti-Dumping Agreement, determination of constructed normal value based on these costs is also inconsistent with Article 2.2 of the Anti-Dumping Agreement.

B. Ukraine acted in breach of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement by replacing (adjusting) production costs actually borne by the Russian producers and exporters with data outside the Russian Federation, and using such data subsequently for construction of the normal value

16. Article 2.2 of the Anti-Dumping Agreement describes circumstances in which the margin of dumping can be established on the basis of a constructed normal value. This provision requires the costs of production both to be assessed on the basis of, and to be based on, the costs that exist in the country where the investigated exporter or producer produces the product under consideration. Thus, Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement prescribe an obligation for the investigating authority to calculate costs based on the costs associated with production and sale of the product under consideration in the country of origin.

17. The Investigating Authority rejected the costs actually incurred by the Russian exporting producers accurately and reasonably reflected in their records and replaced (adjusted) them with the average price for natural gas exported and charged at the border with Germany. Subsequently, it used this "average price" for the construction of normal value for ammonium nitrate. The Investigating Authority used this price specifically because it does not reflect the gas price within the domestic market of the Russian Federation. For these reasons this export price for gas cannot be regarded as the price for gas associated with production and sale in the country of origin of the product concerned, i.e. ammonium nitrate in the Russian Federation.

18. The adjustment (replacement) of gas prices by the Investigating Authority inflated the costs of production of ammonium nitrate and thus the constructed normal value, which ultimately resulted in the finding of the existence of dumping and in higher dumping margins.

19. Article 2.2.1.1 of the Anti-Dumping Agreement precludes WTO Members from including in the costs of production "costs" not "associated with the production and sale" of the product under consideration, while Article 2.2 prescribes them to calculate a normal value on the basis of the costs of production in the country of origin. Ukraine violated both of these Articles.

C. Ukraine violated Article 2.2.1 of the Anti-Dumping Agreement

20. The guidance for conducting the "ordinary course of trade test" by reason of price is provided for in Article 2.2.1 of the Anti-Dumping Agreement. This provision provides for the investigating authority's right to "disregard below-cost sales of the like product".[5] It may do so only if below-cost sales (i) are made within an extended period of time; (ii) in substantial quantities; and (iii) at prices which do not provide for the recovery of all costs within a reasonable

[4] Appellate Body Report, *EU – Biodiesel*, para. 6.22.
[5] Appellate Body Report, *China – HP-SSST (Japan)*, para. 5.22. (emphasis original)

period of time. The Investigating Authority acted inconsistently with this provision as it has disregarded domestic sales of the Russian exporting producers of ammonium nitrate without determining whether such sales meet the said characteristics.

21. Moreover, even if these factors have been at hand, any conclusions made on the absence of ordinary course of trade by reason of price of ammonium nitrate would have been legally flawed due to the use of the adjusted costs of production calculated in breach of Article 2.2.1.1 of the Anti-Dumping Agreement.

22. Thus, in its application of the ordinary course of trade test by reason of price, the Investigating Authority failed to satisfy the requirements of Article 2.2.1 of the Anti-Dumping Agreement by improperly treating domestic sales of ammonium nitrate in the Russian Federation and disregarding these sales in determining the normal value.

D. Ukraine violated Article 2.4 of the Anti-Dumping Agreement

23. Article 2.4 of the Anti-Dumping Agreement sets forth an overarching obligation, applying to all paragraphs of Article 2 of the Anti-Dumping Agreement. The obligation in the first sentence of Article 2.4 requires that comparison between the export price and the normal value shall be "fair".

24. Investigating Authority's calculation of the "margin of dumping" on the basis of a comparison between the export price and inflated normal value is contrary to the first sentence of Article 2.4. The result of such unfair comparison was the dumping margin in the amount that is considerably higher than the one that would have been calculated had the export price been compared with the normal value calculated using the price the Russian producers actually paid.

E. Ukraine violated Article 2.1 of the Anti-Dumping Agreement

25. Article 2.1 of the Anti-Dumping Agreement stipulates when a product is to be considered as being dumped for the purposes of the entire Anti-Dumping Agreement.[6] This provision defines normal value in terms of domestic sales transactions in the exporting Member.[7]

26. Had the Investigating Authority used the actual gas prices paid by the investigated exporters in the calculation of the production costs of ammonium nitrate consistently with Articles 2.2.1.1 and 2.2.1, the Investigating Authority would have *not* found legal grounds for the application of Article 2.2 to determine dumping, or even to find the existence of any dumping at all.

27. Accordingly, the Investigating Authority should have determined the dumping margin following the rules of Article 2.1 of the Anti-Dumping Agreement by comparing the export price with the comparable price of the like product destined for consumption in the exporting country. Since the Investigating Authority, on the contrary, compared the export price with the constructed normal value in the absence of circumstances envisaged in Article 2.2. of the Anti-Dumping Agreement, it determined dumping in violation of Article 2.1 of the Anti-Dumping Agreement, which is a standalone claim submitted by the Russian Federation.

F. Ukraine violated Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement

28. Being an independent obligation, Article 11.1 of the Anti-Dumping Agreement, as an overarching rule, underlines the requirements for reviews of anti-dumping duties under Articles 11.2 and 11.3 and also highlights the factors that must inform such reviews.[8] In *US – Corrosion-Resistant Steel*, the Appellate Body considered that, if the investigating authority "choose[s] to rely upon dumping margins" in its likelihood determination, the dumping calculations "must conform to the principles" set forth in Article 2 in general.[9]

[6] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 109; Panel Report, *US — Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina),* para. 7.76, footnote 50.

[7] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.272.

[8] See Appellate Body's explanation regarding the parallel wording of Article 21.1 of the SCM Agreement (Appellate Body Report, *US – Carbon Steel*, para. 70).

[9] Appellate Body Report, *US – Corrosion-Resistant Steel*, paras. 127, 130.

29. Based on the Investigating Authority's conclusions in the interim and expiry reviews, the Intergovernmental Commission decided to change the anti-dumping duty rates and to extend the anti-dumping measures for five years. In its consideration of whether the anti-dumping measure is necessary to offset dumping, the Investigating Authority breached Articles 2.1, 2.2, 2.2.1, 2.2.1.1 and 2.4 of the Anti-Dumping Agreement as explained above. These violations, taken individually and collectively, infected conclusions made by the Investigating Authority under Articles 11.2 and 11.3 of the Anti-Dumping Agreement. Irrespective of the inconsistencies with these provisions, Ukraine violated Article 11.1 because it maintains anti-dumping duties despite the absence of dumping. Hence, Ukraine acted inconsistently with Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement.

IV. CLAIMS REGARDING INCLUSION OF A RUSSIAN PRODUCER WITH NEGATIVE DUMPING MARGIN INTO THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS

A. Ukraine acted inconsistently with Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement

30. Under Article 5.8 of the Anti-Dumping Agreement, an anti-dumping investigation should be immediately terminated, and no anti-dumping measure shall be imposed for exporters found not to be involved in dumping practices. In *Mexico – Anti-Dumping Measures on Rice,* the Appellate Body ruled that "the second sentence of Article 5.8 requires the immediate termination of the investigation in respect of exporters for which an *individual* margin of dumping of **zero or *de minimis*** is determined".[10] The Appellate Body explained that exporters excluded from an investigation under this provision cannot be subject to subsequent reviews.[11]

31. Ukraine violated this provision for four reasons. First, Ukraine maintained the Russian producer with a negative dumping margin, as defined by the 2008 Decision as amended by the 2010 Decision, within the scope of the anti-dumping measures and thus failed to terminate the measures in respect of this exporter despite a determination on the absence of dumping. Second, by the 2010 Decision, Ukraine imposed a 0% duty on the exporter for which a below *de minimis* dumping margin was found. Third, it included the said Russian producer into the scope of the underlying reviews. Finally, by extending measures to that producer, Ukraine imposed anti-dumping duties on the exporter for which no dumping was originally established.

32. Therefore, there was no termination of investigation with regard to the Russian producer under consideration within the meaning of Article 5.8 of the Anti-Dumping Agreement. That is despite the fact that its dumping margin was negative as acknowledged by the Ukrainian legal system. The Investigating Authority alleged that the *de minimis* dumping margin was assigned to that Russian producer in the context of an "administrative procedure" that is outside the scope of the anti-dumping investigation and included this exporter into the reviews. Regardless of the legal status of procedures and decisions affecting anti-dumping investigations and imposition of measures in Ukrainian domestic legislation, Article 27 of the Vienna Convention on Law of Treaties obliges Ukraine to respect its international obligations under the WTO Agreements, which was not done in the present case.

33. As to Article 11.2 the Anti-Dumping Agreement, the Appellate Body explained that exporters for which below *de minimis* margins have been established "cannot be subject to … changed circumstances reviews, because such reviews examine … 'the need for the *continued imposition* of the duty'".[12] By analogy, in the context of Article 11.3, such exporters cannot be subject to an expiry review because such reviews examine the likelihood of continuation or recurrence of dumping, whereas no dumping is found. Besides, the mere fact that the anti-dumping duty remains in force while no longer being necessary constitutes a violation of Article 11.1 of the Anti-Dumping Agreement.

34. For these reasons, the Russian Federation submits that Ukraine breached its WTO obligations under Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement.

[10] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice,* para. 217. (emphasis added)
[11] Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, paras. 305-306.
[12] Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, paras. 305-306. (emphasis original)

V. SUBSTANTIVE CLAIMS RELATING TO THE LIKELIHOOD OF INJURY DETERMINATION

A Ukraine acted inconsistently with Articles 11.1, 11.2, 11.3, 3.1 and 3.4 of the Anti-Dumping Agreement

35. In its determination of the likelihood of continuation of injury, the Investigating Authority relied on unsubstantiated findings regarding the existence of injury at the time the review should have been terminated and therefore such determination is WTO-inconsistent, which is described in detail as follows.

(A) Ukraine failed to exclude imports of the Russian producer with negative dumping margin from the volume of "dumped" imports

36. Articles 11.2 and 11.3 of the Anti-Dumping Agreement mandate that imports attributed to a particular producer (exporter) should be excluded from the determination of likelihood of injury if it is established that imports previously found to be dumped were not in fact dumped, i.e. not responsible for the alleged injury.

37. Ukraine did not exclude imports of the producer with negative dumping margin from the scope of the determination on the likelihood of continuation of injury. The volume of imports regarded as dumped in the original injury determinations still included the imports that could no longer be treated as dumped. Given the change in the volume of "dumped" imports, Articles 11.2, 11.3 and 3.1 of the Anti-Dumping Agreement obliged Ukraine this volume for the purposes of the expiry and interim reviews and to decrease the scope of injury determination by the volume of not dumped imports. Ukraine failed to do so.

38. Besides, it made affirmative conclusions on the likelihood of a future increase of imports from the Russian Federation based on an assumption regarding the future dynamics of imports attributable to this producer. Thus, the process of reviews carried out by Ukraine was not based on "positive evidence" and "objective examination" but favoured its domestic industry's interests.

39. Taking into account that provisions of Article 3 of the Anti-Dumping Agreement "contemplate a logical progression in an authority's examination leading to the ultimate injury and causation determination"[13] the fact that the Investigating Authority included in its injury analysis not dumped imports led to infection of all the conclusions regarding the effect of imports from the Russian Federation on the state of the Ukrainian domestic industry. Hence, Ukraine breached Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement.

(B) The evaluation of economic factors and indices having a bearing on the state of the Ukrainian domestic industry was not based on an "objective examination" of "positive evidence"

40. Ukraine breached its obligations under Articles 11.2, 11.3 and 3.4 of the Anti-Dumping Agreement since it: (a) failed to give an objective examination of factors and indices having a bearing on the state of domestic industry; (b) based its injury finding on a single factor, i.e. deterioration of financial results; (c) failed to give an objective examination of the substantial increase in the costs of production as a key factor having bearing on the state of domestic industry.

41. The evidence on the record shows that the likelihood-of-injury determination consisted of two steps: (1) determination of the current state of the domestic industry and (2) prospective analyses of what happens should the anti-dumping measures lapse. As to the first step, the Investigating Authority stated that the domestic industry had been suffering injury. Yet, a number of economic factors demonstrated strong positive trends not in line with this conclusion, i.e. upward trends *inter alia* in the volume of production, capacity utilization, market share and investments.

[13] See Appellate Body Report, *China – GOES*, para. 143.

42. The injury analysis was based on selective use of information. In its likelihood of injury determination, the Investigating Authority attributed considerable weight to financial results of the domestic industry, but failed to provide any explanation on why this particular factor outweighed all the others. In fact, the Investigating Authority based its injury findings on the sole negative trend in profitability of the domestic industry.

43. The evidence on the record conclusively indicated that Ukrainian domestic industry's financial results were deteriorating due to an increase in production costs. But the Investigating Authority did not explain how the increase of production costs influenced the domestic industry.

44. An objective and unbiased investigating authority would not have made an affirmative determination on the likelihood of continuation (recurrence) of injury on the basis of the sole factor given the positive trends in other economic factors and indices. Investigating Authority's assessment of the current state of the domestic industry was done contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement. As a result, Ukraine failed to meet its obligations under Articles 11.1, 11.2, 11.3 of the Anti-Dumping Agreement.

VI. PROCEDURAL ISSUES AND CLAIMS

A. Ukraine committed several procedural violations of its obligations under Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement

45. Ukraine acted inconsistently with Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement for four reasons. Firstly, Ukraine resorted to the facts available in a situation when the Russian investigated producers and exporters cooperated and provided necessary information within a reasonable period of time. The Investigating Authority did not make any findings suggesting that Russian exporters and producers of ammonium nitrate either refused access to or otherwise failed to provide any necessary information within a reasonable period or significantly impeded the investigation and determinations.

46. Secondly, despite the cooperation of the Russian exporters and producers under the investigation and their appropriate submission of verifiable information in a timely fashion so that it could be used in the investigation without undue difficulties, the Investigating Authority rejected some information provided by them with respect to some of the costs associated with the production of the product under consideration and instead used in its determinations information from alternative sources. The completeness, correctness and accuracy of the information provided by investigated producers and exporters in their replies to the anti-dumping questionnaire were not questioned by the Investigating Authority.

47. Thirdly, the Investigating Authority failed to inform the investigated producers and exporters in advance of the fact that their responses to the anti-dumping questionnaire about some of the costs information had been rejected and of the reasons therefor. Finally, the Investigating Authority failed to give the Russian exporters and producers an opportunity to provide further explanations within a reasonable period of time.

B. Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement by not disclosing the essential facts

48. Articles 6.2 and 6.9 of the Anti-Dumping Agreement provide for separate obligations for investigating authorities, which relate to disclosure of the essential facts.

49. The confidentiality of information could be a legitimate justification of a failure to disclose all the essential facts without violation of Article 6.9 of the Anti-Dumping Agreement. However, it could be the case only if a non-confidential summary of such information is disclosed, provided that such summary enables an interested party to understand the essential facts, comment on them, correct miscalculations and, thus, to defend its interests.

50. Investigating Authority sent to the interested parties the Disclosure containing its findings on dumping and injury made during the interim and expiry reviews. These findings did not sufficiently cover the essential facts about the likelihood of injury determination. Nor did they

contain precise figures and calculations sufficient for the parties concerned to understand how the Investigating Authority arrived at the conclusions on dumping determinations.

51. The lack of facts in the Disclosure prevented the Russian exporters and producers from commenting on these facts and, thus, deprived them of their rights to defend their interests guaranteed by Article 6.2 of the Anti-Dumping Agreement. What is more, Ukraine frustrated the purpose of the "essential facts" disclosure requirement by denying interested parties an opportunity to "provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts".[14] Consequently, the Russian producers were effectively deprived of the right to defend their interests because they were unable to present the rebutting arguments or address the errors in Investigating Authority's analyses. Therefore, Ukraine violated Articles 6.2 and 6.9 of the Anti-Dumping Agreement.

C. Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by not providing sufficient time to comment on the Disclosure

52. On 25 June 2014, the Investigating Authority sent the Disclosure to the interested parties imposing the deadline of 27 June 2014 for them to comment on this document. Thus, it provided only two calendar days for comments. One Russian producer with a negative dumping margin requested an extension of the deadline by 14 days. However, that request was not satisfied.

53. In the context of Article 6.9 of the Anti-Dumping Agreement, the ability of interested parties to defend their interests is strongly connected with their ability to submit arguments on the facts under consideration. In its turn, the ability to submit arguments is dependent upon the time when the disclosure of those facts was made. The two days deadline for commenting on essential facts which formed the basis for the decision made as a result of interim and expiry reviews was not sufficient for the parties to defend their interests. Accordingly, the Russian producers and exporters were effectively deprived of the right to defend their interests under Article 6.9 of the Anti-Dumping Agreement.

VII. OTHER CLAIMS

A. Ukraine breached Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

54. Under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, an investigating authority has to provide in sufficient detail in form of a public notice the findings and conclusions reached on all issues of fact and law it considered in making its preliminary and final determinations, which have led to the imposition of the measures. As the Appellate Body indicated in *China – GOES*,[15] confidentiality concerns cannot excuse an investigating authority from its obligation to provide all materials relevant to its dumping determination and injury margin calculation.

55. The publication of the Disclosure and the 2014 Extension Decision do not constitute a public notice within the meaning of these provisions as Ukraine failed to report calculation methodology, whether in the form of worksheets and computer output or the description of the data and formulas applied, as well as all relevant information on the matters of fact and law which have led to the calculation of dumping margin. Besides, Ukraine did not provide all relevant information which formed the basis for its affirmative findings in respect of injury. In particular, it did not disclose data characterizing the state of the Ukrainian industry. Thus Articles 12.2 and 12.2.2.of the Anti-Dumping Agreement were violated.

B. Ukraine violated Articles 1, 18.1 of the Anti-Dumping Agreement and Article VI of the GATT due to its WTO-inconsistent behaviour described above

56. Both determinations of dumping and extension by Ukraine of anti-dumping duties imposed on imports of ammonium nitrate originating in the Russian Federation violate numerous provisions of the Anti-Dumping Agreement. These measures also entail violations of Articles 1 and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

[14] Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[15] Appellate Body Report, *China – GOES*, para. 259.

VIII. UKRAINE'S REQUEST FOR A PRELIMINARY RULING SHOULD BE REJECTED IN ITS TOTALITY

57. Ukraine alleged that the 2008 and 2010 Decisions are not sufficiently clear indicated in the Panel Request. Yet, both the claim itself and the Panel Request, read in its entirety, including the footnotes, indicate that these decisions have been duly identified as a challenged measure. Likewise, all claims of the Russian Federation are within the Panel's Terms of Reference and should be examined by the Panel.

58. First, the Panel Request sufficiently informed Ukraine and third parties about the Russian Federation's complaint on Ukraine's violation of Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement (Claim 1 in the Panel Request). The same is correct for Claim 17 and Claim 4 of the Panel Request.

59. The Russian Federation's Claim 17 is similarly reflected in the Panel Request with sufficient clarity. In addition to that, this claim (violation of Articles 11.1, 11.2, 11.3, 3.1 and 3.4) concerns the aspects of injury deriving from Claims 14-16 of the Panel Request. In Claim 4 of the Panel Request (breach of Articles 6.8 and paragraphs 3, 5 and 6 of Annex II of the Anti-Dumping Agreement), the Russian Federation also provided a brief summary of the corresponding factual background to enable Ukraine and third parties to understand the issue clearly.

60. Second, none of the claims made in the Panel Request expand the scope of the dispute or change the essence of the complaint. A combined reading of the Panel Request and the Request for Consultations shows that the legal basis of Claim 7 in the Panel Request (violation of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement) naturally evolved from the legal basis of Claim 10 of the Request for Consultations (violation of Article 6.9 of the Anti-Dumping Agreement).

61. The inclusion of Claim 17 in the Panel Request (breach of Articles 11.1, 11.2, 11.3, 3.1 and 3.4 of the Anti-Dumping Agreement) was due to the fact that additional information was received during consultations and contributed to a better understanding of the operation of a challenged measure which warranted revisiting the list of treaty provisions with which the measure is inconsistent. This claim evolved from Claim 13 and 14 (Articles 6.6 and 11.2, and Articles 6.6 and 11.3 of the Anti-Dumping Agreement accordingly), as well as from Claim 7 set forth in the Request for Consultations (violation of Article 5.8 of the Anti-Dumping Agreement).

ANNEX B-2

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. UKRAINE'S REQUEST FOR PRELIMINARY RULING

1. Measures not specified in the Panel Request

1. The Russian Federation breached Article 6.2 DSU since it included a measure in its First Written Submission that was not identified in its Panel Request. While the Russian Federation's Panel Request clearly identifies the 2014 Decision as the measure at issue, nothing in the Panel Request indicates that this is also the case for the 2008 Decision. Quite on the contrary, the first two sentences of the Panel Request explicitly limit the scope of the dispute to the 2014 Decision by referring only to the measures "in connection with expiry and interim reviews. (…) as set forth in the [2014 Decision]." A use of plural or the mere mentioning of the 2008 Decision in a footnote is not sufficiently clear according to the panel in *China - Publications and Audiovisual Products* to comply with the requirements of Article 6.2 DSU.

2. Claims having no basis in the Request for Consultations

2. Ukraine submits that Claims 7 and 17 in the Panel Request have no basis in the Request for Consultations and therefore fall outside the terms of reference of the Panel. The Appellate Body held that it is not necessary that the claims in the request for consultations are identical to those set out in the panel request, provided that the legal basis in the panel request may reasonably be said to have evolved from the legal basis that formed the subject of consultations.[1] This last requirement has often been interpreted to require a close correlation between the provisions.

(a) Claim 7 of the Panel Request

3. With respect to Claim 7 of the Panel Request, it cannot be said that claims under Article 6.9 Anti-Dumping Agreement have evolved from the same legal basis as claims under Article 12.2 and 12.2.2 Anti-Dumping Agreement. The only similarity between these articles is that they contain an obligation to disclose information. However, as confirmed in WTO case law, the nature of these obligations is different. Article 6.9 relates to information and facts that must be disclosed to provide the parties with an opportunity to defend their interests, while Article 12.2 and 12.2.2 requires the investigating authority to disclose the reasoning of its final determination. Moreover, Article 6.9 requires the disclosure of facts before the final determination is made and Article 12.2 and 12.2.2 require the public notice after the final determination is made. A third difference relates to the purpose of the articles. The purpose of Article 6.9 is to provide the parties with the opportunity to defend their interests. Articles 12.2 and 12.2.2, on the other hand, is to ensure that the investigating authority's reasons for making the final determination can be discerned and understood by the public. For those reasons, Ukraine submits that there is no correlation between Article 6.9 and Articles 12.2 and 12.2.2.

(b) Claim 17 of the Panel Request

4. The Russian Federation argues that Claim 17 has evolved from the legal basis of Claims 7, 13 and 14 of the Request for Consultations. Contrary to the legal standard, the Russian Federation does not argue that the legal basis of Claim 17 is closely related to the legal basis of the Claims 7, 13 and 14. With regard to the correlation with Claim 7 of the Request for Consultations, the Russian Federation instead argues that the same factual circumstances – the inclusion of a producer with a *de minimis* dumping margin in the scope of the expiry and interim review – led to the violation of the Articles 5.8, 11.1, 11.2, 2.2, 2.4, 11.3, 9.2 and 9.3 listed in Claim 7 of the Request for Consultations and a violation of Articles 3.1 and 3.4 mentioned in the Panel Request. Nevertheless, case law has held that the mere fact that claims under two different articles are premised on the same or related factual basis, does not imply that such claims concern the same matter or that one claim has evolved from the other.

[1] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

5. With respect to the correlation with Claims 13 and 14 of the Request for Consultations, the Russian Federation submits that because Claims 13 and 14 mention the word "injury", its claims under Article 3 naturally evolved from its claim under Articles 6.6, 11.2 and 11.3. However, case law has exhaustively explained the difference in nature and purpose between these articles. Consequently, the obligations under Article 3, on the one hand, and Articles 11.2 and 11.3, on the other hand differ in nature as to "what" has to be analyzed and evaluated. Article 3 calls for an analysis of whether the domestic industry is presently suffering from material injury caused by dumped imports, whereas Articles 11.2 and 11.3 call for the examination of the future situation following the termination of the anti-dumping order. Furthermore, in performing the analysis of the presently existing material injury as opposed to the evaluation of the future situation, the investigating authority has to comply with different obligations: Article 3 in the first scenario and Articles 11.2 and 11.3 in the second. Thus, there is clearly no correlation between the claims under Article 3 and the claims under Articles 11.2 and 11.3 which results in Claim 17 not falling within the terms of reference of the Panel.

II. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

(a) Article 2.2.1.1 Anti-Dumping Agreement

6. Ukraine submits that the reliance by the Russian Federation on *EU – Biodiesel* is misplaced. First, the Russian Federation has selectively quoted certain portions from that proceeding while ignoring other equally important parts. Second, the factual circumstances in *EU – Biodiesel* were entirely different. The Russian Federation has then selectively applied certain legal considerations from that case to a whole different set of factual circumstances. The factual differences consist of the fact that:

(i) the governmental price-fixing of the domestic Russian gas which is called dual pricing is WTO inconsistent. This is different from the export taxes that were in place in Argentina;

(ii) the domestic Russian gas prices were found to be below cost, different from the prices of soybeans in Argentina;

(iii) the government intervention was direct as opposed to the indirect effect of the export taxes in Argentina; and

(iv) the result of the intervention in the Russian gas prices has been measurable and significant, whereas in Argentina, the prices were merely depressed. It is important to note that Gazprom is the predominant overall gas supplier in Russia (>70%), moreover, it accounts for virtually all gas supplies to the Agro-Chemical Industry to which ammonium nitrate producers belong.

7. Turning to the legal provisions under investigation, contrary to what the Russian Federation argues, the Appellate Body held in *EU – Biodiesel* that an investigating authority is certainly free to examine the reliability and accuracy of the costs recorded in the records of the exporters to determine whether all costs incurred are captured, understated and whether non-arms-length transactions or other practices affect the reliability of the reported costs. Ukraine recalls that the Appellate Body provided three additional exceptions to reject the costs recorded in the records of the exporters; (i) non-arm's length transaction; (ii) other practices; and (iii) situations which are not 'normal'. Ukraine submits that its actions with respect to disregarding the cost of gas as pictured in the records of the Russian exporters fall within these exceptions.

8. The notion of non-arm's length is neither defined in the Covered Agreements, nor in Appellate Body case law. Since we are dealing with the most specific accounting provision within the Anti-Dumping Agreement, i.e. Article 2.2.1.1, Ukraine submits that for the definition of 'arm's length' the Panel should be guided by the relevant specific accounting definitions. GAAS and ISA provide that an arm's length transaction is "[a] transaction conducted on such terms and conditions between a willing buyer and a willing seller who are unrelated and are acting independently of each other and pursuing their own best interests." The domestic sales transactions of gas were not at arm's length since those prices do not reflect an interaction between independent buyers and sellers, pursuing their own best interests. This non-arm's length

nature of the practice therefore falls squarely within the first exception provided by the Appellate Body in *EU – Biodiesel*. Accordingly, the cost rectification by the Ukrainian authority was therefore in line with exception foreseen by the Appellate Body and is not inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.

9. Second, the factual situation in the Russian Federation's gas market is significantly unique to qualify as such 'other practice'. The facts demonstrate that there exists a clear practice in the Russian Federation which is definitely 'other' than which is usual in the commercial world, and which is also distinctly different from the factual situation in *EU – Biodiesel*. The illegal price fixing by the Government, the mandatory domestic gas sales below cost and the direct governmental intervention are all aspects of something that is not typical of most, if not all, other anti-dumping proceedings of WTO members. Such facts, therefore, clearly warrant denomination as an 'other practice' in the sense of one of the exceptions described by the Appellate Body in *EU – Biodiesel*. Since this practice can therefore be identified as 'other', it justifies a rectification of the line item for gas purchases in the records of the producers.

10. It is submitted that we do not need to get to the discussion of 'normally' since the particular situation in the Russian Federation already falls squarely in one of the two regular exceptions discussed above (non-arm's length or other practices). However, should the Panel deem it useful, Ukraine will be pleased to discuss as to why it considers that the domestic gas prices in the Russian Federation and their reflection in the accounting records are not normal. In such situation, Ukraine submits that the above described specific factual circumstances in this case (a) governmental price fixing, (b) prices fixed below cost, (c) direct governmental intervention which is (d) measurable warrant deviation from the obligation to normally base the cost on the records.

(b) Article 2.2 of the Anti-Dumping Agreement

11. Ukraine recalls that the situation before us is again vastly different than the one in *EU – Biodiesel*, where there was no need to look elsewhere for information. The persuasive reasoning of *US – Softwood Lumber IV* in the context of the *Agreement on Subsidies and Countervailing Measures*, as repeated by *EU – Biodiesel* in the context of the *Anti-Dumping Agreement* is instructive. In very specific and unique circumstances, such as the one that the Ministry of Economic Development and Trade of Ukraine (MEDTU) was facing, interpretation must be given to a legal concept in light of the economic facts that underpin it. In this case, as a result of the artificial and pervasive nature of the domestic gas prices in the Russian Federation, the investigating authority was compelled to resort to information and evidence from outside the country of origin to arrive at and determine the cost inside the country of origin. Compliance with this obligation may then require the investigating authority to adapt the information. This is exactly what the investigating authority did. It considered prices of Russian gas sold on a free market. It adjusted these prices back so as to arrive to the price within the Russian Federation. In so doing it carefully limited itself to the distorted line item of gas prices and did not substitute the entire cost of the product under consideration.

(c) Article 2.2.1 of the Anti-Dumping Agreement

12. This claim represents not much more than a repetition of the Russian Federation's discontent with the calculation of the normal value inclusive of the cost rectification. To this extent, claim 3 is therefore consequential to claim 1. Ukraine submits that the Russian Federation's argument has no merit as the investigating authority did not violate the provisions of Article 2.2.1.1 of the Anti-Dumping Agreement.

13. In any event, MEDTU conducted the ordinary course of trade test on the basis of the determined cost of production and found that the sales of the Russian producers were not made in the ordinary course of trade. When making this determination, MEDTU assessed whether (i) the sales were made at a loss within an extended period of time; (ii) the sales were made at a loss in substantial quantities; and (iii) the prices did not provide for recovery of all the costs within a reasonable period of time. Based on this assessment, MEDTU concluded that the sales of the Russian producers were not in ordinary course of trade.

14. Further, even if the Panel were to uphold the claim that Article 2.2.1.1 of the Anti-Dumping Agreement had been violated, this does not mean that the obligations under Article 2.2.1 have

been violated as a consequence. Article 2.2.1.1 and Article 2.2.1 contain distinct obligations that should not be mixed.

(d) Article 2.4 of the Anti-Dumping Agreement

15. The "difference" that the Russian Federation claims "affects price comparability" between the normal value and the export price, such that "due allowance" should have been made in order to ensure a "fair comparison" under Article 2.4, arose from the methodology used by MEDTU to determine the normal value. Unlike the examples in the illustrative list in Article 2.4, the alleged "difference" is not a characteristic of the transactions being compared. It was a methodological approach that affected the cost of ammonium nitrate, but it did not affect the price comparability of the normal value and the export price. This approach has been confirmed by the Appellate Body in *US – Zeroing (EC)*.

16. Furthermore, the Appellate Body held in *EU – Biodiesel* that Article 2.2.1.1 and Article 2.4 serve different functions in the context of determinations of dumping whereby the former assists an investigating authority in the calculation of costs for purposes of constructing the normal value; whereas the latter concerns the fair comparison between the normal value and the export price.[2] Similarly, the panel held in *EU – Footwear (China)* that "[n]othing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price."[3]

III. VIOLATION OF ARTICLES 5.8, 11.2 AND 11.3 OF THE ANTI-DUMPING AGREEMENT BY INCLUDING A RUSSIAN PRODUCER WITH A NEGATIVE DUMPING MARGIN IN THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS

17. First, the 2008 Decision, as amended by the 2010 Decision, falls outside of the scope of the Panel's terms of reference. Therefore, the only issue before the Panel is whether the 2014 Decision violates Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement. Since the Russian Federation did not specify which actions of MEDTU violate these legal provisions, the claim under Articles 11.1, 11.2 and 11.3 should be dismissed as unfounded since the Russian Federation has failed to provide a *prima facie* case.

18. The claim under Article 5.8 must equally be dismissed since the Russian Federation erroneously relied on the findings of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. The findings of the Appellate Body relate to the determination of a zero or *de minimis* dumping margin by the investigating authority. MEDTU, in fact, found dumping margins of 40.5% and 82.2%. Therefore, there was no obligation to terminate the investigation. Moreover, the Appellate Body held, in line with the findings of several panels, that the obligation is only limited to original investigations and that no such obligation arises in the context of interim reviews, expiry reviews and administrative reviews.

19. Finally, if the Panel is of the view that a case could have been brought against the 2008 Decision, as amended by the 2010 Decision, Ukraine submits that this claim should be rejected. Based on case law, there are three cumulative conditions that must be met before an investigating authority needs to terminate an investigation. These are that (1) it relates to an original investigation; (2) a negative or *de minimis* dumping margin is determined; and (3) this dumping margin determination is made by the investigating authority. These conditions are not met since, first, the 2008 Decision found a dumping margin for EuroChem of 10.78%. Second, no investigating authority ever found a zero or *de minimis* dumping margin. The 2010 Decision – taken following a series of decisions by the Ukrainian courts – did not determine that EuroChem's dumping margin was negative, zero or *de minimis*. The 2010 Decision merely enforced the rulings of the Ukrainian courts that EuroChem's dumping margin was not correctly determined. Rather than recalculating EuroChem's dumping margin, the Interdepartmental Commission on International Trade only modified the anti-dumping *duty* rate – and not the *margin* – applicable to EuroChem and changed this duty rate to zero.

20. Panels previously made a clear distinction between the purpose of an original investigation and a duty assessment procedure under Article 9.3 of the Anti-Dumping Agreement when it

[2] Appellate Body Report, *EU – Biodiesel*, para. 6.48
[3] Panel Report, *EU – Footwear (China)*, para. 7.263. See also Panel Report, *EU – Biodiesel*, para. 7.296

quoted the panel's findings in *US – DRAMS* that "…in the context of Article 5.8, the function of the *de minimis* test is to determine whether or not an exporter is subject to an anti-dumping order. In the context of Article 9.3 duty assessment procedures, however, the function of any *de minimis* test applied by Members is to determine whether or not an exporter should pay a duty."[4] Similarly to an Article 9.3 duty assessment procedure, the 2010 Decision merely set a new duty level for EuroChem but did not calculate a new dumping margin for that producer.

21. Since the three conditions are not met, no obligation to terminate the investigation existed upon MEDTU. Claim 7 of the First Written Submission must therefore be dismissed.

IV. SUBSTANTIVE CLAIMS REGARDING LIKELIHOOD OF RECURRENCE AND/OR CONTINUATON OF INJURT DETERMINATION

(a) The Russian Federation's reliance on Article 3 Anti-Dumping Agreement

22. Ukraine notes that it is a well-established rule in WTO jurisprudence that provisions of Article 3 of the Anti-Dumping Agreement do not apply to likelihood of recurrence or continuation of injury determinations in expiry and interim reviews. Ukraine agrees that in the course of expiry and interim reviews, an investigating authority is obliged to base its findings on an objective examination of positive evidence. However, the source of this obligation are Articles 11.2 and 11.3 themselves and not Article 3. Consequently, Ukraine asks the Panel not to consider any of the Russian Federation's claims based on the alleged violations of Article 3 of the Anti-Dumping Agreement.

(b) Proper interpretation of MEDTU findings

23. The arguments of the Russian Federation are based on an erroneous interpretation of the obligations of an investigating authority under Articles 11.2 and 11.3 of the Anti-Dumping Agreement. It should be pointed out that neither Article 11.2 nor Article 11.3 of the Anti-Dumping Agreement obligate an investigating authority to make a determination that the domestic industry is suffering material injury. Instead, the investigating authority is tasked with making a determination in respect of the likelihood of recurrence or continuation of dumping and injury should the anti-dumping measures be terminated.

24. Most of the Russian Federation's arguments are premised on the erroneous presumption that MEDTU made a finding that the Ukrainian industry was suffering material injury and that such a finding was the basis for MEDTU's determination of the likelihood of recurrence of injury. MEDTU did not determine that the Ukrainian industry was suffering from material injury. Instead, MEDTU determined that (i) during the period of investigation of the interim and expiry review, the Russian producers continued to export dumped products; (ii) there was no indication that the pricing behavior would change; (iii) the Russian producers were also exporting dumped products to other markets; (iv) in case the duties would be terminated, the Russian producers would increase their exports which would have an impact on the prices in the market; and (v) patterns showed the increase in Russian imports in the periods when the application of the anti-dumping duty was suspended.

(c) EuroChem imports

25. The Russian Federation claims that EuroChem should not have been included in the determination on likelihood of injury since its dumping margin was zero. However, in an expiry review, an investigating authority is under no obligation to exclude from the likelihood of recurrence of injury analysis the volume of imports from a producer currently not found to be engaged in dumping (which was not the case here in any event). Nevertheless, nothing in Articles 11.1, 11.2 and 11.3 prohibits an investigating authority from analysing the import volume trends in respect of the product subject to a zero anti-dumping duty in order to make a determination as to the likely behaviour of producers subject to the anti-dumping duties, once such duties are removed. The analysis of EuroChem's export and prices indicated that a surge of imports was to be expected if the duties were terminated.

[4] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.142 (emphasis added).

(d) Alleged undue reliance on the profitability of the Ukrainian industry

26. Contrary to what the Russian Federation is arguing, MEDTU did not solely make a determination on the likelihood of the recurrence of injury based on the decrease of profitability of the Ukrainian industry. Instead, it determined that there was a likelihood of recurrence of injury based on (i) the likely increase of the dumped imports should the anti-dumping measures be terminated; (ii) the impact of the dumped imports on the prices of the national producers; and (iii) the consequential impact on the state of the Ukrainian industry. Secondly, taking into account the dramatic drop in profitability of the domestic industry, it was not unreasonable for MEDTU to conclude that the Ukrainian industry was still in a fragile state.

(e) Analysis of the costs of production of the Ukrainian industry

27. Finally, the Russian Federation argues that MEDTU failed to examine the cost of production as a factor having a bearing on the state of the industry under Article 3.4 of the Anti-Dumping Agreement. In that respect, it suffices to note that the Russian Federation's claim is based on an incorrect understanding of the facts of the case. MEDTU in fact examined the increase in the cost of production of the Ukrainian industry. MEDTU determined that the cost of production significantly increased, at a pace exceeding the increase in the sales prices, thus resulting in a significant decrease of the profitability.

V. PROCEDURAL CLAIMS

(a) Alleged recourse to facts available

28. The Russian Federation argues that MEDTU's decision to disregard the costs for gas in the records of the investigated producers equates to a decision to resort to facts available under Article 6.8 of the Anti-Dumping Agreement. It is clear, based on the investigation record, that the information about costs of gas in the producers' records was not rejected on evidentiary grounds under Article 6.8 of the Anti-Dumping Agreement. Instead, the information regarding the costs of gas in the records of the investigated producers was accepted into evidence, analyzed by MEDTU and thereafter rectified based on the substantive rules regarding the determination of costs under Article 2.2.1.1 of the Anti-Dumping Agreement. The Russian Federation tries to blur the lines between the procedural and evidentiary rules in Article 6.8 on the one hand, and substantive rules in Article 2.2.1.1 regarding the dumping determination, on the other hand. However, Article 6.8 and Annex II do not govern how an investigating authority is to calculate dumping margins.

(b) Alleged deficiencies in the disclosure of the essential facts

29. The Russian Federation's claim regarding the disclosure of essential facts in the likelihood of recurrence of injury relates first to the figures and price effects analysis and second, to the figures in Tables 11.3.1 to 11.3.6 in the Disclosure. First, The Russian Federation bases its arguments on the findings of the Appellate Body in *China – GOES*. Nevertheless, this case concerned an original investigation whereas the investigation at issue is a combined interim and expiry review. Moreover, as far as the data in Tables 11.3.1 through 11.3.6 is concerned, the Russian Federation did not advance any argument at all to demonstrate that such data would constitute essential data within the meaning of Article 6.9 of the Anti-Dumping Agreement.

30. Further, Ukraine recalls that the disclosure obligations under Article 6.9 of the Anti-Dumping Agreement relate to essential facts on the record of the investigating authority and not to reasoning or explanations.[5] Since neither of the Russian Federation's two complaints deal with the disclosure of facts, they do not fall within the scope of Article 6.9 of the Anti-Dumping Agreement.

31. Finally, Ukraine notes that the information in Tables 11.3.1 through 11.3.6 was properly disclosed to the interested parties taking into account MEDTU's confidentiality obligations under Article 6.5 of the Anti-Dumping Agreement. The disclosure of trends' data instead of absolute figures is a generally used method for providing non-confidential summaries of confidential data and this does not render the disclosure concerning price effects inconsistent with the requirements of Article 6.9 of the Anti-Dumping Agreement.

[5] Appellate Body Report, *China – Autos (US),* para. 7.145.

32. Regarding the essential facts in the dumping calculations, MEDTU disclosed the essential facts underlying its dumping determinations in sufficient detail so as to enable the Russian exporting producers to understand clearly which data was used for the calculation of the dumping margins. MEDTU explained the applied methodology in detail and referred to precise information in the questionnaire responses of the investigated Russian producers used to calculate the dumping margin. The actual figures are indeed not reflected in the Disclosure. Nevertheless, sufficient details were given and disclosure took place by form of reference to the specific data which was in the possession of the investigated Russian producers.

VI. CLAIMS UNDER ARTICLES 12.2 AND 12.2.2

33. In respect of the Russian Federation's claims under Articles 12.2 and 12.2.2, Ukraine reiterates its position as set out in Ukraine's First Written Submission. Further, Ukraine notes that the Russian Federation's claim under Articles 12.2 and 12.2.2 is limited to the lack of disclosure in respect of the dumping margin calculations. In its First Written Submission, however, the Russian Federation additionally argues that Ukraine violated Articles 12.2 and 12.2.2 by not disclosing in sufficient details the data regarding injury margin calculations and determination of the likelihood of the recurrence of injury. Since claim 7 in the Panel Request only mentioned the deficiency of the disclosure in respect of the dumping margin calculations, the Russian Federation's claims in respect of the injury margin calculations and determination of the likelihood of the recurrence of injury are outside the Panel's terms of reference.

VII. CONCLUSIONS

34. Ukraine has demonstrated the lawfulness of the anti-dumping action that Ukraine has taken in respect of the injuriously dumped ammonium nitrate from the Russian Federation.

ANNEX B-3

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF RUSSIA

I. INTRODUCTION

1. In this second integrated executive summary the Russian Federation summarizes arguments presented to the Panel in its second written submission, its opening and closing oral statements at the second substantive meeting and its responses to the Panel's questions after the second substantive meeting.

II. PRELIMINARY ISSUES – TERMINOLOGY AND ADMISSION OF EVIDENCE

2. The Russian Federation objects to both the use of the term "Investigation Report" and the designation of Report on the Gas Market of Russian Federation prepared by the Ukrainian State Enterprise "Ukrpromvnesheksрertiza" by Ukraine as "underlying the investigation report" and respectfully requests the Panel to use the term "Disclosure" in its references to Exhibit RUS-10 and Exhibit UKR-17 in its Report.

3. Also, the Russian Federation does not agree with the usage of the term "rectification" or "rectify", which is a misrepresentation by Ukraine of what actually was a *substitution*" of natural gas prices actually paid by the Russian producers with a surrogate price for natural gas destined for export charged at the "border with Germany".

4. Along with the request to disregard Exhibits from UKR-1 to UKR-8, the Russian Federation respectfully asks the Panel to disregard Ukraine's exhibits from UKR-31 to UKR-40. These exhibits are irrelevant to the consideration of the Russian Federation's claims. They are acts of *ex post* rationalization since none of them are referenced in the Disclosure and some of them even postdate the Disclosure. Legal acts and anti-dumping practices of other WTO Members referred to by Ukraine are also irrelevant since they are part of internal law of other WTO Members and concern anti-dumping investigations based on the facts that are not before the Panel in this dispute.

III. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

A. Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because it failed to calculate the cost of production of ammonium nitrate in the Russian Federation on the basis of the records kept by the Russian producers of ammonium nitrate

(A) Facts of the present case are similar to those in *EU – Biodiesel*

5. The Russian Federation considers that the findings of the panel and the Appellate Body in *EU – Biodiesel* are highly relevant to the present dispute. The factual circumstances at hand are similar to those in *EU-Biodiesel*: (i) the measures concerned are anti-dumping measures; (ii) in both cases investigating authorities (1) did not allege that the records of the investigated producers were improper, flawed, or otherwise inconsistent with the generally accepted accounting principles of the exporting countries; (2) did not allege that the prices for raw materials in the records kept by the investigated producers did not represent the actual prices incurred by those producers, thus in both disputes input prices were considered as recorded correctly; (3) considered that Article 2.2.1.1 of the Anti-Dumping Agreement allows them to examine the "reasonableness" of the costs reflected in the records of the investigated producers and exporter; (4) disregarded the actual prices of raw materials, correctly reflected in the records of the investigated producers and exporters; (5) relied explicitly on the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement to justify such rejection; (6) replaced input prices actually incurred by the investigated companies with the surrogate prices of raw materials and used them in the calculation of the cost of production of the products under consideration; (7) concluded that domestic sales of the product were not made in the ordinary course of trade and the normal value had to be constructed; (8) used the cost of production of the product under consideration, and replaced the raw material prices with surrogate prices, to construct the normal value of the products; (9) used the surrogate prices for raw materials that did not represent the cost of raw materials in the domestic market of the products under consideration for their producers or

exporters; (iii) in both cases inconsistencies with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement are claimed.

6. In addition, Ukraine's reference to the Appellate Body Report in *EU – Biodiesel* into its first written submission indicates its agreement with the Appellate Body's interpretation of Article 2.2.1.1 and the application of that Article in that case.

(B) Arguments based on the analysis of prices of natural gas in the Russian Federation are irrelevant

7. The examination of the reasonableness of prices paid for input (i.e. natural gas), as well as the government regulation of prices on inputs, falls outside the scope of provisions of Article 2, in particular Articles 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement. Thus, all arguments concerning the alleged "factual differences" between the present dispute and *EU – Biodiesel* presented by Ukraine do not offer any valid reasons, let alone legal grounds for deviation from the findings of the Appellate Body in *EU – Biodiesel.*

8. Russian commitments envisaged in the Working Party Report on Russia's Accession to the WTO and corresponding arguments of Ukraine are irrelevant to this dispute and outside the Panel's terms of reference. Their consideration would be contrary to Article 3.10 of the DSU as an attempt to link several distinct matters in the same proceedings. The paragraphs of the Working Party Report cited by Ukraine do not contain a special commitment of the Russian Federation on price comparability for the purpose of anti-dumping proceedings. Any discussions and commitments reflected in these paragraphs are irrelevant for the examination of Russia's claims in the dispute at issue. In addition, Members of the Working Party on Russia's accession were satisfied with the explanations provided by the representative of the Russian Federation, including those on the pricing policies; they knew that some prices on natural gas were regulated in the Russian Federation, and agreed that some prices on gas in the Russian Federation would be regulated in the future. Reference to the Working Party Report on Russia's Accession to the WTO provided in the Disclosure is irrelevant and approach of Ukrainian authorities in reading of accession documents and evaluation of its own and Russia's regulation of prices on natural gas highlight that they were not objective during the anti-dumping proceedings on imports of ammonium nitrate from the Russian Federation.

9. The question of whether Russian gas suppliers conduct their business practice in accordance with Article XVII:1(b) of the GATT 1994 is irrelevant for this dispute. The measure at issue in this dispute is not about the business practice of Russian gas suppliers, but about the consistency of Ukraine's anti-dumping measures with the WTO Agreements. Article 2.2.1.1, as well as other provisions of Article 2 of the Anti-Dumping Agreement, do not provide a legal basis for an investigating authority's analysis of whether an investigated producer or exporter, or a supplier of raw materials to an investigated producer or exporter, is a state trading enterprise and of whether such an enterprise acts in accordance with Article XVII of the GATT 1994. The preparatory work during the Uruguay and Tokyo rounds confirm this understanding.

10. Any arguments related to the Supplementary Provision to Article VI:1 in Annex I to the GATT 1994 (the second Ad Note to Article VI of the GATT 1994) or "the particular market situation" are irrelevant to this dispute. These arguments were not considered by Ukrainian authorities while conducting underlying reviews and therefore constitute *ex post* rationalization considerations contrary to Article 17.6(i) of the Anti-Dumping Agreement.

11. Ukrainian authorities' "determination" on the gas supplier cost of production of natural gas is irrelevant and WTO-inconsistent. In the current case: (i) the product under consideration and the like product are both ammonium nitrate originating in the Russian Federation; (ii) natural gas is a raw material used to produce ammonium nitrate, and, thus, natural gas is not a like product to ammonium nitrate; (iii) the investigated producers are the Russian producers of ammonium nitrate and not the producers of natural gas; (iv) the investigated producers purchase natural gas; (v) the records of the investigated producers correctly reproduced the cost of production of ammonium nitrate including prices paid by these producers for natural gas. Taking these and the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement into account, the examination of the investigating authority should have been focused on whether the records of the investigated producers of ammonium nitrate reasonably reflect the costs *actually* incurred by them for the product under consideration, including *actual prices* paid for natural gas.

12. However, Ukrainian authorities went further and examined the reasonableness of prices for *natural gas*. In this analysis, Ukrainian authorities compared the recorded actually paid prices for natural gas with some hypothetical costs that might have been incurred under a different set of

circumstances and with gas prices in other markets. Neither Articles 2.2.1.1, 2.2.1, 2.2 nor any other disciplines (including Article 6.6) of the Anti-Dumping Agreement allow assessment of prices for inputs in determination of normal value.

13. The Russian Federation emphasizes that gas suppliers were *not* "the investigated producers" for the purpose of the anti-dumping proceedings. That means *inter alia* that the cost of production of natural gas was neither reviewed, nor commented on by the Russian gas suppliers. Finally, Ukrainian authorities erroneously presumed and in fact never determined the identity of the supplier of gas to the investigated producers of ammonium nitrate. Had Ukrainian authorities checked the identity of the suppliers of gas to the Russian exporting producers, they would have found, for instance, that they were supplied with gas by different gas producers and not just the one that was wrongly presumed by Ukraine to be the sole supplier of gas to the investigated producers. On the basis of these considerations, all Ukraine's arguments, reasons and evidence related to the costs of production of natural gas in the Russian Federation shall be rejected.

14. Moreover, Ukraine's characterization of government regulation of natural gas prices and its alleged effect is irrelevant to the settlement of this dispute since Article 2.2.1.1 of the Anti-Dumping Agreement does not allow to examine government regulation and its effect. Instead it prescribes examination of the quality of records of "the exporter or producer under investigation" and the proper allocation of costs. This is in line with the general concept of dumping which "relates to the pricing behavior of exporters or foreign producers".[1]

15. By characterizing the government regulation at issue as alleged "direct intervention", Ukraine tries, on the one hand, to downplay the situation in Argentina explored in *EU – Biodiesel*, and, on the other hand, to exaggerate the situation in the Russian Federation. The situation in Argentina cannot be even compared with the regulation of some prices for natural gas in the Russian Federation. While price regulation and export duties are both government regulations, Article 2.2.1.1 of the Anti-Dumping Agreement does not require any analysis related to government regulation, including its nature (whether it is direct or not), thus rendering such determination irrelevant for the present dispute.

16. As to evaluation of the alleged effect of the government regulation of prices on natural gas in the Russian Federation in comparison to the regulation analyzed by the panel in *EU-Biodiesel*, the EU authorities, contrary to Ukraine's allegations, were able to measure the effect of government regulation quite precisely.

(C) Arguments based on footnote 400 of the panel report in *EU – Biodiesel* are irrelevant and legally flawed

17. In its search for the legal basis justifying its measures, Ukraine attempts to invoke footnote 400 of the panel report in *EU – Biodiesel*. First, its reference to this footnote, as well as to paragraphs of the Appellate Body Report that refer to footnote 400, is an act of *ex post* rationalization, and therefore should be rejected in its totality. Second, neither "non-arm's length transactions" nor "other practices" in footnote 400 of the panel report in *EU – Biodiesel* can be qualified as "legal exceptions" from application of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement. The Anti-Dumping Agreement under no circumstances permits measures inconsistent with its provisions, since there are no exceptions in this Agreement like, for example, general exceptions in the GATT 1994. Third, footnote 400 of the panel report in *EU – Biodiesel* constitutes o*biter dictum*, since neither the Appellate Body, nor the panel made any particular affirmative findings based on substantive statements of this footnote. Therefore footnote 400 of the panel report in *EU – Biodiesel* does not constitute legal basis in a manner Ukraine claims it to be.

18. In addition, Ukraine arguments based on the "arm's length" test for determination of normal value are irrelevant for several reasons, including: (i) Article 2.2.1.1 of the Anti-Dumping Agreement does not contain an additional, third, condition that would permit an investigating authority to use this test; (ii) its applicability will be contrary to what Article 2.2.1.1 prescribes, i.e., comparison between the costs reported in the records kept by the investigated producers and the costs actually incurred by that investigated producer; (iii) the context of Article 2.2.1.1 (including the text of Article 2.3) does not support Ukraine's position either; (iv) its application contradicts the Appellate Body's ruling that the examination of the reasonableness of costs is not permitted under Article 2.2.1.1 of the Anti-Dumping Agreement; (v) it ignores that dumping arises

[1] Appellate Body Report, US – Zeroing (Japan), para. 156 (referring to Appellate Body Report, US – Zeroing (EC), para. 129).

from the pricing behaviour of an exporter of the product under investigation, and not of a third party (producer of input).

19. Moreover, the suggested by Ukraine definition of an arm's length transaction shall not be accepted. The suggested analysis of government regulation of prices of inputs as well as of producers of inputs and their business structure and operation, the cost of production of inputs would result in a violation of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement. Also, Ukraine relies on definitions from the *auditing standards, international and those of the US*, while Article 2.2.1.1 of the Anti-Dumping Agreement concerns generally accepted *accounting principles of the exporting country*, i.e. the Russian Federation in this case.

20. In its argumentation on the relevance of Article 2.3 of the Anti-Dumping Agreement, Ukraine ignores the functional and textual differences between Articles 2.2.1.1 and 2.3 of the Anti-Dumping Agreement. While Article 2.3 governs the methodology for determining the export price, Article 2.2.1.1 concerns the calculation of the cost of production for determination of the normal value. Provisions of Article 2.2.1.1 and Article 2.3 contain different obligations and address different issues, and should not be mixed up. In particular, Article 2.2.1.1 does not include the terms "unreliable", "independent buyer". The absence of such wording in Article 2.2.1.1 and other provisions relevant to the determination of normal value also indicates that Article 2.3 should not be considered as the relevant context for interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.

21. Ukraine's arguments on "other practices" are not relevant either. Consistently with the well-established *ejusdem generis* canon of construction, the category of "other practices" should be understood as encompassing only such practices as are of the same kind as those preceding this phrase in footnote 400 of the panel report in *EU – Biodiesel*. Thus, the immediate context of the phrase suggests that the words "other practices" should be understood as reporting and business practices, i.e. the reporting practices of the investigated producers or exporters, but not as practices of governments. This is confirmed by the conclusion of the panel in *EU – Biodiesel*, in which it emphasized that records should adequately report the actual costs incurred by the particular producer or exporter for the product under consideration.[2]

(D) Ukraine's arguments based on the interpretation of the word "normally" in Article 2.2.1.1 of the Anti-Dumping Agreement are irrelevant and legally flawed

22. Ukraine cannot rely on the word "normally" in Article 2.2.1.1 of the Anti-Dumping Agreement as all such arguments constitute *ex post* rationalization. Furthermore, there is a limited number of explicit provisions that would allow investigating authorities in the course of normal value determination to disregard costs reflected in investigated producers' and exporters' records (when both conditions of the first sentence of Article 2.2.1.1 are satisfied) when determining the normal value. The exhaustive list of such provisions is: the third sentence of Article 2.2.1.1 of the Anti-Dumping Agreement and its footnote 6; Article 2.7 of the Anti-Dumping Agreement and the incorporated second Ad Note to Article VI:1 of the GATT 1994; special commitments on price comparability in the accession protocols of certain Members. None of them apply in the present case.

23. In this regard, the panel's interpretation of the term "normally" in *China – Broiler Products* is problematic, as not being balanced since it put more weight on the side of an investigating authority and should not be used. Also, there is no need to outreach to the *US – Clove Cigarettes* on the applicability of the TBT Agreement in order to examine the term "normally" in its ordinary meaning in Article 2.2.1.1 of the Anti-Dumping Agreement. The relevant context, namely Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 support this understanding.

24. As to the interpretation of the term "appropriate proxy" in paragraph 6.24 of the Appellate Body Report in *EU – Biodiesel*, the Russian Federation submits that "the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country" means that an investigating authority is required to establish as accurately as possible the price of the like product in the domestic market.

25. In their examination of the records kept by the Russian investigated producers and exporters Ukrainian authorities were biased and not objective. There was no legal reason to reject prices of natural gas. Ukraine acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-

[2] Panel Report, *EU – Biodiesel*, para. 7.232.

Dumping Agreement as Ukrainian authorities failed to calculate the cost of production of ammonium nitrate on the basis of the records kept by the investigated producers and exporters of ammonium nitrate.

B. Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement by replacing (adjusting) gas prices actually paid by the Russian investigated producers and exporters with data outside the Russian Federation, and using such data subsequently for construction of the normal value

(A) Any ruling based on Article 14(d) of the SCM Agreement is not applicable to the present dispute

26. Contrary to Ukraine's suggestion, neither Article 14(d) of the SCM Agreement, nor reasoning, interpretations and findings by the panel and the Appellate Body in *US – Softwood Lumber IV* apply to this dispute. There is no legal basis for the inclusion of obligations of Article 14(d) of the SCM Agreement into the framework of Article 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. These provisions use entirely different terminology, different structure, and different wording. The primary focus of determining a subsidy under the SCM Agreement lies in the analysis of a government's actions, while the rules on determination of dumping stipulated by Article 2 of the Anti-Dumping Agreement are focused on "the foreign producer's or exporter's pricing behavior". Suggested applicability of Article 14(d) of the SCM Agreement is contrary to the intention of drafters to treat different problems differently with different instruments. Had the drafters intended so, they would have made an explicit reference or incorporated a similar wording in these articles of the Anti-Dumping Agreement.

27. Accordingly, the approach advocated by Ukraine, if adopted, would culminate in the extension of rights of importing Members at determining dumping and diminishment of rights of the exporting Members. As a result, Ukraine's approach towards the applicability of inferences made from Article 14(d) of the SCM Agreements is against Article 2 of the Anti-Dumping Agreement and Article 3.2 of the DSU.

(B) Ukrainian authorities did not use the cost of production in the Russian Federation when constructing the normal value of ammonium nitrate

28. Ukraine improperly interprets the claim of the Russian Federation under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement limiting it only to the "use of out-of-country evidence". This claim is, however, broader as Ukraine violated the said provisions because: 1) gas prices were taken not from the records of the investigated producers of ammonium nitrate, but from outside the country of origin, namely at German/Czech border (Waidhaus) as Ukraine explained; 2) Waidhaus gas price is not the "costs associated with the production and sale of the product under consideration"; and 3) Waidhaus gas price, with or without adjustment for transportation costs, does not reflect natural gas prices available for producers of ammonium nitrate in the Russian Federation. Thus, Ukraine's construction of normal value is not based on "the cost of production [of ammonium nitrate] in the country of origin", i.e.in the Russian Federation.

29. Ukrainian authorities violated Articles 2.2.1.1 and 2.2 when they substituted natural gas prices reflected in the investigated producers' records with the natural gas price at the German/Czech border and used this surrogate price in the calculation of the cost of production and then in the construction of the normal value of ammonium nitrate. There were no legal reasons for such substitution and the use of out-of-country price in these calculations.

30. Even if in a hypothetical case when records kept by Russian producers and exporters were not in compliance comply with the requirements of Article 2.2.1.1 of the Anti-Dumping Agreement or investigated producers had not cooperated and Ukrainian authorities had failed have *any* data about the prices paid by investigated producers of ammonium nitrate for natural gas, Ukrainian authorities should also have resorted first to the gas prices in the Russian Federation. The Appellate Body explained in *EU – Biodiesel* that "in-country evidence" is the preferred source of information after an examination of the records of the investigated producers and exporters. A resort to the information obtained outside the country of origin is limited to certain circumstances listed by the Appellate Body where there is *a need* to analyze or verify the information in the records kept by the exporter or producer under investigation using documents, information, or evidence from other sources, including from sources outside the 'country of origin'.[3] In any event, such information shall reflect the cost of production in the country of origin.

[3] Appellate Body Report, *EU – Biodiesel*, paras. 6.70-6.71, fn 228.

31. Ukraine's resort to out-of-country evidence in the anti-dumping proceedings on imports of ammonium nitrate clearly constitutes a violation of Article 2.2 of the Anti-Dumping Agreement.

(C) Ukraine failed to adapt price of Russian gas at the Germany/Czech border in order to arrive at the "cost of production in the country of origin"

32. There were no legal reasons to reject in-country prices of Russian natural gas and resort to out-of-country price for natural gas. Without prejudice to this position, while resorting to out-of-country price, Ukraine failed to adapt the gas price at the German/Czech border to arrive at the cost of production of ammonium nitrate in the country of origin. The price at Waidhaus more than three times exceed the price actually paid by the Russian investigated producers and was several times higher than other gas prices in the domestic Russian market. In fact, Ukrainian authorities used the price at the Germany/Czech border *specifically* because it did not reflect the gas price within the domestic market of the Russian Federation, which mirrors the investigating authorities' decision that took place in *EU – Biodiesel.*[4] All these factors also show that Ukraine did not intend to adapt the information from outside the country in order to arrive at the "cost of production in the country of origin*".*

33. In their calculations of the cost of production of ammonium nitrate and the consequent construction of its normal value, Ukrainian authorities were biased and not objective. They replaced gas prices in the records of the investigated producers with prices outside of country of origin in a situation when the records of the investigated producers must have been used for the calculation of the cost of production of ammonium nitrate. The surrogate price for natural gas used by Ukrainian authorities in its calculations did not reflect actual prices of natural gas in the Russian Federation. The surrogate price for natural gas was neither "the cost[] associated with the production … of the product under consideration" nor "the cost of production [of the product under consideration] in the country of origin" because it was not the price of natural gas in the Russian Federation. The Russian Federation reiterates that Ukraine acted inconsistently with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

C. Ukraine violated Article 2.2.1 of the Anti-Dumping Agreement

34. Ukrainian authorities violated Article 2.2.1 by improperly calculating the cost of production of ammonium nitrate and disregarding sales that are not below-costs. Prior to disregarding sales of the like products Ukraine failed to establish that they were: i) below cost in substantial quantities; ii) made at prices which do not provide for the recovery of all costs within a reasonable period of time; iii) made within an extended period of time. Contrary to Ukraine's objection to the scope of the claim, Ukrainian authorities understood the content of the arguments of the Russian Federation correctly.

35. The Russian Federation submitted that had Ukrainian authorities conducted such analysis by considering all three criteria prescribed by Article 2.2.1 of the Anti-Dumping Agreement, the result would have been legally flawed anyway since using the costs inflated due to the use of the surrogate gas price would inevitably distort the results of the ordinary course of trade test.

36. Ukrainian authorities' allegations that they complied with the "substantial quantities" requirement and the "extended period of time" requirement under Article 2.2.1 of the Anti-Dumping Agreement are misleading. Ukrainian authorities did not establish a "weighted average selling price" of ammonium nitrate. The Disclosure does not indicate that Ukrainian authorities carried out the respective analysis. Accordingly, any allegations made on the establishment of the "weighted average selling price", including fulfilment of "substantial quantities" and "extended period of time" requirements are incorrect. Compliance with these obligations cannot be implied.

37. Contrary to Ukraine's assertion, the Russian Federation does not need to "demonstrate that lower costs would have resulted in a finding that unit sales prices would have been above those lower costs" to prove a violation of Article 2.2.1 of the Anti-Dumping Agreement. Under Article 2.2.1, Ukrainian authorities should have conducted the ordinary course of trade test by reason of price based on costs of production reflected in the records kept by investigated producers and exporters. They failed to do so.

[4] See Appellate Body Report, *EU – Biodiesel*, paras. 6.81-6.83 (quoting Panel Report, *EU – Biodiesel*, para. 7.258).

D. Ukraine violated Article 2.4 of the Anti-Dumping Agreement

38. Being a logical progression of obligations under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, the first sentence of Article 2.4 mandates an investigating authority to apply these provisions in a way to ensure the fair comparison between the normal value and the export price. As a result, Russian Federation's claim under Article 2.4 should not be reduced to the issue of adjustments under the third sentence of Article 2.4 of the Anti-Dumping Agreement. The comparison of the actual export price with the inflated normal value constructed on the basis of WTO-inconsistent calculation of the costs of production resulted in the dumping margin at rate 82.2%. This margin is self-explanatory in contrast with the negative dumping margin in the absence of cost adjustments.

39. Ukraine violated the obligation in the first sentence of Article 2.4 of the Anti-Dumping Agreement because it failed to make a fair comparison between the export price and the constructed normal value by improperly calculating constructed normal value for ammonium nitrate produced in the Russian Federation.

E. Ukraine violated Article 2.1 of the Anti-Dumping Agreement

40. There are compelling reasons for the Russian Federation to request the Panel to consider the claim under Article 2.1 of the Anti-Dumping Agreement and make a separate finding on the violation by Ukraine of its obligations under this Article. Nothing in the text of Article 2.1 represents an obstacle to this. Besides, such a fundamentally important provision, determinant for the entire Anti-Dumping Agreement, cannot be relegated to the level of "context" precluding the Panel from issuing a separate finding on it. This finding will positively affect the stage of implementation of the Panel's recommendations as the nature of the violation predetermines responding party's actions to eliminate it.

41. Ukrainian authorities should have determined the dumping margin by comparing the export price with the comparable price of the like product destined for consumption in the exporting country, i.e. the Russian Federation. Yet, they compared the export price with constructed normal value and, thus, determined the normal value in violation of Article 2.1 of the Anti-Dumping Agreement.

IV. CLAIMS REGARDING INCLUSION OF A RUSSIAN PRODUCER WITH NEGATIVE DUMPING MARGIN INTO THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS – UKRAINE ACTED INCONSISTENTLY WITH ARTICLES 5.8, 11.1, 11.2 AND 11.3 OF THE ANTI-DUMPING AGREEMENT

A. The Panel Request properly identifies the contested measures

42. Ukraine maintains its position that only the 2014 Decision was identified as a measure at issue in the Panel Request. However, the text of the Panel Request refers to the anti-dumping measures "in relation to" or "relating to" the interim and expiry reviews including, thus, the 2008 Decision, as amended by the 2010 Decision and later extended through the 2014 Decision.

43. Read in its entirety, the second sentence of the Panel Request further supports this understanding. Not only does this sentence cite "any and all annexes, notices, communications and reports of [MEDTU] and any amendments thereof," but it also mentions other decisions in footnote 2. Ukraine unconvincingly attempts to refute the relevance of footnote 2 by arguing that challenged measures are supposed to be mentioned in the main body of a panel request. This position is at odds with the Appellate Body's postulate requiring to "consider[] the panel request as a whole."[5] By the same token, the reference to the 2010 Decision in footnote 3 of the Panel Request disproves Ukraine's argument.

44. Contrary to its allegation, Ukraine has been able to identify the 2008 and 2010 Decisions and to comment on the claims made by the Russian Federation. Thus, Ukraine's ability to defend itself has not been impaired.

B. Ukraine found that JSC MCC EuroChem was not dumping and correspondingly failed to exclude this exporter from the definitive anti-dumping measure

45. The Russian Federation is challenging Ukraine's decision to impose a 0% anti-dumping duty on JSC MCC EuroChem through the 2010 Decision under Article 5.8. Whereas Ukraine committed an independent breach of Articles 11.1, 11.2 and 11.3 by including this exporter into the underlying reviews and by adopting the 2014 Decision in respect of JSC MCC EuroChem.

[5] Appellate Body Report, *US – Carbon Steel*, para. 127.

46. As per Ukraine's submission, the 2010 Decision does not amount to a legal finding that JSC MCC EuroChem's dumping margin was negative, zero, or *de minimis*. Rather, its anti-dumping duty rate was set equal to 0%. But Ukraine overlooks the combined effect of Ukrainian courts' judgments modifying the dumping margin rate for JSC MCC EuroChem to be *de minimis*. As a result, Ukraine should have excluded this Russian producer from any subsequent review and from any extension of the measures as follows from *Mexico – Anti-Dumping Measures on Rice*.[6] Ukraine is precluded from invoking its national law to justify the allegedly improper decisions of its authorities, including those related to the acceptance of evidence.

47. For all these reasons, the Russian Federation maintains that Ukraine violated Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement by failing to terminate the anti-dumping measures in respect of JSC MCC EuroChem and unlawfully including it in the underlying reviews.

V. SUBSTANTIVE CLAIMS RELATING TO THE LIKELIHOOD OF INJURY DETERMINATION

A. Ukraine has not substantiated its likelihood of injury determination in violation of Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement

(A) Applicable legal standard

48. The Russian Federation contends that any injury analysis in anti-dumping proceedings is strictly governed by the Anti-Dumping Agreement. Ukraine's attempt to escape the obligations stemming from the Anti-Dumping Agreement is undermined by the proper interpretation of case law. If an investigating authority in its own judgement decides to make an examination falling under the scope of Article 3, "then it would be bound by the relevant provisions of Article 3 of the Agreement".[7] Even beyond this finding, Article 11.3 of the Anti-Dumping Agreement alone requires the investigating authority to act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination, to base its determinations on "positive evidence" and an "objective examination".

(B) Ukraine made a determination on the likelihood of continuation of injury

49. According to the Disclosure Ukrainian authorities made a determination regarding the likelihood of *continuation* of injury which was consisted of two steps. Ukraine, firstly, determined the present state of the domestic industry as to whether the injury was eliminated or not; and, secondly, conducted prospective analyses of what happens should the anti-dumping measures lapse. These logical steps taken by Ukrainian authorities culminate in the understanding that they had examined the present state of the domestic industry and made a conclusion that there was injury.

50. Ukraine's usage of a different terminology, i.e. *recurrence of injury* is deceiving. Ukraine tries to convince that Ukrainian authorities determined that Ukrainian producers did not completely recover from the injury established in the original investigation. However, this allegation does contrast with the actual determination that Ukrainian industry was suffering from the material injury caused by dumped imports. Additionally, Ukraine's reasoning that its authorities made a determination regarding the recurrence of injury are *ex post* rationalization and should be rejected in their totality.

(C) Evaluation of economic factors and indices having a bearing on the state of the Ukrainian domestic industry was not based on an "objective examination" of "positive evidence"

51. Ukraine made affirmative determination on the likelihood of continuation of injury predominantly on the basis of decreased profitability, ignoring the positive trends in other economic factors and indices. Despite Ukraine's emphasis on the dramatic drop in profitability of the domestic industry, Ukrainian authorities failed to conduct an objective and unbiased analysis of increase of gas costs and its influence on the state of the domestic industry. Ukraine failed to exclude imports of the Russian producer with negative dumping margin from the volume of "dumped" imports.

52. Ukraine's inclusion of imports attributable to the producer with negative dumping margin into the volumes of dumped imports in the likelihood-of-injury determination breaches Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement as not based on "positive evidence".

[6] Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, para. 305.
[7] Panel Report, US – Oil Country Tubular Goods Sunset Reviews, para. 7. 274.

As a corollary, conclusions made on the basis of this incorrectly established volume of "dumped" imports do not qualify as "objective assessments". The Russian Federation wishes to underline that the producer with negative dumping margin was the main exporter of the product under consideration to Ukraine. Thus, the inclusion of non-dumped imports into injury analysis has infected the *overall conclusions* on the likelihood of continuation of injury.

53. Ukraine made finding on the continuation of injury analysis, in such finding its evaluation of economic factors and indices having a bearing on the state of Ukrainian domestic industry was not based on an "objective examination" of "positive evidence". As a result, Ukraine made the likelihood of injury determination in violation of Articles 11.1, 11.2, 11.3 of the Anti-Dumping Agreement.

VI. PROCEDURAL ISSUES AND CLAIMS

A. Ukraine committed several procedural violations of its obligations under Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement

54. Contrary to Ukraine's argument that Article 6.8 of the Anti-Dumping Agreement and provisions of Annex II do not apply to the present case, MEDTU *de facto* referred to facts available when it rejected the "first-best" information from records of the investigated producers and used the surrogate price of natural gas. The analogies between Article 2.2.1.1 governing the calculation of costs and Article 2.3 governing the determination of export price[8] drawn by Ukraine are unfounded and do not affect the applicability of Article 6.8 of the Anti-Dumping Agreement.

B. Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement by not disclosing the essential facts

55. Contrary to Ukraine's contention, the Russian Federation has established a *prima* facie case by explaining in its submissions why the data redacted in Tables 11.3.1-11.3.6 of the Disclosure and the formulas on the calculation of normal value and dumping margin are "facts on the record," which formed "the basis for the decision" to apply anti-dumping measures. By virtue of these properties, these are essential facts in the sense of Article 6.9 of the Anti-Dumping Agreement.

56. The Russian Federation's claim under Article 6.2 of the Anti-Dumping Agreement is not consequential to that of Article 6.9. Even if certain information is not regarded as essential facts to be disclosed under Article 6.9, its disclosure still can be a subject to the Article 6.2 broader obligation to provide interested parties with a full opportunity to defend their interests.

57. In its attempt to justify the violations of Articles 6.9 and 6.2 of the Anti-Dumping Agreement, Ukraine relies on the alleged confidentiality of the data concerned. By substantiating its response to Ukraine's arguments on the legal provisions invoked by the responding party, *i.e.* Article 6.5 and 6.5.1 of the Anti-Dumping Agreement, the Russian Federation enjoys its due process rights requiring equal opportunities to be provided for both parties during dispute settlement. In given circumstances, the departure from this rule is not warranted since a non-compliance with Article 6.5.1 may trigger a breach of obligations under Articles 6.2 and 6.9.

58. Either way, Ukraine is barred from relying on the confidentiality explanation with regard to the aggregate data included in Tables 11.3.1-11.3.6 of the Disclosure, i.e. that four producers which filed a collective confidentiality request belong to one group, as it is merely *ex post* rationalization proffered by Ukraine first during these proceedings before the Panel and not known during the anti-dumping investigation at hand. Requests, if any, were sent by the Ukrainian producers in their own name, and yet they did not indicate reasons that would amount to good cause. The reasons presented in Exhibit UKR-51b, are nothing but a repetition of the general definition of confidential information under Article 6.5 of the Anti-Dumping Agreement that does not cover the aggregate data *per se*.

59. Ukraine did not provide an effective non-confidential summary as it is absolutely impossible to derive any conclusive findings from the relevant figures given in the Disclosure.

C. Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by not providing sufficient time to comment on the Disclosure and refusing to accept comments duly submitted by the Russian investigated producer

60. All arguments and explanations provided by Ukraine do not justify the imposition of the 2-days period for comments on the Disclosure. The complexity of the issues involved in the

[8] Ukraine second written submission, para. 170.

investigation rendered it impossible to derive any incorrectness or mistakes effectively within 2 days from the document in the foreign language for the Russian producers. The fact that the data used in the Disclosure was provided by the Russian producers in their replies to the questionnaires before circulation of the Disclosure is irrelevant as they could not be expected to know which information is essential for the investigation.

61. The Russian Federation upholds its claims regarding several procedural violations of WTO law committed by Ukraine in the course of the underlying reviews. Specifically, Ukraine breached Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement be-cause its decision to resort to facts available was unfounded. Ukraine's failure to disclose essential facts, harmful for interested persons' rights, is contrary to Articles 6.2 and 6.9 of the Anti-Dumping Agreement. Last but not least, Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement when it set the 2-days period for comments on the Disclosure.

VII. OTHER CLAIMS

A. Ukraine breached Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

62. Claim under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement fall within the Panel's terms of references since they have naturally evolved from the claim under Article 6.9 as laid down in the Request for Consultations. Article 6.9 and Articles 12.2 and 12.2.2 do not categorically differ as far as the scope of the obligation, the time of disclosure (both obligations are triggered when an investigating authority takes or is about to take a final decision) and their purposes are concerned. As a result, this comparability amounts to "at the very least, some connection" that would suffice to establish that the claim in the Panel Request has evolved from the one set out in the request for consultations without changing the essence of the claim.

63. In addition to that, the claim is not strictly confined to "the lack of disclosure in respect of the dumping margin calculation" as Ukraine suggested, but to the full set of circumstances implied in the text of the claim in the Panel Request. The last sentence, singled out by Ukraine, is not a substitution but, rather, an exemplification of what the claims are. Finally, Ukraine may not rely on this objection to the scope of the claims at bar as it raised this argument at later stages of dispute settlement.

B. Ukraine violated Articles 1, 18.1 of the Anti-Dumping Agreement and Article VI of the GATT due to its WTO-inconsistent behaviour described above

64. Ukraine falsely asserts that a dependent character of the claim under Articles 1 and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 renders it manifestly unfounded in law. Russian Federation's claim is substantiated as the measures imposed on imports of ammonium nitrate from Russia are not specific actions against dumping that are in accordance with the GATT 1994, as interpreted by the Anti-Dumping Agreement.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATION

A. Claim 1 (Claim 10 of the Panel Request): Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because, in determining the constructed normal value, it failed to calculate costs on the basis of records kept by the Russian producers and exporters, even though the costs associated with the production and sale of ammonium nitrate were accurately and reasonably reflected in the Russian exporters' and producers' records that were in accordance with the generally accepted accounting principles of the country of origin and exportation (RF SWS section 1)

1. As Ukraine has explained in its First Written Submission and subsequent documents, the normal value calculation contained in the disclosure document and underlying documents provided a coherent explanation of the reasonable reflection of the costs associated with the production and sale of the product under consideration which justified the conclusion that the reliability of the reported costs had been affected.

2. Ukraine therefore submits that MEDT of Ukraine acted in accordance with the Anti-Dumping Agreement when it calculated the cost of gas in the Russian Federation and determined the reliability of the reported costs. The Appellate Body in *EU – Biodiesel* did not consider that the reliability of the records should necessarily be taken at face value when determining whether records reflect the costs.[1] On the contrary, an investigating authority has discretion within the factual context to examine non-arm's length transactions and other practices.[2] Ukraine also notes that the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement suggests that the investigating authority is in fact invited to examine all relevant evidence. Therefore, the assertion by the Russian Federation that an investigation into the reliability of the costs is somehow off-limits is contrary to the text of the provision and contrary to the text of the clarifications by the panel and the Appellate Body in *EU – Biodiesel*. Furthermore, in the context of the Anti-Dumping Agreement, "costs" means real economic costs involved in producing the product in the exporting country and not simply the amount reflected on an invoice.

3. Consequently, MEDT of Ukraine did properly examine the reliability of the reflection of the costs in the records, in accordance with the guidance of the Appellate Body, and found that these records did not completely reflect the costs of gas after a thorough investigation of all evidence before it. MEDT of Ukraine found that the domestic gas prices were regulated by the Government, were artificially lower than prices in genuine free markets, and were below cost. These are all consequences of the dual pricing system of gas in the Russian Federation. As for the suggestion that MEDT of Ukraine conducted a '*reasonableness*' inquiry,[3] this does not comport with the disclosure document (Exhibit RUS-10). As witnessed on pages 21 through 23 of that document, MEDT of Ukraine did properly examine the *reliability* of the reflection of the costs in the records.

4. The Russian Federation is attempting to defy the clarifications by the panel and Appellate Body in *EU – Biodiesel* by either ignoring it, misinterpreting it or considering it an *obiter dictum*. The Russian Federation's qualification of footnote 400 of the panel report as *obiter dictum* is absurd and inconsistent. Footnote 400 does not deviate from the examination of the panel in paragraphs 7.220 to 7.247 and contributes to the panel's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement. Hence, paragraphs 7.220 to 7.247, including the footnotes to these paragraphs, constitute, as a whole, the panel's legal analysis of the second condition of Article 2.2.1.1, which was essential to settle the dispute.

[1] Appellate Body Report, *EU – Biodiesel,* para. 6.33.
[2] Appellate Body Report, *EU – Biodiesel,* para. 6.41.
[3] The Russian Federation's response to Panel question No. 7, para. 11, fourth sentence.

5. Ukraine thus maintains that the domestic gas prices in the Russian Federation were not at arm's length and could therefore be disregarded by MEDT of Ukraine. In similar vein, Ukraine submits that this governmental set of circumstances is a "practice" which is "other" than what happens in a marketplace driven by supply in demand, and that this centrally dictated fixed price affects the reliability and accuracy of the costs as reported in the records of a producer or exporter. Ukraine finds that it does not need to get to the discussion of 'normally' since the particular situation of the investigated Russian exporting producers already falls squarely in one of the two regular exceptions discussed earlier (non-arm's length or other practices). However, should the Panel deem it useful, Ukraine will be pleased to discuss this.

6. Contrary to what the Russian Federation holds, the fundamental differences between the *EU – Biodiesel* case and the case at hand make it impossible to merely transplant the factual findings of *EU – Biodiesel* to the case before us. The first difference between the two cases is the governmental regulation of gas prices in the Russian Federation, which was confirmed by the Working Party Report of the Russian Federation's accession. The Working Party Report illustrates the specific circumstances on the Russian gas market, that led MEDT of Ukraine to the finding that the gas prices in the Russian Federation's internal market are not at arm's length and are the result of 'other practices'. This report is used as a factual basis and therefore falls within the scope of this dispute. In addition to this, the second *Ad Note* to Article VI:1 GATT serves as relevant context to interpret Article 2.2.1.1 of the Anti-Dumping Agreement and stipulates that price comparability may be difficult when domestic prices are fixed by the State.[4] Both the Working Party Report and the Second *Ad Note* point to the WTO incompatibility of the Russian Federation's dual pricing system for gas, which is in stark contrast to the export duty imposed in Argentina.

7. MEDT of Ukraine did not need to investigate whether prices of other suppliers were also fixed pursuant to the national legislation since it found that Gazprom was the main and sole supplier of gas for all the Russian producers of ammonium nitrate. Additionally, out of all the relevant exporting producers from the Russian Federation: Uralchem did not export, EuroChem wanted all its answers to be disregarded and the financial statements mentioned that Dorogobuzh purchased all gas volumes from Gazprom.

8. The second difference lies in the fact that, contrary to the Argentine prices, the Russian prices for gas are below cost. The Russian Federation accuses Ukraine of misrepresenting and generalising the facts on the record. The facts however demonstrate that MEDT of Ukraine analyzed thousands of pages of evidence, including those contained in Exhibit UKR-1 and UKR-2. On the basis of a careful and balanced analysis, MEDT of Ukraine produced a concise disclosure document (Exhibit RUS-10) in excess of forty pages, with ten pages exclusively devoted to the normal value determination.

9. Initially, MEDT of Ukraine did not ask for detailed information on gas suppliers, because the sheer size and consequences of the distorted gas costs only surfaced after the submission by the Russian producers of the answers to the questionnaires on 26 November 2013. However, after analysis of the answers to the questionnaires of the Russian producers, as well as additional documents submitted by them, MEDT of Ukraine identified that in fact there were no Russian producers to which it *could* have *directly* sent further requests on gas suppliers. [[***]]% of the exports from the Russian Federation came from EuroChem and this company had already formally requested that MEDT of Ukraine should disregard all its answers. Despite this position, MEDT of Ukraine still conducted a thorough examination and presented a well-reasoned explanation of its actions and findings in its disclosure.

10. Ukraine submits that the third difference with the *EU – Biodiesel* case is that in *EU – Biodiesel*, the domestic prices for *biodiesel* (the finished product) were regulated.[5] For that reason the European Union found that the domestic sales of biodiesel were not made in the ordinary course of trade, hence resorted to constructed normal value and only then started to doubt the raw material costs.[6] This sharply contrasts with the situation before us, where the price of the *main raw material* was fixed by the Russian State and which was the trigger to examine the raw material costs, *ab initio*. Furthermore, the price of the main raw material in *EU – Biodiesel* was not

[4] Panel Report, *EU – Biodiesel*, para. 7.241.

[5] Russian Federation's Second Written Submission, paras. 139 and 140, quoting AB in *EU – Biodiesel,* para. 5.4.

[6] Ibid.

regulated. In contrast to the situation in Argentina, gas prices in the Russian Federation were the immediate consequence of governmental price setting.

11. Lastly, the fourth difference is that the impact of the fixed price of gas is measurable and significant, in contrast to the impact of an export duty. It is important to note that the percentages of export taxes are not the same as measuring the actual effect of those taxes on soybean prices. In light of the above, Ukraine submits that it is clear that the factual findings of the *EU – Biodiesel* case cannot be applied to the case at hand.

B. Claim 2 (Claim 11 of the Panel Request): Ukraine acted in breach of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because it replaced (adjusted) the costs of gas actually borne by the Russian producers and exporters for production of ammonium nitrate with data on the gas prices outside the Russian Federation, in particular at the border with Germany, that did not reflect the costs of production in the country of origin, and used such prices subsequently for constructing the normal value (RF SWS Section 2)

12. Ukraine submits that the Russian WTO-inconsistent dual pricing system of gas is at the root of the distortion. After having determined that under these circumstances, the accounting records of the companies did not reliably reflect the costs of gas, MEDT of Ukraine needed to properly rectify these records. By contrast, the approach suggested by the Russian Federation, namely accepting the records as they are, would lead to distorted results.

13. According to the Panel and the Appellate Body in *EU – Biodiesel*, "in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence"[7] as long as, "whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin'."[8] The fact that the real cost of the gas is significantly higher than the fixed domestic price within the Russian Federation does not mean that this disqualifies the evidence from outside the country. On the contrary, as Ukraine mentioned in its First Written Submission, the Appellate Body has proffered sound criteria and suggestions to make the required judgment calls in situations such as these. Ukraine acted in line with that guidance.

14. Ukraine submits that the reasoning of the Appellate Body in *US – Softwood Lumber IV* and further developed in the anti-dumping context in *EU – Biodiesel* is compelling. In very specific and unique circumstances, such as the one that MEDT of Ukraine was facing, interpretation must be given to a legal concept in light of economic facts that underpin it. In this case, no unaffected domestic market in the Russian Federation existed due to the demonstrated direct and pervasive intrusion of the State. Hence, Ukraine finds that this was imperative to search for an outside benchmark, duly adjusted, to supply objective evidence of the costs of gas in the Russian Federation.

15. Ukraine therefore intentionally used an undistorted price of Russian gas and then adapted that price to the local level. The average Russian gas price at Waidhaus was USD 426, which was properly 'adapted' back to the price level at the Russian border, i.e. USD 396 in line with the Appellate Body guidance concerning Article 2.2 of the Anti-Dumping Agreement.

C. Claim 3 (Claim 9 of the Panel Request): Ukraine violated Article 2.2.1 of the Anti-Dumping Agreement because it improperly treated domestic sales of ammonium nitrate in the Russian Federation as not being in the ordinary course of trade and disregarded these sales in determining the normal value (RF SWS Section 3)

16. Ukraine submits that MEDT's of Ukraine determination on the ordinary course of trade complied with Article 2.2.1 of the Anti-Dumping Agreement, footnote 5, and with the explanation accorded to Article 2.2.1 in *EC – Salmon.* In paragraph 7.238 of *EC – Salmon* the panel clarified that "the "determination" that below-cost sales are made "within an extended period of time" does not call for the investigating authority to "determine" the "extended period of time" itself, but only

[7] Ibid.
[8] Ibid.

that the below-cost sales in question are made within a period of time that is normally one year but no less than six months." In the case before the Panel, the period of time that was used was the Review Investigation Period (RIP) (which was one year). Ukraine submits that this period fully qualifies as an extended period of time in the sense of footnote 4 of the Agreement.

17. In paragraph 7.239 of *EC – Salmon,* the panel confirmed that footnote 5 of the Anti-Dumping Agreement explains that below-cost sales may be considered to be "made in substantial quantities" when an investigating authority establishes that the "weighted average selling price" of the below-cost sales at issue is less than the "weighted average per unit costs". This is exactly what MEDT of Ukraine did.

18. In paragraph 7.275 of *EC – Salmon,* the panel clarified that all sales not found to be above weighted average cost for the period of investigation *do not* provide for the recovery of costs within a reasonable period of time. By finding that the weighted average selling price was below the weighted average unit cost, MEDT of Ukraine made exactly this determination on pages 25, 26 and 27 of the disclosure document.

19. It is abundantly clear therefore that by meeting all three relevant conditions of Article 2.2.1 of the Anti-Dumping Agreement, Ukraine has respected the requirements of the ordinary course of trade test.

20. Article 2.2.1 should in any event not be relegated to the realm of a consequential violation, should an inconsistency with Article 2.2.1.1 somehow be determined.[9] Assuming *arguendo* that an inconsistency with Article 2.2.1 could exist and lead a separate life as a consequential violation, the Russian Federation has never presented a *prima facie* case that, absent the rectification of the gas purchase costs, the *three*-step OCOT analysis (as properly conducted by Ukraine) would have led to a different result. The only allegation that was made was that the rectification of the gas costs "resulted in a much higher unit cost of production" that "made the conclusion that the domestic sales by the Russian exporting producers under investigation were made not in the ordinary course of trade *more likely*".[10] Such vague contention as 'more likely' is not sufficient to serve as a prima facie case since a violation of a provision of the Anti-Dumping Agreement cannot just be established on the mere basis of 'more likely'. There was in fact never a claim that Article 2.2.1 was violated as a result of higher unit costs.

D. Claim 4 (Claim 12 of the Panel Request): Ukraine violated the obligation in the first sentence of Article 2.4 of the Anti-Dumping Agreement because it failed to make a fair comparison between the export price and the constructed normal value by improperly calculating constructed normal value for ammonium nitrate produced in the Russian Federation (RF SWS Section 4)

21. Ukraine recalls that the Appellate Body held in *EU – Biodiesel* that Article 2.2.1.1 and Article 2.4 of the Anti-Dumping Agreement serve different functions in the context of determinations of dumping whereby the former assists an investigating authority in the calculation of costs for purposes of constructing the normal value; whereas the latter concerns the fair comparison between the normal value and the export price.

22. Similarly, the panel held in *EU – Footwear (China)* that "[n]othing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price."

23. For the foregoing reasons, the Russian Federation has not demonstrated that Ukraine failed to make a "fair comparison" between the normal value and the export price, inconsistently with Article 2.4 of the Anti-Dumping Agreement.

[9] Ukraine's response to Panel question No. 15. paras. 68-70.
[10] Russian Federation's First Written Submission, para. 117. (emphasis added)

II. VIOLATION OF ARTICLES 5.8, 11.1, 11.2 AND 11.3 OF THE ANTI-DUMPING AGREEMENT BY INCLUDING A RUSSIAN PRODUCER WITH A NEGATIVE DUMPING MARGIN IN THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS

A. The Panel's Term of Reference

24. Since the Russian Federation has clarified that it is no longer bringing a claim against the 2008 Decision, Ukraine does not need to reiterate its previous arguments regarding the fact that the 2008 Decision is not a measure brought properly before the Panel.

25. Notwithstanding this, Ukraine submits that the 2010 Decision was not brought properly before the Panel and therefore falls outside the Panel's terms of reference. This is clear by the wording of the Panel Request that limits the scope of the dispute to only those measures in relation to the expiry and interim reviews. Furthermore, contrary to what the Russian Federation holds, footnote 2 of the Panel Request is insufficient to properly identify the measures at issue since it appears to merely provide factual context to the expiry and interim review. Similarly, Ukraine holds that the Russian Federation's First Written Submission did not provide the required clarification since it emphasised a violation of Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement, which can only relate to the 2014 Decision.

26. As a consequence of the unclarity, Ukraine has to engage in speculation as to which measures were being challenged by the Russian Federation. However, the fact that Ukraine accidently addressed the correct claim does not make the Panel Request compliant with Article 6.2 DSU. Evidently, these requirements needed to be met when the Panel Request was submitted and not after Ukraine wrote its First Written Submission. For these reasons, Ukraine submits that the 2010 Decision is not a measure before the Panel.

B. Violation of Article 5.8 Anti-Dumping Agreement in the 2014 Decision

27. Ukraine submits that the obligation under Article 5.8 of the Anti-Dumping Agreement to immediately terminate an investigation when the dumping margin is zero or *de minimis,* did not arise with respect to the 2014 Decision. Pursuant to the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, an investigating authority only needs to terminate an investigation if it determines a negative, zero or *de minimis* dumping margin. MEDT of Ukraine found dumping margins of 40.5% and 82.2%, and therefore, it was not under the obligation to terminate the investigation. Furthermore, as held by the panel in *US – DRAMS* and the panel in *US – Corrosion-Resistant Steel Sunset Review*, the obligation to immediately terminate an investigation when the dumping margin is zero or *de minimis* is only applicable to original investigations initiated pursuant to Article 5 of the Anti-Dumping Agreement. Consequently, the *de minimis* test in Article 5.8 of the Anti-Dumping Agreement does not apply in expiry reviews.

C. Conditional Defense Regarding the Claim that the 2010 Decision Violated Article 5.8 Anti-Dumping Agreement

28. Even if one assumes that a claim under Article 5.8 of the Anti-Dumping Agreement could have been brought against the 2010 Decision, Ukraine submits that such claim should be rejected since the investigating authority, MEDT of Ukraine and the Interdepartmental Commission on International Trade (ICIT), never determined a negative, zero or *de minimis* dumping margin. Upon request of EuroChem, the Ukrainian Courts simply ruled that the 2008 Decision was unlawful but did not find in the operative part that the dumping margin for EuroChem was negative, zero or *de minimis*. During the Court proceedings, the only calculation methods presented were the erroneous calculations carried out by EuroChem itself. The Courts, however, did neither instruct to reopen the investigation, nor to apply a particular methodology for the calculation of the dumping margin since this was not requested by EuroChem. Consequently, MEDT of Ukraine and ICIT had no choice but to bring the duty down to zero without recalculating the dumping margin.

29. Ukraine submits that as neither the investigating authorities in the 2010 Decision, nor the judgements of the Ukrainian Courts determined a negative, zero or *de minimis* dumping margin for EuroChem, the conditions set out by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* are not met. Therefore, the obligation under Article 5.8 of the Anti-Dumping Agreement to

immediately terminate an investigation and to not include producers with a negative or *de minimis* dumping margin in future reviews was not triggered by the 2010 Decision.

D. Violation of Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement in the 2014 Decision

30. Ukraine considers that the Russian Federation's claim concerning Article 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement is purely consequential to the Russian Federation's claim under Article 5.8 of the Anti-Dumping Agreement. Ukraine therefore submits that since the mere imposition of a zero dumping duty on a company − without a determination of a negative, zero or *de minimis* dumping margin − does not trigger the obligation to immediately terminate the investigation, there is also no obligation upon the investigating authority to exclude the same company in later reviews. In other words, if the obligation under Article 5.8 of the Anti-Dumping Agreement does not apply in the original investigation, Ukraine holds that the same obligation cannot exist in later reviews.

31. If the Panel were to consider that this claim is not consequential, Ukraine submits that this claim must still be dismissed as unfounded as the Russian Federation failed to provide a *prima facie* violation of these provisions. Indeed, the Russian Federation did not specify which actions − or inactions − by MEDT of Ukraine or ICIT constitute an alleged violation of these legal provisions. Ukraine cannot be expected to defend itself against claims that merely refer to articles of the Anti-Dumping Agreement without any further specifications or clarifications as to the exact claimed violations.

III. SUBSTANTIVE CLAIMS RELATING TO THE LIKELIHOOD OF INJURY DETERMINATION

A. Claim 8: Ukraine Acted Inconsistently with Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement

1. MEDT's of Ukraine Determination of the Likelihood of Recurrence of Injury

32. Pursuant to the panel in *EU − Footwear (China)*, in order to discharge the burden of proof, the Russian Federation must demonstrate that while making its conclusion on the likelihood of injury, MEDT of Ukraine did not make a reasoned conclusion based on sufficient evidence. The heart of the Russian Federation's argument is that MEDT of Ukraine made a determination that material injury existed in the RIP and that MEDT of Ukraine relied on this determination to conclude that there was likelihood of continuation of injury.

33. As is clear from section 13 and 11.4 of the Disclosure, Ukraine holds that MEDT of Ukraine determined that there was a likelihood of recurrence of injury and not of continuation of injury. The analysis performed by MEDT of Ukraine underscored the negative effects on the Ukrainian domestic industry which would occur should the measures be terminated. Moreover, Ukraine notes that the Russian Federation does not point out a single passage in the Disclosure or 2014 Decision stating that MEDT of Ukraine determined that the injury was likely to continue should the anti-dumping measures be repealed.

34. Ukraine submits that the Russian Federation's argument saying that MEDT's of Ukraine determination that the Ukrainian domestic industry did not completely recover from material injury established during the original investigation is equal to a determination that the Ukrainian industry is suffering from material injury is incorrect since it ignores the economic reality. When carrying out an interim or expiry review, the condition of the domestic industry may range anywhere between a completely healthy state and suffering from serious injury. Essentially, all possible degrees of deterioration of domestic industry, that fall short of "injury" within the meaning of Article 3, should therefore be classified, in terms of the Anti-Dumping Agreement, *as absence of injury*. A finding that the domestic industry did not *completely* recover from previous material injury would suggest that the domestic industry is somewhere in *between* having recovered (a healthy state) and suffering from material injury. Therefore, in terms of two legal categories provided for in the Anti-Dumping Agreement, such finding should be classified as a finding that the domestic industry is not suffering from a material injury.

2. Russian Federation's Claims in respect to the Determinations relied on by MEDT of Ukraine in its likelihood analysis

35. Ukraine submits that in the course of expiry and interim reviews, an investigating authority is obliged to base it findings on an objective examination of positive evidence. However, as held by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, the source of this obligation is Articles 11.2 and 11.3 of the Anti-Dumping Agreement and not Article 3 since the obligations set out in Article 3 do not apply to likelihood-of-injury determinations in sunset reviews.[11]

36. The Russian Federation submits a new argument in its second written submission stating that MEDT of Ukraine should have taken into account the that natural gas was supplied to the Ukrainian domestic industry by Ostchem at prices, allegedly higher than Ostchem's own purchase costs.[12] This allegation never appeared in the Russian Federation's First Written Submission, First Oral Statement nor in the responses to the questions from the Panel. Ukraine therefore submits that this cannot be addressed in the Panel Report.

37. In any event, the Russian Federation's allegation has no merit. MEDT of Ukraine was indeed aware that the Ukrainian domestic producers were purchasing gas from its parent company, Ostchem Holding. This is clearly indicated in the questionnaire responses of the Ukrainian producers. At the same time, gas purchase prices of the Ukrainian domestic industry, as reflected in their records, were in line with the market prices for the industrial users in Ukraine (that is, Naftogaz market price to industrial users). Therefore, the price of gas sale transactions between Ostchem and Ukrainian domestic industry adequately reflected market forces and the arm's length principle.[13] Moreover, the assessment of the state of the industry is limited to the domestic companies producing the like product and does not include the assessment of the profitability of the parent company.

38. The Russian Federation criticizes MEDT's of Ukraine comparison between the prices of the imported product and like domestic product on the grounds that it does not discuss "reasons underlying the difference in prices"[14] and attributes to "a legitimate decision of the Ukrainian courts" negative effect on the prices of the domestic industry.[15] First, similar to the issue of transfer pricing, the criticism of MEDT's of Ukraine price comparison was raised for the first time in Russian Federation's Second Written Submission. It would, therefore, be inappropriate to address this new allegation in the Panel's report. Secondly, there is no connection between this argument and the two "claims" under Articles 11.1, 11.2 and 11.3 advanced by the Russian Federation in the Panel Request. Further, Russian Federation's criticism, has, in any event, no merit. There is no obligation to explore the "reasons" for differences in price levels and/or the difference between the price of the Russian exporters and the cost of production of domestic industry. The fact is that Russian producer's export price (Ukraine border) was lower than the cost of production of Ukrainian domestic producers and the sales prices of the Ukrainian domestic producers.

39. With regard to the Russian Federation's argument that MEDT's of Ukraine determination "on likelihood of injury was unsubstantiated and legally flawed since the analysis had been carried out on the basis of imports including"[16] imports from EuroChem in respect of which a zero anti-dumping duty was established in the 2010 Decision, Ukraine would like to reiterate its position. As previously explained, MEDT of Ukraine was under no obligation to exclude EuroChem from the review since this obligation does not exist during reviews and since EuroChem was found to be dumping. In any event, Ukraine submits that considering import volume trends of a producer in respect of whom anti-dumping duty was decreased to zero is the most reasonable methodology to assess the import trends once the anti-dumping measures are terminated.

[11] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 285.

[12] Russian Federation's Second Written Submission, paras. 604-610.

[13] In particular, in 2012 the domestic industry gas purchase price (net of VAT, inclusive transportation costs) was in the range between [[***]] and [[***]] USD/1000 m^3 and in RIP, between [[***]] and [[***]] USD/1000 m^3. Naftogaz price to industrial consumers (net of VAT, inclusive transportation costs) was 476.8 USD/1000 m^3 both in 2012 and RIP.

[14] Russian Federation's Second Written Submission, para. 615.

[15] Ibid.

[16] Russian Federation's First Written Submission, para. 209.

IV. PROCEDURAL CLAIMS

A. Claim 9 (Claim 4 of the Panel Request): Relating to the Alleged Recourse to Facts Available

40. Ukraine explains that the information about costs of gas in the producers' records was not rejected on evidentiary grounds under Article 6.8 of the Anti-Dumping Agreement.[17] Instead, the information regarding the costs of gas in the records of the investigated producers was accepted into evidence, analyzed by MEDT of Ukraine and thereafter rectified based on the substantive rules regarding the determination of costs under Article 2.2.1.1 of the Anti-Dumping Agreement. The respective explanations were duly provided in the Disclosure. Furthermore, the Russian Federation did not bring forward any arguments substantiating its claim.

B. Claim 10 (Claim 5 of the Panel Request): Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement because Ukraine failed to adequately disclose the essential facts under consideration which formed the basis for the decision to apply anti-dumping measures, including the essential facts underlying the determinations of the existence of dumping; the calculation of the dumping margins, including relevant data and formula applied; the determination of injury and causation, including the price comparisons and the underlying data; information on import and domestic prices used therein

41. With respect to the Russian Federation's claims under Articles 6.2 and 6.9 of the Anti-Dumping Agreement, Ukraine reiterates that the Russian Federation failed to demonstrate that any of the facts, which were allegedly not disclosed, constitute essential facts. Moreover, Ukraine notes that the information in Tables 11.3.1, 11.3.2, 11.3.3, 11.3.4, 11.3.5 and 11.3.6 was properly disclosed to the interested parties taking into account MEDT's of Ukraine confidentiality obligations under Article 6.5 of the Anti-Dumping Agreement.

42. Contrary to the Russian Federation's allegations, the Ukrainian producers did request confidential treatment both for their individual data and for the combined data. The request for confidentiality was in fact substantiated since the Ukrainian producers qualified the data as commercially sensitive for the companies individually and together. This qualification was reasonable, as for example, the disclosure of the average price level in respect to the four affiliated companies would have given Russian producers a good basis for formulating their own pricing strategy in Ukraine. Ukraine emphasizes that none of the interested Russian Producers objected to the designation of this data as commercially sensitive.

43. Furthermore, with regard to the sufficiency of the non-confidential summaries, Ukraine argues that since MEDT of Ukraine made its determinations on the basis of trends of various economic and financial indicators, as opposed to absolute figures, the disclosure of trends data was the most appropriate means of providing a summary of the confidential information.

44. Finally, Ukraine notes that the Federation's grievances regarding the confidentiality treatment and insufficient confidential summaries are, in any event, outside of the Panel's Terms of Reference. The Panel's Terms of Reference are limited pursuant to Article 7 DSU to the claims put forward in the Russian Federation's Panel Request. In its Panel Request, the Russian Federation advanced only a claim under Article 6.5.1 of the Anti-Dumping Agreement and not under Article 6.5 in general. Consequently, the Panel has no jurisdiction to rule on Ukraine's alleged violation of Article 6.5 of the Anti-Dumping Agreement.

C. Claim 11 (Claim 6 of the Panel Request): Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because the disclosure of the documents with results of expiry and interim reviews issued on 25 June 2014 was not made by Ukraine in sufficient time for the interested parties to defend their interests

45. Ukraine notes that the Ukrainian Anti-Dumping Law clearly indicates that the time-limits established by the investigating authority "expire at the end of the working hours in ministries,

[17] See Ukraine's First Written Submission, Section VII.A.1.

central executive body in the tax or customs sphere or in the Commission".[18] Ukraine submits that it is not unreasonable to expect that one interested party, namely EuroChem, participating in an anti-dumping investigation in Ukraine would familiarize itself with the legislation − Ukrainian Anti-Dumping Law − applicable to the conduct of the investigation.

46. The Russian Federation also claims that the 2-days period was unreasonable because the disclosure was issued in Ukrainian language. The anti-dumping investigation was conducted in Ukraine by Ukrainian Authorities with Ukrainian being the official language of Ukraine. The fact that an interested party may not have command of the Ukrainian language, therefore, does not warrant a provision of any additional time for submitting comments.

V. OTHER CLAIMS

A. Claim 14 (Claim 7 of the Panel Request): Ukraine acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because Ukraine failed to provide in sufficient detail in the Decision of the Intergovernmental Commission on International Trade No.AD-315/2014/4421-06 of 1 July 2014, as referred to in Notice "On the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate originating in the Russian Federation", and in the Communication of the Ministry of Economic Development and Trade of Ukraine No. 4421-10/21367-07 of 25 June 2014 the findings and conclusions reached on all issues of fact and law it considered in making its preliminary and final determinations and failed to provide all relevant information and reasons, which have led to the imposition of the measure. In particular, Ukraine did not provide the calculations used to determine the dumping margins in the final determination and the data it relied upon in order to make the calculations

47. Ukraine explained that a claim under Article 12.2 does not evolve from a claim under Article 6.9 and does in fact expand the scope of the dispute. In respect of the scope of obligations under Articles 6.9 and 12.2, Russian Federation's arguments are limited to a mere statement that both Articles contain an obligation to disclose information and, therefore, do not categorically differ.[19] Ukraine notes that the scope of disclosure (*i.e.*, which information has to be disclosed) was considered a relevant factor by the panel in *EC − Fasteners (China)* in its decision to rule that a claim under Article 6.9 (an obligation to disclose information) not mentioned in the Request for Consultations was outside the Panel's Terms of Reference, even though a claim under Article 6.2 (also a disclosure obligation) was mentioned in the Request for Consultations.[20] The same panel found that the timing as to when the disclosure has to be fulfilled is another relevant factor.

48. Furthermore, the difference in purpose is that Article 6.9 of the Anti-Dumping Agreement obliges an investigating authority to provide parties "with sufficient factual information to defend their interests during the investigation", whereas Article 12.2.2 − "to ensure that the investigating authority's reasons for concluding as it did can be discerned and understood".

49. Finally, Ukraine notes that including the phrase "notices […] of the Ministry of Economic Development and Trade of Ukraine" is insufficient to indicate to Ukraine that by challenging the measures under Article 6.9 of the Anti-Dumping Agreement, the Russian Federation also intends to challenge the measures under Article 12.2 of the same Agreement. Ukraine recalls that the complaining party must indicate both the measure being challenged and the specific legal provisions alleged to be violated.[21] The mere indication of a measure being challenged does not put the respondent on a sufficient notice as to what claims the claimant intends to pursue and what "matter" is being referred to the DSB. Based on the foregoing, Ukraine submits that the Russian Federation's claim under Article 12.2 of the Anti-Dumping Agreement falls outside of the scope of the Panel's terms of reference.

[18] Paragraph 4, Article 6 of the Ukrainian Anti-Dumping Law, Exhibit UKR-9.
[19] Russian Federation's Second Written Submission, para. 714.
[20] Panel Report, *EC − Fasteners (China)*, paras. 7.507 and 7.508.
[21] Appellate Body Report, *Guatemala − Cement I*, paras. 70 and 72.

VI. CONCLUSIONS

50. Ukraine has shown that all the claims pursued and developed in the Russian Federation's First Written Submission, First Oral Statement, Second Written Submission and Second Oral Statement are unfounded and based on erroneous interpretations of the covered agreements. Ukraine respectfully asks the Panel to reject all of the Russian Federation's claims.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA

Third party oral statement

Introduction

1. Argentina thanks the Panel for the opportunity to participate in this case and to present its views, given its systemic and trade interest in the correct interpretation of certain obligations contained in the legal provisions of the Anti-Dumping Agreement and the GATT 1994 invoked in this dispute.

2. In particular, Argentina emphasizes the importance of maintaining a proper interpretation of the rules contained in those agreements and the findings made by the Appellate Body in *EU – Biodiesel* (DS473).

3. In the light of the foregoing, Argentina respectfully submits the following considerations to the Panel.

The Russian Federation's claim under Article 2.2.1.1 of the Anti-Dumping Agreement

4. In connection with the claim under Article 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, Argentina considers it appropriate to recall certain specific principles developed by the Appellate Body in the *EU – Biodiesel* case.

5. First of all, the Appellate Body upheld the Panel's finding that Article 2.2.1.1 "does not involve an examination of the 'reasonableness' of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful".[1]

6. Upon verification of the conditions of the first sentence of Article 2.2.1.1, that is, the existence of records that are kept in accordance with generally accepted accounting principles and reasonably reflect the costs associated with the production and sale of the product under consideration, the value must be constructed on the basis of those records insofar as they reflect the actual costs incurred.[2]

7. Argentina has argued that the correct inquiry into whether the records reasonably reflect the cost of production involves an assessment of the reasonableness of the records, as opposed to the reasonableness of the costs, and that, although government intervention may distort costs, such intervention does not necessarily constitute a sufficient basis for disregarding the records.[3]

8. Secondly, Argentina does not agree with the interpretation given by some third parties to the effect that certain governmental actions may be the source or origin of dumping.[4]

9. The Panel in the *EU – Biodiesel* case found that there were no legal arguments to extrapolate from the second Ad Note to Articles VI:2 and VI:3 that the concept of "dumping" is intended to cover any distortion arising out of government action.[5]

10. The Appellate Body reaffirmed that the object and purpose of the Anti-Dumping Agreement is to recognize the right of Members to take anti-dumping measures to counteract injurious

[1] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.41).
[2] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.41).
[3] *EU – Biodiesel* (WT/DS473/R, para. 7.188).
[4] Third Party Written Submission of the European Union, p. 7; Third Party Written Submission of Brazil, pp. 8-9.
[5] *EU – Biodiesel* (WT/DS473/R, para. 7.240).

dumping[6] and that the normal value of the product under consideration must be constructed in accordance with costs actually incurred by the investigated companies.[7]

11. In other words, the construction of value must not be based on hypothetical costs that might have been incurred under a different set of conditions or circumstances, such as the alleged absence of any distortion of costs caused by government intervention.[8]

12. In this connection, in the *EU – Biodiesel* case, both the Panel and the Appellate Body found that the difference between the domestic market prices and the international prices of the raw material caused as a result of certain government interventions does not, in itself, constitute a sufficient basis, under Article 2.2.1.1, for concluding that the producers' records do not reasonably reflect the costs of the raw material, or for disregarding those costs when constructing the normal value of the product under consideration.[9]

The Russian Federation's claims under Article 2.2 of the Anti-Dumping Agreement

13. The Russian Federation argues that Ukraine acted in a manner inconsistent with Article 2.2 of the Anti-Dumping Agreement by not using production costs in the country of origin to construct normal value and by replacing the raw material costs reported in producers' records (internal cost and cost actually incurred) with the average price of gas destined for export at the border with Germany.[10]

14. Argentina recalls that, as was noted by the Appellate Body in the *EU – Biodiesel* case, the investigating authority is not prevented from having recourse to information on costs other than that contained in the records of exporters or producers, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin".[11]

15. The Appellate Body held that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination provided for in that rule refers to the "cost of production [...] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin".[12]

16. It may be concluded from the foregoing that the investigating authority may not have recourse to information from a place other than the country of origin for the sole purpose of correcting an alleged cost distortion caused by government intervention, by substituting an alleged out-of-country cost for the domestic cost actually incurred.

The Russian Federation's claim under Article 6.9 of the Anti-Dumping Agreement

17. The Russian Federation argues that Ukraine acted in a manner inconsistent with Article 6.9 of the Anti-Dumping Agreement by not having informed all interested parties of the essential facts in sufficient time for them to defend their interests. Russia maintains that Ukraine granted only two working days for the interested parties to make comments on the essential facts which formed the basis for the decision taken as a result of the interim review and the final review upon expiry of the time-limit.

18. Without seeking to take a position on factual questions in this specific case, Argentina shares the view expressed by the Russian Federation and by some third parties[13] to the effect that the two working days allowed for comments on the essential facts do not appear *prima facie* to be sufficient or reasonable under the terms of Article 6.9 of the Anti-Dumping Agreement.

[6] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.25).
[7] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.19).
[8] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.41).
[9] *EU – Biodiesel* (WT/DS473/AB/R, paras. 6.54-6.56).
[10] First Written Submission by the Russian Federation, p. 95.
[11] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.73).
[12] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.73).
[13] Third Party Submission of Brazil, pp. 22-24.

Conclusion

19. Madam President and distinguished Panel members, Argentina thanks you for your attention.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

1. Australia's submissions in this dispute have focused on how normal value should be determined in anti-dumping investigations where government price setting is evident.

I. INTERPRETATION OF "REASONABLY REFLECT THE COSTS" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

2. In Australia's view, the proper application of Article 2.2.1.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the "Anti-Dumping Agreement") is informed by the purpose of Article 2.2, which the Appellate Body has described as follows:

> Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy. This supports the view that the "costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 are those costs that have a genuine relationship with the production and sale of the product under consideration.[1]

3. Australia considers that an investigating authority must therefore examine whether costs calculated pursuant to Article 2.2.1.1 are capable of generating an appropriate proxy; and have a genuine relationship with the production and sale of the product under consideration. Where reliance on the costs reflected in a producer or exporter's records would not result in an appropriate proxy, an investigating authority should disregard those costs.

4. In Australia's view, such circumstances may arise in instances where government price setting is evident. This is because government price setting may not apportion costs between relevant entities on the basis of commercial considerations and market forces of supply and demand. Rather, where the input prices paid and recorded by a producer or exporter are set by government, they may not accurately reflect how the actual costs have been apportioned between the relevant transacting entities. In such circumstances, using the producer's or exporter's cost records could fail to reasonably reflect the costs associated with the production and sale of the product under consideration, such that they would yield an inappropriate proxy that fulfils the basic purpose of Article 2.2.

5. The Appellate Body has consistently recognised that costs may be disregarded in remedies investigations where they are not based on forces of supply and demand but instead reflect some anomalous distortion – including: where prices in a subsidies investigation are suppressed because of a government's predominant role in the market;[2] where prices are suppressed because sales of relevance to an anti-dumping investigation take place between affiliates;[3] and where sales take place in the context of a liquidation sale.[4] This is further supported by the context of Article 2.2, including Article 2.7 – which makes clear that the price comparison methodology may need to be adjusted in circumstances of government price setting.

6. Australia therefore considers that the setting of input prices by government may be a sufficient basis for disregarding the costs reflected in the records of producers and exporters because, where those costs would not yield an appropriate proxy for the price of the like product in the ordinary course of trade, they would not fulfil the basic purpose of Article 2.2.

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[1] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.
[2] Appellate Body Reports, *US – Softwood Lumber IV*, para. 106; *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.
[3] Appellate Body, *US – Hot-Rolled Steel*, paras. 140 - 147.
[4] Appellate Body, *US – Hot-Rolled Steel*, para. 143.

II. INTERPRETATION OF "NORMALLY" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

7. Australia supports Ukraine's argument in this dispute that the "normally" condition in Article 2.2.1.1 of the Anti-Dumping Agreement provides a separate legal ground for derogating from producers' records.

8. As was found by the panel in *China – Broiler Products*, the "normally" condition provides a standalone legal basis to derogate from the rule applied in Article 2.2.1.1, and ''requires an investigating authority to explain why it departed from the norm and declined to use a respondent's books and records."[5]

9. Australia therefore considers that the "normally" condition: supports the view that an investigating authority should consider whether it would be appropriate in the circumstances of a particular investigation to depart from the usual rule in Article 2.2.1.1; and justifies disregarding the records of producers and exporters where these would not yield an appropriate proxy.

III. DISTINGUISING THIS DISPUTE FROM *EU – BIODIESEL (ARGENTINA)*

10. Australia considers that it is important to take account of the factual and legal distinctions between this dispute and *EU – Biodiesel (Argentina)*, and cautions against any reflexive application of the reasoning and findings in *EU – Biodiesel (Argentina)* to the current dispute.

11. Nuances in the panel and Appellate Body reports in *EU – Biodiesel (Argentina)* have not been reflected in Russia's first written submission or oral statement. In particular, Russia contends that Article 2.2.1.1, as clarified by the Appellate Body in that dispute, makes the parameters of the costs themselves beyond the scope of the investigating authority's examination.[6] However, while the panel and the Appellate Body determined that the Argentine export tax system did not provide "a sufficient basis" for disregarding the costs in producer and exporter records, both the panel and the Appellate Body explicitly recognised a number of circumstances in which the costs reflected in producers' records might be examined and disregarded.[7]

12. Importantly, the panel in *EU – Biodiesel (Argentina)* also explicitly noted that the circumstances at issue in that dispute were distinct from those where input prices are set by the government, as is the case in the current dispute.[8] For the reasons Australia has provided throughout its submissions in this dispute, in Australia's view, government price setting provides a sufficient basis for disregarding the costs in records of producers and exporters under investigation.

13. Further, in *EU – Biodiesel (Argentina)*, the EU made clear that it did not seek to rely upon the "normally" condition.[9] In contrast, Ukraine does seek to rely upon it in this dispute. This provides a second legal ground to support Ukraine's approach which was not examined in the dispute upon which Russia seeks to rely.

IV. FINDING THE COSTS ASSOCIATED WITH PRODUCTION IN THE COUNTRY OF ORIGIN CONSISTENTLY WITH ARTICLE 2.2

14. The text of Article 2.2 permits the margin of dumping to be determined by comparison with a comparable price of the like product when exported to an appropriate third country in certain circumstances. In considering how this should be applied, Australia observes that the Appellate Body in *EU – Biodiesel (Argentina)* found that the use of "information from sources outside the country" was permitted on the condition that:

[5] Panel Report, *China – Broiler Products*, para. 7.161, citing Appellate Body Report, *US – Clove Cigarettes*, para. 273.
[6] Russia's first written submission, para. 68.
[7] Panel Report, *EU – Biodiesel (Argentina)*, fn 400; Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41.
[8] Panel Report *EU – Biodiesel (Argentina)*, fn 421 to para. 7.249. Note the Appellate Body upheld these findings in para. 6.57 of its Report.
[9] Panel Report, *EU – Biodiesel (Argentina)*, fn 380; Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 120.

> … whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin".[10]

15. This makes clear that use of data from outside of the country of production is permitted where that data is adapted to ensure it is suitable to determine the cost of production in the country of origin. In Australia's view, this will depend on the specific circumstances of a given case, the quality and quantity of the evidence on the investigation record, and the quality of an investigating authority's explanation. However, Australia cautions that the process of adjustment should not reintroduce distortions, such as those arising from government price setting, in the construction of normal value.

V. CONCLUSION

16. Australia concludes that Article 2.2 requires an investigating authority to examine whether costs calculated pursuant to Article 2.2.1.1 are capable of generating an appropriate proxy, and whether government price setting has suppressed costs to the extent that costs apportioned to the seller are not reasonably reflected in the records. In such circumstances there may be grounds for the investigating authority to depart from the producer or exporter records where doing so would yield a more appropriate proxy. Where such derogation takes place, Article 2.2 clearly permits the use of data from a third country where it is appropriately adjusted to reflect the costs of production in the country of origin, without reintroducing the very distortions that undermine the appropriateness of the proxy.

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

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil made the following points in relation to topics of systemic relevance in this dispute.

I. The legal standard under Article 2.2.1.1 of the Anti-dumping Agreement (ADA)

2. The Russian Federation relied heavily on the Appellate Body jurisprudence in *EU – Biodiesel (Argentina)* to argue its case. Brazil would like to recall, however, that the referred Appellate Body's ruling is circumscribed to the factual circumstances of that case. Therefore, Brazil would caution the Panel against overstretching the boundaries of the Appellate Body's ruling in *EU – Biodiesel (Argentina)*.

3. It is clear from the report in *EU – Biodiesel (Argentina)* that the Appellate Body's reading of the legal standard under Article 2.2.1.1 of the ADA is more nuanced than Russia has argued in these proceedings.

4. Firstly, the Appellate Body referred to several instances in which investigating authorities are authorized to depart from the records kept by producers when calculating the normal value. It explained that:

> "[R]ecords that are GAAP-consistent may nonetheless be found not to reasonably reflect the costs associated with the production and sale of the product under consideration. This may occur, for example, if certain costs relate to the production both of the product under consideration and of other products, or where the exporter or producer under investigation is part of a group of companies in which the costs of certain inputs associated with the production and sale of the product under consideration are spread across different companies' records, or where transactions involving such inputs are not at arm's length."[1]

5. The Appellate Body also clarified that there may be circumstances where the obligation to calculate the cost on the basis of the records kept by the exporter or producer does not apply. The Appellate Body did not limit those circumstances, nor did it establish an exhaustive list, they merely mentioned transfer pricing as *one* example of such instances[2].

6. Moreover, the Appellate Body considered that the phrase "the cost of production in the country of origin" does not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin.[3] This means that there may be circumstances when it would be appropriate for the investigating authority to rely on an external benchmark when calculating the normal value under Article 2.2.1.1 of the ADA.

7. Secondly, in *EU – Biodiesel (Argentina)*, the EU based its determination that the producer's records do not reasonably reflect the cost of soybeans on the fact that the export tariff applied to soybean was around 20% higher than that applied to the exportation of biodiesel. For the Appellate Body, however,

> "the Argentine export tax system was not, in itself, a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel."[4]

[1] *EU – Biodiesel (Argentina)*, para. 6.33.
[2] *Ib.*, para. 6.73.
[3] *Ib.,* para. 6.74.
[4] *Ib.,* para. 6.55.

8. Brazil understands that the determination of which circumstances would in fact authorize investigating authorities to depart from the records kept by producers needs to be made on a case-by-case basis, according to the actual effect of this restriction in the product at issue. In this regard, Brazil agrees with Australia's Third Party Submission that the basic purpose of constructing the normal value under Article 2.2 of the ADA is to identify an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when that price cannot be used. It is thus for investigating authorities to asses in each case whether constructing the normal value on the basis of the records kept by producers will generate this proxy.

9. Brazil considers that, depending on the nature and on the magnitude of the intervention, State interference in the market to set or regulate the prices of inputs or raw materials at artificially low levels could be considered "sufficient basis" for investigating authorities disregarding producers' records under Article 2.2.1.1 of the ADA. It is important to note that, in *EU – Biodiesel (Argentina),* the Appellate Body did not make any findings regarding how Article 2.2.1.1 should apply to situations where the prices of inputs are subject to price controls.

10. Thirdly, the Appellate Body's decision in *EU – Biodiesel (Argentina)* was specifically circumscribed to the second condition of the *first sentence of Article 2.2.1.1. This means that there was no guidance* about the interpretation of the term "normally", in the beginning of the first sentence. More specifically, on which circumstances the obligation in the first sentence of Article 2.2.1.1 to "normally" base the calculation of costs on the records kept by the exporter or producer under investigation would not apply:

> "As the Panel noted, the EU authorities relied explicitly on the second condition in the first sentence of Article 2.2.1.1 of the Anti- Dumping Agreement to discard the records kept by the Argentine producers under investigation insofar as they pertained to the cost of soybeans. (See Panel Report, paras. 7.221 and 7.227; and Definitive Regulation (Panel Exhibit ARG-22), Recital 38) Thus, for purposes of resolving this dispute, it is the meaning of this condition that must be ascertained, and not whether there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 'normally' to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply". [5]

11. Brazil understands that the term "normally" in the first sentence of the Article 2.2.1.1 suggests that there may be specific situations where the records kept by the exporter or producer could be put aside, justifying the departure of the obligation to calculate the costs of production on the basis of the records kept by the producers.

12. In sum, Brazil considers that the jurisprudence in *EU – Biodiesel (Argentina)* offers only limited guidance when assessing whether investigating authorities can resort to an external benchmark when calculating the normal value under Article 2.2.1.1 of the ADA. In deciding the present dispute, the Panel should be conscious of these limitations.

II. Article 5.8 of the ADA is applicable in the context of reviews initiated under Articles 11.2 or 11.3 of the ADA

13. In Brazil's views Article 5.8 of the ADA is applicable in the context of reviews initiated under Articles 11.2 or 11.3 of the Anti-Dumping Agreement. Therefore, an investigating authority cannot impose duties in the context of reviews if the producer/exporter's dumping margin was found to be *de minimis*. This understanding is confirmed by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*:

> "[a]n investigating authority does not, of course, impose duties – including duties at zero per cent – on exporters excluded from the definitive anti-dumping measure, therefore such exporters cannot be subject to administrative and changed circumstances reviews, because such reviews examine, respectively, the 'duty paid' and 'the need for the continued imposition of the duty'"[6].

[5] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.18, footnote 120.
[6] Appellate Body Report, *Mexico – Anti-dumping measures on rice*, para. 305.

III. Procedural claim: Deadline for producer and exporter to comment on the essential facts

14. Brazil understands that there is no definition in the ADA as to what constitutes "sufficient time" for the purpose of Article 6.9 of the ADA.

15. Brazil considers however, that, in any case, the parties should have full opportunity to defend their interests.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

Third party oral statement

Ms Chairperson, distinguished Members of the Panel:

1. The People's Republic of China appreciates the opportunity to express its views before the Panel at the third party session. In this oral statement, China will focus on the legal interpretation of Articles 2.2.1.1 and 2.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement").

I. INTRODUCTION

2. This dispute raises important interpretive issues regarding the relevant provisions under Article 2 of the Anti-Dumping Agreement. As Article 2 disciplines a Member's determination of the existence and magnitude of "dumping", this dispute relates to the foundational concept of "dumping" that applies throughout the Anti-Dumping Agreement and in Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The Appellate Body has explained that "dumping is the result of the *pricing behavior of individual exporters or foreign producers*",[1] and that "[d]umping arises from the *pricing practices of exporters* as both normal values and export prices reflect *their pricing strategies* in home and foreign markets".[2] This understanding of "dumping" as international price discrimination is fundamental for the balance of rights and obligations in the Anti-Dumping Agreement. The factors exogenous to the producer are simply not relevant for determining the existence of "dumping". Anti-dumping measures are not a tool for importing countries to counteract the *regulatory policies of exporting countries.* The interpretation of the relevant provisions under Article 2 of the Anti-Dumping Agreement should be consistent with the foundational concept of "dumping".

II. ARTICLE 2.2.1.1 STIPULATES TO CALCULATE THE COST OF PRODUCTION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS

3. Article 2.2.1.1 addresses how to determine costs of production in the country of origin, either where an investigating authority assesses whether prices are below costs under Article 2.2.1 or where it chooses to *construct* normal value under Article 2.2. Article 2.2.1.1 states that an authority must use the costs set forth in the GAAP compliant "records kept by the exporter or *producer* under investigation", unless the records do not "reasonably reflect the *costs* associated with the production and sale of the *product*".[3] The Appellate Body in *EU – Biodiesel* stressed that the term "reasonably reflect the costs associated with the production and sale of the product" in Article 2.2.1.1 refers to whether "the records kept by the exporter or producer suitably and sufficiently correspond or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the *specific product under consideration*".[4]

4. The mere recording of the *price paid* for inputs does not inevitably mean that the producer's records reasonably reflect the costs associated with the product's production. For instance, Article 2.2.1.1 itself embodies rules dealing with the "proper allocation" of certain costs, and the Appellate Body in *EU – Biodiesel* pointed out some exceptional situation too. However, none of these situations involve imposition of hypothetical out-of-country costs in a bid to counter the economic effects of regulation by an exporting government. The Appellate Body has excluded "an examination of the 'reasonableness' of the reported costs themselves, when the actual costs

[1] Appellate Body Report, *US – Zeroing (Japan)*, para. 111 (emphasis added).
[2] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 95 (emphasis added), referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 156 and *US – Zeroing (Japan)*, para. 156 "[t]he concept of dumping relates to the pricing behaviour of exporters or foreign producers". See also Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 86.
[3] Emphasis added.
[4] Appellate Body Report, *EU – Biodiesel*, para. 6.26.

recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful".[5] The Appellate Body found the costs "calculated on the basis of records kept by the exporter or producer" under Article 2.2.1.1 must lead to a cost "in the country of origin".[6]

5. Article 2.2.1.1 states that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation". The panel in *US – Softwood Lumber V* explained that this imposes a positive obligation on an investigating authority to normally use the books and records of the respondent, provided that two conditions are met.[7] The fact that the sentence uses the word "normally" does not render the rule optional. It simply indicates that the obligation included in that sentence is not absolute and that there are exceptions as expressed by the two conditions referred to in the same sentence. This understanding has also been highlighted by the Appellate Body in *US – Clove Cigarettes*:

> *We observe that the ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions, as a rule". In our view, the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule". Rather, we consider that the use of the term 'normally' … indicates that the rule … admits of derogation under certain circumstances." […]*[8]

6. There is no reason that the interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement in this dispute could depart from the WTO jurisprudence in *EU – Biodiesel*. The use of the word "normally" can't be interpreted to allow an investigating authority to ignore its obligation under Article 2.2.1.1 unless under the exceptions provided under the Anti-Dumping Agreement.

III. ARTICLE 2.2 STIPULATES TO CONSTRUCT THE NORMAL VALUE ON THE BASIS OF THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN

7. Article 2.2 of the Anti-Dumping Agreement deals with the establishment of the producer/export's normal value. It requires that domestic prices normally be used for the purpose of establishing normal value. In some circumstances, however, Article 2.2 recognizes that domestic prices may be unsuitable. These situations are clearly provided in Article 2.2. In such a situation, an investigating authority has two options: it may base normal value on "a comparable price of the like product when exported to an appropriate third country", or, it may construct normal value on the basis of the "cost of production in the country of origin" plus administrative, selling and general costs and profit. Each of these methods aims to achieve a proxy normal value as close as possible to the would-be domestic selling price:[9] sales must be to an "*appropriate*" third country at a "*comparable*" price and the costs of production must be the producer's costs in the "*country of origin*". The "cost of production" described in Article 2.2 is the *producer's* cost and not a *hypothetical* cost that does not reflect the true cost incurred by the producer to produce the product under consideration.

8. China recognizes that situations arise where a producer's true costs to produce the product are not reflected in its records, meaning that the "cost of production in the country of origin" must be determined through evidence other than the producer's own accounts. This may be the case, for example, where the producer's records cannot be used because the transaction is influenced by a non-arm's length pricing transfer with a related party, in which case the recorded cost may appear to be unreliable. To be clear, in such a case, the investigating authority may reject the producer's *records*, but may not deny the *true costs* of the producer of the product under consideration. The authority may look for evidence other than the producer's records, but, at the end of the day, it must determine or calculate the *true costs* of the producer of the product under consideration and not a *hypothetical* cost. To determine costs in such a case, the authority must clearly look for evidence *in the country of origin* because this evidence is the best evidence of the true cost to the producer "in the country of origin".

[5] Ibid. para. 6.41 (quoting Panel Report, *EU – Biodiesel*, fn 400 to para. 7.242).
[6] Ibid. para. 6.23.
[7] Panel Report, *US – Softwood Lumber V*, para. 7.237.
[8] Appellate Body Report, *US – Clove Cigarettes*, para. 273. See also Panel Report, *China – Broiler Products*, para. 7.161.
[9] Panel Report, *Thailand – H-Beams*, para. 7.112.

9. The Appellate Body in *EU – Biodiesel* also stressed that an investigating authority may not, when using out-of-country evidence, "simply substitute costs from outside the country of origin for the 'cost of production in the country of origin'"; rather "the investigating authority [is required] to adapt the information that it collects" [to the conditions of the country of origin].[10]

10. Thus, if no in-country evidence were available and out-of-country evidence had to be used, the out-of-country costs would have to be adjusted to ensure that the "cost of production" ascertained by the authority is a reflection of the producer's true costs to produce the product *in the country of origin*. Such necessary adjustments would include accounting for any differences in regulatory policies and any other factors exogenous to the producer that affect the cost of production. Ignoring such factors would mean that the external costs taken into consideration reflect conditions *outside* the country of origin and therefore could not be reflective of the producer's cost of production "in the country of origin".

IV. OTHER ISSUE

11. China takes note that some Parties use Article 2.7 of the Anti-Dumping Agreement and the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994 ("*Ad* Note") as context to support their conclusion that a state regulation of prices would allow an investigating authority to reject home market prices.

12. The *Ad* Note is the only provision of the Anti-Dumping Agreement and GATT 1994 that provides conditional authority for an investigating authority to use of a methodology not based on a strict comparison with domestic prices and costs. However, the *Ad* Note lays down two strict conditions that must be met before an authority is permitted to depart from a strict comparison with home market prices and costs. Specifically, the *Ad* Note permits recourse to the exceptional methodology under the *Ad* Note only if: (i) there is a complete or substantially complete monopoly of trade by the State in the exporting country; and (ii) *all* prices in the exporting country are fixed by the State.

13. The *Ad* Note is an exception to the rules provided under articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI of GATT 1994. It could not justify an investigating authority's practice to reject home market price or costs based on the regulation of price in the exporting country. On the contrary, if it does not meet the two strict conditions provided under the *Ad* Note, an investigating authority must strictly follow the rules provided under articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI of GATT 1994.

Thank you. The delegation of China looks forward to your questions.

[10] Appellate Body Report, *EU – Biodiesel*, para. 6.73.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

The government of Colombia (hereinafter "Colombia") intervenes in this case given its systemic interest in the application of several provisions of the WTO Covered Agreements discussed before this Panel.

While not taking a final position on the specific merits of this case, Colombia provides its views on some of the legal claims advanced by the Parties to the dispute. In particular, Colombia has made submissions on the following issues presented by the Parties:

A. ARTICLES 2.2 AND 2.2.1.1 - SOURCES INSIDE THE COUNTRY OF ORIGIN

1. In Colombia's opinion, the Anti-Dumping Agreement acknowledges that in certain circumstances consideration of the domestic price in the exporting country does not produce an appropriate 'normal value' for the purposes of comparison with the export price in order to determine the margin of dumping. Thus, ADA Article 2.2 envisages circumstances in which such a straightforward price-to-price comparison may not be possible or appropriate and therefore provides for alternative methodologies for the calculation of the normal value. Such possibilities do not exclude information collected outside the exporting country when determining the "cost of production in the country of origin".

2. This issue was clarified by the Appellate Body in *EU – Biodiesel w*hen interpreting Article 2.2 of the ADA and VI of the GATT 1994; the AB stated that: *"these provisions do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin…".*[1]

3. Furthermore, the AB stressed the "reference" role of ADA Article 2.2 and stated that "…On the basis of the text of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the phrase "cost of production […] in the country of origin" may be understood as a reference to the price paid or to be paid to produce something within the country of origin".[2]

B. THE TERMS "SHALL NORMALLY" UNDER ADA ARTICLE 2.2.1.1

4. Colombia recognizes that the use of the term "shall" before the term "normally" implies an obligation of mandatory nature. However, as the AB has stated, there should be certain circumstances where the preference rule over records kept by the exporter or the producer admits derogation. This seems to be the case where despite the evidence submitted or obtained during the investigation proceedings, the IA concludes that domestic sales of any product are not "in the ordinary course of trade". This has critical relevance in cases where distorting administrative practices or rules could affect the "normal value" of the investigated product. Nonetheless, the IA must comply with the fundamental obligations set out in ADA Article 5.3 when performing the proper examination of the evidence provided by the interested parties. This means to examine whether the evidence before the authority at the time it made its determination was such that an unbiased and objective that evidence could properly have made the determination.[3]

C. THE OBLIGATION TO ESTABLISH A PRIMA FACIE CASE

5. Colombia considers that the *prima facie case*, refers to several elements: a) there must be an express statement on the claim; b) the reasons for which the complaining Member considers there is a violation of a specific article of a Covered Agreement; c) identification of the specific measures at issue and provision of a brief summary of the legal basis of the complaint sufficient to

[1] ABR, *EU – Biodiesel*, para. 6.74 (WT/DS473/AB/R).
[2] Ibid, para. 6.69.
[3] PR, *US – Hot-Rolled Steel*, para. 7.153 (WT/DS184/R).

present the problem clearly[4]. Evidence must be presented to enable the complainant to rule on the alleged facts.

6. For this reason, it is important to consider that, according to Article 13 of the DSU, the panels have a significant investigative authority, but this authority cannot replace the burden for the complaining party to establish a *prima facie* case of inconsistency based on a specific legal claims.[5] A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU, but not to make the case for a complaining party.

[4] Appellate Body Report, *Guatemala – Cement I*, paras. 70 and 72.
[5] ABR, *India – Agricultural Products*, para. 5.85.

ANNEX C-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1 INTRODUCTION

1. The EU exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the Anti-Dumping Agreement. Whilst not taking a position on the facts of this case, the EU provides its views on certain legal claims and arguments advanced so far by the Parties to the dispute.

2 SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

2.1 Russia's claim that Ukraine violated Articles 2.2 and 2.2.1.1 of Anti-Dumping Agreement because, in determining the constructed normal value, it failed to calculate costs on the basis of records kept by the Russian producers and exporters

2. The EU notes that the Appellate Body in *EU — Biodiesel*, referring to the panel report in the same case, mentioned "non-arms-length transactions" or "other practices" which may affect the reliability of the costs reported in the records. Several third parties (Australia, Brazil, the US) highlighted this aspect in their written submissions.

3. *First*, the EU agrees that certain government actions can be at the source of dumping and material injury. Ukraine distinguishes the present case from *EU — Biodiesel* and explains in detail that the kind of state intervention in the present case is much more significant than in *EU — Biodiesel*, as the domestic price of gas in Russia is established by law and not subject to market forces.

4. Indeed, Article VI:5 of GATT 1994 provides that no product can be subject to both anti-dumping and countervailing duties, in order to "compensate for the same situation". It is uncontroversial that countervailing duties can be used to address situations caused by the action of the government of the exporting country, such as prohibited subsidies. This means that, by acknowledging that there can be a single situation which could be the subject to either a countervailing duty or an anti-dumping duty, Article VI of GATT 1994 acknowledges that government actions may be at the source of dumping and material injury.

5. This conclusion was confirmed by the Appellate Body in *United States — Anti-dumping and Countervailing duties (China)* that clearly establishes that "exogenous factors", such as the actions of the government of the exporting country, may very well be the source of dumping.

6. *Second*, the EU agrees with Ukraine that the establishment of the domestic gas prices in Russia may fall under the "other practices" which may affect the reliability of the reported costs. Indeed, the domestic gas price in Russia is regulated by the State and not subject to market forces. It appears that the price at which the main provider, Gazprom, sells gas on Russia's domestic market does not even cover the costs for extraction and transportation to the Russian producers, let alone the other expenses incurred.

7. The EU agrees that this practice by the Russian State of establishing the domestic gas prices may be considered as falling under the category of "other practices" which affect the reliability and accuracy of the costs in the producers' records.

8. *Third*, the EU agrees that at the time of its accession to the WTO Russia undertook specific commitments with regard to pricing policies and in particular with regard to the fact that "producers/distributors of natural gas in the Russian Federation would operate [...] on the basis normal commercial considerations, based on recovery of costs and profit". In addition, the EU recalls the concerns expressed by Members with regard to Russia's gas pricing policies and the role of Gazprom.

9. Thus, Russia's commitment that producers and distributors of gas in Russia would operate on the basis of normal commercial considerations, based on recovery of cost and profit, is part of

its WTO obligations. However, the fixing of domestic gas prices by the State cannot be equated to "normal commercial considerations".

10. *Finally*, with regard to the meaning of "normally" in Article 2.2.1.1, the EU considers that a threshold question is whether Ukraine has explained sufficiently well to the Panel how that particular provision was relied upon by the IA in the investigation at issue. Otherwise the invocation by this particular provision may only constitute an attempt at *ex-post* rationalisation. This would mean that the Panel almost certainly does not need to decide this question in this case, and in our submission should not do so.

11. Following the definition of dumping, and the introduction of the notions of normal value and price comparability in Article 2.1 of the Anti-Dumping Agreement, Article 2.2 elaborates the rules for determining normal value. Article 2.2 contains two sub-paragraphs. Article 2.2.1 focuses in on the question of when domestic sales or sales to a third country may be treated as not in the ordinary course of trade by reason of price (when they are below the costs of production plus administrative, selling and general costs).

12. Article 2.2.1 itself contains one further sub-paragraph: Article 2.2.1.1. By its own terms, Article 2.2.1.1 is framed as a provision to be applied "for the purpose of paragraph 2". The term "purpose" appears in the singular. To understand the provision properly, we must therefore look back to the single purpose of paragraph 2. We must neither improperly expand nor narrow that single purpose. The single purpose of paragraph 2 is, as we have already observed, to set out rules governing the establishment of a value that is normal or, for short, a normal value. Thus, we must correctly understand the first sentence of Article 2.2.1.1 as requiring that, for the purpose of establishing a normal value, provided that certain conditions are met, costs shall normally be based on the records of the investigated firm.

13. The first sentence of Article 2.2.1.1 contains two conditions, introduced by the term "provided that"'. The first condition relates to GAAP, whilst the second condition refers to "records … reasonably reflect the costs …". If the relevant conditions are fulfilled, then, according to the terms of Article 2.2.1.1, a particular consequence follows. That consequence is framed as an obligation (through the use of the term "shall"). Specifically, the consequence is that normally the costs are to be calculated on the basis of the records of the investigated firm. Thus, by its own terms, the first sentence of Article 2.2.1.1 does not establish the consequence as an absolute rule, but frames the consequential obligation by using the term "normally". Also by its own terms, the first sentence of Article 2.2.1.1 does not explicitly set out what circumstances may be considered "normal" and what circumstances may be considered "not normal".

14. It is important to recognise and acknowledge, in the design and architecture of the first sentence of Article 2.2.1.1, that there are two conditions that, if satisfied, result in a specific consequence. Such a condition − consequence structure is not the same, as a matter of law, to a general rule − exception structure, and it would be legally erroneous to interpret and apply the provision as if it were framed as a general rule − exception, when that is not the case.

15. By its own terms, Article 2.2.1.1 does indicate some of the circumstances in which it may be justified to reject/replace/adjust specific cost items in the records of the investigated firm. For example, the second sentence of Article 2.2.1.1 refers to cost allocations have been "historically utilized" by the investigated firm, in particular as regards amortization, depreciation, allowances for capital expenditures and other development costs. Thus, a specific cost allocation might be in accordance with GAAP and otherwise "reasonably reflect the costs …", but it might not have been "historically utilized" by the investigated firm, as opposed to being specifically engineered for the purposes of completing the questionnaire response. Thus, in such a situation, instead of calculating costs exclusively on the basis of the records kept by the investigated firm, an investigating authority may be entitled to reject/replace/adjust such costs (by definition, by having recourse to information or data exogenous to the records kept by the investigated firm). The same comment applies with respect to the existence of an "association or compensatory arrangement" as referenced in Article 2.3. The Appellate Body has recognised that rejecting transactions between affiliates in favour of transactions that are in the ordinary course of trade is consistent with Article 2.1, and thus consistent with the purpose (establishing a normal value) that Article 2.2.1.1 is expressly directed towards achieving. If such adjustments would not be made pursuant to Article 2.2.1.1 (the terms adjusted and adjustment appear in the third sentence and in footnote 6), then they would only have to be made instead pursuant to Article 2.4.

16. These observations are confirmed by the repeated use of the term "normal" throughout the relevant provisions, including in Article VI of the GATT 1994; in the basic definition in Article 2.1;

in Article 2.2, footnote 2, Article 2.2.1, and footnote 5; in Articles 2.2.1.1 and 2.2.2 (by cross-reference) and Article 2.4. The overarching requirement that the export price must be compared with a value that is normal, that is, a normal value, provides compelling support for the preceding analysis.

17. Thus, the EU has offered some initial views with regard to the correct interpretation of Article 2.2.1.1, including the meaning and place of "normally" in its overall architecture. The EU considers that there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 "normally" to base the calculation of costs on the records kept by the exporter or producer under investigation would not preclude the rejection or adjustment of data found to relate to an abnormal situation, an issue which was not decided in *EU — Biodiesel*. This understanding is shared by other third parties.

2.2 Russia's claim that Ukraine acted in breach of Articles 2.2 and 2.2.1.1 of Anti-Dumping Agreement because it replaced (adjusted) the costs of gas actually borne by the Russian producers and exporters for production of ammonium nitrate with data on the gas prices outside of Russia

18. Ukraine maintains that, differently from *EU – Biodiesel*, in the present case the gas price was regulated by the State and the State was the main supplier of the respective product.

19. The EU recalls that the Appellate Body has made it clear that evidence from outside the country of origin may be taken into account in the determination of the cost of production in the country of origin.

20. Furthermore, the EU notes that in the context of the SCM Agreement the Appellate Body went even further, stating in *US – Softwood Lumber IV* that an IA may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted.

21. That position was later confirmed by the Appellate Body in *US — Anti-Dumping and Countervailing Duties (China)*, also in the context of the SCM Agreement. According to the Appellate Body an IA may reject in-country private prices if it reaches the conclusion that these are too distorted due to the predominant participation of the government as a supplier in the market.

22. Similarly, in the present case Ukraine has brought evidence that in-country gas prices in Russia are distorted such that they cannot meaningfully be used for the construction of the normal value, as the Russian government establishes itself the domestic gas prices. It follows that in the case of a market distorted to such an extent by state intervention an IA may not rely on the domestic prices of gas.

2.3 Russia's claim that Ukraine violated Article 2.2.1 of the Anti-Dumping Agreement because it improperly treated domestic sales of Ammonium nitrate in Russia as not being in the ordinary course of trade

23. Russia claims that the use of the price adjustment with respect to the gas prices in Russia's domestic market resulted in a much higher per unit costs of production and lead to the conclusion that the domestic sales of the ammonium nitrate producers were not in the ordinary course of trade. Thus, the use of a several times higher gas price tainted the entire analysis under Article 2.2.1 of the Anti-Dumping Agreement.

24. Ukraine maintains that Russia's third claim is consequential to its first claim according to which Ukraine violated Article 2.2.1.1 of the Anti-Dumping Agreement, explaining then that the IA has found that sales were made at a loss, in substantial quantities and during an extended period of time, the prices not having provided for recovery of all costs within a reasonable period of time.

25. The EU recalls that Appellate Body has offered in *US — Hot-Rolled Steel* several examples of situations which may fall under the category of transactions "not in the ordinary course of trade".

2.4 Russia's claim that Ukraine violated Article 2.4 of the Anti-Dumping Agreement because it failed to make a fair comparison between the export price and the constructed normal value

26. Russia claims that Ukraine violated Article 2.4 of the Anti-Dumping Agreement as a consequence of the fact that in the construction of the normal value the IA rejected the prices of gas paid by the ammonium nitrate producers and replaced them with gas prices charged to customers outside the country of origin.

27. Ukraine maintains that Russia's claim is merely a repetition of its previous claim regarding the construction of the normal value and that the "artificial inflation" of the total cost of production is not a difference which affects price comparability. It re-explains that the IA reached the conclusion that gas prices on Russia's domestic market were clearly not of a commercial nature, being significantly lower than the export prices, and that those prices were fixed by the State and were below the cost, contrary to Russia's commitment undertaken upon its WTO accession. Accordingly, the IA took into account the average of the gas prices at the German border. Thus, the solution used by the IA does not relate to a difference in the characteristics of the domestic and export transactions which are compared, or for that matter a difference affecting price comparability.

28. The text of Article 2.4 provides that a "fair comparison" be made between the export price and the normal value when determining whether dumping exists. The second sentence of Article 2.4 sets up the requirements to be met by this comparison, stating that it shall be "at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time". The third sentence of Article 2.4 elaborates on the means to be employed in order that the "comparison" between the normal value and the export price is "fair".

29. The EU recalls that the panel in *EU – Biodiesel* has found that Article 2.4 refers to only those differences which affect price comparability and not to differences arising exclusively from the methodology used to construct the normal value.

30. The EU agrees with Ukraine. As the way that Argentina and Russia structured their claims is similar in the two cases, the EU considers that the Panel should dismiss Russia's claim, as it is a merely consequential claim to its claims regarding the construction of the normal value and it does not address specific aspects of the fair comparison contemplated by Article 2.4 of the Anti-Dumping Agreement.

31. Russia's claim under Article 2.4 pertains to the calculation of the normal value, as opposed to the comparison between the normal value and the export price. In light of the panel reports in *Egypt – Steel Rebar* and *EC – Tube or Pipe Fittings,* Article 2.4 does not deal with the basis for and basic establishment of the export price and normal value (which are addressed in other provisions), but rather addresses the nature of the comparison of export price and normal value. Thus, Russia's claim that the Ukrainian authorities should have calculated the normal value in a different way falls outside the scope of Article 2.4, because Article 2.4 does not apply to the establishment of the normal value. If Ukraine is right about the adjustments made pursuant to Article 2.2.1.1, which the EU considers to be the case, it would of course not be required to "un-adjust" pursuant to Article 2.4. The case turns on a proper construction and application of Article 2.2.1.1, not Article 2.4.

2.5 Termination of investigation against an exporter with alleged negative dumping in the original investigation

32. The EU starts by recalling that the Appellate Body in *Mexico — Anti-Dumping Measures on Rice* found that by requiring the investigating authority to conduct a review for exporters with zero and *de minimis* margins, Article 68 of Mexico's Foreign Trade Act was inconsistent with Article 5.8 of Anti-Dumping Agreement and Article 11.9 of SCM Agreement.

33. If the Panel finds that in the present case there were no such *de minimis* determinations with respect to EuroChem in the original investigation, then the question may be if Article 5.8 of Anti-Dumping Agreement applies in the context of reviews initiated under Articles 11.2 or 11.3 of Anti-Dumping Agreement.

34. In this respect, the panel in *US — Corrosion-Resistant Steel Sunset Review* did not find textual or contextual support in the language of either Article 11.3 or Article 5.8 to suggest that the *de minimis* standard also applies in the context of sunset reviews.

35. However, the EU notes that in interpreting the provisions with respect to sunset reviews a panel needs to take into account their rationale and not confine itself to the sole analysis of text and context. For instance, in the context of the cumulative assessment of injury the Appellate Body found in *US — Oil Country Tubular Goods Sunset Reviews* that notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries.

36. Finally, the EU recalls that in the context of the SCM Agreement the Appellate Body has found in *US — Carbon Steel* that the *de minimis* standard set forth in Article 11.9 of the SCM Agreement is not implied in Article 21.3 of the Agreement.

3 CONCLUSIONS

37. The EU hopes that its contribution in the present case will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the Anti-Dumping Agreement.

ANNEX C-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. In this dispute, the Russian Federation ("Russia") challenges the anti-dumping measures imposed by Ukraine on ammonium nitrate originating in Russia, raising a number of claims pertaining to the interpretation of the WTO covered agreements, notably the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement"). Japan considers that this dispute raises issues of systemic importance, and focuses on several issues regarding the interpretation of Articles 2.2.1.1, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement. Notwithstanding the above, Japan does not take any specific views on the factual aspects of the dispute.

II. INTERPRETATION OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

A. The Condition that the Exporter's Records Reasonably Reflect Costs

2. Japan's comments regarding the condition that the exporter's records reasonably reflect the costs focus on the methodology used by an investigating authority to calculate the cost of production. Russia correctly notes that, in *EU – Biodiesel (Argentina)*, the Appellate Body clarified that there is no "additional or abstract standard of 'reasonableness' that governs the meaning of costs associated with the production and sales of the product under consideration".[1] This, however, does not mean that an investigating authority must in all circumstances accept the costs registered in an exporter's or producer's records.[2]

3. For example, the panel in *EU – Biodiesel (Argentina)* made it clear that an investigating authority are "free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs [ ]".[3] The Appellate Body also recognized in *EU – Biodiesel (Argentina)* that there may be circumstances in which the exporter's or producer's records may be found "not to reasonably reflect the costs associated with the production and sale of the product under consideration".[4] In sum, both the panel and the Appellate Body left open the possibility that the investigating authority could permissibly decline to use the exporter's or producer's records after considering the specific circumstances of the costs reported to be incurred by those exporters or producers on their records. In Japan's view, transactions affected by government price control may fall under "non-arms-length transactions or other practices which may affect the reliability of the reported costs" and which the investigating authorities are "free to examine".

4. Further, Japan notes that Article 2.2.1.1 must be understood in the light of the concept of "normal value" and Articles 2.1 and 2.2. "Normal value" is defined in Article 2.1 as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The "normal value" is meant to reflect "the 'normal' price of the like product, in the home market of the exporter".[5] Sales not made in the ordinary course of trade are to be excluded from the calculation of normal value "precisely to ensure that normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter".[6]

5. The Appellate Body also stated that Article 2.2.1.1 pertains to a methodology for obtaining an "appropriate proxy" for the sales price of the product under investigation "if it were sold in the ordinary course of trade in the domestic market".[7] In this regard, "the costs associated with the production and sale of the product" under Article 2.2.1.1 are intended to serve as an appropriate

[1] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37.
[2] See for example, Panel Report, *EU – Biodiesel (Argentina)*, footnote 400 to para. 7.242.
[3] Ibid.
[4] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33.
[5] Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.
[6] Ibid.
[7] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

basis for estimating the would-be market price of the products concerned, or, in other words, the price that would have resulted from sales transactions concluded on terms and conditions that are compatible with normal commercial practice. Japan considers that whether or not a commercial practice is "normal" must be determined objectively by the investigating authority of the importing country and take into account the actual commercial practices in the relevant market.

6. The above interpretation does not constitute a new test under Article 2.2.1.1. To the contrary, the above interpretation faithfully reflects the text of Article 2.2.1.1, as previously interpreted by panels and the Appellate Body. Article 2.2.1.1 permits an investigating authority to disregard the exporter's or producer's records when it determines that such records do not "reasonably reflect the costs associated with the production and sale of the product under consideration" because the recorded costs of inputs do not reflect transactions concluded on terms and conditions that are compatible with normal commercial practice.

B. The Term "Normally" Under Article 2.2.1.1

7. Japan notes that the first sentence of Article 2.2.1.1 contemplates that an investigating authority shall "normally" calculate costs on the basis of records kept by the exporter or producer, provided that such records satisfy the two prescribed conditions.

8. The ordinary meaning of "normally" is "[u]nder normal or usual conditions; as a rule".[8] The Appellate Body has observed that the qualification of an obligation with the adverb "normally" connotes that there are circumstances "in which the obligation in the first sentence of Article 2.2.1.1 'normally' to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply".[9] In accordance with the principle of effectiveness,[10] this Panel must give "meaning and effect" [11] to the term "normally" in Article 2.2.1.1. Limiting the circumstances in which an investigating authority may depart from the exporter's records to the two prescribed conditions reads out the term "normally" from Article 2.2.1.1 and the text would have exactly the same meaning as if it had read: "costs shall be calculated on the basis of records kept by the exporter or producer under investigation, provided that [ ]".

9. Furthermore, the rationale for relying on the recorded costs of the producer or exporter is that such costs potentially reflect market prices of inputs and, consequently, the use of such prices can yield a proxy that approximates the would-be price of the product under consideration if it had been sold in the ordinary course of trade. Such rationale is premised on the existence of a well-functioning market in which participants are acting independently (as in arm's length transactions) for their own commercial interest. When prices of inputs are determined arbitrarily by government regulations, then an investigating authority should be allowed to exclude the relevant transactions from the calculation of constructed normal value. Japan recalls, in this regard, that the Appellate Body has recognized "that the Anti-Dumping Agreement affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not 'in the ordinary course of trade'" provided that discretion is exercised in an even-handed way.[12] Japan respectfully requests the Panel to give "meaning and effect" to the inclusion of the term "normally" and to preserve the flexibility that the inclusion of this term in Article 2.2.1.1 is intended to provide to investigating authorities.

III. INTERPRETATION OF ARTICLE 11 OF THE ANTI-DUMPING AGREEMENT

10. Article 11 of the Anti-Dumping Agreement provides that anti-dumping duties may continue or be extended if the investigating authority finds that the removal or expiry of the anti-dumping duties would likely lead to continuation or recurrence of injury. With respect to Article 11, Russia argues that the provisions of Article 3 of the Anti-Dumping Agreement apply to reviews conducted pursuant to Article 11.[13]

[8] Appellate Body Report, *US – Clove Cigarettes*, para. 273.
[9] Appellate Body Report, *EU – Biodiesel (Argentina)*, footnote 120 to para. 6.18.
[10] The principle of effectiveness is "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention [on the Law of Treaties]" (Appellate Body Report, *US – Gasoline,* p. 23).
[11] Appellate Body Report, *Canada – Dairy*, para. 133.
[12] Appellate Body Report, *US – Hot-Rolled Steel*, para. 148.
[13] Russia's First Written Submission, para. 199.

11. As stated by the Appellate Body, there are certain differences in the "nature and purpose" of original investigations and sunset reviews.[14] The Appellate Body further noted that there are no cross-references between Article 3 and Article 11.3, and that Article 11.3 does not expressly identify any particular factors that authorities must take into account in making such a determination.[15] However, investigating authorities' discretion is not unfettered with respect to the determination of likelihood of the continuation or recurrence of injury under Article 11. The investigating authorities must abide by the following considerations.

12. First, the Appellate Body has confirmed that "the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3."[16] Second, pursuant to Article 11.3, the investigating authority's likelihood-of-injury determination must rest on "a sufficient factual basis to allow it to draw reasoned and adequate conclusions".[17] To comply with this requirement, "[c]ertain of the analyses mandated by Article 3 [ ] may prove to be probative, or even required".[18] As the Appellate Body explained:

> [i]t seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgment, consider other factors contained in Article 3 when making a likelihood-of-injury determination.[19]

13. In sum, Japan considers that, contrary to Russia's assertion, there is no rigid requirement to examine *all* of the injury factors listed in Article 3.4 of the Anti-Dumping Agreement in every Article 11 review. Nonetheless, by the nature of likelihood of "injury" determinations, Japan understands that certain factors examined under Article 3 may need to be examined in an Article 11 review depending on the specific circumstances of the case.

[14] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 124.
[15] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 113.
[16] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.
[17] Appellate Body, *US – Corrosion-Resistant Steel Sunset Review*, para 114 (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para 7.271).
[18] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.
[19] Ibid.

ANNEX C-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

Third party oral statement

1. Mexico is grateful for the opportunity to put forward its views on this dispute.

2. In this statement, my delegation will first address substantive aspects and then go on to some procedural aspects.

3. In general terms, Mexico does not agree with various arguments put forward by Russia concerning the interpretation of the second condition in the first sentence of Article 2.2.1.1 and its relationship with Article 2.2 of the Anti-Dumping Agreement.

4. Russia argues that the reference to "costs of production" contained in Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement concerns the producer-specific costs associated with the production and sale of the product under consideration, since only these costs can be those incurred by the producer investigated in the country of origin.

5. Mexico disagrees with Russia's interpretation. In our view, a proper interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement leads to the conclusion that the production costs referred to in Article 2.2 of the Anti-Dumping Agreement are not necessarily the costs associated with the production and sale of the product under consideration that are actually incurred by the specific producer/exporter.

6. In this connection, in the first place Russia's interpretation would necessarily lead to the conclusion that it is implicit in Article 2.2 that the reference to the "cost of production" pertains to the specific product of the producer or exporter investigated. However, that would make it superfluous for the article to go on to say "in the country of origin", since this would already be covered by the expression "of the product" (under consideration) which is considered implicit.

7. Secondly, if an investigating authority validly determines that it cannot use the records of the exporter or producer because they are not in conformity with the generally accepted accounting principles of the exporting country, or because they do not reasonably reflect the costs associated with the production and sale of the product under investigation, then the authority would have to use a different basis for the costs associated with the production and sale of the product under consideration. If, in using this alternative basis, it determines that there are no domestic sales in the ordinary course of trade, it would then be able to construct the normal value. Obviously, in constructing the normal value in accordance with Article 2.2, it could not use the accounting records of the exporter, since, as was said earlier, they are not reliable. However, according to Russia's interpretation, Article 2.2 of the Anti-Dumping Agreement would oblige the authority precisely to use those records, despite the fact that it has already been determined that they are not reliable. That is the reason why Article 2.2 cannot refer implicitly to the specific product, because such an interpretation would mean that, despite the existence of a valid reason for not using the accounting records, the authority would necessarily have to use the costs of the product under consideration, now by virtue of Article 2.2.

8. Thus, apart from the fact that there is nothing in Article 2.2 to support the interpretation that the article in question implicitly refers to the specific product, such an interpretation would mean that there is no difference between the costs referred to in that article and Article 2.2.1.1, even though the Appellate Body itself, in its *EU – Biodiesel* report (DS43), stated that the scope of Article 2.2 is much broader than that of Article 2.2.1.1. On the other hand, as mentioned before, if it were implicit in Article 2.2 that the production cost must be that of the specific product, referring to the product under investigation produced by a particular producer/exporter, it would be superfluous to go on to say "in the country of origin", since this would already be covered by the fact that there is an implicit reference to the specific product.

9. Mexico therefore considers that the reference contained in Article 2.2 to the "cost of production in the country of origin" indicates that the information sought is not the specific information of a company, but information making it possible to determine what is the cost of production in the country of origin. This reading is compatible with what was stated by the Appellate Body in the *EU – Biodiesel* case (DS473), where it found:

> "[…] the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence".[1]

10. Mexico also considers that the Anti-Dumping Agreement's preference for actual information does not justify limiting the methodological options for its substitution. This is evidenced by the fact that Article 2.2.2, which also refers to the construction of normal value, provides the flexibility of replacing the actual data with "any other reasonable method". Moreover, according to Article 2.2.1.1, the option of calculating costs using records of the producer/exporter is only the preferred basis, since, as was indicated by the Appellate Body in *US – Clove Cigarettes* (DS406), if a provision is qualified by the term "normally", it admits of exceptions. Thus, in accordance with that article, it is possible to resort to other options in order to calculate costs.

11. Mexico considers that the interpretations given by Russia, taken to the extreme, would imply that the "facts available" provisions may not be used either, although these are set out in the Anti-Dumping Agreement itself, because they imply an option other than that of costs.

12. Lastly, with regard to the procedural issues, Mexico wishes to express its concern about the time-limit imposed on third parties by the Panel for the reading of oral statements during this session, irrespective of the language in which it is wished to make them. Mexico points out that this limitation is not a decision of the Members reflected in the Dispute Settlement Understanding; in addition, in establishing the limitation indiscriminately for all languages, consideration is not given to the fact that more time is required to make a statement in Spanish than in English, as is shown by the versions of the Panel and Appellate Body reports in Spanish, which require roughly 16% more pages than the English versions. Thus, the imposition of a single limit for official languages has a detrimental impact on Spanish and French.

13. Moreover, my delegation wishes to point out that the Panel decided to use the Digital Dispute Settlement Registry mandatorily, without consulting the third parties. The progress towards a digital platform is important and may facilitate the handling of the case file; however, as that platform is still in a test phase, permission should have been given for the use of both the traditional system and the new platform.

14. Having made these points, the Mexican Government again expresses gratitude for being given the opportunity to participate in this proceeding and to present its points of view, and is more than willing to reply to any question the Panel may put to it.

[1] Appellate Body Report, *EU – Biodiesel* (DS473), para. 6.73.

The Response by Mexico to the Question of the Panel

1. DISREGARDING COSTS OF GAS USED IN PRODUCTION OF AMMONIUM NITRATE

1. In paragraph 6 of its third-party statement, Norway states that under Article 2.2.1.1 of the Anti-Dumping Agreement it is the records of the investigated producer that stand the test of reasonableness and not the costs reflected in those records. In the third parties' view, in ascertaining whether the records reasonably reflect the costs, is an investigating authority permitted to examine the reasonableness of the costs themselves? Please explain what in the text of Article 2.2.1.1 would support your view.

Reply:

1. In Mexico's view, yes, this is permitted. Article 2.2.1.1 of the ADA lays down the requirements that must be met in choosing the basis to be used in calculating the costs for determining normal value. In particular, we note that the text of this article establishes two basic premises:

(a) first, that costs are normally calculated on the basis of records kept by the exporter or producer;

(b) second, that the first premise (i.e. that costs are normally calculated on the basis of records kept by the exporter or producer) will be applied provided that two conditions are satisfied:

(i) that the records of the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and

(ii) that they reasonably reflect the costs associated with the production and sale of the product under consideration.

2. In other words, if the records kept by the exporter or producer are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under investigation, then the authority will normally use the accounting records kept by the exporter or producer.

3. Now, in *US – Clove Cigarettes*, the WTO Appellate Body (AB) interpreted the ordinary meaning of the term "normally" as "under normal or ordinary conditions; as a rule".[2] In the same dispute, the AB observed that if an obligation is qualified by the adverb "normally", then that obligation admits of derogation.[3] In paragraph 7.161 of its final report, the Panel in *China – Boiler Products* adopted the same approach.

4. Thus, if the accounting records are in accordance with the GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration, then the authority will normally use those accounting records for calculating the costs. Obviously, if the records reflect the costs of production and sale of the product under consideration, then in using those records the authority would be basing itself on the costs of production and sale of the product under consideration. On the other hand, however, if the authority were to decide not to base itself on the accounting records (for example, because the records did not comply with the GAAP or reasonably reflect the costs associated with the production and sale of the product under consideration), then, by definition, the authority would not be able to base itself on the costs of production and sale of the product under consideration, but would have to carry out its calculations on some other basis. It is precisely for this reason that Article 2.2 of the ADA cannot implicitly contain the expression "of the product", since that interpretation would mean that, despite not being able to use the accounting records, the authority would necessary have to fall back, this time under Article 2.2, on the costs of the product under consideration.

[2] Appellate Body Report, *US – Clove Cigarettes*, para. 273.
[3] Idem.

5. Clearly, this interpretation leads to absurd results and, moreover, deprives the word "normally" in Article 2.2.1.1 of its meaning, since, for practical purposes, the authority would always have to base itself on the accounting records to be able to obtain the costs of the product under consideration incurred by the exporter, regardless of the fact that Article 2.2.1.1 would allow it to seek another option.

6. If recourse to an option other than the accounting records of the exporter is permitted, we see no reason why that other option could not be used when the accounting records of the exporter reflect unreasonable costs.

ANNEX C-9

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

Third party oral statement

Madam Chairperson, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel. Without taking any position on the facts of this dispute, Norway will in this oral statement take the opportunity to offer some views on the interpretation of the Second condition of Article 2.2.1.1 of the Anti-Dumping Agreement, and the application of the Panel and Appellate Body reports in EU – Biodiesel.[1]

2. The obligations on the investigating authorities according to Article 2.2.1.1, is subjected to two cumulative conditions:

i. that the records kept by the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and

ii. that such records reasonably reflect the costs associated with the production and sale of the product under consideration.

3. If these two conditions are fulfilled, the investigating authorities "*shall normally*" calculate the costs on the basis of the records kept by the exporter or producer under investigation.

4. With regards to the second condition, the parties disagree on whether Article 2.2.1.1 "*allows an investigating authority to disregard input prices reasonably reflected in records kept by the investigated producers and ex-porters on the grounds that due to governmental regulation domestic input prices are lower than prices charged for exporter of the input concerned and/or in the markets of third countries*".[2]

5. Ukraine contends, among other, that following the guidance of the Appellate Body and Panel in EU – Biodiesel, the second condition of Article 2.2.1.1 allows the investigating authority to *"examine the reliability and accuracy of the costs recorded in the records of the producers/exporters"*, and disregard such records when they do not reasonably reflect the costs associated with the production and sale of the product under consideration, because the recorded costs of inputs do not reflect transactions concluded on terms and conditions that are <u>compatible with normal commercial practices</u>.

6. Regarding the content of the second condition, Norway notes that the Appellate Body in EU – Biodiesel clearly established that the wording "*reasonably reflect*" of Article 2.2.1.1 relates to the "*records*", and not the "*costs associated with the production and sale of the product under consideration*". It is the "*records*" that stand the test of reasonableness, and not the "*costs*".

7. Furthermore, regarding the "*costs*", both the Panel and the Appellate Body in EU – Biodiesel established that "*costs associated with the production and sale of the product under consideration*" relates to the *"actual"* costs incurred that are genuinely related to the production and sale of the specific product under consideration.[3]

8. In connection to this, the Panel in EU – Biodiesel underlined that the condition at issue relates to whether the costs set out in a producer's or exporter's records "*correspond – within acceptable limits – in an accurate and reliable manner[] to <u>all the actual costs incurred</u> by the*

[1] DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina.
[2] Russia's First Written Submission para. 64.
[3] Appellate Body Report in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 6.30.

particular producer or exporter under consideration".[4] In addition the Panel further underlined that *"the object of comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under different set of conditions or circumstances and which the investigating authority consider more "reasonable" than the costs actually incurred"*.[5]

9. Norway does not intend to delve into the facts of the case, but it seems from the written submissions of the parties that the Ukraine does not dispute that the costs recorded by the producers accurately and reliably capture all the relevant production activities that have actually incurred related to the production of the specific product. The real issue in dispute would seem to be whether the input price of gas in Russia can be disregarded due to it being subsidized or distorted through government regulations so that the producer receives gas for less than market value.

10. In this respect, Norway notes that "dumping" is defined as price discrimination by the investigated producer between domestic and export markets.[6] Anti-dumping measures are available to counter such discriminatory behavior by exporters. Government regulation or intervention in the home market, that affect the producers' cost of production, for instance price caps or the provision by a Government of an input for less than market value, is more appropriately considered under the Subsidies Agreement[7], and is not as such a reason to reject the actual cost of production in a dumping investigation.

11. In conclusion, Article 2.2.1.1 of the Anti-dumping Agreement does not allow the investigating authorities to reject records by the producer or exporter, on the grounds that the records do not reasonably reflect the costs associated with the production and sale of the product under investigation, because the price of an input is considered not to reflect market value due to governmental regulation.

12. This concludes Norway's statement here today. Thank you.

[4] Panel Report in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 7.247.
[5] Panel Report, in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 7.242.
[6] GATT Article VI:1(b)(ii) and *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* Article 2.1.
[7] Cf. *Agreement on Subsidies and Countervailing Measures* Article 1.1(a)(1)(iii) and Article 14(d).

ANNEX C-10

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. CLAIMS REGARDING ARTICLES 2.2 AND 2.2.1.1

A. Costs Associated With the Production of the Product under Investigation

1. The United States has serious concerns with the positions espoused by Russia with regard to the interpretation and application of Article 2.2.1.1 of the Anti-Dumping Agreement. First, the Anti-Dumping Agreement uses the general term "costs," and not a term such as "amounts actually incurred." In context, the term "cost" means real economic costs involved in producing the product in the exporting country and not simply the amount reflected, for example, in an invoice price. Otherwise, investigating authorities would be bound to accept artificial, affiliated-party transfer prices – amounts which have no economic meaning.

2. Second, Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration." "Associate" or "associated" is typically defined as being "placed or found in conjunction with another." This language does not support an interpretation that the only inquiry involves what the producer paid for a particular input. Rather, the term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product and supports an economic conception of costs.

3. The context provided by other provisions in Article 2.2 also undermines Russia's suggested interpretation. Where the Anti-Dumping Agreement refers to costs "actually incurred by producers," it does so explicitly. For instance, for administrative, selling, and general costs, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question." Similarly, Article 2.2.2(ii) uses an express limitation to "the actual amounts incurred and realized by other exporters or producers." Given the express language utilized in Articles 2.2.2(i) and 2.2.2(ii), Article 2.2.1.1 cannot be read to limit "costs" to those actually incurred in the way envisioned by Russia.

4. Russia's reliance on the Appellate Body report in *EU – Biodiesel* is also misplaced. First, the Appellate Body understood that the costs calculated pursuant to Article 2.2.1.1 must generate an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. Given that Article 2.2.1.1 (in conjunction with Article 2.2) pertains to a methodology for obtaining an "appropriate proxy" for the price of the product under investigation "if it were sold in the ordinary course of trade in the domestic market," "the costs associated with the production and sale of the product" under Article 2.2.1.1 must be of the kind that is capable of serving as an appropriate basis for estimating the normal value of the final product. Similarly, the Appellate Body stated the general proposition that the second condition (starting with "reasonably reflect") means that the records of the exporter or producer must "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration."

5. Second, the Appellate Body in *EU – Biodiesel* made an explicit finding on what kind of analysis an authority may employ in applying the second condition of the first sentence of Article 2.2.1.1:

> an investigating authority is "certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters" to determine, in particular, whether all costs incurred are captured, whether the costs incurred have been over- or understated *and whether non-arms-length transactions or other practices affect the reliability of the reported costs*.

If, as Russia suggests, the only inquiry related to whether the books and records reflected amounts actually incurred, then the existence of "non-arms-length transactions" or "other practices" would be irrelevant.

6. Finally, the United States recalls that the Panel's role is to consider whether Russia has established that Ukraine's authority failed to provide a reasoned and adequate explanation for its determination. Here, Ukraine explains that the recorded cost for natural gas is artificial because it is set by the Government of Russia. In these circumstances, an unbiased and objective investigating authority could have found that a State-determined natural gas price was not a real, economic cost. Just as a price between affiliated parties may be artificial because it does not reflect an arm's-length price, so too a State-determined price may be artificial because the seller is similarly not free to sell at the price it determines, and therefore price does not reflect the interaction between independent buyers and sellers.

B. Use of Out-of-Country Sources to Derive the Cost of Production

7. Ukraine is correct that the panel and Appellate Body in *EU – Biodiesel* "did not exclude the possibility that an investigating authority may use information and evidence outside the country of origin to determine the prices in the country of origin." Rather, as the Appellate Body explained, when an authority rejects cost data under the second condition of the first sentence of Article 2.2.1.1, information from out-of-country sources could be used to arrive at the cost of production in the country of origin, albeit the benchmark chosen may need to be adapted to reflect the market conditions in the origin country.

8. The Appellate Body in *EU – Biodiesel* correctly differentiated "costs" from "information or evidence" used to establish "costs" by observing "that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin." As the Appellate Body recognized, "these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country." Accordingly, Articles 2.2 and 2.2.1.1 do not preclude an investigating authority from looking to sources outside the country of origin for information or evidence about costs associated with the production of the product under consideration and may use such information or evidence to determine an exporter's or producer's cost of production in the country of origin.

II. CLAIMS REGARDING THE RELATIONSHIP BETWEEN ARTICLES 3 AND 11.3

9. The obligations set forth in Article 3 do not apply directly to likelihood-of-injury determinations in sunset reviews conducted under Article 11.3. As the Appellate Body observed in *US – Oil Country Tubular Goods Sunset Reviews*, the Anti-Dumping Agreement distinguishes between "'determination[s] of injury' addressed in Article 3, and determinations of likelihood of 'continuation or recurrence . . . of injury', addressed in Article 11.3." Article 11.3 contains no cross-reference to Article 3 that would make Article 3 provisions applicable to sunset reviews. As further explained by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, "for the 'review' of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3."

10. Although Article 3.1 does not apply to sunset reviews, the United States nonetheless agrees with Russia that investigating authorities must base likelihood-of-injury determinations on an objective examination of positive evidence under Article 11.3, and the authority's evaluation of the evidence must be unbiased and objective. An authority may look to Article 3 for guidance in conducting its likelihood-of-injury analysis, but it is not required to do so.

11. Finally, an investigating authority's likelihood-of-injury determination under Article 11.3 must be made in an objective manner based on positive facts, but Article 11.3 does not prescribe the particular factors that must be considered or the methodology used by an authority. Trade barriers in third country markets can be relevant to an authority's likelihood-of-injury determination. Therefore, an authority could reasonably find that trade barriers in third country markets make an increase in subject import volume after expiry of a duty more likely by limiting the availability of other export markets to absorb any additional exports from the subject producers and exporters.

III. CLAIMS REGARDING ARTICLE 6.8 AND ANNEX II

12. Article 6.8 and Annex II set forth the conditions under which an investigating authority may make a determination on the basis of facts available. They do not govern how an investigating authority is to calculate dumping margins. Those conditions are provided for in Article 2. Therefore, the United States agrees with Ukraine that the cooperation of Russian respondents is not pertinent to the question of whether Ukraine's decision not to rely on the cost data reported by those parties with respect to its determination of dumping is consistent with its obligations under Article 2.2.1.1 of the Anti-Dumping Agreement.

IV. CLAIMS REGARDING ARTICLES 6.2 AND 6.9

13. Article 6.2 provides, in part, that all parties shall have a full opportunity to defend their interests throughout an anti-dumping investigation. Article 6.9 further requires that an investigating authority, "before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." The disclosure obligation of Article 6.9, while it does not extend to all facts, does extend to those facts which are "salient for a decision to apply definitive measures."

14. Absent a full disclosure of the "essential facts" forming the basis for consideration of an underlying dumping determination, it might not be possible for an interested party to identify whether the determination contains clerical or mathematical errors or even whether the investigating authority properly considered the factual information before it. In this regard, the United States agrees with the panel in *China – Broiler Products* that an investigating authority, with respect to a determination of the existence and margin of dumping, should disclose: (1) the data used in the determinations of normal value (including constructed value) and export price; (2) sales that were used in comparison between normal value and export price; (3) any adjustments for differences that affect price comparability; and (4) the formulas applied to the data. Failure to provide this information could result in an interested party being unable to defend its interests within the meaning of Articles 6.2 and 6.9 because it would not be able to sufficiently identify which issues, if any, are adverse to its interests.

V. CLAIMS REGARDING ARTICLES 12.2 AND 12.2.2

15. Article 12.2 obligates investigating authorities to set forth "the findings and conclusions on all issues of fact and law considered material by the investigating authorit[y]." To this end, Article 12.2.2 provides that the authority's public notice or separate report on a final affirmative determination shall contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . as well as the reasons for the acceptance or rejection of relevant arguments or claims made by exporters or importers." Therefore, disclosure by the investigating authority, including a mere reference to data in possession of an interested party, may not necessarily constitute disclosure of "relevant information on matters of fact and law and reasons which have led to the imposition of final measures," because an interested party may not be able to discern from the reference whether the data in its possession was accurately used, or whether there were mathematical errors in the calculation using the data.

16. At a minimum, the calculations employed by an investigating authority to determine dumping margins, and the data underlying the calculations, constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2. Such calculations are the mathematical basis for arriving at the dumping margins imposed by an authority. They thus are highly "relevant" to the decision to apply final measures, and because they consist of sales and cost data and mathematical uses of these data, they are "matters of fact" within the meaning of Articles 12.2 and 12.2.2.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

17. Contrary to Russia's position, Articles 2.2.1.1 and 2.2 permit an investigating authority to reject or adjust recorded prices or costs where that authority's decision to do so is based on a reasoned and adequate explanation. None of the parties or third parties appear to dispute that recorded costs may be rejected or adjusted where they are artificial transfer prices between affiliated entities. In such a situation, where a producer charges its affiliate an artificially low price for a production input, an authority may reject or adjust the transfer price of that input to reflect

its real cost in the domestic market. A non-arm's-length transaction for an input subsequently used in producing merchandise subject to an anti-dumping proceeding therefore provides a clear example where an authority may look beyond the four corners of a respondent's records to determine whether they "reasonably reflect the costs associated with the production and sale of the product under consideration" within the meaning of Article 2.2.1.1.

18. As Ukraine characterizes the facts, the situation created by the Russian Government's intervention is analogous to a non-arm's-length transaction because the recorded cost for natural gas in Russia is set by the Russian Government and is "not the result of market forces." In these circumstances, an unbiased and objective investigating authority could have found that the price for natural gas in Russia is an artificial price in that it does not reasonably reflect the price that would otherwise be determined by independent interactions between a seller and a buyer in a free market. This then could be another practice, similar to the recordation of non-arm's-length transactions, which may affect the reliability of the reported costs. Accordingly, these circumstances could well constitute grounds to substitute or adjust that cost under Article 2.2.1.1, depending on the facts of the case and the conclusions the authority draws from those facts.

19. Finally, as the Appellate Body explained in *EU – Biodiesel*, when an authority rejects cost data under the second condition of Article 2.2.1.1, information from out-of-country sources could be used to arrive at the cost of production in the country of origin. In certain circumstances, the proxy chosen may need to be adapted to reflect market conditions in the country of origin. That said, in doing so, the authority should not be required to adapt those costs in a way that reintroduces the distortions that led it to substitute the recorded cost.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

20. The Panel's question asks whether "an investigating authority [is] permitted to examine the reasonableness of the costs themselves." The premise of this question does not comport either with the text and structure of Article 2.2.1.1 of the Anti-Dumping Agreement, or with the U.S. understanding of the correct interpretation of this provision.

21. First, the phrase "costs themselves" used in the question seems to imply that an authority must otherwise limit its examination to the figures recorded in the books and records of the producers. This proposition is inconsistent with, and even contrary to, what is provided for in Article 2.2.1.1. Indeed, Article 2.2.1.1 affirmatively provides that an authority may consider whether the producer's "records . . . reasonably reflect the costs associated with the production and sale of the product under consideration." That is, two items should be compared: (1) the recorded costs should be compared with (2) those costs (whether or not contained somewhere in the producer's books and records) associated with the production and sale of the product under consideration. The authority thus is clearly not limited to examining the recorded "costs themselves."

22. Second, the phrase "reasonableness of the costs" is vague and misleading – this phrase is not contained in Article 2.2.1.1, and is not an element of what the United States understands to be the proper interpretation of Article 2.2.1.1. Rather, the inquiry under this second condition in the first sentence of Article 2.2.1.1 is whether the producer's "records . . . *reasonably reflect* the costs associated with the production and sale of the product under consideration." Thus, the application of Article 2.2.1.1 – contrary to what is arguably implied by the question – does not turn on some vague inquiry into the "reasonableness of costs." Rather, the inquiry is aimed at the extent to which the figures recorded in the books and records correspond to those costs associated with the production and sale of the product at issue.

23. Turning to Norway's reading of Article 2.2.1.1, Norway's interpretation does not accurately reflect the text of this article, especially when read in context with Articles 2.1 and 2.2 of the Anti-Dumping Agreement. First, Article 2.1 requires an investigating authority to include in the calculation of normal value only those sales "in the ordinary course of trade." As the Appellate Body has noted, there could be many reasons why sales of the like product, destined for consumption in the exporting country, may be incompatible with market-determined, "'normal' commercial practices" or principles, and thus not an appropriate basis for the calculation of normal value.

24. Second, when no sales of the like product in the ordinary course of trade exist in the domestic market of the exporting country, or such sales do not permit a proper comparison because of "the particular market situation" or the low volume of sales in the domestic market, Article 2.2 prescribes two alternative data sources that may provide for a "proper comparison." Under either alternative, the margin of dumping shall be determined by comparison with a "normal value" that reflects normal commercial practices or principles.

25. If the investigating authority decides to calculate normal value based on cost data, Article 2.2.1.1, together with Article 2.2.2, provides the framework for this determination. Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration." The term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product under consideration and supports an economic conception of costs. Pursuant to Article 2.2.1.1, and as the Appellate Body has concluded, the "costs associated with the production and sale of the product under consideration" must be considered as referring to "those costs that have a genuine relationship with the production and sale of the product under consideration. This is because these are the costs that, together with other elements, would otherwise form the basis for the [comparable] price of the like product if it were sold in the ordinary course of trade in the domestic market."

26. The term "normally" as it appears in Article 2.2.1.1 further suggests that this provision should not be read to limit "costs" to those actually incurred. Definitions for the term "normally" include "in a regular manner," "under . . . ordinary conditions," or "as a rule, ordinarily." The term "normally" thus indicates that there may be conditions in which costs should not be calculated based on the records kept by the exporter or producer under investigation.

27. Finally, the Appellate Body in *EU – Biodiesel* confirmed that an authority, in ascertaining whether the records kept by the exporter or producer under investigation reasonably reflect the costs of production, could "'examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine, in particular, whether all costs incurred are captured, whether the costs incurred have been over- or understated and whether non-arms-length transactions or other practices affect the reliability of the reported costs."

28. In sum, Article 2.2.1.1 cannot be interpreted such that the costs reported in the records kept by the exporter or producer under investigation must be accepted without any consideration. To the contrary, an authority may examine such records. That examination may include, *inter alia*, a consideration of whether the costs kept by the exporter or producer under investigation do not "reasonably reflect" the real economic costs associated with the production and sale of the product under consideration. In such a situation, an unbiased and objective investigating authority would have a basis under the Anti-Dumping Agreement to reject or adjust a cost that does not reflect a normal commercial practice or principle, so long as its determination was based on a reasoned and adequate explanation.

ANNEX D

PANEL COMMUNICATIONS

ANNEX D-1

COMMUNICATION DATED 23 AUGUST 2017 REGARDING DEADLINES SET OUT IN THE TIMETABLE FOR THIS DISPUTE

In this communication, we address issues arising out of Ukraine's refusal to submit a written response to the questions posed to it by the Russian Federation (Russia) following the first substantive meeting, on the ground that it did not receive these questions from Russia by 5 p.m. on the due date set out in the timetable. In addressing these issues, we have considered the comments made by Ukraine and Russia on this matter, including those presented on 18 August 2017.

We recall that the deadline set out in the timetable for each party to pose questions to the other party following the first substantive meeting, to which it wished to receive a response in writing was 5 p.m. on 28 July 2017. The deadline for the other party to submit its written response to these questions was 5 p.m. on 14 August 2017. The Working Procedures adopted in this dispute require parties to file all submissions, including the written questions to the other party through the Digital Dispute Settlement Registry (DDSR), which is the electronic platform maintained by the WTO Secretariat for official filings in this dispute.[1]

Russia informed us through email, at 6.47 p.m. on 28 July 2017, that while it uploaded its questions to Ukraine at 4.57 p.m. on 28 July 2017, due to a technical error in the DDSR, these questions were not released to the other users, including Ukraine at that time.[2] Russia further explained that after it became aware of this technical error, it re-uploaded these questions on the DDSR at 5.57 p.m. on 28 July 2017. The DDSR time log shows that the questions became available to other users, including Ukraine at 5.57 p.m. Ukraine does not suggest otherwise. Thus, Ukraine had access to these questions on 28 July, albeit 57 minutes after the deadline of 5 p.m. Further, Ukraine was copied on this email from Russia, and thus aware as of 28 July 2017 about Russia's explanations for this delay.

Ukraine did not object to this 57 minutes delay at any time prior to the expiry of the deadline on 14 August 2017 for receipt of its written response to questions posed by Russia, or inform us that it would not file its response on account of this delay. We became aware of Ukraine's decision to not file this response only on 15 August 2017, when, in response to a query by the Secretariat, Ukraine stated that it would not be filing this response as it did not receive Russia's questions within the deadline.

In these circumstances, we deeply regret that Ukraine unilaterally decided to not file its response on account of this delay, and then failed to communicate its decision on this matter to the Panel and Russia in a timely manner. We also regret that despite having sufficient time to do so, Ukraine failed to raise its objections regarding the delay faced in accessing Russia's questions in a timely fashion.

Nonetheless, having considered the parties' comments on this matter, and taking into account the minimal delay faced by Ukraine in accessing these questions, the Panel asks Ukraine to provide its written response to the questions posed by Russia to Ukraine on 28 July 2017, **by 5 p.m. on 25 August 2017.** The Panel will not grant any request for an extension of this deadline.

[1] Working Procedures, para. 26. This paragraph also sets out circumstances wherein official filings may be made through a system other than the DDSR.

[2] We have no reason to question Russia's explanations regarding the technical error on the DDSR, and it does appear that the DDSR did not release these written questions at 5 p.m. on 28 July 2017 to other users because of a technical issue in the system. The issue was that instead of releasing the questions initially uploaded by Russia to other users, including Ukraine at 5 p.m. on 28 July 2017, the DDSR system incorrectly applied a different release deadline of 5 p.m. on 24 November 2017.

ANNEX D-2

COMMUNICATION DATED 23 AUGUST 2017 REGARDING UKRAINE'S FIRST INTEGRATED EXECUTIVE SUMMARY

The Panel notes Ukraine's clarification on 21 August 2017 that as part of its first integrated executive summary, it has submitted an (i) executive summary of the first written submission of Ukraine and (ii) executive summary of the oral statement of Ukraine. The combined length of these two documents, excluding the cover pages, exceeds 15 pages.

Paragraph 20 of the Working Procedures states that each "integrated executive summary shall be limited to no more than 15 pages". Thus, Ukraine's submission in this regard exceeds the page limit set out in the Working Procedures.

Considering Ukraine has submitted two separate executive summaries as part of its integrated executive summary, and bearing in mind the two documents combined exceed the page limit specified in the Working Procedures, the Panel will accept only one of the two executive summaries filed by Ukraine as the integrated executive summary for the purposes of paragraph 20 of the Working Procedures. Please let the Panel know by **5 p.m. on 28 August 2017** which of the two executive summaries filed by Ukraine should be treated by the Panel as the first integrated executive summary for the purpose of paragraph 20 of the Working Procedures.

No new submissions may be made at this stage as part of the first integrated executive summary.

ANNEX D-3

COMMUNICATION DATED 30 AUGUST 2017

The Panel takes note of Ukraine's message of 29 August 2017 that it did not have access to the DDSR system from 24-28 August 2017, on account of public holidays in Ukraine between 24-27 August, and technical difficulties in accessing the DDSR on 28 August. Thus, Ukraine was unable to access the communications sent by the Panel at around 8.14 p.m. (Geneva time) on 23 August 2017, including the communication asking Ukraine to respond to the written questions posed to it by Russia following the first substantive meeting by **5 p.m. on 28 August 2017**.

The Panel recalls that in its communication it had stated that it would not grant any request for an extension of the deadline of 5 p.m. on 28 August for Ukraine to respond to the written questions posed by Russia. However, the Panel acknowledges the particular difficulties faced by Ukraine due to which it could not file its response within the set deadline. The Panel asks Ukraine to provide its written response to the questions posed by Russia on 28 July 2017, by **5 p.m. on Friday, 1 September**, in accordance with paragraph 26 of the Working Procedures.

In setting this new deadline, the Panel has taken into consideration the fact that the original deadline to respond to these questions was 14 August 2017, Ukraine chose not to submit its response on this date on account of a 57 minutes delay faced in accessing these questions, and failed to inform the Panel of its decision to not file a response for this reason till 15 August 2017.

The Panel also acknowledges Ukraine's submission that the integrated executive summary of its oral statements should be treated as the first integrated executive summary for the purposes of this dispute.

ANNEX D-4

COMMUNICATION DATED 12 SEPTEMBER 2017

Having considered Russia's communication of 6 September 2017, and the communications cross-referred therein, the Panel has decided as follows:

2 EXTENSION OF DEADLINE FOR REBUTTAL SUBMISSION (SECOND WRITTEN SUBMISSION)

The Panel acknowledges Russia's concern that while Ukraine's written response to questions posed to it by Russia following the first substantive meeting was due on 14 August 2017, the responses were ultimately filed on 1 September 2017. The reasons for this delay and the Panel's decisions in this regard, are discussed in the Panel's communications of 23 August 2017 and 30 August 2017.

Russia submits that this delay deprived it of an adequate opportunity to prepare its rebuttal submission, which, per the timetable is due on 15 September 2017. Russia requests the Panel to extend the deadline for the rebuttal submission to 25 September 2017.

Upon consideration of the reasons put forth by Russia for its request for extension, the Panel agrees to extend the deadline for the rebuttal submissions by Russia and Ukraine to **5 p.m.** on **25 September 2017**.

3 RUSSIA'S CONCERNS REGARDING PANEL'S COMMUNICATION OF 23 AUGUST 2017

The Panel refers to Russia's statement in its communication of 6 September 2017, about its deep concerns regarding the wording used in the Panel's communication of 23 August 2017 characterizing the situation that occurred in relation to Ukraine's response to Russia's questions. Russia does not identify the specific wording in this communication that it has concerns about, but asks the Panel to note, for the record of this dispute, that Russia met the deadline for submitting its questions to the other party. Russia welcomes, *inter alia*, in the Panel Report a correction highlighting that Russia met the deadline for filing its questions to the other party following the first substantive meeting.

In the Panel's view, its communication of 23 August 2017 does not suggest that Russia did not file its questions to Ukraine following the first substantive meeting within the deadline of 5 p.m. on 28 July 2017. On the contrary, the communication acknowledges Russia's statement in its email of 28 July 2017 that it uploaded these questions at 4.57 p.m. on 28 July 2017, which is before the deadline of 5 p.m., and that due to a technical error in the DDSR, these questions were not released to other users, including Ukraine at that time. In footnote 2 of the communication, the Panel states that it has no reason to question Russia's explanations regarding the technical error in the DDSR, and further clarifies that it does appear that the "DDSR did not release these written questions at 5 p.m. on 28 July 2017" to other users because of a "technical issue in the system". Thus, we consider the communication is clear that due to a technical issue in the DDSR, rather than due to an error on part of Russia, Ukraine had access to the questions at 5.57 p.m., instead of 5 p.m. The communication also notes a delay of 57 minutes in Ukraine having "access" to the questions, not in Russia filing them.

Thus, to the extent Russia's concern is that the Panel's communication of 23 August 2017 suggests that Russia did not file the questions to Ukraine following the first substantive meeting by the deadline of 5 p.m. on 28 July 2017, the Panel does not share Russia's concern, and does not consider any revision to this communication to be necessary.

Procedural issues arising in this dispute, including this one, will be appropriately reflected in the descriptive part of the Panel Report.

4 PROPOSED MODIFICATION TO WORKING PROCEDURES

The Panel proposes a modification to the working procedures for this dispute to more specifically address situations where a party uploads submissions or exhibits on the DDSR without facing any apparent technical difficulty, but other users, including the other party, do not have access to them due to, *inter alia*, technical issues relating to the DDSR.

In particular, the Panel proposes the addition of the following footnote (underlined) to paragraph 26(a) of the Working Procedures:

> Each party and third party shall submit all documents to the Panel by filing them via the Digital Dispute Settlement Registry (DDSR) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute. Upload into the DDSR shall also constitute electronic service on the Panel, the other party, and the third parties.[1] In case any party or third party is unable to meet the 5.00 p.m. deadline because of technical difficulties in uploading these documents into the DDSR, the party or third party concerned shall contact the DS Registry without delay and provide an electronic version of all documents to be submitted to the Panel by e-mail, except for any exhibits. The e-mail shall be addressed to DSRegistry@wto.org and the other party and, where appropriate, the third parties. The documents sent by email shall be filed no later than 5.30 p.m. on the date due.The exhibits shall also be filed with the DS Registry (office No. 2047) and provided to the other party and, where appropriate, the third parties by no later than 5:30 p.m., but shall be submitted on a CD-ROM, DVD, or USB stick, together with the DDSR E-docket template.
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> **1** When a party uploads a document on the DDSR, in accordance with this paragraph, it shall also send a message on the DDSR to the Panel, through the Secretariat, and the other party, identifying the document, including exhibits uploaded. The other party shall inform, through the DDSR, the DS Registry and the party which uploaded the document, promptly and in any case, no later than 5 p.m. the next working day, if it does not have access to any document identified in that message.

The parties are requested to provide their comments on the proposed modification to the working procedures by **5 p.m.** on **15 September 2017**.

ANNEX D-5

COMMUNICATION DATED 21 SEPTEMBER 2017

Pursuant to Russia's communication of 6 September 2017, the Panel proposed a modification to the working procedures for this dispute to more specifically address situations where a party uploads submissions and/or exhibits into the DDSR without facing any apparent technical difficulty, but other users, including the other party, do not have access to them due to, *inter alia*, technical issues relating to the DDSR. The Panel invited comments from the parties on this proposed modification on 12 September 2017.

Having considered the parties' responses on 15 September 2017, the Panel has amended the working procedures by adding a footnote to Paragraph 26(a). No other change has been made to the working procedures. The revised working procedures have been uploaded into the DDSR.

ANNEX D-6

COMMUNICATION DATED 16 OCTOBER 2017

Having considered the requests made by the Russian Federation (Russia) in its letter of 29 September 2017, and Ukraine's comments on 10 October 2017 on these requests, the Panel has decided as follows:

a. The Panel declines Russia's request to ask Ukraine, pursuant to Article 13 of the DSU, to provide full confidential version of the questionnaire responses filed by the domestic industry, including all exhibits thereto, or at least the information contained in sections 4.2, 7 and 8 of these questionnaire responses, as the Panel does not find it necessary to seek this information at this stage.

b. The Panel notes Russia's objections to Ukraine's designation of Exhibits UKR-42, UKR-53, UKR-54 and UKR-55 as BCI.

   Regarding Exhibit UKR-42, Ukraine acknowledges that this exhibit was inadvertently designated as BCI. In light of this acknowledgment, the Panel will not treat Exhibit UKR-42 as BCI, pursuant to the BCI procedures.

   With respect to Exhibits UKR-53, UKR-54 and UKR-55, the Panel notes that pursuant to paragraph 3 of its BCI procedures, in deciding "whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, [the Panel] will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information." Ukraine invokes Article 32 of its domestic anti-dumping law to justify the BCI designation of these exhibits.

   The Panel intends to pose questions to the parties at the second substantive meeting to gain more clarity on this justification put forth by Ukraine, and then take a decision as to whether Exhibits UKR-53, UKR-54 and UKR-55 should continue to be treated as BCI for the purpose of these proceedings. Pending the Panel's decision in this regard, the parties should continue to treat these exhibits as BCI.

c. The Panel notes Russia's request that the Panel oblige Ukraine to submit an English translation in full of Exhibits UKR-46A, UKR-47A, UKR-48-A and UKR-49A, which are in the Ukrainian language. The Panel recalls that these exhibits were submitted by Ukraine in its written responses to Russia's questions following the first substantive meeting. Ukraine filed certain parts of these exhibits in English because it considers that only certain parts of these exhibits were relevant to answer the questions posed by Russia. The limited English translation is in Exhibits UKR-46B, UKR-47B, UKR-48-B and UKR-49B.

   In its responses, Ukraine also filed Exhibit UKR-50, and stated that this exhibit provides an overview of the parts of Exhibits UKR-46 – UKR-49 where confidentiality has been claimed by the relevant domestic producers. The Panel notes that the cross references in Exhibit UKR-50 appear to be to the Ukrainian version of the exhibits, and not the English version.

   In the Panel's view, while it is for each party to decide how to respond to questions posed by the other party, those responses must be filed in accordance with the Working Procedures. In this regard, paragraph 9 of the Working Procedures stipulates that "[w]here the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time".

   Considering Exhibits UKR-46A, UKR-47A, UKR-48A and UKR-49A are not in an official WTO language, the Panel will limit its review to those parts of the exhibits that are filed in English, namely, Exhibits UKR-46B, UKR-47B, UKR-48B and UKR-49B. If Ukraine wishes that the Panel take into account any other part of these exhibits, in part, or in full, it should file these exhibits in a WTO working language, consistent with paragraph 9 of the Working Procedures.

ANNEX E

INTERIM REVIEW

ANNEX E-1

INTERIM REVIEW

1 INTRODUCTION

1. In accordance with Article 15.3 of the DSU, this Annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in light of the parties' comments. In addition, we have made certain editorial changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the parties. The footnote numbers in the Final Report have changed due to these revisions. The footnote numbers indicated in this Annex pertain to those in the Final Report, but we have also indicated the footnote numbers in the Interim Report where they differ from those in the Final Report. The paragraph numbers in the Final Report remain unchanged.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 7.62

2. Russia requests us to modify this paragraph to accurately reflect its arguments under Article 11.1 of the Anti-Dumping Agreement.[1] Ukraine asks us to reject Russia's request because it sees no merit in it.[2]

3. We have made some minor changes to more closely reflect the actual language used by Russia in its submissions. However, we do not find it necessary to modify this paragraph in the manner proposed by Russia as we consider the changes that we made to be sufficient to accurately reflect Russia's arguments.

2.2 Paragraph 7.64, footnote 107

4. Russia requests us to add two additional sentences in footnote 107 to paragraph 7.64 in order to reflect two additional arguments.[3] First, Russia asserts that in footnote 294 of its second written submission it questioned the accuracy of the transportation costs used by MEDT of Ukraine to calculate the surrogate price of gas and asks us to reflect this argument in the Final Report. Second, Russia asks us to reflect its argument that the surrogate price of gas could not be considered to be the price of gas in Russia. Ukraine asks us to reject Russia's request as the original footnote in the Interim Report was clear and correct.[4] Ukraine also asserts that the arguments referred by Russia were submitted at a late stage in panel proceedings, and should therefore not be accepted.[5]

5. We consider the additions requested by Russia to be unnecessary. We note that parties are free to reflect their arguments in their executive summaries, annexed to the Final Report, as they deem fit, and we see no reason to reproduce these specific arguments in the Final Report. We also note that the second argument is adequately reflected in paragraph 7.94 of this Report. Therefore, we decline Russia's request.

2.3 Paragraphs 7.71, 7.95, and 7.99

6. Russia requests us to make certain changes to accurately reflect the text of Article 2.2 of the Anti-Dumping Agreement.[6] Ukraine asks us to reject Russia's request because it does not see any problem in these paragraphs.[7]

[1] Russia's request for interim review, para. 2.
[2] Ukraine's comments on Russia's request for interim review, para. 3.
[3] Russia's request for interim review, para. 3.
[4] Ukraine's comments on Russia's request for interim review, para. 5.
[5] Ukraine's comments on Russia's request for interim review, para. 5.
[6] Russia's request for interim review, para. 5.

7. We have made the changes suggested by Russia to accurately reflect the text of Article 2.2 of the Anti-Dumping Agreement.

2.4 Paragraph 7.74

8. Ukraine requests us to reflect in the Final Report the additional reasons that it presented in its submissions, apart from the dominant position of Gazprom in domestic Russian market, for why the gas prices set by other independent suppliers in Russia were aligned with the gas price of Gazprom.[8] Russia asks us to decline Ukraine's request because the Interim Report accurately and fully reflects Ukraine's position on the matter.[9] Russia also asserts that contrary to what Ukraine alleges in its request, Gazprom's dominant position in the domestic Russian market was the only reason that Ukraine provided in its submissions for the alleged pricing behaviour of independent gas suppliers.[10]

9. We reject Ukraine's request as we do not find it necessary to reflect these additional reasons presented by Ukraine as they do not add to the clarity or accuracy of the Final Report, which already reflects the main arguments of Ukraine on this matter.[11]

2.5 Paragraph 7.75

10. Russia requests us to make three specific modifications to more accurately reflect its arguments. First, Russia asks us to replace the word "provide" with the word "constitute" to more accurately reflect the language that it used in its submissions.[12] Second, Russia asks us to add a footnote to this paragraph to reflect certain arguments that it made in its submissions.[13] Third, Russia asks us to modify footnote 129 to paragraph 7.75 to reflect the "focal point" of Russia's position that "all [of] Ukraine's arguments, reasons and evidence related to the cost of production of an input used for manufacturing of the product under consideration are irrelevant to this dispute".[14] Ukraine states that the Interim Report already reflects Russia's arguments on this point, submits that no further modification or addition in this paragraph is necessary, and asks us to not add a footnote to this paragraph, as requested by Russia.[15]

11. We have made the first modification proposed by Russia to more closely reflect the language that it used in its submissions. We decline to make the second and third modifications proposed by Russia as we do not find it necessary to reflect these arguments in the Final Report. Parties, as noted above, are free to reflect their arguments in their executive summaries as they deem fit.

2.6 Paragraph 7.80

12. Russia requests us to delete a part of the fourth sentence of this paragraph to avoid any assumptions based on hypothetical situations that are not necessary for the effective resolution of this dispute, and which in its view may have far reaching and misleading effects well beyond the scope of this dispute.[16] Ukraine asks us to reject Russia's request.[17]

13. We note that we made the observation alluded by Russia in rejecting, as *ex post facto* rationalization, Ukraine's argument based on the use of the word "normally" in Article 2.2.1.1. We limited our review to the parties' arguments on the second condition of Article 2.2.1.1 and offered no views on whether an investigating authority's rejection of certain costs incurred by an exporter or producer could be justified based on the use of the word "normally" in Article 2.2.1.1.

[7] Ukraine's comments on Russia's request for interim review, para. 7.
[8] Ukraine's request for interim review, para. 5.
[9] Russia's comments on Ukraine's request for interim review, para. 4.
[10] Russia's comments on Ukraine's request for interim review, para. 7.
[11] As noted in footnote 159 of the Report, MEDT of Ukraine did not find that the gas prices of independent suppliers were aligned with the gas price of Gazprom. Ukraine has not suggested in its comments on the interim report that MEDT of Ukraine actually made such a finding. Thus, the additional reasons provided by Ukraine are not integral to our evaluation and findings.
[12] Russia's request for interim review, para. 7.
[13] Russia's request for interim review, para. 8.
[14] Russia's request for interim review, para. 9.
[15] Ukraine's comments on Russia's request for interim review, para. 9.
[16] Russia's request for interim review, para. 10.
[17] Ukraine's comments on Russia's request for interim review, para. 11.

Therefore, we do not consider, and Russia does not explain why, our observations will have the "far reaching and misleading effects" contemplated by Russia. In addition, we note that deleting part of the fourth sentence in the manner proposed by Russia will make the sentence less clear. Therefore, we decline Russia's request.

2.7 Paragraph 7.82

14. Russia requests us to make certain additions in this paragraph to properly reflect its arguments.[18] Ukraine asks us to reject Russia's request.[19]

15. We decline Russia's request as the additions proposed by Russia are unnecessary, and will also affect the clarity of the Final Report.

2.8 Paragraph 7.83

16. Russia requests us to add a footnote to this paragraph to reflect its arguments in full.[20] Ukraine asks us to reject Russia's request.[21]

17. We decline Russia's request as the additions proposed by Russia are unnecessary, and will also affect the clarity of the Final Report.

2.9 Paragraph 7.88

18. Russia requests us to make certain changes in paragraph 7.88 to accurately reflect the facts of this dispute.[22] In particular, Russia objects to the part of this paragraph, where, while recalling the factual 2basis of MEDT of Ukraine's findings set out in paragraph 7.73 of the Interim Report, we stated that MEDT of Ukraine had found that the gas prices in the domestic Russian market were not based "on commercial considerations" due to governmental regulation of the domestic gas prices in Russia.[23] Russia submits that MEDT of Ukraine only referred to the absence of "commercial considerations" in gas prices set in Russia when alluding to the discussions of WTO Members during the accession process of Russia to the WTO.[24] Thus, in Russia's view, MEDT of Ukraine did not make any finding as such that gas prices in Russia were not set based on commercial considerations. Ukraine asks us to reject Russia's request.[25]

19. We recall that while setting out the factual basis of MEDT of Ukraine's findings in paragraph 7.73 of the Interim Report with respect to cost adjustments, we noted MEDT of Ukraine's finding that the gas price in the domestic Russian market was not a "market price", as the state controlled the price of gas. However, while cross-referring in paragraph 7.88 to the factual basis of MEDT of Ukraine's findings set out in paragraph 7.73 we stated that it had found that the price in Russia was not based on "commercial considerations". For consistency in our use of terminologies across the Final Report, and specifically paragraphs 7.73 and 7.88, we have deleted the reference to a price not based on commercial considerations in paragraph 7.88. Instead, we note in paragraph 7.88, like we did in paragraph 7.73, that MEDT of Ukraine found that the gas price in Russia was not a market price. This change does not affect our analysis with respect to Russia's claim under Article 2.2.1.1 of the Anti-Dumping Agreement.

2.10 Paragraph 7.89

20. Russia requests us to insert quotation marks around the terms "normal" or "normal circumstances" in the third sentence of paragraph 7.89 so as to clarify that these terms refer to

[18] Russia's request for interim review, para. 11.
[19] Ukraine's comments on Russia's request for interim review, para. 13.
[20] Russia's request for interim review, para. 12.
[21] Ukraine's comments on Russia's request for interim review, para. 15.
[22] Russia's request for interim review, para. 13.
[23] Russia's request for interim review, para. 13.
[24] Russia's request for interim review, para. 13.
[25] Ukraine's comments on Russia's request for interim review, para. 17.

Ukraine's own views on the matter. Russia also requests us to add a citation to Ukraine's first written submission at the end of this paragraph.[26] Ukraine does not comment on this request.

21. The third sentence of paragraph 7.89 reflects our own assessment, and not Ukraine's arguments. Thus, we do not find it necessary to cite Ukraine's first written submission at the end of this sentence, or add the quotation marks suggested by Russia. Nonetheless, we have slightly modified this sentence to enhance the clarity of our analysis.

2.11 Paragraph 7.90

22. Russia requests us to insert a footnote after the first sentence of paragraph 7.90 to reflect an additional argument that it made.[27] Ukraine asks us to dismiss Russia's request.[28]

23. The additions proposed by Russia are not integral to our evaluation and findings, and do not add to the clarity of the Final Report. Therefore, we deny Russia's request.

2.12 Paragraph 7.93

24. Russia requests us to add certain citations in footnote 165 to paragraph 7.93 to make references to Russia's arguments complete and accurate.[29] Ukraine does not comment on this request.

25. We have added the citations suggested by Russia.

2.13 Paragraph 7.94

26. Russia requests us to make certain additions in this paragraph to more completely reflect its arguments.[30] Ukraine asks us to dismiss this request.[31]

27. We reject Russia's request as the proposed arguments are adequately reflected in other parts of this Report.[32]

2.14 Paragraph 7.104

28. Russia requests us to make certain additions in this paragraph to more completely reflect its arguments with respect to its claim under Article 2.2.1 of the Anti-Dumping Agreement.[33] Ukraine asks us to reject this request.[34]

29. The additions proposed by Russia are not integral to our evaluation and findings. Therefore, we reject Russia's request.

2.15 Paragraph 7.105

30. Russia requests us to add certain citations in footnote 188 to paragraph 7.105 to make references to Russia's arguments more complete and accurate.[35] Ukraine does not comment on this request.

31. We have added the citations suggested by Russia.

[26] Russia's request for interim review, para. 14.
[27] Russia's request for interim review, para. 15.
[28] Ukraine's comments on Russia's request for interim review, para. 19.
[29] Russia's request for interim review, para. 16.
[30] Russia's request for interim review, para. 17.
[31] Ukraine's comments on Russia's request for interim review, para. 21.
[32] See, e.g. Panel Report, para. 7.93.
[33] Russia's request for interim review, para. 19.
[34] Ukraine's comments on Russia's request for interim review, para. 23.
[35] Russia's request for interim review, para. 18.

2.16 Paragraph 7.125

32. Russia requests us to include a reference to Article 2.2 of the Anti-Dumping Agreement in paragraph 7.125.[36] Ukraine does not comment on this request.

33. We have added a reference to Article 2.2 of the Anti-Dumping Agreement to this paragraph pursuant to Russia's request.

2.17 Paragraph 7.128

34. Russia requests us to insert a footnote in this paragraph reflecting additional citations to Russia's submissions to make references to its arguments complete and accurate.[37] Ukraine does not comment on this request.

35. We have inserted a new footnote (footnote 225) reflecting the additional citations suggested by Russia.

2.18 Section 7.5

36. Ukraine observes that Section 7.5 does not contain: (a) a detailed description regarding the competence of the Ukrainian courts in the Ukrainian legal order; and (b) reference to the fact that the Ukrainian courts confirmed that MEDT of Ukraine had correctly included EuroChem in the underlying reviews.[38] Ukraine requests us to add these descriptions in the Final Report. Russia asks us to reject Ukraine's requests. In particular, Russia finds Ukraine's requests to be unclear, vague, and imprecise, and considers them to go beyond the requirement under Article 15.2 of the DSU that a request for review be limited to "precise aspects" of the Interim Report.[39]

37. With respect to Ukraine's request that we add a detailed description regarding the competence of the Ukrainian courts in the Ukrainian legal order, we note that we have already set out the facts necessary to resolve Russia's claim, and support our reasoning. While Ukraine requests us to add a description regarding the Ukrainian legal order, it does not propose any particular edits or specify the precise additions that it wishes us to make in this regard. We do not consider that such additional descriptions would add to the clarity of the Final Report. We accordingly reject this aspect of Ukraine's request.

38. Regarding Ukraine's request to add a reference to the fact that the Ukrainian courts confirmed that MEDT of Ukraine had correctly included EuroChem in the underlying reviews, we do not consider that such additions would add to the clarity of the Report, or be necessary to resolve the claim. Therefore, we also reject this aspect of Ukraine's request.[40]

2.19 Paragraph 7.150, footnote 272 (footnote 271 of Interim Report)

39. Ukraine requests us to modify this footnote to correctly reflect the title of the Constitution of Ukraine.[41] Russia does not comment on this request.

40. We have made the change suggested by Ukraine.

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[36] Russia's request for interim review, para. 20.
[37] Russia's request for interim review, para. 21.
[38] Ukraine's request for interim review, paras. 8.
[39] Russia's comments on Ukraine's request for interim review, paras. 11-12.
[40] We recall that in the Interim Report we found that the combined effect of Ukrainian court judgments, which found that EuroChem had a negative rate of dumping, and the implementation of these judgments through ICIT's 2010 amendment was that dumping margin for this producer in the original investigation phase was *de minimis*. We thus found that the obligation under the second sentence of Article 5.8 that authorities terminate the investigation against an exporter or producer found to have a *de minimis* dumping margin in the original investigation was applicable in this case, and thus the Ukrainian authorities should have terminated the investigation against EuroChem. We do not consider that the references to court judgments that upheld the Ukrainian authorities' decision to initiate the underlying reviews against Eurochem affect the probative value of the evidence we relied upon to find that in the original investigation phase EuroChem was found to have a negative rate of dumping.
[41] Ukraine's request for interim review, para. 7.

2.20 Paragraph 7.193

41. Russia requests us to reflect its argument that in the underlying reviews MEDT of Ukraine *de facto* resorted to facts available in rejecting the reported gas cost, and using the surrogate price of gas to calculate the cost of production of the investigated Russian producers.[42] Ukraine does not comment on this request.

42. We have made the change suggested by Russia.

2.21 Paragraph 7.233

43. Russia requests us to make two sets of changes in this paragraph. First, Russia requests us to add a sentence in footnote 424 (footnote 422 of Interim Report) to paragraph 7.233 to more completely reflect its arguments.[43] Second, Russia requests us to insert a new footnote in this paragraph noting that at the second substantive meeting of the Panel, Russia replied to the "defence" raised by Ukraine under Article 6.5 of the Anti-Dumping Agreement in response to Russia's claim under Article 6.9 of the Anti-Dumping Agreement.[44] Ukraine asks us to reject Russia's request. In particular, Ukraine considers the additions proposed by Russia to be confusing, notes that Russia's arguments under Article 6.5 were adequately reflected in paragraph 7.230 of the Interim Report, and disagrees with Russia's characterization of Ukraine's arguments under Article 6.5 as a "defence".

44. We do not consider that the additional references to Russia's arguments to be necessary as they do not add to the clarity of the Final Report. Therefore, we reject Russia's requests.

2.22 Paragraph 7.250

45. Russia requests us to add certain citations in footnote 452 (footnote 450 of Interim Report) to paragraph 7.250.[45] Ukraine does not comment on this request.

46. We have added certain citations in footnote 452, including those proposed by Russia.

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[42] Russia's request for interim review, para. 22.
[43] Russia's request for interim review, para. 23.
[44] Russia's request for interim review, para. 24.
[45] Russia's request for interim review, para. 25.

WORLD TRADE ORGANIZATION

WT/DS493/R/Add.1

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UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

REPORT OF THE PANEL

Addendum

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

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS493/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 3 April 2017 and revised on 21 September 2017

1.1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

1.2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

1.3. The parties and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel.

1.4. The Panel shall meet in closed session. The parties and third parties shall be present at the meetings only when invited by the Panel to appear before it.

1.5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

1.6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

1.7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the Russian Federation requests such a ruling, Ukraine shall submit its response to the request in its first written submission. If Ukraine requests such a ruling, the Russian Federation shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

1.8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

1.9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

1.10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by the Russian Federation could be numbered RUS-1, RUS-2, etc. If the last exhibit in connection with the first submission was numbered RUS-5, the first exhibit of the next submission thus would be numbered RUS-6.

1.11. Each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1, to the extent that it is practicable to do so.

Questions

1.12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

1.13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

1.14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the Russian Federation to make an opening statement to present its case first. Subsequently, the Panel shall invite Ukraine to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the Russian Federation presenting its statement first.

1.15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Ukraine if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Ukraine to present its opening statement, followed by the Russian Federation. If Ukraine chooses not to avail itself of that right, the Panel shall invite the Russian Federation to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

1.16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

1.17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

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

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in

writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

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

1.20. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

1.21. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

1.22. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

1.23. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

1.24. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

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

Service of documents

1.26. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them via the Digital Dispute Settlement Registry (DDSR) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute. Upload into the DDSR shall also constitute electronic service on the Panel, the other party, and the third parties.[1] In case any party or third party is unable to meet the 5.00 p.m. deadline

[1] When a party uploads a document into the DDSR, in accordance with this paragraph, it shall send a notification to the Panel and the other party via e-mail, identifying the document, including the number of exhibits uploaded. The notification to the Panel should be addressed to DSRegistry@wto.org. The Panel shall also notify the parties via e-mail when it uploads a document into the DDSR. If a party does not have access to a document identified in the e-mail sent by the other party or the Panel, it shall inform the DS Registry and the other party via e-mail, promptly, and in any case, no later than 5 p.m. the next working day.

because of technical difficulties in uploading these documents into the DDSR, the party or third party concerned shall contact the DS Registry without delay and provide an electronic version of all documents to be submitted to the Panel by e-mail, except for any exhibits. The e-mail shall be addressed to DSRegistry@wto.org and the other party and, where appropriate, the third parties. The documents sent by email shall be filed no later than 5.30 p.m. on the date due.The exhibits shall also be filed with the DS Registry (office No. 2047) and provided to the other party and, where appropriate, the third parties by no later than 5:30 p.m., but shall be submitted on a CD-ROM, DVD, or USB stick, together with the DDSR E-docket template.

b. By 5 p.m. the next working day following the electronic filing, each party and third party shall file one paper copy of all documents it submits to the Panel, including the exhibits with the DS Registry. The DS Registrar shall stamp the documents with the date and time of the filing.

c. The Panel shall provide the parties with the descriptive part, the interim report and the final report, as well as of other documents as appropriate, via the DDSR. When the Panel provides the parties or third parties both paper and electronic versions of a document, the electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute.

1.27. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 3 April 2017

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS493.

1. For the purposes of these Panel proceedings, BCI includes:

   a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

   b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute may not be designated as BCI if the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.

3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

4. No person may have access to BCI except a member of the Secretariat assisting the Panel or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.

5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The

first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

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

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF RUSSIA

I. INTRODUCTION

1. In this dispute, the Russian Federation challenges Ukraine's measures imposing anti-dumping duties on imports of ammonium nitrate originating in the Russian Federation. These measures are set forth in several decisions of the Intergovernmental Commission on International Trade (Intergovernmental Commission): the 2008 Decision, as amended by the 2010 Decision, the 2010 Decision itself and the Decision No. AD-315/2014/4421-06 of 1 July 2014 and Notice "On the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate, origin from the Russian Federation", published on 8 July 2014 in *Uryadoviy Courier*, No. 120, including all annexes, notices, communications and reports of the Ministry of Economic Development and Trade of Ukraine (Investigating Authority) and any amendments thereto.[1]

II. SUMMARY OF FACTS

2. On 21 May 2008 the Intergovernmental Commission adopted Decision No. AD-176/2008/143-47 imposing definitive anti-dumping measures on imports of ammonium nitrate originating in Russia. The anti-dumping duties were set at 10.78% for JSC MCC EuroChem, 9.76% – for JSC Dorogobuzh, and 11.91% – for all other.

3. On 6 February 2009 the District Administrative Court of Kiev issued Decision No 5/411 annulling the anti-dumping measure for one producer (JSC MCC EuroChem). The District Court ruled that the Investigating Authority incorrectly applied a downward level of trade adjustment to the company's export price and adjustments to the normal value and that the correct dumping margin for sales made by that producer amounted to minus 0.12%. This Decision was upheld by higher Ukrainian courts. In order to implement the Ukrainian Courts' Judgments the Intergovernmental Commission adopted the 2010 Decision, that changed the anti-dumping duty assigned to that producer to 0%.

4. In 2013, the Intergovernmental Commission launched interim and expiry reviews of these anti-dumping measures and included the Russian producer with negative dumping margin in the scope of both interim and expiry reviews.

5. In the course of the reviews, despite full cooperation of the Russian producers and exporters, the Investigating Authority rejected some data on production costs of ammonium nitrate submitted by them in their questionnaire responses. The price for gas, i.e. the major input in the manufacture of the product under consideration, which was actually paid by the companies, was disregarded. The Investigating Authority used instead the average export price for gas charged at the border with Germany, net of transport costs.

6. Accordingly, the adjusted gas price was used for the calculation of production costs. The sales of ammonium nitrate in the Russian domestic market were found to be lower than "reasonable" per unit costs for its production plus administrative, selling and general costs. The Investigating Authority came to a conclusion that domestic sales of ammonium nitrate were not "in

[1] The definitive anti-dumping measures were imposed through the Decision of the Intergovernmental Commission on International Trade No. AD-176/2008/143-47 of 21 May 2008 "On the Application of the Definitive Anti-Dumping Measures on Import into Ukraine of Ammonium Nitrate Originating in the Russian Federation" (2008 Decision), as amended by the Decision No. AD-245/2010/4403-47 of 25 October 2010 (2010 Decision). The expiry review was initiated pursuant to the Decision of the Intergovernmental Commission on International Trade No. AD-294/2013/4423-06 of 24 May 2013. The interim review was initiated pursuant to the Decision of the Intergovernmental Commission on International Trade No. AD-296/2013/4423-06 of 2 July 2013. As a result of the simultaneously conducted expiry and interim reviews, the definitive anti-dumping duty rates on imports of ammonium nitrate from the Russian Federation, that were initially imposed by the Decision No. AD-176/2008/143-47 of 21 May 2008, were increased and extended for the duration of five years by the Decision of the Intergovernmental Commission on International Trade No. AD-315/2014/4421-06 of 1 July 2014, which came into force on 8 July 2014.

the ordinary course of trade" by reason of price. The Investigating Authority constructed the normal value using the adjusted gas price that is three times higher than the price actually paid by the Russian producers and exporters.

7. On 25 June 2014, the Investigating Authority circulated to the interested parties its "Materials provided according to the results obtained in the process of reviews of the anti-dumping measures (interim review and in relation to their expiry) against the imports into Ukraine of ammonium nitrate originating in the Russian Federation" (Disclosure). Only two calendar days were provided for the interested parties to comment on this document.

8. On 1 July 2014, the Intergovernmental Commission adopted Decision No. AD-315/2014/4421-06 extending the anti-dumping measures on imports of ammonium nitrate originating in Russia for the next five years.[2] The Decision also modified the anti-dumping duties as follows: JSC Dorogobuzh − 20.51%; JSC MCC EuroChem − 36.03%; all others − 36.03%, and therefore, levied the anti-dumping duty on the said Russian producer found to have negative dumping margin by the Ukrainian courts.

III. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

A. Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate costs on the basis of records kept by the Russian producers and exporters while determining the constructed normal value

9. Article 2.2.1.1 of the Anti-Dumping Agreement provides for the obligation to calculate costs by using records of the investigated producer or exporter. Under this rule, an investigating authority examines records on whether they: 1) are in accordance with the generally accepted accounting principles of the exporting country; and 2) reasonably reflect the costs associated with the production and sale of the product under consideration.

10. As a matter of systemic relevance, the Russian Federation wishes to note that the panel's and the Appellate Body's legal interpretations of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b) of the GATT 1994 are relevant to this dispute as they provide interpretative guidance for future panels. It is further submitted that it is appropriate for the Panel in this dispute to rely on the Appellate Body's legal interpretations and reasoning in *EU − Biodiesel* of the provisions of the Anti-Dumping agreement applicable in this dispute.

11. Following these interpretations, the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement does not include a general standard of "reasonableness". Nor is there any legal basis for an investigating authority to use an additional or abstract standard to assess if the recorded costs are "reasonable" or "representative" through a comparison with hypothetical costs that might have been incurred under a different set of circumstances or any other costs not associated with the production and sale of the product under consideration in the country of origin. Indeed, the Appellate Body has already found that the second condition "relates to whether the records … suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".[3]

12. During the interim and expiry reviews, Investigating Authority, relying on the second condition under Article 2.2.1.1, deemed Russian producers' records as not reasonably reflecting the costs associated with the production and sale of gas. While ultimately rejecting the gas prices actually paid by them, it did not argue that these prices in the investigated producers' records do not represent the actual prices incurred by those producers in manufacturing ammonium nitrate. Instead, the Investigating Authority explained that Russian domestic gas prices are lower than export prices or key international markets' prices for gas due to government regulation. The sole reason to reject the recorded costs of production was the fact that in Ukraine's view these costs were considered as "affected by administrative and political factors". However, the issue as to

[2] Notice of Decision of the Intergovernmental Commission on International Trade No. AD-315/2014/4421-06, 1 July 2014 on the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate, origin from the Russian Federation, 08 July 2014 (2014 Extension Decision).

[3] Appellate Body Report, *EU − Biodiesel*, paras. 6.22, 6.30, 6.56.

whether Russian domestic selling prices of gas are set by law does not affect reasonable reflection of actually incurred gas costs in investigated producers' records.

13. Besides, the Appellate Body explained that "the inquiry envisaged under Article 2.2.1.1 is one relating to the circumstances of each investigated exporter or producer in the exporting country".[4] Hence, the investigated producer can be accountable only for its own behaviour and its recording of the actually incurred manufacturing costs of the product under consideration.

14. Accordingly, since the costs of production of ammonium nitrate were calculated not on the basis of records kept by Russian producers which were in accordance with the generally accepted accounting principles in the Russian Federation and reasonably reflected the costs associated with the production and sale of the ammonium nitrate, Ukraine acted in breach of its obligations under Article 2.2.1.1 of the Anti-Dumping Agreement.

15. The proper interpretation of Article 2.2.1.1 is relevant for the calculation of costs for normal value construction under Article 2.2 of the Anti-Dumping Agreement as the adjusted costs were used to construct the normal value. Since these costs were calculated in breach of Article 2.2.1.1 of the Anti-Dumping Agreement, determination of constructed normal value based on these costs is also inconsistent with Article 2.2 of the Anti-Dumping Agreement.

B. Ukraine acted in breach of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement by replacing (adjusting) production costs actually borne by the Russian producers and exporters with data outside the Russian Federation, and using such data subsequently for construction of the normal value

16. Article 2.2 of the Anti-Dumping Agreement describes circumstances in which the margin of dumping can be established on the basis of a constructed normal value. This provision requires the costs of production both to be assessed on the basis of, and to be based on, the costs that exist in the country where the investigated exporter or producer produces the product under consideration. Thus, Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement prescribe an obligation for the investigating authority to calculate costs based on the costs associated with production and sale of the product under consideration in the country of origin.

17. The Investigating Authority rejected the costs actually incurred by the Russian exporting producers accurately and reasonably reflected in their records and replaced (adjusted) them with the average price for natural gas exported and charged at the border with Germany. Subsequently, it used this "average price" for the construction of normal value for ammonium nitrate. The Investigating Authority used this price specifically because it does not reflect the gas price within the domestic market of the Russian Federation. For these reasons this export price for gas cannot be regarded as the price for gas associated with production and sale in the country of origin of the product concerned, i.e. ammonium nitrate in the Russian Federation.

18. The adjustment (replacement) of gas prices by the Investigating Authority inflated the costs of production of ammonium nitrate and thus the constructed normal value, which ultimately resulted in the finding of the existence of dumping and in higher dumping margins.

19. Article 2.2.1.1 of the Anti-Dumping Agreement precludes WTO Members from including in the costs of production "costs" not "associated with the production and sale" of the product under consideration, while Article 2.2 prescribes them to calculate a normal value on the basis of the costs of production in the country of origin. Ukraine violated both of these Articles.

C. Ukraine violated Article 2.2.1 of the Anti-Dumping Agreement

20. The guidance for conducting the "ordinary course of trade test" by reason of price is provided for in Article 2.2.1 of the Anti-Dumping Agreement. This provision provides for the investigating authority's right to "disregard below-cost sales of the like product".[5] It may do so only if below-cost sales (i) are made within an extended period of time; (ii) in substantial quantities; and (iii) at prices which do not provide for the recovery of all costs within a reasonable

[4] Appellate Body Report, *EU – Biodiesel*, para. 6.22.
[5] Appellate Body Report, *China – HP-SSST (Japan)*, para. 5.22. (emphasis original)

period of time. The Investigating Authority acted inconsistently with this provision as it has disregarded domestic sales of the Russian exporting producers of ammonium nitrate without determining whether such sales meet the said characteristics.

21. Moreover, even if these factors have been at hand, any conclusions made on the absence of ordinary course of trade by reason of price of ammonium nitrate would have been legally flawed due to the use of the adjusted costs of production calculated in breach of Article 2.2.1.1 of the Anti-Dumping Agreement.

22. Thus, in its application of the ordinary course of trade test by reason of price, the Investigating Authority failed to satisfy the requirements of Article 2.2.1 of the Anti-Dumping Agreement by improperly treating domestic sales of ammonium nitrate in the Russian Federation and disregarding these sales in determining the normal value.

D. Ukraine violated Article 2.4 of the Anti-Dumping Agreement

23. Article 2.4 of the Anti-Dumping Agreement sets forth an overarching obligation, applying to all paragraphs of Article 2 of the Anti-Dumping Agreement. The obligation in the first sentence of Article 2.4 requires that comparison between the export price and the normal value shall be "fair".

24. Investigating Authority's calculation of the "margin of dumping" on the basis of a comparison between the export price and inflated normal value is contrary to the first sentence of Article 2.4. The result of such unfair comparison was the dumping margin in the amount that is considerably higher than the one that would have been calculated had the export price been compared with the normal value calculated using the price the Russian producers actually paid.

E. Ukraine violated Article 2.1 of the Anti-Dumping Agreement

25. Article 2.1 of the Anti-Dumping Agreement stipulates when a product is to be considered as being dumped for the purposes of the entire Anti-Dumping Agreement.[6] This provision defines normal value in terms of domestic sales transactions in the exporting Member.[7]

26. Had the Investigating Authority used the actual gas prices paid by the investigated exporters in the calculation of the production costs of ammonium nitrate consistently with Articles 2.2.1.1 and 2.2.1, the Investigating Authority would have *not* found legal grounds for the application of Article 2.2 to determine dumping, or even to find the existence of any dumping at all.

27. Accordingly, the Investigating Authority should have determined the dumping margin following the rules of Article 2.1 of the Anti-Dumping Agreement by comparing the export price with the comparable price of the like product destined for consumption in the exporting country. Since the Investigating Authority, on the contrary, compared the export price with the constructed normal value in the absence of circumstances envisaged in Article 2.2. of the Anti-Dumping Agreement, it determined dumping in violation of Article 2.1 of the Anti-Dumping Agreement, which is a standalone claim submitted by the Russian Federation.

F. Ukraine violated Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement

28. Being an independent obligation, Article 11.1 of the Anti-Dumping Agreement, as an overarching rule, underlines the requirements for reviews of anti-dumping duties under Articles 11.2 and 11.3 and also highlights the factors that must inform such reviews.[8] In *US – Corrosion-Resistant Steel*, the Appellate Body considered that, if the investigating authority "choose[s] to rely upon dumping margins" in its likelihood determination, the dumping calculations "must conform to the principles" set forth in Article 2 in general.[9]

[6] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 109; Panel Report, *US — Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina),* para. 7.76, footnote 50.

[7] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.272.

[8] See Appellate Body's explanation regarding the parallel wording of Article 21.1 of the SCM Agreement (Appellate Body Report, *US – Carbon Steel*, para. 70).

[9] Appellate Body Report, *US – Corrosion-Resistant Steel*, paras. 127, 130.

29. Based on the Investigating Authority's conclusions in the interim and expiry reviews, the Intergovernmental Commission decided to change the anti-dumping duty rates and to extend the anti-dumping measures for five years. In its consideration of whether the anti-dumping measure is necessary to offset dumping, the Investigating Authority breached Articles 2.1, 2.2, 2.2.1, 2.2.1.1 and 2.4 of the Anti-Dumping Agreement as explained above. These violations, taken individually and collectively, infected conclusions made by the Investigating Authority under Articles 11.2 and 11.3 of the Anti-Dumping Agreement. Irrespective of the inconsistencies with these provisions, Ukraine violated Article 11.1 because it maintains anti-dumping duties despite the absence of dumping. Hence, Ukraine acted inconsistently with Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement.

IV. CLAIMS REGARDING INCLUSION OF A RUSSIAN PRODUCER WITH NEGATIVE DUMPING MARGIN INTO THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS

A. Ukraine acted inconsistently with Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement

30. Under Article 5.8 of the Anti-Dumping Agreement, an anti-dumping investigation should be immediately terminated, and no anti-dumping measure shall be imposed for exporters found not to be involved in dumping practices. In *Mexico – Anti-Dumping Measures on Rice,* the Appellate Body ruled that "the second sentence of Article 5.8 requires the immediate termination of the investigation in respect of exporters for which an *individual* margin of dumping of **zero or *de minimis*** is determined".[10] The Appellate Body explained that exporters excluded from an investigation under this provision cannot be subject to subsequent reviews.[11]

31. Ukraine violated this provision for four reasons. First, Ukraine maintained the Russian producer with a negative dumping margin, as defined by the 2008 Decision as amended by the 2010 Decision, within the scope of the anti-dumping measures and thus failed to terminate the measures in respect of this exporter despite a determination on the absence of dumping. Second, by the 2010 Decision, Ukraine imposed a 0% duty on the exporter for which a below *de minimis* dumping margin was found. Third, it included the said Russian producer into the scope of the underlying reviews. Finally, by extending measures to that producer, Ukraine imposed anti-dumping duties on the exporter for which no dumping was originally established.

32. Therefore, there was no termination of investigation with regard to the Russian producer under consideration within the meaning of Article 5.8 of the Anti-Dumping Agreement. That is despite the fact that its dumping margin was negative as acknowledged by the Ukrainian legal system. The Investigating Authority alleged that the *de minimis* dumping margin was assigned to that Russian producer in the context of an "administrative procedure" that is outside the scope of the anti-dumping investigation and included this exporter into the reviews. Regardless of the legal status of procedures and decisions affecting anti-dumping investigations and imposition of measures in Ukrainian domestic legislation, Article 27 of the Vienna Convention on Law of Treaties obliges Ukraine to respect its international obligations under the WTO Agreements, which was not done in the present case.

33. As to Article 11.2 the Anti-Dumping Agreement, the Appellate Body explained that exporters for which below *de minimis* margins have been established "cannot be subject to … changed circumstances reviews, because such reviews examine … 'the need for the *continued imposition* of the duty'".[12] By analogy, in the context of Article 11.3, such exporters cannot be subject to an expiry review because such reviews examine the likelihood of continuation or recurrence of dumping, whereas no dumping is found. Besides, the mere fact that the anti-dumping duty remains in force while no longer being necessary constitutes a violation of Article 11.1 of the Anti-Dumping Agreement.

34. For these reasons, the Russian Federation submits that Ukraine breached its WTO obligations under Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement.

[10] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice,* para. 217. (emphasis added)
[11] Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, paras. 305-306.
[12] Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, paras. 305-306. (emphasis original)

V. SUBSTANTIVE CLAIMS RELATING TO THE LIKELIHOOD OF INJURY DETERMINATION

A Ukraine acted inconsistently with Articles 11.1, 11.2, 11.3, 3.1 and 3.4 of the Anti-Dumping Agreement

35. In its determination of the likelihood of continuation of injury, the Investigating Authority relied on unsubstantiated findings regarding the existence of injury at the time the review should have been terminated and therefore such determination is WTO-inconsistent, which is described in detail as follows.

(A) Ukraine failed to exclude imports of the Russian producer with negative dumping margin from the volume of "dumped" imports

36. Articles 11.2 and 11.3 of the Anti-Dumping Agreement mandate that imports attributed to a particular producer (exporter) should be excluded from the determination of likelihood of injury if it is established that imports previously found to be dumped were not in fact dumped, i.e. not responsible for the alleged injury.

37. Ukraine did not exclude imports of the producer with negative dumping margin from the scope of the determination on the likelihood of continuation of injury. The volume of imports regarded as dumped in the original injury determinations still included the imports that could no longer be treated as dumped. Given the change in the volume of "dumped" imports, Articles 11.2, 11.3 and 3.1 of the Anti-Dumping Agreement obliged Ukraine this volume for the purposes of the expiry and interim reviews and to decrease the scope of injury determination by the volume of not dumped imports. Ukraine failed to do so.

38. Besides, it made affirmative conclusions on the likelihood of a future increase of imports from the Russian Federation based on an assumption regarding the future dynamics of imports attributable to this producer. Thus, the process of reviews carried out by Ukraine was not based on "positive evidence" and "objective examination" but favoured its domestic industry's interests.

39. Taking into account that provisions of Article 3 of the Anti-Dumping Agreement "contemplate a logical progression in an authority's examination leading to the ultimate injury and causation determination"[13] the fact that the Investigating Authority included in its injury analysis not dumped imports led to infection of all the conclusions regarding the effect of imports from the Russian Federation on the state of the Ukrainian domestic industry. Hence, Ukraine breached Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement.

(B) The evaluation of economic factors and indices having a bearing on the state of the Ukrainian domestic industry was not based on an "objective examination" of "positive evidence"

40. Ukraine breached its obligations under Articles 11.2, 11.3 and 3.4 of the Anti-Dumping Agreement since it: (a) failed to give an objective examination of factors and indices having a bearing on the state of domestic industry; (b) based its injury finding on a single factor, i.e. deterioration of financial results; (c) failed to give an objective examination of the substantial increase in the costs of production as a key factor having bearing on the state of domestic industry.

41. The evidence on the record shows that the likelihood-of-injury determination consisted of two steps: (1) determination of the current state of the domestic industry and (2) prospective analyses of what happens should the anti-dumping measures lapse. As to the first step, the Investigating Authority stated that the domestic industry had been suffering injury. Yet, a number of economic factors demonstrated strong positive trends not in line with this conclusion, i.e. upward trends *inter alia* in the volume of production, capacity utilization, market share and investments.

[13] See Appellate Body Report, *China – GOES*, para. 143.

42. The injury analysis was based on selective use of information. In its likelihood of injury determination, the Investigating Authority attributed considerable weight to financial results of the domestic industry, but failed to provide any explanation on why this particular factor outweighed all the others. In fact, the Investigating Authority based its injury findings on the sole negative trend in profitability of the domestic industry.

43. The evidence on the record conclusively indicated that Ukrainian domestic industry's financial results were deteriorating due to an increase in production costs. But the Investigating Authority did not explain how the increase of production costs influenced the domestic industry.

44. An objective and unbiased investigating authority would not have made an affirmative determination on the likelihood of continuation (recurrence) of injury on the basis of the sole factor given the positive trends in other economic factors and indices. Investigating Authority's assessment of the current state of the domestic industry was done contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement. As a result, Ukraine failed to meet its obligations under Articles 11.1, 11.2, 11.3 of the Anti-Dumping Agreement.

VI. PROCEDURAL ISSUES AND CLAIMS

A. Ukraine committed several procedural violations of its obligations under Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement

45. Ukraine acted inconsistently with Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement for four reasons. Firstly, Ukraine resorted to the facts available in a situation when the Russian investigated producers and exporters cooperated and provided necessary information within a reasonable period of time. The Investigating Authority did not make any findings suggesting that Russian exporters and producers of ammonium nitrate either refused access to or otherwise failed to provide any necessary information within a reasonable period or significantly impeded the investigation and determinations.

46. Secondly, despite the cooperation of the Russian exporters and producers under the investigation and their appropriate submission of verifiable information in a timely fashion so that it could be used in the investigation without undue difficulties, the Investigating Authority rejected some information provided by them with respect to some of the costs associated with the production of the product under consideration and instead used in its determinations information from alternative sources. The completeness, correctness and accuracy of the information provided by investigated producers and exporters in their replies to the anti-dumping questionnaire were not questioned by the Investigating Authority.

47. Thirdly, the Investigating Authority failed to inform the investigated producers and exporters in advance of the fact that their responses to the anti-dumping questionnaire about some of the costs information had been rejected and of the reasons therefor. Finally, the Investigating Authority failed to give the Russian exporters and producers an opportunity to provide further explanations within a reasonable period of time.

B. Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement by not disclosing the essential facts

48. Articles 6.2 and 6.9 of the Anti-Dumping Agreement provide for separate obligations for investigating authorities, which relate to disclosure of the essential facts.

49. The confidentiality of information could be a legitimate justification of a failure to disclose all the essential facts without violation of Article 6.9 of the Anti-Dumping Agreement. However, it could be the case only if a non-confidential summary of such information is disclosed, provided that such summary enables an interested party to understand the essential facts, comment on them, correct miscalculations and, thus, to defend its interests.

50. Investigating Authority sent to the interested parties the Disclosure containing its findings on dumping and injury made during the interim and expiry reviews. These findings did not sufficiently cover the essential facts about the likelihood of injury determination. Nor did they

contain precise figures and calculations sufficient for the parties concerned to understand how the Investigating Authority arrived at the conclusions on dumping determinations.

51. The lack of facts in the Disclosure prevented the Russian exporters and producers from commenting on these facts and, thus, deprived them of their rights to defend their interests guaranteed by Article 6.2 of the Anti-Dumping Agreement. What is more, Ukraine frustrated the purpose of the "essential facts" disclosure requirement by denying interested parties an opportunity to "provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts".[14] Consequently, the Russian producers were effectively deprived of the right to defend their interests because they were unable to present the rebutting arguments or address the errors in Investigating Authority's analyses. Therefore, Ukraine violated Articles 6.2 and 6.9 of the Anti-Dumping Agreement.

C. Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by not providing sufficient time to comment on the Disclosure

52. On 25 June 2014, the Investigating Authority sent the Disclosure to the interested parties imposing the deadline of 27 June 2014 for them to comment on this document. Thus, it provided only two calendar days for comments. One Russian producer with a negative dumping margin requested an extension of the deadline by 14 days. However, that request was not satisfied.

53. In the context of Article 6.9 of the Anti-Dumping Agreement, the ability of interested parties to defend their interests is strongly connected with their ability to submit arguments on the facts under consideration. In its turn, the ability to submit arguments is dependent upon the time when the disclosure of those facts was made. The two days deadline for commenting on essential facts which formed the basis for the decision made as a result of interim and expiry reviews was not sufficient for the parties to defend their interests. Accordingly, the Russian producers and exporters were effectively deprived of the right to defend their interests under Article 6.9 of the Anti-Dumping Agreement.

VII. OTHER CLAIMS

A. Ukraine breached Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

54. Under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, an investigating authority has to provide in sufficient detail in form of a public notice the findings and conclusions reached on all issues of fact and law it considered in making its preliminary and final determinations, which have led to the imposition of the measures. As the Appellate Body indicated in *China – GOES*,[15] confidentiality concerns cannot excuse an investigating authority from its obligation to provide all materials relevant to its dumping determination and injury margin calculation.

55. The publication of the Disclosure and the 2014 Extension Decision do not constitute a public notice within the meaning of these provisions as Ukraine failed to report calculation methodology, whether in the form of worksheets and computer output or the description of the data and formulas applied, as well as all relevant information on the matters of fact and law which have led to the calculation of dumping margin. Besides, Ukraine did not provide all relevant information which formed the basis for its affirmative findings in respect of injury. In particular, it did not disclose data characterizing the state of the Ukrainian industry. Thus Articles 12.2 and 12.2.2.of the Anti-Dumping Agreement were violated.

B. Ukraine violated Articles 1, 18.1 of the Anti-Dumping Agreement and Article VI of the GATT due to its WTO-inconsistent behaviour described above

56. Both determinations of dumping and extension by Ukraine of anti-dumping duties imposed on imports of ammonium nitrate originating in the Russian Federation violate numerous provisions of the Anti-Dumping Agreement. These measures also entail violations of Articles 1 and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

[14] Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[15] Appellate Body Report, *China – GOES*, para. 259.

VIII. UKRAINE'S REQUEST FOR A PRELIMINARY RULING SHOULD BE REJECTED IN ITS TOTALITY

57. Ukraine alleged that the 2008 and 2010 Decisions are not sufficiently clear indicated in the Panel Request. Yet, both the claim itself and the Panel Request, read in its entirety, including the footnotes, indicate that these decisions have been duly identified as a challenged measure. Likewise, all claims of the Russian Federation are within the Panel's Terms of Reference and should be examined by the Panel.

58. First, the Panel Request sufficiently informed Ukraine and third parties about the Russian Federation's complaint on Ukraine's violation of Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement (Claim 1 in the Panel Request). The same is correct for Claim 17 and Claim 4 of the Panel Request.

59. The Russian Federation's Claim 17 is similarly reflected in the Panel Request with sufficient clarity. In addition to that, this claim (violation of Articles 11.1, 11.2, 11.3, 3.1 and 3.4) concerns the aspects of injury deriving from Claims 14-16 of the Panel Request. In Claim 4 of the Panel Request (breach of Articles 6.8 and paragraphs 3, 5 and 6 of Annex II of the Anti-Dumping Agreement), the Russian Federation also provided a brief summary of the corresponding factual background to enable Ukraine and third parties to understand the issue clearly.

60. Second, none of the claims made in the Panel Request expand the scope of the dispute or change the essence of the complaint. A combined reading of the Panel Request and the Request for Consultations shows that the legal basis of Claim 7 in the Panel Request (violation of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement) naturally evolved from the legal basis of Claim 10 of the Request for Consultations (violation of Article 6.9 of the Anti-Dumping Agreement).

61. The inclusion of Claim 17 in the Panel Request (breach of Articles 11.1, 11.2, 11.3, 3.1 and 3.4 of the Anti-Dumping Agreement) was due to the fact that additional information was received during consultations and contributed to a better understanding of the operation of a challenged measure which warranted revisiting the list of treaty provisions with which the measure is inconsistent. This claim evolved from Claim 13 and 14 (Articles 6.6 and 11.2, and Articles 6.6 and 11.3 of the Anti-Dumping Agreement accordingly), as well as from Claim 7 set forth in the Request for Consultations (violation of Article 5.8 of the Anti-Dumping Agreement).

ANNEX B-2

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. UKRAINE'S REQUEST FOR PRELIMINARY RULING

1. Measures not specified in the Panel Request

1. The Russian Federation breached Article 6.2 DSU since it included a measure in its First Written Submission that was not identified in its Panel Request. While the Russian Federation's Panel Request clearly identifies the 2014 Decision as the measure at issue, nothing in the Panel Request indicates that this is also the case for the 2008 Decision. Quite on the contrary, the first two sentences of the Panel Request explicitly limit the scope of the dispute to the 2014 Decision by referring only to the measures "in connection with expiry and interim reviews. (…) as set forth in the [2014 Decision]." A use of plural or the mere mentioning of the 2008 Decision in a footnote is not sufficiently clear according to the panel in *China - Publications and Audiovisual Products* to comply with the requirements of Article 6.2 DSU.

2. Claims having no basis in the Request for Consultations

2. Ukraine submits that Claims 7 and 17 in the Panel Request have no basis in the Request for Consultations and therefore fall outside the terms of reference of the Panel. The Appellate Body held that it is not necessary that the claims in the request for consultations are identical to those set out in the panel request, provided that the legal basis in the panel request may reasonably be said to have evolved from the legal basis that formed the subject of consultations.[1] This last requirement has often been interpreted to require a close correlation between the provisions.

(a) Claim 7 of the Panel Request

3. With respect to Claim 7 of the Panel Request, it cannot be said that claims under Article 6.9 Anti-Dumping Agreement have evolved from the same legal basis as claims under Article 12.2 and 12.2.2 Anti-Dumping Agreement. The only similarity between these articles is that they contain an obligation to disclose information. However, as confirmed in WTO case law, the nature of these obligations is different. Article 6.9 relates to information and facts that must be disclosed to provide the parties with an opportunity to defend their interests, while Article 12.2 and 12.2.2 requires the investigating authority to disclose the reasoning of its final determination. Moreover, Article 6.9 requires the disclosure of facts before the final determination is made and Article 12.2 and 12.2.2 require the public notice after the final determination is made. A third difference relates to the purpose of the articles. The purpose of Article 6.9 is to provide the parties with the opportunity to defend their interests. Articles 12.2 and 12.2.2, on the other hand, is to ensure that the investigating authority's reasons for making the final determination can be discerned and understood by the public. For those reasons, Ukraine submits that there is no correlation between Article 6.9 and Articles 12.2 and 12.2.2.

(b) Claim 17 of the Panel Request

4. The Russian Federation argues that Claim 17 has evolved from the legal basis of Claims 7, 13 and 14 of the Request for Consultations. Contrary to the legal standard, the Russian Federation does not argue that the legal basis of Claim 17 is closely related to the legal basis of the Claims 7, 13 and 14. With regard to the correlation with Claim 7 of the Request for Consultations, the Russian Federation instead argues that the same factual circumstances – the inclusion of a producer with a *de minimis* dumping margin in the scope of the expiry and interim review – led to the violation of the Articles 5.8, 11.1, 11.2, 2.2, 2.4, 11.3, 9.2 and 9.3 listed in Claim 7 of the Request for Consultations and a violation of Articles 3.1 and 3.4 mentioned in the Panel Request. Nevertheless, case law has held that the mere fact that claims under two different articles are premised on the same or related factual basis, does not imply that such claims concern the same matter or that one claim has evolved from the other.

[1] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

5. With respect to the correlation with Claims 13 and 14 of the Request for Consultations, the Russian Federation submits that because Claims 13 and 14 mention the word "injury", its claims under Article 3 naturally evolved from its claim under Articles 6.6, 11.2 and 11.3. However, case law has exhaustively explained the difference in nature and purpose between these articles. Consequently, the obligations under Article 3, on the one hand, and Articles 11.2 and 11.3, on the other hand differ in nature as to "what" has to be analyzed and evaluated. Article 3 calls for an analysis of whether the domestic industry is presently suffering from material injury caused by dumped imports, whereas Articles 11.2 and 11.3 call for the examination of the future situation following the termination of the anti-dumping order. Furthermore, in performing the analysis of the presently existing material injury as opposed to the evaluation of the future situation, the investigating authority has to comply with different obligations: Article 3 in the first scenario and Articles 11.2 and 11.3 in the second. Thus, there is clearly no correlation between the claims under Article 3 and the claims under Articles 11.2 and 11.3 which results in Claim 17 not falling within the terms of reference of the Panel.

II. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

(a) Article 2.2.1.1 Anti-Dumping Agreement

6. Ukraine submits that the reliance by the Russian Federation on *EU – Biodiesel* is misplaced. First, the Russian Federation has selectively quoted certain portions from that proceeding while ignoring other equally important parts. Second, the factual circumstances in *EU – Biodiesel* were entirely different. The Russian Federation has then selectively applied certain legal considerations from that case to a whole different set of factual circumstances. The factual differences consist of the fact that:

(i) the governmental price-fixing of the domestic Russian gas which is called dual pricing is WTO inconsistent. This is different from the export taxes that were in place in Argentina;

(ii) the domestic Russian gas prices were found to be below cost, different from the prices of soybeans in Argentina;

(iii) the government intervention was direct as opposed to the indirect effect of the export taxes in Argentina; and

(iv) the result of the intervention in the Russian gas prices has been measurable and significant, whereas in Argentina, the prices were merely depressed. It is important to note that Gazprom is the predominant overall gas supplier in Russia (>70%), moreover, it accounts for virtually all gas supplies to the Agro-Chemical Industry to which ammonium nitrate producers belong.

7. Turning to the legal provisions under investigation, contrary to what the Russian Federation argues, the Appellate Body held in *EU – Biodiesel* that an investigating authority is certainly free to examine the reliability and accuracy of the costs recorded in the records of the exporters to determine whether all costs incurred are captured, understated and whether non-arms-length transactions or other practices affect the reliability of the reported costs. Ukraine recalls that the Appellate Body provided three additional exceptions to reject the costs recorded in the records of the exporters; (i) non-arm's length transaction; (ii) other practices; and (iii) situations which are not 'normal'. Ukraine submits that its actions with respect to disregarding the cost of gas as pictured in the records of the Russian exporters fall within these exceptions.

8. The notion of non-arm's length is neither defined in the Covered Agreements, nor in Appellate Body case law. Since we are dealing with the most specific accounting provision within the Anti-Dumping Agreement, i.e. Article 2.2.1.1, Ukraine submits that for the definition of 'arm's length' the Panel should be guided by the relevant specific accounting definitions. GAAS and ISA provide that an arm's length transaction is "[a] transaction conducted on such terms and conditions between a willing buyer and a willing seller who are unrelated and are acting independently of each other and pursuing their own best interests." The domestic sales transactions of gas were not at arm's length since those prices do not reflect an interaction between independent buyers and sellers, pursuing their own best interests. This non-arm's length

nature of the practice therefore falls squarely within the first exception provided by the Appellate Body in *EU – Biodiesel*. Accordingly, the cost rectification by the Ukrainian authority was therefore in line with exception foreseen by the Appellate Body and is not inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.

9. Second, the factual situation in the Russian Federation's gas market is significantly unique to qualify as such 'other practice'. The facts demonstrate that there exists a clear practice in the Russian Federation which is definitely 'other' than which is usual in the commercial world, and which is also distinctly different from the factual situation in *EU – Biodiesel*. The illegal price fixing by the Government, the mandatory domestic gas sales below cost and the direct governmental intervention are all aspects of something that is not typical of most, if not all, other anti-dumping proceedings of WTO members. Such facts, therefore, clearly warrant denomination as an 'other practice' in the sense of one of the exceptions described by the Appellate Body in *EU – Biodiesel*. Since this practice can therefore be identified as 'other', it justifies a rectification of the line item for gas purchases in the records of the producers.

10. It is submitted that we do not need to get to the discussion of 'normally' since the particular situation in the Russian Federation already falls squarely in one of the two regular exceptions discussed above (non-arm's length or other practices). However, should the Panel deem it useful, Ukraine will be pleased to discuss as to why it considers that the domestic gas prices in the Russian Federation and their reflection in the accounting records are not normal. In such situation, Ukraine submits that the above described specific factual circumstances in this case (a) governmental price fixing, (b) prices fixed below cost, (c) direct governmental intervention which is (d) measurable warrant deviation from the obligation to normally base the cost on the records.

(b) Article 2.2 of the Anti-Dumping Agreement

11. Ukraine recalls that the situation before us is again vastly different than the one in *EU – Biodiesel*, where there was no need to look elsewhere for information. The persuasive reasoning of *US – Softwood Lumber IV* in the context of the *Agreement on Subsidies and Countervailing Measures*, as repeated by *EU – Biodiesel* in the context of the *Anti-Dumping Agreement* is instructive. In very specific and unique circumstances, such as the one that the Ministry of Economic Development and Trade of Ukraine (MEDTU) was facing, interpretation must be given to a legal concept in light of the economic facts that underpin it. In this case, as a result of the artificial and pervasive nature of the domestic gas prices in the Russian Federation, the investigating authority was compelled to resort to information and evidence from outside the country of origin to arrive at and determine the cost inside the country of origin. Compliance with this obligation may then require the investigating authority to adapt the information. This is exactly what the investigating authority did. It considered prices of Russian gas sold on a free market. It adjusted these prices back so as to arrive to the price within the Russian Federation. In so doing it carefully limited itself to the distorted line item of gas prices and did not substitute the entire cost of the product under consideration.

(c) Article 2.2.1 of the Anti-Dumping Agreement

12. This claim represents not much more than a repetition of the Russian Federation's discontent with the calculation of the normal value inclusive of the cost rectification. To this extent, claim 3 is therefore consequential to claim 1. Ukraine submits that the Russian Federation's argument has no merit as the investigating authority did not violate the provisions of Article 2.2.1.1 of the Anti-Dumping Agreement.

13. In any event, MEDTU conducted the ordinary course of trade test on the basis of the determined cost of production and found that the sales of the Russian producers were not made in the ordinary course of trade. When making this determination, MEDTU assessed whether (i) the sales were made at a loss within an extended period of time; (ii) the sales were made at a loss in substantial quantities; and (iii) the prices did not provide for recovery of all the costs within a reasonable period of time. Based on this assessment, MEDTU concluded that the sales of the Russian producers were not in ordinary course of trade.

14. Further, even if the Panel were to uphold the claim that Article 2.2.1.1 of the Anti-Dumping Agreement had been violated, this does not mean that the obligations under Article 2.2.1 have

been violated as a consequence. Article 2.2.1.1 and Article 2.2.1 contain distinct obligations that should not be mixed.

(d) Article 2.4 of the Anti-Dumping Agreement

15. The "difference" that the Russian Federation claims "affects price comparability" between the normal value and the export price, such that "due allowance" should have been made in order to ensure a "fair comparison" under Article 2.4, arose from the methodology used by MEDTU to determine the normal value. Unlike the examples in the illustrative list in Article 2.4, the alleged "difference" is not a characteristic of the transactions being compared. It was a methodological approach that affected the cost of ammonium nitrate, but it did not affect the price comparability of the normal value and the export price. This approach has been confirmed by the Appellate Body in *US – Zeroing (EC)*.

16. Furthermore, the Appellate Body held in *EU – Biodiesel* that Article 2.2.1.1 and Article 2.4 serve different functions in the context of determinations of dumping whereby the former assists an investigating authority in the calculation of costs for purposes of constructing the normal value; whereas the latter concerns the fair comparison between the normal value and the export price.[2] Similarly, the panel held in *EU – Footwear (China)* that "[n]othing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price."[3]

III. VIOLATION OF ARTICLES 5.8, 11.2 AND 11.3 OF THE ANTI-DUMPING AGREEMENT BY INCLUDING A RUSSIAN PRODUCER WITH A NEGATIVE DUMPING MARGIN IN THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS

17. First, the 2008 Decision, as amended by the 2010 Decision, falls outside of the scope of the Panel's terms of reference. Therefore, the only issue before the Panel is whether the 2014 Decision violates Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement. Since the Russian Federation did not specify which actions of MEDTU violate these legal provisions, the claim under Articles 11.1, 11.2 and 11.3 should be dismissed as unfounded since the Russian Federation has failed to provide a *prima facie* case.

18. The claim under Article 5.8 must equally be dismissed since the Russian Federation erroneously relied on the findings of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. The findings of the Appellate Body relate to the determination of a zero or *de minimis* dumping margin by the investigating authority. MEDTU, in fact, found dumping margins of 40.5% and 82.2%. Therefore, there was no obligation to terminate the investigation. Moreover, the Appellate Body held, in line with the findings of several panels, that the obligation is only limited to original investigations and that no such obligation arises in the context of interim reviews, expiry reviews and administrative reviews.

19. Finally, if the Panel is of the view that a case could have been brought against the 2008 Decision, as amended by the 2010 Decision, Ukraine submits that this claim should be rejected. Based on case law, there are three cumulative conditions that must be met before an investigating authority needs to terminate an investigation. These are that (1) it relates to an original investigation; (2) a negative or *de minimis* dumping margin is determined; and (3) this dumping margin determination is made by the investigating authority. These conditions are not met since, first, the 2008 Decision found a dumping margin for EuroChem of 10.78%. Second, no investigating authority ever found a zero or *de minimis* dumping margin. The 2010 Decision – taken following a series of decisions by the Ukrainian courts – did not determine that EuroChem's dumping margin was negative, zero or *de minimis*. The 2010 Decision merely enforced the rulings of the Ukrainian courts that EuroChem's dumping margin was not correctly determined. Rather than recalculating EuroChem's dumping margin, the Interdepartmental Commission on International Trade only modified the anti-dumping *duty* rate – and not the *margin* – applicable to EuroChem and changed this duty rate to zero.

20. Panels previously made a clear distinction between the purpose of an original investigation and a duty assessment procedure under Article 9.3 of the Anti-Dumping Agreement when it

[2] Appellate Body Report, *EU – Biodiesel*, para. 6.48
[3] Panel Report, *EU – Footwear (China)*, para. 7.263. See also Panel Report, *EU – Biodiesel*, para. 7.296

quoted the panel's findings in *US – DRAMS* that "…in the context of Article 5.8, the function of the *de minimis* test is to determine whether or not an exporter is subject to an anti-dumping order. In the context of Article 9.3 duty assessment procedures, however, the function of any *de minimis* test applied by Members is to determine whether or not an exporter should pay a duty."[4] Similarly to an Article 9.3 duty assessment procedure, the 2010 Decision merely set a new duty level for EuroChem but did not calculate a new dumping margin for that producer.

21. Since the three conditions are not met, no obligation to terminate the investigation existed upon MEDTU. Claim 7 of the First Written Submission must therefore be dismissed.

IV. SUBSTANTIVE CLAIMS REGARDING LIKELIHOOD OF RECURRENCE AND/OR CONTINUATON OF INJURT DETERMINATION

(a) The Russian Federation's reliance on Article 3 Anti-Dumping Agreement

22. Ukraine notes that it is a well-established rule in WTO jurisprudence that provisions of Article 3 of the Anti-Dumping Agreement do not apply to likelihood of recurrence or continuation of injury determinations in expiry and interim reviews. Ukraine agrees that in the course of expiry and interim reviews, an investigating authority is obliged to base its findings on an objective examination of positive evidence. However, the source of this obligation are Articles 11.2 and 11.3 themselves and not Article 3. Consequently, Ukraine asks the Panel not to consider any of the Russian Federation's claims based on the alleged violations of Article 3 of the Anti-Dumping Agreement.

(b) Proper interpretation of MEDTU findings

23. The arguments of the Russian Federation are based on an erroneous interpretation of the obligations of an investigating authority under Articles 11.2 and 11.3 of the Anti-Dumping Agreement. It should be pointed out that neither Article 11.2 nor Article 11.3 of the Anti-Dumping Agreement obligate an investigating authority to make a determination that the domestic industry is suffering material injury. Instead, the investigating authority is tasked with making a determination in respect of the likelihood of recurrence or continuation of dumping and injury should the anti-dumping measures be terminated.

24. Most of the Russian Federation's arguments are premised on the erroneous presumption that MEDTU made a finding that the Ukrainian industry was suffering material injury and that such a finding was the basis for MEDTU's determination of the likelihood of recurrence of injury. MEDTU did not determine that the Ukrainian industry was suffering from material injury. Instead, MEDTU determined that (i) during the period of investigation of the interim and expiry review, the Russian producers continued to export dumped products; (ii) there was no indication that the pricing behavior would change; (iii) the Russian producers were also exporting dumped products to other markets; (iv) in case the duties would be terminated, the Russian producers would increase their exports which would have an impact on the prices in the market; and (v) patterns showed the increase in Russian imports in the periods when the application of the anti-dumping duty was suspended.

(c) EuroChem imports

25. The Russian Federation claims that EuroChem should not have been included in the determination on likelihood of injury since its dumping margin was zero. However, in an expiry review, an investigating authority is under no obligation to exclude from the likelihood of recurrence of injury analysis the volume of imports from a producer currently not found to be engaged in dumping (which was not the case here in any event). Nevertheless, nothing in Articles 11.1, 11.2 and 11.3 prohibits an investigating authority from analysing the import volume trends in respect of the product subject to a zero anti-dumping duty in order to make a determination as to the likely behaviour of producers subject to the anti-dumping duties, once such duties are removed. The analysis of EuroChem's export and prices indicated that a surge of imports was to be expected if the duties were terminated.

[4] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.142 (emphasis added).

(d) Alleged undue reliance on the profitability of the Ukrainian industry

26. Contrary to what the Russian Federation is arguing, MEDTU did not solely make a determination on the likelihood of the recurrence of injury based on the decrease of profitability of the Ukrainian industry. Instead, it determined that there was a likelihood of recurrence of injury based on (i) the likely increase of the dumped imports should the anti-dumping measures be terminated; (ii) the impact of the dumped imports on the prices of the national producers; and (iii) the consequential impact on the state of the Ukrainian industry. Secondly, taking into account the dramatic drop in profitability of the domestic industry, it was not unreasonable for MEDTU to conclude that the Ukrainian industry was still in a fragile state.

(e) Analysis of the costs of production of the Ukrainian industry

27. Finally, the Russian Federation argues that MEDTU failed to examine the cost of production as a factor having a bearing on the state of the industry under Article 3.4 of the Anti-Dumping Agreement. In that respect, it suffices to note that the Russian Federation's claim is based on an incorrect understanding of the facts of the case. MEDTU in fact examined the increase in the cost of production of the Ukrainian industry. MEDTU determined that the cost of production significantly increased, at a pace exceeding the increase in the sales prices, thus resulting in a significant decrease of the profitability.

V. PROCEDURAL CLAIMS

(a) Alleged recourse to facts available

28. The Russian Federation argues that MEDTU's decision to disregard the costs for gas in the records of the investigated producers equates to a decision to resort to facts available under Article 6.8 of the Anti-Dumping Agreement. It is clear, based on the investigation record, that the information about costs of gas in the producers' records was not rejected on evidentiary grounds under Article 6.8 of the Anti-Dumping Agreement. Instead, the information regarding the costs of gas in the records of the investigated producers was accepted into evidence, analyzed by MEDTU and thereafter rectified based on the substantive rules regarding the determination of costs under Article 2.2.1.1 of the Anti-Dumping Agreement. The Russian Federation tries to blur the lines between the procedural and evidentiary rules in Article 6.8 on the one hand, and substantive rules in Article 2.2.1.1 regarding the dumping determination, on the other hand. However, Article 6.8 and Annex II do not govern how an investigating authority is to calculate dumping margins.

(b) Alleged deficiencies in the disclosure of the essential facts

29. The Russian Federation's claim regarding the disclosure of essential facts in the likelihood of recurrence of injury relates first to the figures and price effects analysis and second, to the figures in Tables 11.3.1 to 11.3.6 in the Disclosure. First, The Russian Federation bases its arguments on the findings of the Appellate Body in *China – GOES*. Nevertheless, this case concerned an original investigation whereas the investigation at issue is a combined interim and expiry review. Moreover, as far as the data in Tables 11.3.1 through 11.3.6 is concerned, the Russian Federation did not advance any argument at all to demonstrate that such data would constitute essential data within the meaning of Article 6.9 of the Anti-Dumping Agreement.

30. Further, Ukraine recalls that the disclosure obligations under Article 6.9 of the Anti-Dumping Agreement relate to essential facts on the record of the investigating authority and not to reasoning or explanations.[5] Since neither of the Russian Federation's two complaints deal with the disclosure of facts, they do not fall within the scope of Article 6.9 of the Anti-Dumping Agreement.

31. Finally, Ukraine notes that the information in Tables 11.3.1 through 11.3.6 was properly disclosed to the interested parties taking into account MEDTU's confidentiality obligations under Article 6.5 of the Anti-Dumping Agreement. The disclosure of trends' data instead of absolute figures is a generally used method for providing non-confidential summaries of confidential data and this does not render the disclosure concerning price effects inconsistent with the requirements of Article 6.9 of the Anti-Dumping Agreement.

[5] Appellate Body Report, *China – Autos (US),* para. 7.145.

32. Regarding the essential facts in the dumping calculations, MEDTU disclosed the essential facts underlying its dumping determinations in sufficient detail so as to enable the Russian exporting producers to understand clearly which data was used for the calculation of the dumping margins. MEDTU explained the applied methodology in detail and referred to precise information in the questionnaire responses of the investigated Russian producers used to calculate the dumping margin. The actual figures are indeed not reflected in the Disclosure. Nevertheless, sufficient details were given and disclosure took place by form of reference to the specific data which was in the possession of the investigated Russian producers.

VI. CLAIMS UNDER ARTICLES 12.2 AND 12.2.2

33. In respect of the Russian Federation's claims under Articles 12.2 and 12.2.2, Ukraine reiterates its position as set out in Ukraine's First Written Submission. Further, Ukraine notes that the Russian Federation's claim under Articles 12.2 and 12.2.2 is limited to the lack of disclosure in respect of the dumping margin calculations. In its First Written Submission, however, the Russian Federation additionally argues that Ukraine violated Articles 12.2 and 12.2.2 by not disclosing in sufficient details the data regarding injury margin calculations and determination of the likelihood of the recurrence of injury. Since claim 7 in the Panel Request only mentioned the deficiency of the disclosure in respect of the dumping margin calculations, the Russian Federation's claims in respect of the injury margin calculations and determination of the likelihood of the recurrence of injury are outside the Panel's terms of reference.

VII. CONCLUSIONS

34. Ukraine has demonstrated the lawfulness of the anti-dumping action that Ukraine has taken in respect of the injuriously dumped ammonium nitrate from the Russian Federation.

ANNEX B-3

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF RUSSIA

I. INTRODUCTION

1. In this second integrated executive summary the Russian Federation summarizes arguments presented to the Panel in its second written submission, its opening and closing oral statements at the second substantive meeting and its responses to the Panel's questions after the second substantive meeting.

II. PRELIMINARY ISSUES – TERMINOLOGY AND ADMISSION OF EVIDENCE

2. The Russian Federation objects to both the use of the term "Investigation Report" and the designation of Report on the Gas Market of Russian Federation prepared by the Ukrainian State Enterprise "Ukrpromvnesheksрertiza" by Ukraine as "underlying the investigation report" and respectfully requests the Panel to use the term "Disclosure" in its references to Exhibit RUS-10 and Exhibit UKR-17 in its Report.

3. Also, the Russian Federation does not agree with the usage of the term "rectification" or "rectify", which is a misrepresentation by Ukraine of what actually was a *substitution*" of natural gas prices actually paid by the Russian producers with a surrogate price for natural gas destined for export charged at the "border with Germany".

4. Along with the request to disregard Exhibits from UKR-1 to UKR-8, the Russian Federation respectfully asks the Panel to disregard Ukraine's exhibits from UKR-31 to UKR-40. These exhibits are irrelevant to the consideration of the Russian Federation's claims. They are acts of *ex post* rationalization since none of them are referenced in the Disclosure and some of them even postdate the Disclosure. Legal acts and anti-dumping practices of other WTO Members referred to by Ukraine are also irrelevant since they are part of internal law of other WTO Members and concern anti-dumping investigations based on the facts that are not before the Panel in this dispute.

III. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

A. Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because it failed to calculate the cost of production of ammonium nitrate in the Russian Federation on the basis of the records kept by the Russian producers of ammonium nitrate

(A) Facts of the present case are similar to those in *EU – Biodiesel*

5. The Russian Federation considers that the findings of the panel and the Appellate Body in *EU – Biodiesel* are highly relevant to the present dispute. The factual circumstances at hand are similar to those in *EU-Biodiesel*: (i) the measures concerned are anti-dumping measures; (ii) in both cases investigating authorities (1) did not allege that the records of the investigated producers were improper, flawed, or otherwise inconsistent with the generally accepted accounting principles of the exporting countries; (2) did not allege that the prices for raw materials in the records kept by the investigated producers did not represent the actual prices incurred by those producers, thus in both disputes input prices were considered as recorded correctly; (3) considered that Article 2.2.1.1 of the Anti-Dumping Agreement allows them to examine the "reasonableness" of the costs reflected in the records of the investigated producers and exporter; (4) disregarded the actual prices of raw materials, correctly reflected in the records of the investigated producers and exporters; (5) relied explicitly on the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement to justify such rejection; (6) replaced input prices actually incurred by the investigated companies with the surrogate prices of raw materials and used them in the calculation of the cost of production of the products under consideration; (7) concluded that domestic sales of the product were not made in the ordinary course of trade and the normal value had to be constructed; (8) used the cost of production of the product under consideration, and replaced the raw material prices with surrogate prices, to construct the normal value of the products; (9) used the surrogate prices for raw materials that did not represent the cost of raw materials in the domestic market of the products under consideration for their producers or

exporters; (iii) in both cases inconsistencies with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement are claimed.

6. In addition, Ukraine's reference to the Appellate Body Report in *EU – Biodiesel* into its first written submission indicates its agreement with the Appellate Body's interpretation of Article 2.2.1.1 and the application of that Article in that case.

(B) Arguments based on the analysis of prices of natural gas in the Russian Federation are irrelevant

7. The examination of the reasonableness of prices paid for input (i.e. natural gas), as well as the government regulation of prices on inputs, falls outside the scope of provisions of Article 2, in particular Articles 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement. Thus, all arguments concerning the alleged "factual differences" between the present dispute and *EU – Biodiesel* presented by Ukraine do not offer any valid reasons, let alone legal grounds for deviation from the findings of the Appellate Body in *EU – Biodiesel.*

8. Russian commitments envisaged in the Working Party Report on Russia's Accession to the WTO and corresponding arguments of Ukraine are irrelevant to this dispute and outside the Panel's terms of reference. Their consideration would be contrary to Article 3.10 of the DSU as an attempt to link several distinct matters in the same proceedings. The paragraphs of the Working Party Report cited by Ukraine do not contain a special commitment of the Russian Federation on price comparability for the purpose of anti-dumping proceedings. Any discussions and commitments reflected in these paragraphs are irrelevant for the examination of Russia's claims in the dispute at issue. In addition, Members of the Working Party on Russia's accession were satisfied with the explanations provided by the representative of the Russian Federation, including those on the pricing policies; they knew that some prices on natural gas were regulated in the Russian Federation, and agreed that some prices on gas in the Russian Federation would be regulated in the future. Reference to the Working Party Report on Russia's Accession to the WTO provided in the Disclosure is irrelevant and approach of Ukrainian authorities in reading of accession documents and evaluation of its own and Russia's regulation of prices on natural gas highlight that they were not objective during the anti-dumping proceedings on imports of ammonium nitrate from the Russian Federation.

9. The question of whether Russian gas suppliers conduct their business practice in accordance with Article XVII:1(b) of the GATT 1994 is irrelevant for this dispute. The measure at issue in this dispute is not about the business practice of Russian gas suppliers, but about the consistency of Ukraine's anti-dumping measures with the WTO Agreements. Article 2.2.1.1, as well as other provisions of Article 2 of the Anti-Dumping Agreement, do not provide a legal basis for an investigating authority's analysis of whether an investigated producer or exporter, or a supplier of raw materials to an investigated producer or exporter, is a state trading enterprise and of whether such an enterprise acts in accordance with Article XVII of the GATT 1994. The preparatory work during the Uruguay and Tokyo rounds confirm this understanding.

10. Any arguments related to the Supplementary Provision to Article VI:1 in Annex I to the GATT 1994 (the second Ad Note to Article VI of the GATT 1994) or "the particular market situation" are irrelevant to this dispute. These arguments were not considered by Ukrainian authorities while conducting underlying reviews and therefore constitute *ex post* rationalization considerations contrary to Article 17.6(i) of the Anti-Dumping Agreement.

11. Ukrainian authorities' "determination" on the gas supplier cost of production of natural gas is irrelevant and WTO-inconsistent. In the current case: (i) the product under consideration and the like product are both ammonium nitrate originating in the Russian Federation; (ii) natural gas is a raw material used to produce ammonium nitrate, and, thus, natural gas is not a like product to ammonium nitrate; (iii) the investigated producers are the Russian producers of ammonium nitrate and not the producers of natural gas; (iv) the investigated producers purchase natural gas; (v) the records of the investigated producers correctly reproduced the cost of production of ammonium nitrate including prices paid by these producers for natural gas. Taking these and the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement into account, the examination of the investigating authority should have been focused on whether the records of the investigated producers of ammonium nitrate reasonably reflect the costs *actually* incurred by them for the product under consideration, including *actual prices* paid for natural gas.

12. However, Ukrainian authorities went further and examined the reasonableness of prices for *natural gas*. In this analysis, Ukrainian authorities compared the recorded actually paid prices for natural gas with some hypothetical costs that might have been incurred under a different set of

circumstances and with gas prices in other markets. Neither Articles 2.2.1.1, 2.2.1, 2.2 nor any other disciplines (including Article 6.6) of the Anti-Dumping Agreement allow assessment of prices for inputs in determination of normal value.

13. The Russian Federation emphasizes that gas suppliers were *not* "the investigated producers" for the purpose of the anti-dumping proceedings. That means *inter alia* that the cost of production of natural gas was neither reviewed, nor commented on by the Russian gas suppliers. Finally, Ukrainian authorities erroneously presumed and in fact never determined the identity of the supplier of gas to the investigated producers of ammonium nitrate. Had Ukrainian authorities checked the identity of the suppliers of gas to the Russian exporting producers, they would have found, for instance, that they were supplied with gas by different gas producers and not just the one that was wrongly presumed by Ukraine to be the sole supplier of gas to the investigated producers. On the basis of these considerations, all Ukraine's arguments, reasons and evidence related to the costs of production of natural gas in the Russian Federation shall be rejected.

14. Moreover, Ukraine's characterization of government regulation of natural gas prices and its alleged effect is irrelevant to the settlement of this dispute since Article 2.2.1.1 of the Anti-Dumping Agreement does not allow to examine government regulation and its effect. Instead it prescribes examination of the quality of records of "the exporter or producer under investigation" and the proper allocation of costs. This is in line with the general concept of dumping which "relates to the pricing behavior of exporters or foreign producers".[1]

15. By characterizing the government regulation at issue as alleged "direct intervention", Ukraine tries, on the one hand, to downplay the situation in Argentina explored in *EU – Biodiesel*, and, on the other hand, to exaggerate the situation in the Russian Federation. The situation in Argentina cannot be even compared with the regulation of some prices for natural gas in the Russian Federation. While price regulation and export duties are both government regulations, Article 2.2.1.1 of the Anti-Dumping Agreement does not require any analysis related to government regulation, including its nature (whether it is direct or not), thus rendering such determination irrelevant for the present dispute.

16. As to evaluation of the alleged effect of the government regulation of prices on natural gas in the Russian Federation in comparison to the regulation analyzed by the panel in *EU-Biodiesel*, the EU authorities, contrary to Ukraine's allegations, were able to measure the effect of government regulation quite precisely.

(C) Arguments based on footnote 400 of the panel report in *EU – Biodiesel* are irrelevant and legally flawed

17. In its search for the legal basis justifying its measures, Ukraine attempts to invoke footnote 400 of the panel report in *EU – Biodiesel*. First, its reference to this footnote, as well as to paragraphs of the Appellate Body Report that refer to footnote 400, is an act of *ex post* rationalization, and therefore should be rejected in its totality. Second, neither "non-arm's length transactions" nor "other practices" in footnote 400 of the panel report in *EU – Biodiesel* can be qualified as "legal exceptions" from application of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement. The Anti-Dumping Agreement under no circumstances permits measures inconsistent with its provisions, since there are no exceptions in this Agreement like, for example, general exceptions in the GATT 1994. Third, footnote 400 of the panel report in *EU – Biodiesel* constitutes o*biter dictum*, since neither the Appellate Body, nor the panel made any particular affirmative findings based on substantive statements of this footnote. Therefore footnote 400 of the panel report in *EU – Biodiesel* does not constitute legal basis in a manner Ukraine claims it to be.

18. In addition, Ukraine arguments based on the "arm's length" test for determination of normal value are irrelevant for several reasons, including: (i) Article 2.2.1.1 of the Anti-Dumping Agreement does not contain an additional, third, condition that would permit an investigating authority to use this test; (ii) its applicability will be contrary to what Article 2.2.1.1 prescribes, i.e., comparison between the costs reported in the records kept by the investigated producers and the costs actually incurred by that investigated producer; (iii) the context of Article 2.2.1.1 (including the text of Article 2.3) does not support Ukraine's position either; (iv) its application contradicts the Appellate Body's ruling that the examination of the reasonableness of costs is not permitted under Article 2.2.1.1 of the Anti-Dumping Agreement; (v) it ignores that dumping arises

[1] Appellate Body Report, US – Zeroing (Japan), para. 156 (referring to Appellate Body Report, US – Zeroing (EC), para. 129).

from the pricing behaviour of an exporter of the product under investigation, and not of a third party (producer of input).

19. Moreover, the suggested by Ukraine definition of an arm's length transaction shall not be accepted. The suggested analysis of government regulation of prices of inputs as well as of producers of inputs and their business structure and operation, the cost of production of inputs would result in a violation of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement. Also, Ukraine relies on definitions from the *auditing standards, international and those of the US*, while Article 2.2.1.1 of the Anti-Dumping Agreement concerns generally accepted *accounting principles of the exporting country*, i.e. the Russian Federation in this case.

20. In its argumentation on the relevance of Article 2.3 of the Anti-Dumping Agreement, Ukraine ignores the functional and textual differences between Articles 2.2.1.1 and 2.3 of the Anti-Dumping Agreement. While Article 2.3 governs the methodology for determining the export price, Article 2.2.1.1 concerns the calculation of the cost of production for determination of the normal value. Provisions of Article 2.2.1.1 and Article 2.3 contain different obligations and address different issues, and should not be mixed up. In particular, Article 2.2.1.1 does not include the terms "unreliable", "independent buyer". The absence of such wording in Article 2.2.1.1 and other provisions relevant to the determination of normal value also indicates that Article 2.3 should not be considered as the relevant context for interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.

21. Ukraine's arguments on "other practices" are not relevant either. Consistently with the well-established *ejusdem generis* canon of construction, the category of "other practices" should be understood as encompassing only such practices as are of the same kind as those preceding this phrase in footnote 400 of the panel report in *EU – Biodiesel*. Thus, the immediate context of the phrase suggests that the words "other practices" should be understood as reporting and business practices, i.e. the reporting practices of the investigated producers or exporters, but not as practices of governments. This is confirmed by the conclusion of the panel in *EU – Biodiesel*, in which it emphasized that records should adequately report the actual costs incurred by the particular producer or exporter for the product under consideration.[2]

(D) Ukraine's arguments based on the interpretation of the word "normally" in Article 2.2.1.1 of the Anti-Dumping Agreement are irrelevant and legally flawed

22. Ukraine cannot rely on the word "normally" in Article 2.2.1.1 of the Anti-Dumping Agreement as all such arguments constitute *ex post* rationalization. Furthermore, there is a limited number of explicit provisions that would allow investigating authorities in the course of normal value determination to disregard costs reflected in investigated producers' and exporters' records (when both conditions of the first sentence of Article 2.2.1.1 are satisfied) when determining the normal value. The exhaustive list of such provisions is: the third sentence of Article 2.2.1.1 of the Anti-Dumping Agreement and its footnote 6; Article 2.7 of the Anti-Dumping Agreement and the incorporated second Ad Note to Article VI:1 of the GATT 1994; special commitments on price comparability in the accession protocols of certain Members. None of them apply in the present case.

23. In this regard, the panel's interpretation of the term "normally" in *China – Broiler Products* is problematic, as not being balanced since it put more weight on the side of an investigating authority and should not be used. Also, there is no need to outreach to the *US – Clove Cigarettes* on the applicability of the TBT Agreement in order to examine the term "normally" in its ordinary meaning in Article 2.2.1.1 of the Anti-Dumping Agreement. The relevant context, namely Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 support this understanding.

24. As to the interpretation of the term "appropriate proxy" in paragraph 6.24 of the Appellate Body Report in *EU – Biodiesel*, the Russian Federation submits that "the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country" means that an investigating authority is required to establish as accurately as possible the price of the like product in the domestic market.

25. In their examination of the records kept by the Russian investigated producers and exporters Ukrainian authorities were biased and not objective. There was no legal reason to reject prices of natural gas. Ukraine acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-

[2] Panel Report, *EU – Biodiesel*, para. 7.232.

Dumping Agreement as Ukrainian authorities failed to calculate the cost of production of ammonium nitrate on the basis of the records kept by the investigated producers and exporters of ammonium nitrate.

B. Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement by replacing (adjusting) gas prices actually paid by the Russian investigated producers and exporters with data outside the Russian Federation, and using such data subsequently for construction of the normal value

(A) Any ruling based on Article 14(d) of the SCM Agreement is not applicable to the present dispute

26. Contrary to Ukraine's suggestion, neither Article 14(d) of the SCM Agreement, nor reasoning, interpretations and findings by the panel and the Appellate Body in *US – Softwood Lumber IV* apply to this dispute. There is no legal basis for the inclusion of obligations of Article 14(d) of the SCM Agreement into the framework of Article 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. These provisions use entirely different terminology, different structure, and different wording. The primary focus of determining a subsidy under the SCM Agreement lies in the analysis of a government's actions, while the rules on determination of dumping stipulated by Article 2 of the Anti-Dumping Agreement are focused on "the foreign producer's or exporter's pricing behavior". Suggested applicability of Article 14(d) of the SCM Agreement is contrary to the intention of drafters to treat different problems differently with different instruments. Had the drafters intended so, they would have made an explicit reference or incorporated a similar wording in these articles of the Anti-Dumping Agreement.

27. Accordingly, the approach advocated by Ukraine, if adopted, would culminate in the extension of rights of importing Members at determining dumping and diminishment of rights of the exporting Members. As a result, Ukraine's approach towards the applicability of inferences made from Article 14(d) of the SCM Agreements is against Article 2 of the Anti-Dumping Agreement and Article 3.2 of the DSU.

(B) Ukrainian authorities did not use the cost of production in the Russian Federation when constructing the normal value of ammonium nitrate

28. Ukraine improperly interprets the claim of the Russian Federation under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement limiting it only to the "use of out-of-country evidence". This claim is, however, broader as Ukraine violated the said provisions because: 1) gas prices were taken not from the records of the investigated producers of ammonium nitrate, but from outside the country of origin, namely at German/Czech border (Waidhaus) as Ukraine explained; 2) Waidhaus gas price is not the "costs associated with the production and sale of the product under consideration"; and 3) Waidhaus gas price, with or without adjustment for transportation costs, does not reflect natural gas prices available for producers of ammonium nitrate in the Russian Federation. Thus, Ukraine's construction of normal value is not based on "the cost of production [of ammonium nitrate] in the country of origin", i.e.in the Russian Federation.

29. Ukrainian authorities violated Articles 2.2.1.1 and 2.2 when they substituted natural gas prices reflected in the investigated producers' records with the natural gas price at the German/Czech border and used this surrogate price in the calculation of the cost of production and then in the construction of the normal value of ammonium nitrate. There were no legal reasons for such substitution and the use of out-of-country price in these calculations.

30. Even if in a hypothetical case when records kept by Russian producers and exporters were not in compliance comply with the requirements of Article 2.2.1.1 of the Anti-Dumping Agreement or investigated producers had not cooperated and Ukrainian authorities had failed have *any* data about the prices paid by investigated producers of ammonium nitrate for natural gas, Ukrainian authorities should also have resorted first to the gas prices in the Russian Federation. The Appellate Body explained in *EU – Biodiesel* that "in-country evidence" is the preferred source of information after an examination of the records of the investigated producers and exporters. A resort to the information obtained outside the country of origin is limited to certain circumstances listed by the Appellate Body where there is *a need* to analyze or verify the information in the records kept by the exporter or producer under investigation using documents, information, or evidence from other sources, including from sources outside the 'country of origin'.[3] In any event, such information shall reflect the cost of production in the country of origin.

[3] Appellate Body Report, *EU – Biodiesel*, paras. 6.70-6.71, fn 228.

31. Ukraine's resort to out-of-country evidence in the anti-dumping proceedings on imports of ammonium nitrate clearly constitutes a violation of Article 2.2 of the Anti-Dumping Agreement.

(C) Ukraine failed to adapt price of Russian gas at the Germany/Czech border in order to arrive at the "cost of production in the country of origin"

32. There were no legal reasons to reject in-country prices of Russian natural gas and resort to out-of-country price for natural gas. Without prejudice to this position, while resorting to out-of-country price, Ukraine failed to adapt the gas price at the German/Czech border to arrive at the cost of production of ammonium nitrate in the country of origin. The price at Waidhaus more than three times exceed the price actually paid by the Russian investigated producers and was several times higher than other gas prices in the domestic Russian market. In fact, Ukrainian authorities used the price at the Germany/Czech border *specifically* because it did not reflect the gas price within the domestic market of the Russian Federation, which mirrors the investigating authorities' decision that took place in *EU – Biodiesel.*[4] All these factors also show that Ukraine did not intend to adapt the information from outside the country in order to arrive at the "cost of production in the country of origin*".*

33. In their calculations of the cost of production of ammonium nitrate and the consequent construction of its normal value, Ukrainian authorities were biased and not objective. They replaced gas prices in the records of the investigated producers with prices outside of country of origin in a situation when the records of the investigated producers must have been used for the calculation of the cost of production of ammonium nitrate. The surrogate price for natural gas used by Ukrainian authorities in its calculations did not reflect actual prices of natural gas in the Russian Federation. The surrogate price for natural gas was neither "the cost[] associated with the production … of the product under consideration" nor "the cost of production [of the product under consideration] in the country of origin" because it was not the price of natural gas in the Russian Federation. The Russian Federation reiterates that Ukraine acted inconsistently with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

C. Ukraine violated Article 2.2.1 of the Anti-Dumping Agreement

34. Ukrainian authorities violated Article 2.2.1 by improperly calculating the cost of production of ammonium nitrate and disregarding sales that are not below-costs. Prior to disregarding sales of the like products Ukraine failed to establish that they were: i) below cost in substantial quantities; ii) made at prices which do not provide for the recovery of all costs within a reasonable period of time; iii) made within an extended period of time. Contrary to Ukraine's objection to the scope of the claim, Ukrainian authorities understood the content of the arguments of the Russian Federation correctly.

35. The Russian Federation submitted that had Ukrainian authorities conducted such analysis by considering all three criteria prescribed by Article 2.2.1 of the Anti-Dumping Agreement, the result would have been legally flawed anyway since using the costs inflated due to the use of the surrogate gas price would inevitably distort the results of the ordinary course of trade test.

36. Ukrainian authorities' allegations that they complied with the "substantial quantities" requirement and the "extended period of time" requirement under Article 2.2.1 of the Anti-Dumping Agreement are misleading. Ukrainian authorities did not establish a "weighted average selling price" of ammonium nitrate. The Disclosure does not indicate that Ukrainian authorities carried out the respective analysis. Accordingly, any allegations made on the establishment of the "weighted average selling price", including fulfilment of "substantial quantities" and "extended period of time" requirements are incorrect. Compliance with these obligations cannot be implied.

37. Contrary to Ukraine's assertion, the Russian Federation does not need to "demonstrate that lower costs would have resulted in a finding that unit sales prices would have been above those lower costs" to prove a violation of Article 2.2.1 of the Anti-Dumping Agreement. Under Article 2.2.1, Ukrainian authorities should have conducted the ordinary course of trade test by reason of price based on costs of production reflected in the records kept by investigated producers and exporters. They failed to do so.

[4] See Appellate Body Report, *EU – Biodiesel*, paras. 6.81-6.83 (quoting Panel Report, *EU – Biodiesel*, para. 7.258).

D. Ukraine violated Article 2.4 of the Anti-Dumping Agreement

38. Being a logical progression of obligations under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, the first sentence of Article 2.4 mandates an investigating authority to apply these provisions in a way to ensure the fair comparison between the normal value and the export price. As a result, Russian Federation's claim under Article 2.4 should not be reduced to the issue of adjustments under the third sentence of Article 2.4 of the Anti-Dumping Agreement. The comparison of the actual export price with the inflated normal value constructed on the basis of WTO-inconsistent calculation of the costs of production resulted in the dumping margin at rate 82.2%. This margin is self-explanatory in contrast with the negative dumping margin in the absence of cost adjustments.

39. Ukraine violated the obligation in the first sentence of Article 2.4 of the Anti-Dumping Agreement because it failed to make a fair comparison between the export price and the constructed normal value by improperly calculating constructed normal value for ammonium nitrate produced in the Russian Federation.

E. Ukraine violated Article 2.1 of the Anti-Dumping Agreement

40. There are compelling reasons for the Russian Federation to request the Panel to consider the claim under Article 2.1 of the Anti-Dumping Agreement and make a separate finding on the violation by Ukraine of its obligations under this Article. Nothing in the text of Article 2.1 represents an obstacle to this. Besides, such a fundamentally important provision, determinant for the entire Anti-Dumping Agreement, cannot be relegated to the level of "context" precluding the Panel from issuing a separate finding on it. This finding will positively affect the stage of implementation of the Panel's recommendations as the nature of the violation predetermines responding party's actions to eliminate it.

41. Ukrainian authorities should have determined the dumping margin by comparing the export price with the comparable price of the like product destined for consumption in the exporting country, i.e. the Russian Federation. Yet, they compared the export price with constructed normal value and, thus, determined the normal value in violation of Article 2.1 of the Anti-Dumping Agreement.

IV. CLAIMS REGARDING INCLUSION OF A RUSSIAN PRODUCER WITH NEGATIVE DUMPING MARGIN INTO THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS – UKRAINE ACTED INCONSISTENTLY WITH ARTICLES 5.8, 11.1, 11.2 AND 11.3 OF THE ANTI-DUMPING AGREEMENT

A. The Panel Request properly identifies the contested measures

42. Ukraine maintains its position that only the 2014 Decision was identified as a measure at issue in the Panel Request. However, the text of the Panel Request refers to the anti-dumping measures "in relation to" or "relating to" the interim and expiry reviews including, thus, the 2008 Decision, as amended by the 2010 Decision and later extended through the 2014 Decision.

43. Read in its entirety, the second sentence of the Panel Request further supports this understanding. Not only does this sentence cite "any and all annexes, notices, communications and reports of [MEDTU] and any amendments thereof," but it also mentions other decisions in footnote 2. Ukraine unconvincingly attempts to refute the relevance of footnote 2 by arguing that challenged measures are supposed to be mentioned in the main body of a panel request. This position is at odds with the Appellate Body's postulate requiring to "consider[] the panel request as a whole."[5] By the same token, the reference to the 2010 Decision in footnote 3 of the Panel Request disproves Ukraine's argument.

44. Contrary to its allegation, Ukraine has been able to identify the 2008 and 2010 Decisions and to comment on the claims made by the Russian Federation. Thus, Ukraine's ability to defend itself has not been impaired.

B. Ukraine found that JSC MCC EuroChem was not dumping and correspondingly failed to exclude this exporter from the definitive anti-dumping measure

45. The Russian Federation is challenging Ukraine's decision to impose a 0% anti-dumping duty on JSC MCC EuroChem through the 2010 Decision under Article 5.8. Whereas Ukraine committed an independent breach of Articles 11.1, 11.2 and 11.3 by including this exporter into the underlying reviews and by adopting the 2014 Decision in respect of JSC MCC EuroChem.

[5] Appellate Body Report, *US – Carbon Steel*, para. 127.

46. As per Ukraine's submission, the 2010 Decision does not amount to a legal finding that JSC MCC EuroChem's dumping margin was negative, zero, or *de minimis*. Rather, its anti-dumping duty rate was set equal to 0%. But Ukraine overlooks the combined effect of Ukrainian courts' judgments modifying the dumping margin rate for JSC MCC EuroChem to be *de minimis*. As a result, Ukraine should have excluded this Russian producer from any subsequent review and from any extension of the measures as follows from *Mexico – Anti-Dumping Measures on Rice*.[6] Ukraine is precluded from invoking its national law to justify the allegedly improper decisions of its authorities, including those related to the acceptance of evidence.

47. For all these reasons, the Russian Federation maintains that Ukraine violated Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement by failing to terminate the anti-dumping measures in respect of JSC MCC EuroChem and unlawfully including it in the underlying reviews.

V. SUBSTANTIVE CLAIMS RELATING TO THE LIKELIHOOD OF INJURY DETERMINATION

A. Ukraine has not substantiated its likelihood of injury determination in violation of Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement

(A) Applicable legal standard

48. The Russian Federation contends that any injury analysis in anti-dumping proceedings is strictly governed by the Anti-Dumping Agreement. Ukraine's attempt to escape the obligations stemming from the Anti-Dumping Agreement is undermined by the proper interpretation of case law. If an investigating authority in its own judgement decides to make an examination falling under the scope of Article 3, "then it would be bound by the relevant provisions of Article 3 of the Agreement".[7] Even beyond this finding, Article 11.3 of the Anti-Dumping Agreement alone requires the investigating authority to act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination, to base its determinations on "positive evidence" and an "objective examination".

(B) Ukraine made a determination on the likelihood of continuation of injury

49. According to the Disclosure Ukrainian authorities made a determination regarding the likelihood of *continuation* of injury which was consisted of two steps. Ukraine, firstly, determined the present state of the domestic industry as to whether the injury was eliminated or not; and, secondly, conducted prospective analyses of what happens should the anti-dumping measures lapse. These logical steps taken by Ukrainian authorities culminate in the understanding that they had examined the present state of the domestic industry and made a conclusion that there was injury.

50. Ukraine's usage of a different terminology, i.e. *recurrence of injury* is deceiving. Ukraine tries to convince that Ukrainian authorities determined that Ukrainian producers did not completely recover from the injury established in the original investigation. However, this allegation does contrast with the actual determination that Ukrainian industry was suffering from the material injury caused by dumped imports. Additionally, Ukraine's reasoning that its authorities made a determination regarding the recurrence of injury are *ex post* rationalization and should be rejected in their totality.

(C) Evaluation of economic factors and indices having a bearing on the state of the Ukrainian domestic industry was not based on an "objective examination" of "positive evidence"

51. Ukraine made affirmative determination on the likelihood of continuation of injury predominantly on the basis of decreased profitability, ignoring the positive trends in other economic factors and indices. Despite Ukraine's emphasis on the dramatic drop in profitability of the domestic industry, Ukrainian authorities failed to conduct an objective and unbiased analysis of increase of gas costs and its influence on the state of the domestic industry. Ukraine failed to exclude imports of the Russian producer with negative dumping margin from the volume of "dumped" imports.

52. Ukraine's inclusion of imports attributable to the producer with negative dumping margin into the volumes of dumped imports in the likelihood-of-injury determination breaches Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement as not based on "positive evidence".

[6] Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, para. 305.
[7] Panel Report, US – Oil Country Tubular Goods Sunset Reviews, para. 7. 274.

As a corollary, conclusions made on the basis of this incorrectly established volume of "dumped" imports do not qualify as "objective assessments". The Russian Federation wishes to underline that the producer with negative dumping margin was the main exporter of the product under consideration to Ukraine. Thus, the inclusion of non-dumped imports into injury analysis has infected the *overall conclusions* on the likelihood of continuation of injury.

53. Ukraine made finding on the continuation of injury analysis, in such finding its evaluation of economic factors and indices having a bearing on the state of Ukrainian domestic industry was not based on an "objective examination" of "positive evidence". As a result, Ukraine made the likelihood of injury determination in violation of Articles 11.1, 11.2, 11.3 of the Anti-Dumping Agreement.

VI. PROCEDURAL ISSUES AND CLAIMS

A. Ukraine committed several procedural violations of its obligations under Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement

54. Contrary to Ukraine's argument that Article 6.8 of the Anti-Dumping Agreement and provisions of Annex II do not apply to the present case, MEDTU *de facto* referred to facts available when it rejected the "first-best" information from records of the investigated producers and used the surrogate price of natural gas. The analogies between Article 2.2.1.1 governing the calculation of costs and Article 2.3 governing the determination of export price[8] drawn by Ukraine are unfounded and do not affect the applicability of Article 6.8 of the Anti-Dumping Agreement.

B. Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement by not disclosing the essential facts

55. Contrary to Ukraine's contention, the Russian Federation has established a *prima* facie case by explaining in its submissions why the data redacted in Tables 11.3.1-11.3.6 of the Disclosure and the formulas on the calculation of normal value and dumping margin are "facts on the record," which formed "the basis for the decision" to apply anti-dumping measures. By virtue of these properties, these are essential facts in the sense of Article 6.9 of the Anti-Dumping Agreement.

56. The Russian Federation's claim under Article 6.2 of the Anti-Dumping Agreement is not consequential to that of Article 6.9. Even if certain information is not regarded as essential facts to be disclosed under Article 6.9, its disclosure still can be a subject to the Article 6.2 broader obligation to provide interested parties with a full opportunity to defend their interests.

57. In its attempt to justify the violations of Articles 6.9 and 6.2 of the Anti-Dumping Agreement, Ukraine relies on the alleged confidentiality of the data concerned. By substantiating its response to Ukraine's arguments on the legal provisions invoked by the responding party, *i.e.* Article 6.5 and 6.5.1 of the Anti-Dumping Agreement, the Russian Federation enjoys its due process rights requiring equal opportunities to be provided for both parties during dispute settlement. In given circumstances, the departure from this rule is not warranted since a non-compliance with Article 6.5.1 may trigger a breach of obligations under Articles 6.2 and 6.9.

58. Either way, Ukraine is barred from relying on the confidentiality explanation with regard to the aggregate data included in Tables 11.3.1-11.3.6 of the Disclosure, i.e. that four producers which filed a collective confidentiality request belong to one group, as it is merely *ex post* rationalization proffered by Ukraine first during these proceedings before the Panel and not known during the anti-dumping investigation at hand. Requests, if any, were sent by the Ukrainian producers in their own name, and yet they did not indicate reasons that would amount to good cause. The reasons presented in Exhibit UKR-51b, are nothing but a repetition of the general definition of confidential information under Article 6.5 of the Anti-Dumping Agreement that does not cover the aggregate data *per se*.

59. Ukraine did not provide an effective non-confidential summary as it is absolutely impossible to derive any conclusive findings from the relevant figures given in the Disclosure.

C. Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by not providing sufficient time to comment on the Disclosure and refusing to accept comments duly submitted by the Russian investigated producer

60. All arguments and explanations provided by Ukraine do not justify the imposition of the 2-days period for comments on the Disclosure. The complexity of the issues involved in the

[8] Ukraine second written submission, para. 170.

investigation rendered it impossible to derive any incorrectness or mistakes effectively within 2 days from the document in the foreign language for the Russian producers. The fact that the data used in the Disclosure was provided by the Russian producers in their replies to the questionnaires before circulation of the Disclosure is irrelevant as they could not be expected to know which information is essential for the investigation.

61. The Russian Federation upholds its claims regarding several procedural violations of WTO law committed by Ukraine in the course of the underlying reviews. Specifically, Ukraine breached Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement be-cause its decision to resort to facts available was unfounded. Ukraine's failure to disclose essential facts, harmful for interested persons' rights, is contrary to Articles 6.2 and 6.9 of the Anti-Dumping Agreement. Last but not least, Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement when it set the 2-days period for comments on the Disclosure.

VII. OTHER CLAIMS

A. Ukraine breached Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement

62. Claim under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement fall within the Panel's terms of references since they have naturally evolved from the claim under Article 6.9 as laid down in the Request for Consultations. Article 6.9 and Articles 12.2 and 12.2.2 do not categorically differ as far as the scope of the obligation, the time of disclosure (both obligations are triggered when an investigating authority takes or is about to take a final decision) and their purposes are concerned. As a result, this comparability amounts to "at the very least, some connection" that would suffice to establish that the claim in the Panel Request has evolved from the one set out in the request for consultations without changing the essence of the claim.

63. In addition to that, the claim is not strictly confined to "the lack of disclosure in respect of the dumping margin calculation" as Ukraine suggested, but to the full set of circumstances implied in the text of the claim in the Panel Request. The last sentence, singled out by Ukraine, is not a substitution but, rather, an exemplification of what the claims are. Finally, Ukraine may not rely on this objection to the scope of the claims at bar as it raised this argument at later stages of dispute settlement.

B. Ukraine violated Articles 1, 18.1 of the Anti-Dumping Agreement and Article VI of the GATT due to its WTO-inconsistent behaviour described above

64. Ukraine falsely asserts that a dependent character of the claim under Articles 1 and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 renders it manifestly unfounded in law. Russian Federation's claim is substantiated as the measures imposed on imports of ammonium nitrate from Russia are not specific actions against dumping that are in accordance with the GATT 1994, as interpreted by the Anti-Dumping Agreement.

ANNEX B-4

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATION

A. Claim 1 (Claim 10 of the Panel Request): Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because, in determining the constructed normal value, it failed to calculate costs on the basis of records kept by the Russian producers and exporters, even though the costs associated with the production and sale of ammonium nitrate were accurately and reasonably reflected in the Russian exporters' and producers' records that were in accordance with the generally accepted accounting principles of the country of origin and exportation (RF SWS section 1)

1. As Ukraine has explained in its First Written Submission and subsequent documents, the normal value calculation contained in the disclosure document and underlying documents provided a coherent explanation of the reasonable reflection of the costs associated with the production and sale of the product under consideration which justified the conclusion that the reliability of the reported costs had been affected.

2. Ukraine therefore submits that MEDT of Ukraine acted in accordance with the Anti-Dumping Agreement when it calculated the cost of gas in the Russian Federation and determined the reliability of the reported costs. The Appellate Body in *EU – Biodiesel* did not consider that the reliability of the records should necessarily be taken at face value when determining whether records reflect the costs.[1] On the contrary, an investigating authority has discretion within the factual context to examine non-arm's length transactions and other practices.[2] Ukraine also notes that the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement suggests that the investigating authority is in fact invited to examine all relevant evidence. Therefore, the assertion by the Russian Federation that an investigation into the reliability of the costs is somehow off-limits is contrary to the text of the provision and contrary to the text of the clarifications by the panel and the Appellate Body in *EU – Biodiesel*. Furthermore, in the context of the Anti-Dumping Agreement, "costs" means real economic costs involved in producing the product in the exporting country and not simply the amount reflected on an invoice.

3. Consequently, MEDT of Ukraine did properly examine the reliability of the reflection of the costs in the records, in accordance with the guidance of the Appellate Body, and found that these records did not completely reflect the costs of gas after a thorough investigation of all evidence before it. MEDT of Ukraine found that the domestic gas prices were regulated by the Government, were artificially lower than prices in genuine free markets, and were below cost. These are all consequences of the dual pricing system of gas in the Russian Federation. As for the suggestion that MEDT of Ukraine conducted a '*reasonableness*' inquiry,[3] this does not comport with the disclosure document (Exhibit RUS-10). As witnessed on pages 21 through 23 of that document, MEDT of Ukraine did properly examine the *reliability* of the reflection of the costs in the records.

4. The Russian Federation is attempting to defy the clarifications by the panel and Appellate Body in *EU – Biodiesel* by either ignoring it, misinterpreting it or considering it an *obiter dictum*. The Russian Federation's qualification of footnote 400 of the panel report as *obiter dictum* is absurd and inconsistent. Footnote 400 does not deviate from the examination of the panel in paragraphs 7.220 to 7.247 and contributes to the panel's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement. Hence, paragraphs 7.220 to 7.247, including the footnotes to these paragraphs, constitute, as a whole, the panel's legal analysis of the second condition of Article 2.2.1.1, which was essential to settle the dispute.

[1] Appellate Body Report, *EU – Biodiesel,* para. 6.33.
[2] Appellate Body Report, *EU – Biodiesel,* para. 6.41.
[3] The Russian Federation's response to Panel question No. 7, para. 11, fourth sentence.

5. Ukraine thus maintains that the domestic gas prices in the Russian Federation were not at arm's length and could therefore be disregarded by MEDT of Ukraine. In similar vein, Ukraine submits that this governmental set of circumstances is a "practice" which is "other" than what happens in a marketplace driven by supply in demand, and that this centrally dictated fixed price affects the reliability and accuracy of the costs as reported in the records of a producer or exporter. Ukraine finds that it does not need to get to the discussion of 'normally' since the particular situation of the investigated Russian exporting producers already falls squarely in one of the two regular exceptions discussed earlier (non-arm's length or other practices). However, should the Panel deem it useful, Ukraine will be pleased to discuss this.

6. Contrary to what the Russian Federation holds, the fundamental differences between the *EU – Biodiesel* case and the case at hand make it impossible to merely transplant the factual findings of *EU – Biodiesel* to the case before us. The first difference between the two cases is the governmental regulation of gas prices in the Russian Federation, which was confirmed by the Working Party Report of the Russian Federation's accession. The Working Party Report illustrates the specific circumstances on the Russian gas market, that led MEDT of Ukraine to the finding that the gas prices in the Russian Federation's internal market are not at arm's length and are the result of 'other practices'. This report is used as a factual basis and therefore falls within the scope of this dispute. In addition to this, the second *Ad Note* to Article VI:1 GATT serves as relevant context to interpret Article 2.2.1.1 of the Anti-Dumping Agreement and stipulates that price comparability may be difficult when domestic prices are fixed by the State.[4] Both the Working Party Report and the Second *Ad Note* point to the WTO incompatibility of the Russian Federation's dual pricing system for gas, which is in stark contrast to the export duty imposed in Argentina.

7. MEDT of Ukraine did not need to investigate whether prices of other suppliers were also fixed pursuant to the national legislation since it found that Gazprom was the main and sole supplier of gas for all the Russian producers of ammonium nitrate. Additionally, out of all the relevant exporting producers from the Russian Federation: Uralchem did not export, EuroChem wanted all its answers to be disregarded and the financial statements mentioned that Dorogobuzh purchased all gas volumes from Gazprom.

8. The second difference lies in the fact that, contrary to the Argentine prices, the Russian prices for gas are below cost. The Russian Federation accuses Ukraine of misrepresenting and generalising the facts on the record. The facts however demonstrate that MEDT of Ukraine analyzed thousands of pages of evidence, including those contained in Exhibit UKR-1 and UKR-2. On the basis of a careful and balanced analysis, MEDT of Ukraine produced a concise disclosure document (Exhibit RUS-10) in excess of forty pages, with ten pages exclusively devoted to the normal value determination.

9. Initially, MEDT of Ukraine did not ask for detailed information on gas suppliers, because the sheer size and consequences of the distorted gas costs only surfaced after the submission by the Russian producers of the answers to the questionnaires on 26 November 2013. However, after analysis of the answers to the questionnaires of the Russian producers, as well as additional documents submitted by them, MEDT of Ukraine identified that in fact there were no Russian producers to which it *could* have *directly* sent further requests on gas suppliers. [[***]]% of the exports from the Russian Federation came from EuroChem and this company had already formally requested that MEDT of Ukraine should disregard all its answers. Despite this position, MEDT of Ukraine still conducted a thorough examination and presented a well-reasoned explanation of its actions and findings in its disclosure.

10. Ukraine submits that the third difference with the *EU – Biodiesel* case is that in *EU – Biodiesel*, the domestic prices for *biodiesel* (the finished product) were regulated.[5] For that reason the European Union found that the domestic sales of biodiesel were not made in the ordinary course of trade, hence resorted to constructed normal value and only then started to doubt the raw material costs.[6] This sharply contrasts with the situation before us, where the price of the *main raw material* was fixed by the Russian State and which was the trigger to examine the raw material costs, *ab initio*. Furthermore, the price of the main raw material in *EU – Biodiesel* was not

[4] Panel Report, *EU – Biodiesel*, para. 7.241.

[5] Russian Federation's Second Written Submission, paras. 139 and 140, quoting AB in *EU – Biodiesel,* para. 5.4.

[6] Ibid.

regulated. In contrast to the situation in Argentina, gas prices in the Russian Federation were the immediate consequence of governmental price setting.

11. Lastly, the fourth difference is that the impact of the fixed price of gas is measurable and significant, in contrast to the impact of an export duty. It is important to note that the percentages of export taxes are not the same as measuring the actual effect of those taxes on soybean prices. In light of the above, Ukraine submits that it is clear that the factual findings of the *EU – Biodiesel* case cannot be applied to the case at hand.

B. Claim 2 (Claim 11 of the Panel Request): Ukraine acted in breach of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because it replaced (adjusted) the costs of gas actually borne by the Russian producers and exporters for production of ammonium nitrate with data on the gas prices outside the Russian Federation, in particular at the border with Germany, that did not reflect the costs of production in the country of origin, and used such prices subsequently for constructing the normal value (RF SWS Section 2)

12. Ukraine submits that the Russian WTO-inconsistent dual pricing system of gas is at the root of the distortion. After having determined that under these circumstances, the accounting records of the companies did not reliably reflect the costs of gas, MEDT of Ukraine needed to properly rectify these records. By contrast, the approach suggested by the Russian Federation, namely accepting the records as they are, would lead to distorted results.

13. According to the Panel and the Appellate Body in *EU – Biodiesel*, "in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence"[7] as long as, "whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin'."[8] The fact that the real cost of the gas is significantly higher than the fixed domestic price within the Russian Federation does not mean that this disqualifies the evidence from outside the country. On the contrary, as Ukraine mentioned in its First Written Submission, the Appellate Body has proffered sound criteria and suggestions to make the required judgment calls in situations such as these. Ukraine acted in line with that guidance.

14. Ukraine submits that the reasoning of the Appellate Body in *US – Softwood Lumber IV* and further developed in the anti-dumping context in *EU – Biodiesel* is compelling. In very specific and unique circumstances, such as the one that MEDT of Ukraine was facing, interpretation must be given to a legal concept in light of economic facts that underpin it. In this case, no unaffected domestic market in the Russian Federation existed due to the demonstrated direct and pervasive intrusion of the State. Hence, Ukraine finds that this was imperative to search for an outside benchmark, duly adjusted, to supply objective evidence of the costs of gas in the Russian Federation.

15. Ukraine therefore intentionally used an undistorted price of Russian gas and then adapted that price to the local level. The average Russian gas price at Waidhaus was USD 426, which was properly 'adapted' back to the price level at the Russian border, i.e. USD 396 in line with the Appellate Body guidance concerning Article 2.2 of the Anti-Dumping Agreement.

C. Claim 3 (Claim 9 of the Panel Request): Ukraine violated Article 2.2.1 of the Anti-Dumping Agreement because it improperly treated domestic sales of ammonium nitrate in the Russian Federation as not being in the ordinary course of trade and disregarded these sales in determining the normal value (RF SWS Section 3)

16. Ukraine submits that MEDT's of Ukraine determination on the ordinary course of trade complied with Article 2.2.1 of the Anti-Dumping Agreement, footnote 5, and with the explanation accorded to Article 2.2.1 in *EC – Salmon.* In paragraph 7.238 of *EC – Salmon* the panel clarified that "the "determination" that below-cost sales are made "within an extended period of time" does not call for the investigating authority to "determine" the "extended period of time" itself, but only

[7] Ibid.
[8] Ibid.

that the below-cost sales in question are made within a period of time that is normally one year but no less than six months." In the case before the Panel, the period of time that was used was the Review Investigation Period (RIP) (which was one year). Ukraine submits that this period fully qualifies as an extended period of time in the sense of footnote 4 of the Agreement.

17. In paragraph 7.239 of *EC – Salmon,* the panel confirmed that footnote 5 of the Anti-Dumping Agreement explains that below-cost sales may be considered to be "made in substantial quantities" when an investigating authority establishes that the "weighted average selling price" of the below-cost sales at issue is less than the "weighted average per unit costs". This is exactly what MEDT of Ukraine did.

18. In paragraph 7.275 of *EC – Salmon,* the panel clarified that all sales not found to be above weighted average cost for the period of investigation *do not* provide for the recovery of costs within a reasonable period of time. By finding that the weighted average selling price was below the weighted average unit cost, MEDT of Ukraine made exactly this determination on pages 25, 26 and 27 of the disclosure document.

19. It is abundantly clear therefore that by meeting all three relevant conditions of Article 2.2.1 of the Anti-Dumping Agreement, Ukraine has respected the requirements of the ordinary course of trade test.

20. Article 2.2.1 should in any event not be relegated to the realm of a consequential violation, should an inconsistency with Article 2.2.1.1 somehow be determined.[9] Assuming *arguendo* that an inconsistency with Article 2.2.1 could exist and lead a separate life as a consequential violation, the Russian Federation has never presented a *prima facie* case that, absent the rectification of the gas purchase costs, the *three*-step OCOT analysis (as properly conducted by Ukraine) would have led to a different result. The only allegation that was made was that the rectification of the gas costs "resulted in a much higher unit cost of production" that "made the conclusion that the domestic sales by the Russian exporting producers under investigation were made not in the ordinary course of trade *more likely*".[10] Such vague contention as 'more likely' is not sufficient to serve as a prima facie case since a violation of a provision of the Anti-Dumping Agreement cannot just be established on the mere basis of 'more likely'. There was in fact never a claim that Article 2.2.1 was violated as a result of higher unit costs.

D. Claim 4 (Claim 12 of the Panel Request): Ukraine violated the obligation in the first sentence of Article 2.4 of the Anti-Dumping Agreement because it failed to make a fair comparison between the export price and the constructed normal value by improperly calculating constructed normal value for ammonium nitrate produced in the Russian Federation (RF SWS Section 4)

21. Ukraine recalls that the Appellate Body held in *EU – Biodiesel* that Article 2.2.1.1 and Article 2.4 of the Anti-Dumping Agreement serve different functions in the context of determinations of dumping whereby the former assists an investigating authority in the calculation of costs for purposes of constructing the normal value; whereas the latter concerns the fair comparison between the normal value and the export price.

22. Similarly, the panel held in *EU – Footwear (China)* that "[n]othing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price."

23. For the foregoing reasons, the Russian Federation has not demonstrated that Ukraine failed to make a "fair comparison" between the normal value and the export price, inconsistently with Article 2.4 of the Anti-Dumping Agreement.

[9] Ukraine's response to Panel question No. 15. paras. 68-70.
[10] Russian Federation's First Written Submission, para. 117. (emphasis added)

II. VIOLATION OF ARTICLES 5.8, 11.1, 11.2 AND 11.3 OF THE ANTI-DUMPING AGREEMENT BY INCLUDING A RUSSIAN PRODUCER WITH A NEGATIVE DUMPING MARGIN IN THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS

A. The Panel's Term of Reference

24. Since the Russian Federation has clarified that it is no longer bringing a claim against the 2008 Decision, Ukraine does not need to reiterate its previous arguments regarding the fact that the 2008 Decision is not a measure brought properly before the Panel.

25. Notwithstanding this, Ukraine submits that the 2010 Decision was not brought properly before the Panel and therefore falls outside the Panel's terms of reference. This is clear by the wording of the Panel Request that limits the scope of the dispute to only those measures in relation to the expiry and interim reviews. Furthermore, contrary to what the Russian Federation holds, footnote 2 of the Panel Request is insufficient to properly identify the measures at issue since it appears to merely provide factual context to the expiry and interim review. Similarly, Ukraine holds that the Russian Federation's First Written Submission did not provide the required clarification since it emphasised a violation of Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement, which can only relate to the 2014 Decision.

26. As a consequence of the unclarity, Ukraine has to engage in speculation as to which measures were being challenged by the Russian Federation. However, the fact that Ukraine accidently addressed the correct claim does not make the Panel Request compliant with Article 6.2 DSU. Evidently, these requirements needed to be met when the Panel Request was submitted and not after Ukraine wrote its First Written Submission. For these reasons, Ukraine submits that the 2010 Decision is not a measure before the Panel.

B. Violation of Article 5.8 Anti-Dumping Agreement in the 2014 Decision

27. Ukraine submits that the obligation under Article 5.8 of the Anti-Dumping Agreement to immediately terminate an investigation when the dumping margin is zero or *de minimis,* did not arise with respect to the 2014 Decision. Pursuant to the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, an investigating authority only needs to terminate an investigation if it determines a negative, zero or *de minimis* dumping margin. MEDT of Ukraine found dumping margins of 40.5% and 82.2%, and therefore, it was not under the obligation to terminate the investigation. Furthermore, as held by the panel in *US – DRAMS* and the panel in *US – Corrosion-Resistant Steel Sunset Review*, the obligation to immediately terminate an investigation when the dumping margin is zero or *de minimis* is only applicable to original investigations initiated pursuant to Article 5 of the Anti-Dumping Agreement. Consequently, the *de minimis* test in Article 5.8 of the Anti-Dumping Agreement does not apply in expiry reviews.

C. Conditional Defense Regarding the Claim that the 2010 Decision Violated Article 5.8 Anti-Dumping Agreement

28. Even if one assumes that a claim under Article 5.8 of the Anti-Dumping Agreement could have been brought against the 2010 Decision, Ukraine submits that such claim should be rejected since the investigating authority, MEDT of Ukraine and the Interdepartmental Commission on International Trade (ICIT), never determined a negative, zero or *de minimis* dumping margin. Upon request of EuroChem, the Ukrainian Courts simply ruled that the 2008 Decision was unlawful but did not find in the operative part that the dumping margin for EuroChem was negative, zero or *de minimis*. During the Court proceedings, the only calculation methods presented were the erroneous calculations carried out by EuroChem itself. The Courts, however, did neither instruct to reopen the investigation, nor to apply a particular methodology for the calculation of the dumping margin since this was not requested by EuroChem. Consequently, MEDT of Ukraine and ICIT had no choice but to bring the duty down to zero without recalculating the dumping margin.

29. Ukraine submits that as neither the investigating authorities in the 2010 Decision, nor the judgements of the Ukrainian Courts determined a negative, zero or *de minimis* dumping margin for EuroChem, the conditions set out by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* are not met. Therefore, the obligation under Article 5.8 of the Anti-Dumping Agreement to

immediately terminate an investigation and to not include producers with a negative or *de minimis* dumping margin in future reviews was not triggered by the 2010 Decision.

D. Violation of Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement in the 2014 Decision

30. Ukraine considers that the Russian Federation's claim concerning Article 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement is purely consequential to the Russian Federation's claim under Article 5.8 of the Anti-Dumping Agreement. Ukraine therefore submits that since the mere imposition of a zero dumping duty on a company − without a determination of a negative, zero or *de minimis* dumping margin − does not trigger the obligation to immediately terminate the investigation, there is also no obligation upon the investigating authority to exclude the same company in later reviews. In other words, if the obligation under Article 5.8 of the Anti-Dumping Agreement does not apply in the original investigation, Ukraine holds that the same obligation cannot exist in later reviews.

31. If the Panel were to consider that this claim is not consequential, Ukraine submits that this claim must still be dismissed as unfounded as the Russian Federation failed to provide a *prima facie* violation of these provisions. Indeed, the Russian Federation did not specify which actions − or inactions − by MEDT of Ukraine or ICIT constitute an alleged violation of these legal provisions. Ukraine cannot be expected to defend itself against claims that merely refer to articles of the Anti-Dumping Agreement without any further specifications or clarifications as to the exact claimed violations.

III. SUBSTANTIVE CLAIMS RELATING TO THE LIKELIHOOD OF INJURY DETERMINATION

A. Claim 8: Ukraine Acted Inconsistently with Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement

1. MEDT's of Ukraine Determination of the Likelihood of Recurrence of Injury

32. Pursuant to the panel in *EU − Footwear (China)*, in order to discharge the burden of proof, the Russian Federation must demonstrate that while making its conclusion on the likelihood of injury, MEDT of Ukraine did not make a reasoned conclusion based on sufficient evidence. The heart of the Russian Federation's argument is that MEDT of Ukraine made a determination that material injury existed in the RIP and that MEDT of Ukraine relied on this determination to conclude that there was likelihood of continuation of injury.

33. As is clear from section 13 and 11.4 of the Disclosure, Ukraine holds that MEDT of Ukraine determined that there was a likelihood of recurrence of injury and not of continuation of injury. The analysis performed by MEDT of Ukraine underscored the negative effects on the Ukrainian domestic industry which would occur should the measures be terminated. Moreover, Ukraine notes that the Russian Federation does not point out a single passage in the Disclosure or 2014 Decision stating that MEDT of Ukraine determined that the injury was likely to continue should the anti-dumping measures be repealed.

34. Ukraine submits that the Russian Federation's argument saying that MEDT's of Ukraine determination that the Ukrainian domestic industry did not completely recover from material injury established during the original investigation is equal to a determination that the Ukrainian industry is suffering from material injury is incorrect since it ignores the economic reality. When carrying out an interim or expiry review, the condition of the domestic industry may range anywhere between a completely healthy state and suffering from serious injury. Essentially, all possible degrees of deterioration of domestic industry, that fall short of "injury" within the meaning of Article 3, should therefore be classified, in terms of the Anti-Dumping Agreement, *as absence of injury*. A finding that the domestic industry did not *completely* recover from previous material injury would suggest that the domestic industry is somewhere in *between* having recovered (a healthy state) and suffering from material injury. Therefore, in terms of two legal categories provided for in the Anti-Dumping Agreement, such finding should be classified as a finding that the domestic industry is not suffering from a material injury.

2. Russian Federation's Claims in respect to the Determinations relied on by MEDT of Ukraine in its likelihood analysis

35. Ukraine submits that in the course of expiry and interim reviews, an investigating authority is obliged to base it findings on an objective examination of positive evidence. However, as held by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, the source of this obligation is Articles 11.2 and 11.3 of the Anti-Dumping Agreement and not Article 3 since the obligations set out in Article 3 do not apply to likelihood-of-injury determinations in sunset reviews.[11]

36. The Russian Federation submits a new argument in its second written submission stating that MEDT of Ukraine should have taken into account the that natural gas was supplied to the Ukrainian domestic industry by Ostchem at prices, allegedly higher than Ostchem's own purchase costs.[12] This allegation never appeared in the Russian Federation's First Written Submission, First Oral Statement nor in the responses to the questions from the Panel. Ukraine therefore submits that this cannot be addressed in the Panel Report.

37. In any event, the Russian Federation's allegation has no merit. MEDT of Ukraine was indeed aware that the Ukrainian domestic producers were purchasing gas from its parent company, Ostchem Holding. This is clearly indicated in the questionnaire responses of the Ukrainian producers. At the same time, gas purchase prices of the Ukrainian domestic industry, as reflected in their records, were in line with the market prices for the industrial users in Ukraine (that is, Naftogaz market price to industrial users). Therefore, the price of gas sale transactions between Ostchem and Ukrainian domestic industry adequately reflected market forces and the arm's length principle.[13] Moreover, the assessment of the state of the industry is limited to the domestic companies producing the like product and does not include the assessment of the profitability of the parent company.

38. The Russian Federation criticizes MEDT's of Ukraine comparison between the prices of the imported product and like domestic product on the grounds that it does not discuss "reasons underlying the difference in prices"[14] and attributes to "a legitimate decision of the Ukrainian courts" negative effect on the prices of the domestic industry.[15] First, similar to the issue of transfer pricing, the criticism of MEDT's of Ukraine price comparison was raised for the first time in Russian Federation's Second Written Submission. It would, therefore, be inappropriate to address this new allegation in the Panel's report. Secondly, there is no connection between this argument and the two "claims" under Articles 11.1, 11.2 and 11.3 advanced by the Russian Federation in the Panel Request. Further, Russian Federation's criticism, has, in any event, no merit. There is no obligation to explore the "reasons" for differences in price levels and/or the difference between the price of the Russian exporters and the cost of production of domestic industry. The fact is that Russian producer's export price (Ukraine border) was lower than the cost of production of Ukrainian domestic producers and the sales prices of the Ukrainian domestic producers.

39. With regard to the Russian Federation's argument that MEDT's of Ukraine determination "on likelihood of injury was unsubstantiated and legally flawed since the analysis had been carried out on the basis of imports including"[16] imports from EuroChem in respect of which a zero anti-dumping duty was established in the 2010 Decision, Ukraine would like to reiterate its position. As previously explained, MEDT of Ukraine was under no obligation to exclude EuroChem from the review since this obligation does not exist during reviews and since EuroChem was found to be dumping. In any event, Ukraine submits that considering import volume trends of a producer in respect of whom anti-dumping duty was decreased to zero is the most reasonable methodology to assess the import trends once the anti-dumping measures are terminated.

[11] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 285.

[12] Russian Federation's Second Written Submission, paras. 604-610.

[13] In particular, in 2012 the domestic industry gas purchase price (net of VAT, inclusive transportation costs) was in the range between [[***]] and [[***]] USD/1000 m^3 and in RIP, between [[***]] and [[***]] USD/1000 m^3. Naftogaz price to industrial consumers (net of VAT, inclusive transportation costs) was 476.8 USD/1000 m^3 both in 2012 and RIP.

[14] Russian Federation's Second Written Submission, para. 615.

[15] Ibid.

[16] Russian Federation's First Written Submission, para. 209.

IV. PROCEDURAL CLAIMS

A. Claim 9 (Claim 4 of the Panel Request): Relating to the Alleged Recourse to Facts Available

40. Ukraine explains that the information about costs of gas in the producers' records was not rejected on evidentiary grounds under Article 6.8 of the Anti-Dumping Agreement.[17] Instead, the information regarding the costs of gas in the records of the investigated producers was accepted into evidence, analyzed by MEDT of Ukraine and thereafter rectified based on the substantive rules regarding the determination of costs under Article 2.2.1.1 of the Anti-Dumping Agreement. The respective explanations were duly provided in the Disclosure. Furthermore, the Russian Federation did not bring forward any arguments substantiating its claim.

B. Claim 10 (Claim 5 of the Panel Request): Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement because Ukraine failed to adequately disclose the essential facts under consideration which formed the basis for the decision to apply anti-dumping measures, including the essential facts underlying the determinations of the existence of dumping; the calculation of the dumping margins, including relevant data and formula applied; the determination of injury and causation, including the price comparisons and the underlying data; information on import and domestic prices used therein

41. With respect to the Russian Federation's claims under Articles 6.2 and 6.9 of the Anti-Dumping Agreement, Ukraine reiterates that the Russian Federation failed to demonstrate that any of the facts, which were allegedly not disclosed, constitute essential facts. Moreover, Ukraine notes that the information in Tables 11.3.1, 11.3.2, 11.3.3, 11.3.4, 11.3.5 and 11.3.6 was properly disclosed to the interested parties taking into account MEDT's of Ukraine confidentiality obligations under Article 6.5 of the Anti-Dumping Agreement.

42. Contrary to the Russian Federation's allegations, the Ukrainian producers did request confidential treatment both for their individual data and for the combined data. The request for confidentiality was in fact substantiated since the Ukrainian producers qualified the data as commercially sensitive for the companies individually and together. This qualification was reasonable, as for example, the disclosure of the average price level in respect to the four affiliated companies would have given Russian producers a good basis for formulating their own pricing strategy in Ukraine. Ukraine emphasizes that none of the interested Russian Producers objected to the designation of this data as commercially sensitive.

43. Furthermore, with regard to the sufficiency of the non-confidential summaries, Ukraine argues that since MEDT of Ukraine made its determinations on the basis of trends of various economic and financial indicators, as opposed to absolute figures, the disclosure of trends data was the most appropriate means of providing a summary of the confidential information.

44. Finally, Ukraine notes that the Federation's grievances regarding the confidentiality treatment and insufficient confidential summaries are, in any event, outside of the Panel's Terms of Reference. The Panel's Terms of Reference are limited pursuant to Article 7 DSU to the claims put forward in the Russian Federation's Panel Request. In its Panel Request, the Russian Federation advanced only a claim under Article 6.5.1 of the Anti-Dumping Agreement and not under Article 6.5 in general. Consequently, the Panel has no jurisdiction to rule on Ukraine's alleged violation of Article 6.5 of the Anti-Dumping Agreement.

C. Claim 11 (Claim 6 of the Panel Request): Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because the disclosure of the documents with results of expiry and interim reviews issued on 25 June 2014 was not made by Ukraine in sufficient time for the interested parties to defend their interests

45. Ukraine notes that the Ukrainian Anti-Dumping Law clearly indicates that the time-limits established by the investigating authority "expire at the end of the working hours in ministries,

[17] See Ukraine's First Written Submission, Section VII.A.1.

central executive body in the tax or customs sphere or in the Commission".[18] Ukraine submits that it is not unreasonable to expect that one interested party, namely EuroChem, participating in an anti-dumping investigation in Ukraine would familiarize itself with the legislation − Ukrainian Anti-Dumping Law − applicable to the conduct of the investigation.

46. The Russian Federation also claims that the 2-days period was unreasonable because the disclosure was issued in Ukrainian language. The anti-dumping investigation was conducted in Ukraine by Ukrainian Authorities with Ukrainian being the official language of Ukraine. The fact that an interested party may not have command of the Ukrainian language, therefore, does not warrant a provision of any additional time for submitting comments.

V. OTHER CLAIMS

A. Claim 14 (Claim 7 of the Panel Request): Ukraine acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because Ukraine failed to provide in sufficient detail in the Decision of the Intergovernmental Commission on International Trade No.AD-315/2014/4421-06 of 1 July 2014, as referred to in Notice "On the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate originating in the Russian Federation", and in the Communication of the Ministry of Economic Development and Trade of Ukraine No. 4421-10/21367-07 of 25 June 2014 the findings and conclusions reached on all issues of fact and law it considered in making its preliminary and final determinations and failed to provide all relevant information and reasons, which have led to the imposition of the measure. In particular, Ukraine did not provide the calculations used to determine the dumping margins in the final determination and the data it relied upon in order to make the calculations

47. Ukraine explained that a claim under Article 12.2 does not evolve from a claim under Article 6.9 and does in fact expand the scope of the dispute. In respect of the scope of obligations under Articles 6.9 and 12.2, Russian Federation's arguments are limited to a mere statement that both Articles contain an obligation to disclose information and, therefore, do not categorically differ.[19] Ukraine notes that the scope of disclosure (*i.e.*, which information has to be disclosed) was considered a relevant factor by the panel in *EC − Fasteners (China)* in its decision to rule that a claim under Article 6.9 (an obligation to disclose information) not mentioned in the Request for Consultations was outside the Panel's Terms of Reference, even though a claim under Article 6.2 (also a disclosure obligation) was mentioned in the Request for Consultations.[20] The same panel found that the timing as to when the disclosure has to be fulfilled is another relevant factor.

48. Furthermore, the difference in purpose is that Article 6.9 of the Anti-Dumping Agreement obliges an investigating authority to provide parties "with sufficient factual information to defend their interests during the investigation", whereas Article 12.2.2 − "to ensure that the investigating authority's reasons for concluding as it did can be discerned and understood".

49. Finally, Ukraine notes that including the phrase "notices […] of the Ministry of Economic Development and Trade of Ukraine" is insufficient to indicate to Ukraine that by challenging the measures under Article 6.9 of the Anti-Dumping Agreement, the Russian Federation also intends to challenge the measures under Article 12.2 of the same Agreement. Ukraine recalls that the complaining party must indicate both the measure being challenged and the specific legal provisions alleged to be violated.[21] The mere indication of a measure being challenged does not put the respondent on a sufficient notice as to what claims the claimant intends to pursue and what "matter" is being referred to the DSB. Based on the foregoing, Ukraine submits that the Russian Federation's claim under Article 12.2 of the Anti-Dumping Agreement falls outside of the scope of the Panel's terms of reference.

[18] Paragraph 4, Article 6 of the Ukrainian Anti-Dumping Law, Exhibit UKR-9.
[19] Russian Federation's Second Written Submission, para. 714.
[20] Panel Report, *EC − Fasteners (China)*, paras. 7.507 and 7.508.
[21] Appellate Body Report, *Guatemala − Cement I*, paras. 70 and 72.

VI. CONCLUSIONS

50. Ukraine has shown that all the claims pursued and developed in the Russian Federation's First Written Submission, First Oral Statement, Second Written Submission and Second Oral Statement are unfounded and based on erroneous interpretations of the covered agreements. Ukraine respectfully asks the Panel to reject all of the Russian Federation's claims.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA

Third party oral statement

Introduction

1. Argentina thanks the Panel for the opportunity to participate in this case and to present its views, given its systemic and trade interest in the correct interpretation of certain obligations contained in the legal provisions of the Anti-Dumping Agreement and the GATT 1994 invoked in this dispute.

2. In particular, Argentina emphasizes the importance of maintaining a proper interpretation of the rules contained in those agreements and the findings made by the Appellate Body in *EU – Biodiesel* (DS473).

3. In the light of the foregoing, Argentina respectfully submits the following considerations to the Panel.

The Russian Federation's claim under Article 2.2.1.1 of the Anti-Dumping Agreement

4. In connection with the claim under Article 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, Argentina considers it appropriate to recall certain specific principles developed by the Appellate Body in the *EU – Biodiesel* case.

5. First of all, the Appellate Body upheld the Panel's finding that Article 2.2.1.1 "does not involve an examination of the 'reasonableness' of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful".[1]

6. Upon verification of the conditions of the first sentence of Article 2.2.1.1, that is, the existence of records that are kept in accordance with generally accepted accounting principles and reasonably reflect the costs associated with the production and sale of the product under consideration, the value must be constructed on the basis of those records insofar as they reflect the actual costs incurred.[2]

7. Argentina has argued that the correct inquiry into whether the records reasonably reflect the cost of production involves an assessment of the reasonableness of the records, as opposed to the reasonableness of the costs, and that, although government intervention may distort costs, such intervention does not necessarily constitute a sufficient basis for disregarding the records.[3]

8. Secondly, Argentina does not agree with the interpretation given by some third parties to the effect that certain governmental actions may be the source or origin of dumping.[4]

9. The Panel in the *EU – Biodiesel* case found that there were no legal arguments to extrapolate from the second Ad Note to Articles VI:2 and VI:3 that the concept of "dumping" is intended to cover any distortion arising out of government action.[5]

10. The Appellate Body reaffirmed that the object and purpose of the Anti-Dumping Agreement is to recognize the right of Members to take anti-dumping measures to counteract injurious

[1] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.41).
[2] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.41).
[3] *EU – Biodiesel* (WT/DS473/R, para. 7.188).
[4] Third Party Written Submission of the European Union, p. 7; Third Party Written Submission of Brazil, pp. 8-9.
[5] *EU – Biodiesel* (WT/DS473/R, para. 7.240).

dumping[6] and that the normal value of the product under consideration must be constructed in accordance with costs actually incurred by the investigated companies.[7]

11. In other words, the construction of value must not be based on hypothetical costs that might have been incurred under a different set of conditions or circumstances, such as the alleged absence of any distortion of costs caused by government intervention.[8]

12. In this connection, in the *EU – Biodiesel* case, both the Panel and the Appellate Body found that the difference between the domestic market prices and the international prices of the raw material caused as a result of certain government interventions does not, in itself, constitute a sufficient basis, under Article 2.2.1.1, for concluding that the producers' records do not reasonably reflect the costs of the raw material, or for disregarding those costs when constructing the normal value of the product under consideration.[9]

The Russian Federation's claims under Article 2.2 of the Anti-Dumping Agreement

13. The Russian Federation argues that Ukraine acted in a manner inconsistent with Article 2.2 of the Anti-Dumping Agreement by not using production costs in the country of origin to construct normal value and by replacing the raw material costs reported in producers' records (internal cost and cost actually incurred) with the average price of gas destined for export at the border with Germany.[10]

14. Argentina recalls that, as was noted by the Appellate Body in the *EU – Biodiesel* case, the investigating authority is not prevented from having recourse to information on costs other than that contained in the records of exporters or producers, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin".[11]

15. The Appellate Body held that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination provided for in that rule refers to the "cost of production [...] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin".[12]

16. It may be concluded from the foregoing that the investigating authority may not have recourse to information from a place other than the country of origin for the sole purpose of correcting an alleged cost distortion caused by government intervention, by substituting an alleged out-of-country cost for the domestic cost actually incurred.

The Russian Federation's claim under Article 6.9 of the Anti-Dumping Agreement

17. The Russian Federation argues that Ukraine acted in a manner inconsistent with Article 6.9 of the Anti-Dumping Agreement by not having informed all interested parties of the essential facts in sufficient time for them to defend their interests. Russia maintains that Ukraine granted only two working days for the interested parties to make comments on the essential facts which formed the basis for the decision taken as a result of the interim review and the final review upon expiry of the time-limit.

18. Without seeking to take a position on factual questions in this specific case, Argentina shares the view expressed by the Russian Federation and by some third parties[13] to the effect that the two working days allowed for comments on the essential facts do not appear *prima facie* to be sufficient or reasonable under the terms of Article 6.9 of the Anti-Dumping Agreement.

[6] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.25).
[7] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.19).
[8] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.41).
[9] *EU – Biodiesel* (WT/DS473/AB/R, paras. 6.54-6.56).
[10] First Written Submission by the Russian Federation, p. 95.
[11] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.73).
[12] *EU – Biodiesel* (WT/DS473/AB/R, para. 6.73).
[13] Third Party Submission of Brazil, pp. 22-24.

Conclusion

19. Madam President and distinguished Panel members, Argentina thanks you for your attention.

ANNEX C-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

1. Australia's submissions in this dispute have focused on how normal value should be determined in anti-dumping investigations where government price setting is evident.

I. INTERPRETATION OF "REASONABLY REFLECT THE COSTS" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

2. In Australia's view, the proper application of Article 2.2.1.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the "Anti-Dumping Agreement") is informed by the purpose of Article 2.2, which the Appellate Body has described as follows:

> Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy. This supports the view that the "costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 are those costs that have a genuine relationship with the production and sale of the product under consideration.[1]

3. Australia considers that an investigating authority must therefore examine whether costs calculated pursuant to Article 2.2.1.1 are capable of generating an appropriate proxy; and have a genuine relationship with the production and sale of the product under consideration. Where reliance on the costs reflected in a producer or exporter's records would not result in an appropriate proxy, an investigating authority should disregard those costs.

4. In Australia's view, such circumstances may arise in instances where government price setting is evident. This is because government price setting may not apportion costs between relevant entities on the basis of commercial considerations and market forces of supply and demand. Rather, where the input prices paid and recorded by a producer or exporter are set by government, they may not accurately reflect how the actual costs have been apportioned between the relevant transacting entities. In such circumstances, using the producer's or exporter's cost records could fail to reasonably reflect the costs associated with the production and sale of the product under consideration, such that they would yield an inappropriate proxy that fulfils the basic purpose of Article 2.2.

5. The Appellate Body has consistently recognised that costs may be disregarded in remedies investigations where they are not based on forces of supply and demand but instead reflect some anomalous distortion – including: where prices in a subsidies investigation are suppressed because of a government's predominant role in the market;[2] where prices are suppressed because sales of relevance to an anti-dumping investigation take place between affiliates;[3] and where sales take place in the context of a liquidation sale.[4] This is further supported by the context of Article 2.2, including Article 2.7 – which makes clear that the price comparison methodology may need to be adjusted in circumstances of government price setting.

6. Australia therefore considers that the setting of input prices by government may be a sufficient basis for disregarding the costs reflected in the records of producers and exporters because, where those costs would not yield an appropriate proxy for the price of the like product in the ordinary course of trade, they would not fulfil the basic purpose of Article 2.2.

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[1] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.
[2] Appellate Body Reports, *US – Softwood Lumber IV*, para. 106; *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.
[3] Appellate Body, *US – Hot-Rolled Steel*, paras. 140 - 147.
[4] Appellate Body, *US – Hot-Rolled Steel*, para. 143.

II. INTERPRETATION OF "NORMALLY" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

7. Australia supports Ukraine's argument in this dispute that the "normally" condition in Article 2.2.1.1 of the Anti-Dumping Agreement provides a separate legal ground for derogating from producers' records.

8. As was found by the panel in *China – Broiler Products*, the "normally" condition provides a standalone legal basis to derogate from the rule applied in Article 2.2.1.1, and ''requires an investigating authority to explain why it departed from the norm and declined to use a respondent's books and records."[5]

9. Australia therefore considers that the "normally" condition: supports the view that an investigating authority should consider whether it would be appropriate in the circumstances of a particular investigation to depart from the usual rule in Article 2.2.1.1; and justifies disregarding the records of producers and exporters where these would not yield an appropriate proxy.

III. DISTINGUISING THIS DISPUTE FROM *EU – BIODIESEL (ARGENTINA)*

10. Australia considers that it is important to take account of the factual and legal distinctions between this dispute and *EU – Biodiesel (Argentina)*, and cautions against any reflexive application of the reasoning and findings in *EU – Biodiesel (Argentina)* to the current dispute.

11. Nuances in the panel and Appellate Body reports in *EU – Biodiesel (Argentina)* have not been reflected in Russia's first written submission or oral statement. In particular, Russia contends that Article 2.2.1.1, as clarified by the Appellate Body in that dispute, makes the parameters of the costs themselves beyond the scope of the investigating authority's examination.[6] However, while the panel and the Appellate Body determined that the Argentine export tax system did not provide "a sufficient basis" for disregarding the costs in producer and exporter records, both the panel and the Appellate Body explicitly recognised a number of circumstances in which the costs reflected in producers' records might be examined and disregarded.[7]

12. Importantly, the panel in *EU – Biodiesel (Argentina)* also explicitly noted that the circumstances at issue in that dispute were distinct from those where input prices are set by the government, as is the case in the current dispute.[8] For the reasons Australia has provided throughout its submissions in this dispute, in Australia's view, government price setting provides a sufficient basis for disregarding the costs in records of producers and exporters under investigation.

13. Further, in *EU – Biodiesel (Argentina)*, the EU made clear that it did not seek to rely upon the "normally" condition.[9] In contrast, Ukraine does seek to rely upon it in this dispute. This provides a second legal ground to support Ukraine's approach which was not examined in the dispute upon which Russia seeks to rely.

IV. FINDING THE COSTS ASSOCIATED WITH PRODUCTION IN THE COUNTRY OF ORIGIN CONSISTENTLY WITH ARTICLE 2.2

14. The text of Article 2.2 permits the margin of dumping to be determined by comparison with a comparable price of the like product when exported to an appropriate third country in certain circumstances. In considering how this should be applied, Australia observes that the Appellate Body in *EU – Biodiesel (Argentina)* found that the use of "information from sources outside the country" was permitted on the condition that:

[5] Panel Report, *China – Broiler Products*, para. 7.161, citing Appellate Body Report, *US – Clove Cigarettes*, para. 273.
[6] Russia's first written submission, para. 68.
[7] Panel Report, *EU – Biodiesel (Argentina)*, fn 400; Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41.
[8] Panel Report *EU – Biodiesel (Argentina)*, fn 421 to para. 7.249. Note the Appellate Body upheld these findings in para. 6.57 of its Report.
[9] Panel Report, *EU – Biodiesel (Argentina)*, fn 380; Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 120.

> … whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin".[10]

15. This makes clear that use of data from outside of the country of production is permitted where that data is adapted to ensure it is suitable to determine the cost of production in the country of origin. In Australia's view, this will depend on the specific circumstances of a given case, the quality and quantity of the evidence on the investigation record, and the quality of an investigating authority's explanation. However, Australia cautions that the process of adjustment should not reintroduce distortions, such as those arising from government price setting, in the construction of normal value.

V. CONCLUSION

16. Australia concludes that Article 2.2 requires an investigating authority to examine whether costs calculated pursuant to Article 2.2.1.1 are capable of generating an appropriate proxy, and whether government price setting has suppressed costs to the extent that costs apportioned to the seller are not reasonably reflected in the records. In such circumstances there may be grounds for the investigating authority to depart from the producer or exporter records where doing so would yield a more appropriate proxy. Where such derogation takes place, Article 2.2 clearly permits the use of data from a third country where it is appropriately adjusted to reflect the costs of production in the country of origin, without reintroducing the very distortions that undermine the appropriateness of the proxy.

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

ANNEX C-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil made the following points in relation to topics of systemic relevance in this dispute.

I. The legal standard under Article 2.2.1.1 of the Anti-dumping Agreement (ADA)

2. The Russian Federation relied heavily on the Appellate Body jurisprudence in *EU – Biodiesel (Argentina)* to argue its case. Brazil would like to recall, however, that the referred Appellate Body's ruling is circumscribed to the factual circumstances of that case. Therefore, Brazil would caution the Panel against overstretching the boundaries of the Appellate Body's ruling in *EU – Biodiesel (Argentina)*.

3. It is clear from the report in *EU – Biodiesel (Argentina)* that the Appellate Body's reading of the legal standard under Article 2.2.1.1 of the ADA is more nuanced than Russia has argued in these proceedings.

4. Firstly, the Appellate Body referred to several instances in which investigating authorities are authorized to depart from the records kept by producers when calculating the normal value. It explained that:

> "[R]ecords that are GAAP-consistent may nonetheless be found not to reasonably reflect the costs associated with the production and sale of the product under consideration. This may occur, for example, if certain costs relate to the production both of the product under consideration and of other products, or where the exporter or producer under investigation is part of a group of companies in which the costs of certain inputs associated with the production and sale of the product under consideration are spread across different companies' records, or where transactions involving such inputs are not at arm's length."[1]

5. The Appellate Body also clarified that there may be circumstances where the obligation to calculate the cost on the basis of the records kept by the exporter or producer does not apply. The Appellate Body did not limit those circumstances, nor did it establish an exhaustive list, they merely mentioned transfer pricing as *one* example of such instances[2].

6. Moreover, the Appellate Body considered that the phrase "the cost of production in the country of origin" does not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin.[3] This means that there may be circumstances when it would be appropriate for the investigating authority to rely on an external benchmark when calculating the normal value under Article 2.2.1.1 of the ADA.

7. Secondly, in *EU – Biodiesel (Argentina)*, the EU based its determination that the producer's records do not reasonably reflect the cost of soybeans on the fact that the export tariff applied to soybean was around 20% higher than that applied to the exportation of biodiesel. For the Appellate Body, however,

> "the Argentine export tax system was not, in itself, a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel."[4]

[1] *EU – Biodiesel (Argentina)*, para. 6.33.
[2] *Ib.*, para. 6.73.
[3] *Ib.,* para. 6.74.
[4] *Ib.,* para. 6.55.

8. Brazil understands that the determination of which circumstances would in fact authorize investigating authorities to depart from the records kept by producers needs to be made on a case-by-case basis, according to the actual effect of this restriction in the product at issue. In this regard, Brazil agrees with Australia's Third Party Submission that the basic purpose of constructing the normal value under Article 2.2 of the ADA is to identify an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when that price cannot be used. It is thus for investigating authorities to asses in each case whether constructing the normal value on the basis of the records kept by producers will generate this proxy.

9. Brazil considers that, depending on the nature and on the magnitude of the intervention, State interference in the market to set or regulate the prices of inputs or raw materials at artificially low levels could be considered "sufficient basis" for investigating authorities disregarding producers' records under Article 2.2.1.1 of the ADA. It is important to note that, in *EU – Biodiesel (Argentina),* the Appellate Body did not make any findings regarding how Article 2.2.1.1 should apply to situations where the prices of inputs are subject to price controls.

10. Thirdly, the Appellate Body's decision in *EU – Biodiesel (Argentina)* was specifically circumscribed to the second condition of the *first sentence of Article 2.2.1.1. This means that there was no guidance* about the interpretation of the term "normally", in the beginning of the first sentence. More specifically, on which circumstances the obligation in the first sentence of Article 2.2.1.1 to "normally" base the calculation of costs on the records kept by the exporter or producer under investigation would not apply:

> "As the Panel noted, the EU authorities relied explicitly on the second condition in the first sentence of Article 2.2.1.1 of the Anti- Dumping Agreement to discard the records kept by the Argentine producers under investigation insofar as they pertained to the cost of soybeans. (See Panel Report, paras. 7.221 and 7.227; and Definitive Regulation (Panel Exhibit ARG-22), Recital 38) Thus, for purposes of resolving this dispute, it is the meaning of this condition that must be ascertained, and not whether there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 'normally' to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply". [5]

11. Brazil understands that the term "normally" in the first sentence of the Article 2.2.1.1 suggests that there may be specific situations where the records kept by the exporter or producer could be put aside, justifying the departure of the obligation to calculate the costs of production on the basis of the records kept by the producers.

12. In sum, Brazil considers that the jurisprudence in *EU – Biodiesel (Argentina)* offers only limited guidance when assessing whether investigating authorities can resort to an external benchmark when calculating the normal value under Article 2.2.1.1 of the ADA. In deciding the present dispute, the Panel should be conscious of these limitations.

II. Article 5.8 of the ADA is applicable in the context of reviews initiated under Articles 11.2 or 11.3 of the ADA

13. In Brazil's views Article 5.8 of the ADA is applicable in the context of reviews initiated under Articles 11.2 or 11.3 of the Anti-Dumping Agreement. Therefore, an investigating authority cannot impose duties in the context of reviews if the producer/exporter's dumping margin was found to be *de minimis*. This understanding is confirmed by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*:

> "[a]n investigating authority does not, of course, impose duties – including duties at zero per cent – on exporters excluded from the definitive anti-dumping measure, therefore such exporters cannot be subject to administrative and changed circumstances reviews, because such reviews examine, respectively, the 'duty paid' and 'the need for the continued imposition of the duty'"[6].

[5] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.18, footnote 120.
[6] Appellate Body Report, *Mexico – Anti-dumping measures on rice*, para. 305.

III. Procedural claim: Deadline for producer and exporter to comment on the essential facts

14. Brazil understands that there is no definition in the ADA as to what constitutes "sufficient time" for the purpose of Article 6.9 of the ADA.

15. Brazil considers however, that, in any case, the parties should have full opportunity to defend their interests.

ANNEX C-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

Third party oral statement

Ms Chairperson, distinguished Members of the Panel:

1. The People's Republic of China appreciates the opportunity to express its views before the Panel at the third party session. In this oral statement, China will focus on the legal interpretation of Articles 2.2.1.1 and 2.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement").

I. INTRODUCTION

2. This dispute raises important interpretive issues regarding the relevant provisions under Article 2 of the Anti-Dumping Agreement. As Article 2 disciplines a Member's determination of the existence and magnitude of "dumping", this dispute relates to the foundational concept of "dumping" that applies throughout the Anti-Dumping Agreement and in Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The Appellate Body has explained that "dumping is the result of the *pricing behavior of individual exporters or foreign producers*",[1] and that "[d]umping arises from the *pricing practices of exporters* as both normal values and export prices reflect *their pricing strategies* in home and foreign markets".[2] This understanding of "dumping" as international price discrimination is fundamental for the balance of rights and obligations in the Anti-Dumping Agreement. The factors exogenous to the producer are simply not relevant for determining the existence of "dumping". Anti-dumping measures are not a tool for importing countries to counteract the *regulatory policies of exporting countries.* The interpretation of the relevant provisions under Article 2 of the Anti-Dumping Agreement should be consistent with the foundational concept of "dumping".

II. ARTICLE 2.2.1.1 STIPULATES TO CALCULATE THE COST OF PRODUCTION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS

3. Article 2.2.1.1 addresses how to determine costs of production in the country of origin, either where an investigating authority assesses whether prices are below costs under Article 2.2.1 or where it chooses to *construct* normal value under Article 2.2. Article 2.2.1.1 states that an authority must use the costs set forth in the GAAP compliant "records kept by the exporter or *producer* under investigation", unless the records do not "reasonably reflect the *costs* associated with the production and sale of the *product*".[3] The Appellate Body in *EU – Biodiesel* stressed that the term "reasonably reflect the costs associated with the production and sale of the product" in Article 2.2.1.1 refers to whether "the records kept by the exporter or producer suitably and sufficiently correspond or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the *specific product under consideration*".[4]

4. The mere recording of the *price paid* for inputs does not inevitably mean that the producer's records reasonably reflect the costs associated with the product's production. For instance, Article 2.2.1.1 itself embodies rules dealing with the "proper allocation" of certain costs, and the Appellate Body in *EU – Biodiesel* pointed out some exceptional situation too. However, none of these situations involve imposition of hypothetical out-of-country costs in a bid to counter the economic effects of regulation by an exporting government. The Appellate Body has excluded "an examination of the 'reasonableness' of the reported costs themselves, when the actual costs

[1] Appellate Body Report, *US – Zeroing (Japan)*, para. 111 (emphasis added).
[2] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 95 (emphasis added), referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 156 and *US – Zeroing (Japan)*, para. 156 "[t]he concept of dumping relates to the pricing behaviour of exporters or foreign producers". See also Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 86.
[3] Emphasis added.
[4] Appellate Body Report, *EU – Biodiesel*, para. 6.26.

recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful".[5] The Appellate Body found the costs "calculated on the basis of records kept by the exporter or producer" under Article 2.2.1.1 must lead to a cost "in the country of origin".[6]

5. Article 2.2.1.1 states that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation". The panel in *US – Softwood Lumber V* explained that this imposes a positive obligation on an investigating authority to normally use the books and records of the respondent, provided that two conditions are met.[7] The fact that the sentence uses the word "normally" does not render the rule optional. It simply indicates that the obligation included in that sentence is not absolute and that there are exceptions as expressed by the two conditions referred to in the same sentence. This understanding has also been highlighted by the Appellate Body in *US – Clove Cigarettes*:

> *We observe that the ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions, as a rule". In our view, the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule". Rather, we consider that the use of the term 'normally' … indicates that the rule … admits of derogation under certain circumstances." […]*[8]

6. There is no reason that the interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement in this dispute could depart from the WTO jurisprudence in *EU – Biodiesel*. The use of the word "normally" can't be interpreted to allow an investigating authority to ignore its obligation under Article 2.2.1.1 unless under the exceptions provided under the Anti-Dumping Agreement.

III. ARTICLE 2.2 STIPULATES TO CONSTRUCT THE NORMAL VALUE ON THE BASIS OF THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN

7. Article 2.2 of the Anti-Dumping Agreement deals with the establishment of the producer/export's normal value. It requires that domestic prices normally be used for the purpose of establishing normal value. In some circumstances, however, Article 2.2 recognizes that domestic prices may be unsuitable. These situations are clearly provided in Article 2.2. In such a situation, an investigating authority has two options: it may base normal value on "a comparable price of the like product when exported to an appropriate third country", or, it may construct normal value on the basis of the "cost of production in the country of origin" plus administrative, selling and general costs and profit. Each of these methods aims to achieve a proxy normal value as close as possible to the would-be domestic selling price:[9] sales must be to an "*appropriate*" third country at a "*comparable*" price and the costs of production must be the producer's costs in the "*country of origin*". The "cost of production" described in Article 2.2 is the *producer's* cost and not a *hypothetical* cost that does not reflect the true cost incurred by the producer to produce the product under consideration.

8. China recognizes that situations arise where a producer's true costs to produce the product are not reflected in its records, meaning that the "cost of production in the country of origin" must be determined through evidence other than the producer's own accounts. This may be the case, for example, where the producer's records cannot be used because the transaction is influenced by a non-arm's length pricing transfer with a related party, in which case the recorded cost may appear to be unreliable. To be clear, in such a case, the investigating authority may reject the producer's *records*, but may not deny the *true costs* of the producer of the product under consideration. The authority may look for evidence other than the producer's records, but, at the end of the day, it must determine or calculate the *true costs* of the producer of the product under consideration and not a *hypothetical* cost. To determine costs in such a case, the authority must clearly look for evidence *in the country of origin* because this evidence is the best evidence of the true cost to the producer "in the country of origin".

[5] Ibid. para. 6.41 (quoting Panel Report, *EU – Biodiesel*, fn 400 to para. 7.242).
[6] Ibid. para. 6.23.
[7] Panel Report, *US – Softwood Lumber V*, para. 7.237.
[8] Appellate Body Report, *US – Clove Cigarettes*, para. 273. See also Panel Report, *China – Broiler Products*, para. 7.161.
[9] Panel Report, *Thailand – H-Beams*, para. 7.112.

9. The Appellate Body in *EU – Biodiesel* also stressed that an investigating authority may not, when using out-of-country evidence, "simply substitute costs from outside the country of origin for the 'cost of production in the country of origin'"; rather "the investigating authority [is required] to adapt the information that it collects" [to the conditions of the country of origin].[10]

10. Thus, if no in-country evidence were available and out-of-country evidence had to be used, the out-of-country costs would have to be adjusted to ensure that the "cost of production" ascertained by the authority is a reflection of the producer's true costs to produce the product *in the country of origin*. Such necessary adjustments would include accounting for any differences in regulatory policies and any other factors exogenous to the producer that affect the cost of production. Ignoring such factors would mean that the external costs taken into consideration reflect conditions *outside* the country of origin and therefore could not be reflective of the producer's cost of production "in the country of origin".

IV. OTHER ISSUE

11. China takes note that some Parties use Article 2.7 of the Anti-Dumping Agreement and the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994 ("*Ad* Note") as context to support their conclusion that a state regulation of prices would allow an investigating authority to reject home market prices.

12. The *Ad* Note is the only provision of the Anti-Dumping Agreement and GATT 1994 that provides conditional authority for an investigating authority to use of a methodology not based on a strict comparison with domestic prices and costs. However, the *Ad* Note lays down two strict conditions that must be met before an authority is permitted to depart from a strict comparison with home market prices and costs. Specifically, the *Ad* Note permits recourse to the exceptional methodology under the *Ad* Note only if: (i) there is a complete or substantially complete monopoly of trade by the State in the exporting country; and (ii) *all* prices in the exporting country are fixed by the State.

13. The *Ad* Note is an exception to the rules provided under articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI of GATT 1994. It could not justify an investigating authority's practice to reject home market price or costs based on the regulation of price in the exporting country. On the contrary, if it does not meet the two strict conditions provided under the *Ad* Note, an investigating authority must strictly follow the rules provided under articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI of GATT 1994.

Thank you. The delegation of China looks forward to your questions.

[10] Appellate Body Report, *EU – Biodiesel*, para. 6.73.

ANNEX C-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

The government of Colombia (hereinafter "Colombia") intervenes in this case given its systemic interest in the application of several provisions of the WTO Covered Agreements discussed before this Panel.

While not taking a final position on the specific merits of this case, Colombia provides its views on some of the legal claims advanced by the Parties to the dispute. In particular, Colombia has made submissions on the following issues presented by the Parties:

A. ARTICLES 2.2 AND 2.2.1.1 - SOURCES INSIDE THE COUNTRY OF ORIGIN

1. In Colombia's opinion, the Anti-Dumping Agreement acknowledges that in certain circumstances consideration of the domestic price in the exporting country does not produce an appropriate 'normal value' for the purposes of comparison with the export price in order to determine the margin of dumping. Thus, ADA Article 2.2 envisages circumstances in which such a straightforward price-to-price comparison may not be possible or appropriate and therefore provides for alternative methodologies for the calculation of the normal value. Such possibilities do not exclude information collected outside the exporting country when determining the "cost of production in the country of origin".

2. This issue was clarified by the Appellate Body in *EU – Biodiesel w*hen interpreting Article 2.2 of the ADA and VI of the GATT 1994; the AB stated that: *"these provisions do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin…".*[1]

3. Furthermore, the AB stressed the "reference" role of ADA Article 2.2 and stated that "…On the basis of the text of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the phrase "cost of production […] in the country of origin" may be understood as a reference to the price paid or to be paid to produce something within the country of origin".[2]

B. THE TERMS "SHALL NORMALLY" UNDER ADA ARTICLE 2.2.1.1

4. Colombia recognizes that the use of the term "shall" before the term "normally" implies an obligation of mandatory nature. However, as the AB has stated, there should be certain circumstances where the preference rule over records kept by the exporter or the producer admits derogation. This seems to be the case where despite the evidence submitted or obtained during the investigation proceedings, the IA concludes that domestic sales of any product are not "in the ordinary course of trade". This has critical relevance in cases where distorting administrative practices or rules could affect the "normal value" of the investigated product. Nonetheless, the IA must comply with the fundamental obligations set out in ADA Article 5.3 when performing the proper examination of the evidence provided by the interested parties. This means to examine whether the evidence before the authority at the time it made its determination was such that an unbiased and objective that evidence could properly have made the determination.[3]

C. THE OBLIGATION TO ESTABLISH A PRIMA FACIE CASE

5. Colombia considers that the *prima facie case*, refers to several elements: a) there must be an express statement on the claim; b) the reasons for which the complaining Member considers there is a violation of a specific article of a Covered Agreement; c) identification of the specific measures at issue and provision of a brief summary of the legal basis of the complaint sufficient to

[1] ABR, *EU – Biodiesel*, para. 6.74 (WT/DS473/AB/R).
[2] Ibid, para. 6.69.
[3] PR, *US – Hot-Rolled Steel*, para. 7.153 (WT/DS184/R).

present the problem clearly[4]. Evidence must be presented to enable the complainant to rule on the alleged facts.

6. For this reason, it is important to consider that, according to Article 13 of the DSU, the panels have a significant investigative authority, but this authority cannot replace the burden for the complaining party to establish a *prima facie* case of inconsistency based on a specific legal claims.[5] A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU, but not to make the case for a complaining party.

[4] Appellate Body Report, *Guatemala – Cement I*, paras. 70 and 72.
[5] ABR, *India – Agricultural Products*, para. 5.85.

ANNEX C-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1 INTRODUCTION

1. The EU exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the Anti-Dumping Agreement. Whilst not taking a position on the facts of this case, the EU provides its views on certain legal claims and arguments advanced so far by the Parties to the dispute.

2 SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

2.1 Russia's claim that Ukraine violated Articles 2.2 and 2.2.1.1 of Anti-Dumping Agreement because, in determining the constructed normal value, it failed to calculate costs on the basis of records kept by the Russian producers and exporters

2. The EU notes that the Appellate Body in *EU — Biodiesel*, referring to the panel report in the same case, mentioned "non-arms-length transactions" or "other practices" which may affect the reliability of the costs reported in the records. Several third parties (Australia, Brazil, the US) highlighted this aspect in their written submissions.

3. *First*, the EU agrees that certain government actions can be at the source of dumping and material injury. Ukraine distinguishes the present case from *EU — Biodiesel* and explains in detail that the kind of state intervention in the present case is much more significant than in *EU — Biodiesel*, as the domestic price of gas in Russia is established by law and not subject to market forces.

4. Indeed, Article VI:5 of GATT 1994 provides that no product can be subject to both anti-dumping and countervailing duties, in order to "compensate for the same situation". It is uncontroversial that countervailing duties can be used to address situations caused by the action of the government of the exporting country, such as prohibited subsidies. This means that, by acknowledging that there can be a single situation which could be the subject to either a countervailing duty or an anti-dumping duty, Article VI of GATT 1994 acknowledges that government actions may be at the source of dumping and material injury.

5. This conclusion was confirmed by the Appellate Body in *United States — Anti-dumping and Countervailing duties (China)* that clearly establishes that "exogenous factors", such as the actions of the government of the exporting country, may very well be the source of dumping.

6. *Second*, the EU agrees with Ukraine that the establishment of the domestic gas prices in Russia may fall under the "other practices" which may affect the reliability of the reported costs. Indeed, the domestic gas price in Russia is regulated by the State and not subject to market forces. It appears that the price at which the main provider, Gazprom, sells gas on Russia's domestic market does not even cover the costs for extraction and transportation to the Russian producers, let alone the other expenses incurred.

7. The EU agrees that this practice by the Russian State of establishing the domestic gas prices may be considered as falling under the category of "other practices" which affect the reliability and accuracy of the costs in the producers' records.

8. *Third*, the EU agrees that at the time of its accession to the WTO Russia undertook specific commitments with regard to pricing policies and in particular with regard to the fact that "producers/distributors of natural gas in the Russian Federation would operate [...] on the basis normal commercial considerations, based on recovery of costs and profit". In addition, the EU recalls the concerns expressed by Members with regard to Russia's gas pricing policies and the role of Gazprom.

9. Thus, Russia's commitment that producers and distributors of gas in Russia would operate on the basis of normal commercial considerations, based on recovery of cost and profit, is part of

its WTO obligations. However, the fixing of domestic gas prices by the State cannot be equated to "normal commercial considerations".

10. *Finally*, with regard to the meaning of "normally" in Article 2.2.1.1, the EU considers that a threshold question is whether Ukraine has explained sufficiently well to the Panel how that particular provision was relied upon by the IA in the investigation at issue. Otherwise the invocation by this particular provision may only constitute an attempt at *ex-post* rationalisation. This would mean that the Panel almost certainly does not need to decide this question in this case, and in our submission should not do so.

11. Following the definition of dumping, and the introduction of the notions of normal value and price comparability in Article 2.1 of the Anti-Dumping Agreement, Article 2.2 elaborates the rules for determining normal value. Article 2.2 contains two sub-paragraphs. Article 2.2.1 focuses in on the question of when domestic sales or sales to a third country may be treated as not in the ordinary course of trade by reason of price (when they are below the costs of production plus administrative, selling and general costs).

12. Article 2.2.1 itself contains one further sub-paragraph: Article 2.2.1.1. By its own terms, Article 2.2.1.1 is framed as a provision to be applied "for the purpose of paragraph 2". The term "purpose" appears in the singular. To understand the provision properly, we must therefore look back to the single purpose of paragraph 2. We must neither improperly expand nor narrow that single purpose. The single purpose of paragraph 2 is, as we have already observed, to set out rules governing the establishment of a value that is normal or, for short, a normal value. Thus, we must correctly understand the first sentence of Article 2.2.1.1 as requiring that, for the purpose of establishing a normal value, provided that certain conditions are met, costs shall normally be based on the records of the investigated firm.

13. The first sentence of Article 2.2.1.1 contains two conditions, introduced by the term "provided that"'. The first condition relates to GAAP, whilst the second condition refers to "records … reasonably reflect the costs …". If the relevant conditions are fulfilled, then, according to the terms of Article 2.2.1.1, a particular consequence follows. That consequence is framed as an obligation (through the use of the term "shall"). Specifically, the consequence is that normally the costs are to be calculated on the basis of the records of the investigated firm. Thus, by its own terms, the first sentence of Article 2.2.1.1 does not establish the consequence as an absolute rule, but frames the consequential obligation by using the term "normally". Also by its own terms, the first sentence of Article 2.2.1.1 does not explicitly set out what circumstances may be considered "normal" and what circumstances may be considered "not normal".

14. It is important to recognise and acknowledge, in the design and architecture of the first sentence of Article 2.2.1.1, that there are two conditions that, if satisfied, result in a specific consequence. Such a condition − consequence structure is not the same, as a matter of law, to a general rule − exception structure, and it would be legally erroneous to interpret and apply the provision as if it were framed as a general rule − exception, when that is not the case.

15. By its own terms, Article 2.2.1.1 does indicate some of the circumstances in which it may be justified to reject/replace/adjust specific cost items in the records of the investigated firm. For example, the second sentence of Article 2.2.1.1 refers to cost allocations have been "historically utilized" by the investigated firm, in particular as regards amortization, depreciation, allowances for capital expenditures and other development costs. Thus, a specific cost allocation might be in accordance with GAAP and otherwise "reasonably reflect the costs …", but it might not have been "historically utilized" by the investigated firm, as opposed to being specifically engineered for the purposes of completing the questionnaire response. Thus, in such a situation, instead of calculating costs exclusively on the basis of the records kept by the investigated firm, an investigating authority may be entitled to reject/replace/adjust such costs (by definition, by having recourse to information or data exogenous to the records kept by the investigated firm). The same comment applies with respect to the existence of an "association or compensatory arrangement" as referenced in Article 2.3. The Appellate Body has recognised that rejecting transactions between affiliates in favour of transactions that are in the ordinary course of trade is consistent with Article 2.1, and thus consistent with the purpose (establishing a normal value) that Article 2.2.1.1 is expressly directed towards achieving. If such adjustments would not be made pursuant to Article 2.2.1.1 (the terms adjusted and adjustment appear in the third sentence and in footnote 6), then they would only have to be made instead pursuant to Article 2.4.

16. These observations are confirmed by the repeated use of the term "normal" throughout the relevant provisions, including in Article VI of the GATT 1994; in the basic definition in Article 2.1;

in Article 2.2, footnote 2, Article 2.2.1, and footnote 5; in Articles 2.2.1.1 and 2.2.2 (by cross-reference) and Article 2.4. The overarching requirement that the export price must be compared with a value that is normal, that is, a normal value, provides compelling support for the preceding analysis.

17. Thus, the EU has offered some initial views with regard to the correct interpretation of Article 2.2.1.1, including the meaning and place of "normally" in its overall architecture. The EU considers that there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 "normally" to base the calculation of costs on the records kept by the exporter or producer under investigation would not preclude the rejection or adjustment of data found to relate to an abnormal situation, an issue which was not decided in *EU — Biodiesel*. This understanding is shared by other third parties.

2.2 Russia's claim that Ukraine acted in breach of Articles 2.2 and 2.2.1.1 of Anti-Dumping Agreement because it replaced (adjusted) the costs of gas actually borne by the Russian producers and exporters for production of ammonium nitrate with data on the gas prices outside of Russia

18. Ukraine maintains that, differently from *EU – Biodiesel*, in the present case the gas price was regulated by the State and the State was the main supplier of the respective product.

19. The EU recalls that the Appellate Body has made it clear that evidence from outside the country of origin may be taken into account in the determination of the cost of production in the country of origin.

20. Furthermore, the EU notes that in the context of the SCM Agreement the Appellate Body went even further, stating in *US – Softwood Lumber IV* that an IA may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted.

21. That position was later confirmed by the Appellate Body in *US — Anti-Dumping and Countervailing Duties (China)*, also in the context of the SCM Agreement. According to the Appellate Body an IA may reject in-country private prices if it reaches the conclusion that these are too distorted due to the predominant participation of the government as a supplier in the market.

22. Similarly, in the present case Ukraine has brought evidence that in-country gas prices in Russia are distorted such that they cannot meaningfully be used for the construction of the normal value, as the Russian government establishes itself the domestic gas prices. It follows that in the case of a market distorted to such an extent by state intervention an IA may not rely on the domestic prices of gas.

2.3 Russia's claim that Ukraine violated Article 2.2.1 of the Anti-Dumping Agreement because it improperly treated domestic sales of Ammonium nitrate in Russia as not being in the ordinary course of trade

23. Russia claims that the use of the price adjustment with respect to the gas prices in Russia's domestic market resulted in a much higher per unit costs of production and lead to the conclusion that the domestic sales of the ammonium nitrate producers were not in the ordinary course of trade. Thus, the use of a several times higher gas price tainted the entire analysis under Article 2.2.1 of the Anti-Dumping Agreement.

24. Ukraine maintains that Russia's third claim is consequential to its first claim according to which Ukraine violated Article 2.2.1.1 of the Anti-Dumping Agreement, explaining then that the IA has found that sales were made at a loss, in substantial quantities and during an extended period of time, the prices not having provided for recovery of all costs within a reasonable period of time.

25. The EU recalls that Appellate Body has offered in *US — Hot-Rolled Steel* several examples of situations which may fall under the category of transactions "not in the ordinary course of trade".

2.4 Russia's claim that Ukraine violated Article 2.4 of the Anti-Dumping Agreement because it failed to make a fair comparison between the export price and the constructed normal value

26. Russia claims that Ukraine violated Article 2.4 of the Anti-Dumping Agreement as a consequence of the fact that in the construction of the normal value the IA rejected the prices of gas paid by the ammonium nitrate producers and replaced them with gas prices charged to customers outside the country of origin.

27. Ukraine maintains that Russia's claim is merely a repetition of its previous claim regarding the construction of the normal value and that the "artificial inflation" of the total cost of production is not a difference which affects price comparability. It re-explains that the IA reached the conclusion that gas prices on Russia's domestic market were clearly not of a commercial nature, being significantly lower than the export prices, and that those prices were fixed by the State and were below the cost, contrary to Russia's commitment undertaken upon its WTO accession. Accordingly, the IA took into account the average of the gas prices at the German border. Thus, the solution used by the IA does not relate to a difference in the characteristics of the domestic and export transactions which are compared, or for that matter a difference affecting price comparability.

28. The text of Article 2.4 provides that a "fair comparison" be made between the export price and the normal value when determining whether dumping exists. The second sentence of Article 2.4 sets up the requirements to be met by this comparison, stating that it shall be "at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time". The third sentence of Article 2.4 elaborates on the means to be employed in order that the "comparison" between the normal value and the export price is "fair".

29. The EU recalls that the panel in *EU – Biodiesel* has found that Article 2.4 refers to only those differences which affect price comparability and not to differences arising exclusively from the methodology used to construct the normal value.

30. The EU agrees with Ukraine. As the way that Argentina and Russia structured their claims is similar in the two cases, the EU considers that the Panel should dismiss Russia's claim, as it is a merely consequential claim to its claims regarding the construction of the normal value and it does not address specific aspects of the fair comparison contemplated by Article 2.4 of the Anti-Dumping Agreement.

31. Russia's claim under Article 2.4 pertains to the calculation of the normal value, as opposed to the comparison between the normal value and the export price. In light of the panel reports in *Egypt – Steel Rebar* and *EC – Tube or Pipe Fittings,* Article 2.4 does not deal with the basis for and basic establishment of the export price and normal value (which are addressed in other provisions), but rather addresses the nature of the comparison of export price and normal value. Thus, Russia's claim that the Ukrainian authorities should have calculated the normal value in a different way falls outside the scope of Article 2.4, because Article 2.4 does not apply to the establishment of the normal value. If Ukraine is right about the adjustments made pursuant to Article 2.2.1.1, which the EU considers to be the case, it would of course not be required to "un-adjust" pursuant to Article 2.4. The case turns on a proper construction and application of Article 2.2.1.1, not Article 2.4.

2.5 Termination of investigation against an exporter with alleged negative dumping in the original investigation

32. The EU starts by recalling that the Appellate Body in *Mexico — Anti-Dumping Measures on Rice* found that by requiring the investigating authority to conduct a review for exporters with zero and *de minimis* margins, Article 68 of Mexico's Foreign Trade Act was inconsistent with Article 5.8 of Anti-Dumping Agreement and Article 11.9 of SCM Agreement.

33. If the Panel finds that in the present case there were no such *de minimis* determinations with respect to EuroChem in the original investigation, then the question may be if Article 5.8 of Anti-Dumping Agreement applies in the context of reviews initiated under Articles 11.2 or 11.3 of Anti-Dumping Agreement.

34. In this respect, the panel in *US — Corrosion-Resistant Steel Sunset Review* did not find textual or contextual support in the language of either Article 11.3 or Article 5.8 to suggest that the *de minimis* standard also applies in the context of sunset reviews.

35. However, the EU notes that in interpreting the provisions with respect to sunset reviews a panel needs to take into account their rationale and not confine itself to the sole analysis of text and context. For instance, in the context of the cumulative assessment of injury the Appellate Body found in *US — Oil Country Tubular Goods Sunset Reviews* that notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries.

36. Finally, the EU recalls that in the context of the SCM Agreement the Appellate Body has found in *US — Carbon Steel* that the *de minimis* standard set forth in Article 11.9 of the SCM Agreement is not implied in Article 21.3 of the Agreement.

3 CONCLUSIONS

37. The EU hopes that its contribution in the present case will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the Anti-Dumping Agreement.

ANNEX C-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. In this dispute, the Russian Federation ("Russia") challenges the anti-dumping measures imposed by Ukraine on ammonium nitrate originating in Russia, raising a number of claims pertaining to the interpretation of the WTO covered agreements, notably the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement"). Japan considers that this dispute raises issues of systemic importance, and focuses on several issues regarding the interpretation of Articles 2.2.1.1, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement. Notwithstanding the above, Japan does not take any specific views on the factual aspects of the dispute.

II. INTERPRETATION OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

A. The Condition that the Exporter's Records Reasonably Reflect Costs

2. Japan's comments regarding the condition that the exporter's records reasonably reflect the costs focus on the methodology used by an investigating authority to calculate the cost of production. Russia correctly notes that, in *EU – Biodiesel (Argentina)*, the Appellate Body clarified that there is no "additional or abstract standard of 'reasonableness' that governs the meaning of costs associated with the production and sales of the product under consideration".[1] This, however, does not mean that an investigating authority must in all circumstances accept the costs registered in an exporter's or producer's records.[2]

3. For example, the panel in *EU – Biodiesel (Argentina)* made it clear that an investigating authority are "free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs [ ]".[3] The Appellate Body also recognized in *EU – Biodiesel (Argentina)* that there may be circumstances in which the exporter's or producer's records may be found "not to reasonably reflect the costs associated with the production and sale of the product under consideration".[4] In sum, both the panel and the Appellate Body left open the possibility that the investigating authority could permissibly decline to use the exporter's or producer's records after considering the specific circumstances of the costs reported to be incurred by those exporters or producers on their records. In Japan's view, transactions affected by government price control may fall under "non-arms-length transactions or other practices which may affect the reliability of the reported costs" and which the investigating authorities are "free to examine".

4. Further, Japan notes that Article 2.2.1.1 must be understood in the light of the concept of "normal value" and Articles 2.1 and 2.2. "Normal value" is defined in Article 2.1 as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The "normal value" is meant to reflect "the 'normal' price of the like product, in the home market of the exporter".[5] Sales not made in the ordinary course of trade are to be excluded from the calculation of normal value "precisely to ensure that normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter".[6]

5. The Appellate Body also stated that Article 2.2.1.1 pertains to a methodology for obtaining an "appropriate proxy" for the sales price of the product under investigation "if it were sold in the ordinary course of trade in the domestic market".[7] In this regard, "the costs associated with the production and sale of the product" under Article 2.2.1.1 are intended to serve as an appropriate

[1] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37.
[2] See for example, Panel Report, *EU – Biodiesel (Argentina)*, footnote 400 to para. 7.242.
[3] Ibid.
[4] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33.
[5] Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.
[6] Ibid.
[7] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

basis for estimating the would-be market price of the products concerned, or, in other words, the price that would have resulted from sales transactions concluded on terms and conditions that are compatible with normal commercial practice. Japan considers that whether or not a commercial practice is "normal" must be determined objectively by the investigating authority of the importing country and take into account the actual commercial practices in the relevant market.

6. The above interpretation does not constitute a new test under Article 2.2.1.1. To the contrary, the above interpretation faithfully reflects the text of Article 2.2.1.1, as previously interpreted by panels and the Appellate Body. Article 2.2.1.1 permits an investigating authority to disregard the exporter's or producer's records when it determines that such records do not "reasonably reflect the costs associated with the production and sale of the product under consideration" because the recorded costs of inputs do not reflect transactions concluded on terms and conditions that are compatible with normal commercial practice.

B. The Term "Normally" Under Article 2.2.1.1

7. Japan notes that the first sentence of Article 2.2.1.1 contemplates that an investigating authority shall "normally" calculate costs on the basis of records kept by the exporter or producer, provided that such records satisfy the two prescribed conditions.

8. The ordinary meaning of "normally" is "[u]nder normal or usual conditions; as a rule".[8] The Appellate Body has observed that the qualification of an obligation with the adverb "normally" connotes that there are circumstances "in which the obligation in the first sentence of Article 2.2.1.1 'normally' to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply".[9] In accordance with the principle of effectiveness,[10] this Panel must give "meaning and effect" [11] to the term "normally" in Article 2.2.1.1. Limiting the circumstances in which an investigating authority may depart from the exporter's records to the two prescribed conditions reads out the term "normally" from Article 2.2.1.1 and the text would have exactly the same meaning as if it had read: "costs shall be calculated on the basis of records kept by the exporter or producer under investigation, provided that [ ]".

9. Furthermore, the rationale for relying on the recorded costs of the producer or exporter is that such costs potentially reflect market prices of inputs and, consequently, the use of such prices can yield a proxy that approximates the would-be price of the product under consideration if it had been sold in the ordinary course of trade. Such rationale is premised on the existence of a well-functioning market in which participants are acting independently (as in arm's length transactions) for their own commercial interest. When prices of inputs are determined arbitrarily by government regulations, then an investigating authority should be allowed to exclude the relevant transactions from the calculation of constructed normal value. Japan recalls, in this regard, that the Appellate Body has recognized "that the Anti-Dumping Agreement affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not 'in the ordinary course of trade'" provided that discretion is exercised in an even-handed way.[12] Japan respectfully requests the Panel to give "meaning and effect" to the inclusion of the term "normally" and to preserve the flexibility that the inclusion of this term in Article 2.2.1.1 is intended to provide to investigating authorities.

III. INTERPRETATION OF ARTICLE 11 OF THE ANTI-DUMPING AGREEMENT

10. Article 11 of the Anti-Dumping Agreement provides that anti-dumping duties may continue or be extended if the investigating authority finds that the removal or expiry of the anti-dumping duties would likely lead to continuation or recurrence of injury. With respect to Article 11, Russia argues that the provisions of Article 3 of the Anti-Dumping Agreement apply to reviews conducted pursuant to Article 11.[13]

[8] Appellate Body Report, *US – Clove Cigarettes*, para. 273.
[9] Appellate Body Report, *EU – Biodiesel (Argentina)*, footnote 120 to para. 6.18.
[10] The principle of effectiveness is "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention [on the Law of Treaties]" (Appellate Body Report, *US – Gasoline,* p. 23).
[11] Appellate Body Report, *Canada – Dairy*, para. 133.
[12] Appellate Body Report, *US – Hot-Rolled Steel*, para. 148.
[13] Russia's First Written Submission, para. 199.

11. As stated by the Appellate Body, there are certain differences in the "nature and purpose" of original investigations and sunset reviews.[14] The Appellate Body further noted that there are no cross-references between Article 3 and Article 11.3, and that Article 11.3 does not expressly identify any particular factors that authorities must take into account in making such a determination.[15] However, investigating authorities' discretion is not unfettered with respect to the determination of likelihood of the continuation or recurrence of injury under Article 11. The investigating authorities must abide by the following considerations.

12. First, the Appellate Body has confirmed that "the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3."[16] Second, pursuant to Article 11.3, the investigating authority's likelihood-of-injury determination must rest on "a sufficient factual basis to allow it to draw reasoned and adequate conclusions".[17] To comply with this requirement, "[c]ertain of the analyses mandated by Article 3 [ ] may prove to be probative, or even required".[18] As the Appellate Body explained:

> [i]t seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgment, consider other factors contained in Article 3 when making a likelihood-of-injury determination.[19]

13. In sum, Japan considers that, contrary to Russia's assertion, there is no rigid requirement to examine *all* of the injury factors listed in Article 3.4 of the Anti-Dumping Agreement in every Article 11 review. Nonetheless, by the nature of likelihood of "injury" determinations, Japan understands that certain factors examined under Article 3 may need to be examined in an Article 11 review depending on the specific circumstances of the case.

[14] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 124.
[15] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 113.
[16] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.
[17] Appellate Body, *US – Corrosion-Resistant Steel Sunset Review*, para 114 (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para 7.271).
[18] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.
[19] Ibid.

ANNEX C-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

Third party oral statement

1. Mexico is grateful for the opportunity to put forward its views on this dispute.

2. In this statement, my delegation will first address substantive aspects and then go on to some procedural aspects.

3. In general terms, Mexico does not agree with various arguments put forward by Russia concerning the interpretation of the second condition in the first sentence of Article 2.2.1.1 and its relationship with Article 2.2 of the Anti-Dumping Agreement.

4. Russia argues that the reference to "costs of production" contained in Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement concerns the producer-specific costs associated with the production and sale of the product under consideration, since only these costs can be those incurred by the producer investigated in the country of origin.

5. Mexico disagrees with Russia's interpretation. In our view, a proper interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement leads to the conclusion that the production costs referred to in Article 2.2 of the Anti-Dumping Agreement are not necessarily the costs associated with the production and sale of the product under consideration that are actually incurred by the specific producer/exporter.

6. In this connection, in the first place Russia's interpretation would necessarily lead to the conclusion that it is implicit in Article 2.2 that the reference to the "cost of production" pertains to the specific product of the producer or exporter investigated. However, that would make it superfluous for the article to go on to say "in the country of origin", since this would already be covered by the expression "of the product" (under consideration) which is considered implicit.

7. Secondly, if an investigating authority validly determines that it cannot use the records of the exporter or producer because they are not in conformity with the generally accepted accounting principles of the exporting country, or because they do not reasonably reflect the costs associated with the production and sale of the product under investigation, then the authority would have to use a different basis for the costs associated with the production and sale of the product under consideration. If, in using this alternative basis, it determines that there are no domestic sales in the ordinary course of trade, it would then be able to construct the normal value. Obviously, in constructing the normal value in accordance with Article 2.2, it could not use the accounting records of the exporter, since, as was said earlier, they are not reliable. However, according to Russia's interpretation, Article 2.2 of the Anti-Dumping Agreement would oblige the authority precisely to use those records, despite the fact that it has already been determined that they are not reliable. That is the reason why Article 2.2 cannot refer implicitly to the specific product, because such an interpretation would mean that, despite the existence of a valid reason for not using the accounting records, the authority would necessarily have to use the costs of the product under consideration, now by virtue of Article 2.2.

8. Thus, apart from the fact that there is nothing in Article 2.2 to support the interpretation that the article in question implicitly refers to the specific product, such an interpretation would mean that there is no difference between the costs referred to in that article and Article 2.2.1.1, even though the Appellate Body itself, in its *EU – Biodiesel* report (DS43), stated that the scope of Article 2.2 is much broader than that of Article 2.2.1.1. On the other hand, as mentioned before, if it were implicit in Article 2.2 that the production cost must be that of the specific product, referring to the product under investigation produced by a particular producer/exporter, it would be superfluous to go on to say "in the country of origin", since this would already be covered by the fact that there is an implicit reference to the specific product.

9. Mexico therefore considers that the reference contained in Article 2.2 to the "cost of production in the country of origin" indicates that the information sought is not the specific information of a company, but information making it possible to determine what is the cost of production in the country of origin. This reading is compatible with what was stated by the Appellate Body in the *EU – Biodiesel* case (DS473), where it found:

> "[…] the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence".[1]

10. Mexico also considers that the Anti-Dumping Agreement's preference for actual information does not justify limiting the methodological options for its substitution. This is evidenced by the fact that Article 2.2.2, which also refers to the construction of normal value, provides the flexibility of replacing the actual data with "any other reasonable method". Moreover, according to Article 2.2.1.1, the option of calculating costs using records of the producer/exporter is only the preferred basis, since, as was indicated by the Appellate Body in *US – Clove Cigarettes* (DS406), if a provision is qualified by the term "normally", it admits of exceptions. Thus, in accordance with that article, it is possible to resort to other options in order to calculate costs.

11. Mexico considers that the interpretations given by Russia, taken to the extreme, would imply that the "facts available" provisions may not be used either, although these are set out in the Anti-Dumping Agreement itself, because they imply an option other than that of costs.

12. Lastly, with regard to the procedural issues, Mexico wishes to express its concern about the time-limit imposed on third parties by the Panel for the reading of oral statements during this session, irrespective of the language in which it is wished to make them. Mexico points out that this limitation is not a decision of the Members reflected in the Dispute Settlement Understanding; in addition, in establishing the limitation indiscriminately for all languages, consideration is not given to the fact that more time is required to make a statement in Spanish than in English, as is shown by the versions of the Panel and Appellate Body reports in Spanish, which require roughly 16% more pages than the English versions. Thus, the imposition of a single limit for official languages has a detrimental impact on Spanish and French.

13. Moreover, my delegation wishes to point out that the Panel decided to use the Digital Dispute Settlement Registry mandatorily, without consulting the third parties. The progress towards a digital platform is important and may facilitate the handling of the case file; however, as that platform is still in a test phase, permission should have been given for the use of both the traditional system and the new platform.

14. Having made these points, the Mexican Government again expresses gratitude for being given the opportunity to participate in this proceeding and to present its points of view, and is more than willing to reply to any question the Panel may put to it.

[1] Appellate Body Report, *EU – Biodiesel* (DS473), para. 6.73.

The Response by Mexico to the Question of the Panel

1. DISREGARDING COSTS OF GAS USED IN PRODUCTION OF AMMONIUM NITRATE

1. In paragraph 6 of its third-party statement, Norway states that under Article 2.2.1.1 of the Anti-Dumping Agreement it is the records of the investigated producer that stand the test of reasonableness and not the costs reflected in those records. In the third parties' view, in ascertaining whether the records reasonably reflect the costs, is an investigating authority permitted to examine the reasonableness of the costs themselves? Please explain what in the text of Article 2.2.1.1 would support your view.

Reply:

1. In Mexico's view, yes, this is permitted. Article 2.2.1.1 of the ADA lays down the requirements that must be met in choosing the basis to be used in calculating the costs for determining normal value. In particular, we note that the text of this article establishes two basic premises:

(a) first, that costs are normally calculated on the basis of records kept by the exporter or producer;

(b) second, that the first premise (i.e. that costs are normally calculated on the basis of records kept by the exporter or producer) will be applied provided that two conditions are satisfied:

(i) that the records of the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and

(ii) that they reasonably reflect the costs associated with the production and sale of the product under consideration.

2. In other words, if the records kept by the exporter or producer are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under investigation, then the authority will normally use the accounting records kept by the exporter or producer.

3. Now, in *US – Clove Cigarettes*, the WTO Appellate Body (AB) interpreted the ordinary meaning of the term "normally" as "under normal or ordinary conditions; as a rule".[2] In the same dispute, the AB observed that if an obligation is qualified by the adverb "normally", then that obligation admits of derogation.[3] In paragraph 7.161 of its final report, the Panel in *China – Boiler Products* adopted the same approach.

4. Thus, if the accounting records are in accordance with the GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration, then the authority will normally use those accounting records for calculating the costs. Obviously, if the records reflect the costs of production and sale of the product under consideration, then in using those records the authority would be basing itself on the costs of production and sale of the product under consideration. On the other hand, however, if the authority were to decide not to base itself on the accounting records (for example, because the records did not comply with the GAAP or reasonably reflect the costs associated with the production and sale of the product under consideration), then, by definition, the authority would not be able to base itself on the costs of production and sale of the product under consideration, but would have to carry out its calculations on some other basis. It is precisely for this reason that Article 2.2 of the ADA cannot implicitly contain the expression "of the product", since that interpretation would mean that, despite not being able to use the accounting records, the authority would necessary have to fall back, this time under Article 2.2, on the costs of the product under consideration.

[2] Appellate Body Report, *US – Clove Cigarettes*, para. 273.
[3] Idem.

5. Clearly, this interpretation leads to absurd results and, moreover, deprives the word "normally" in Article 2.2.1.1 of its meaning, since, for practical purposes, the authority would always have to base itself on the accounting records to be able to obtain the costs of the product under consideration incurred by the exporter, regardless of the fact that Article 2.2.1.1 would allow it to seek another option.

6. If recourse to an option other than the accounting records of the exporter is permitted, we see no reason why that other option could not be used when the accounting records of the exporter reflect unreasonable costs.

ANNEX C-9

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

Third party oral statement

Madam Chairperson, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel. Without taking any position on the facts of this dispute, Norway will in this oral statement take the opportunity to offer some views on the interpretation of the Second condition of Article 2.2.1.1 of the Anti-Dumping Agreement, and the application of the Panel and Appellate Body reports in EU – Biodiesel.[1]

2. The obligations on the investigating authorities according to Article 2.2.1.1, is subjected to two cumulative conditions:

i. that the records kept by the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and

ii. that such records reasonably reflect the costs associated with the production and sale of the product under consideration.

3. If these two conditions are fulfilled, the investigating authorities "*shall normally*" calculate the costs on the basis of the records kept by the exporter or producer under investigation.

4. With regards to the second condition, the parties disagree on whether Article 2.2.1.1 "*allows an investigating authority to disregard input prices reasonably reflected in records kept by the investigated producers and ex-porters on the grounds that due to governmental regulation domestic input prices are lower than prices charged for exporter of the input concerned and/or in the markets of third countries*".[2]

5. Ukraine contends, among other, that following the guidance of the Appellate Body and Panel in EU – Biodiesel, the second condition of Article 2.2.1.1 allows the investigating authority to *"examine the reliability and accuracy of the costs recorded in the records of the producers/exporters"*, and disregard such records when they do not reasonably reflect the costs associated with the production and sale of the product under consideration, because the recorded costs of inputs do not reflect transactions concluded on terms and conditions that are <u>compatible with normal commercial practices</u>.

6. Regarding the content of the second condition, Norway notes that the Appellate Body in EU – Biodiesel clearly established that the wording "*reasonably reflect*" of Article 2.2.1.1 relates to the "*records*", and not the "*costs associated with the production and sale of the product under consideration*". It is the "*records*" that stand the test of reasonableness, and not the "*costs*".

7. Furthermore, regarding the "*costs*", both the Panel and the Appellate Body in EU – Biodiesel established that "*costs associated with the production and sale of the product under consideration*" relates to the *"actual"* costs incurred that are genuinely related to the production and sale of the specific product under consideration.[3]

8. In connection to this, the Panel in EU – Biodiesel underlined that the condition at issue relates to whether the costs set out in a producer's or exporter's records "*correspond – within acceptable limits – in an accurate and reliable manner[] to <u>all the actual costs incurred</u> by the*

[1] DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina.
[2] Russia's First Written Submission para. 64.
[3] Appellate Body Report in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 6.30.

particular producer or exporter under consideration".[4] In addition the Panel further underlined that *"the object of comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under different set of conditions or circumstances and which the investigating authority consider more "reasonable" than the costs actually incurred"*.[5]

9. Norway does not intend to delve into the facts of the case, but it seems from the written submissions of the parties that the Ukraine does not dispute that the costs recorded by the producers accurately and reliably capture all the relevant production activities that have actually incurred related to the production of the specific product. The real issue in dispute would seem to be whether the input price of gas in Russia can be disregarded due to it being subsidized or distorted through government regulations so that the producer receives gas for less than market value.

10. In this respect, Norway notes that "dumping" is defined as price discrimination by the investigated producer between domestic and export markets.[6] Anti-dumping measures are available to counter such discriminatory behavior by exporters. Government regulation or intervention in the home market, that affect the producers' cost of production, for instance price caps or the provision by a Government of an input for less than market value, is more appropriately considered under the Subsidies Agreement[7], and is not as such a reason to reject the actual cost of production in a dumping investigation.

11. In conclusion, Article 2.2.1.1 of the Anti-dumping Agreement does not allow the investigating authorities to reject records by the producer or exporter, on the grounds that the records do not reasonably reflect the costs associated with the production and sale of the product under investigation, because the price of an input is considered not to reflect market value due to governmental regulation.

12. This concludes Norway's statement here today. Thank you.

[4] Panel Report in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 7.247.
[5] Panel Report, in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 7.242.
[6] GATT Article VI:1(b)(ii) and *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* Article 2.1.
[7] Cf. *Agreement on Subsidies and Countervailing Measures* Article 1.1(a)(1)(iii) and Article 14(d).

ANNEX C-10

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

I. CLAIMS REGARDING ARTICLES 2.2 AND 2.2.1.1

A. Costs Associated With the Production of the Product under Investigation

1. The United States has serious concerns with the positions espoused by Russia with regard to the interpretation and application of Article 2.2.1.1 of the Anti-Dumping Agreement. First, the Anti-Dumping Agreement uses the general term "costs," and not a term such as "amounts actually incurred." In context, the term "cost" means real economic costs involved in producing the product in the exporting country and not simply the amount reflected, for example, in an invoice price. Otherwise, investigating authorities would be bound to accept artificial, affiliated-party transfer prices – amounts which have no economic meaning.

2. Second, Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration." "Associate" or "associated" is typically defined as being "placed or found in conjunction with another." This language does not support an interpretation that the only inquiry involves what the producer paid for a particular input. Rather, the term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product and supports an economic conception of costs.

3. The context provided by other provisions in Article 2.2 also undermines Russia's suggested interpretation. Where the Anti-Dumping Agreement refers to costs "actually incurred by producers," it does so explicitly. For instance, for administrative, selling, and general costs, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question." Similarly, Article 2.2.2(ii) uses an express limitation to "the actual amounts incurred and realized by other exporters or producers." Given the express language utilized in Articles 2.2.2(i) and 2.2.2(ii), Article 2.2.1.1 cannot be read to limit "costs" to those actually incurred in the way envisioned by Russia.

4. Russia's reliance on the Appellate Body report in *EU – Biodiesel* is also misplaced. First, the Appellate Body understood that the costs calculated pursuant to Article 2.2.1.1 must generate an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. Given that Article 2.2.1.1 (in conjunction with Article 2.2) pertains to a methodology for obtaining an "appropriate proxy" for the price of the product under investigation "if it were sold in the ordinary course of trade in the domestic market," "the costs associated with the production and sale of the product" under Article 2.2.1.1 must be of the kind that is capable of serving as an appropriate basis for estimating the normal value of the final product. Similarly, the Appellate Body stated the general proposition that the second condition (starting with "reasonably reflect") means that the records of the exporter or producer must "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration."

5. Second, the Appellate Body in *EU – Biodiesel* made an explicit finding on what kind of analysis an authority may employ in applying the second condition of the first sentence of Article 2.2.1.1:

> an investigating authority is "certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters" to determine, in particular, whether all costs incurred are captured, whether the costs incurred have been over- or understated *and whether non-arms-length transactions or other practices affect the reliability of the reported costs*.

If, as Russia suggests, the only inquiry related to whether the books and records reflected amounts actually incurred, then the existence of "non-arms-length transactions" or "other practices" would be irrelevant.

6. Finally, the United States recalls that the Panel's role is to consider whether Russia has established that Ukraine's authority failed to provide a reasoned and adequate explanation for its determination. Here, Ukraine explains that the recorded cost for natural gas is artificial because it is set by the Government of Russia. In these circumstances, an unbiased and objective investigating authority could have found that a State-determined natural gas price was not a real, economic cost. Just as a price between affiliated parties may be artificial because it does not reflect an arm's-length price, so too a State-determined price may be artificial because the seller is similarly not free to sell at the price it determines, and therefore price does not reflect the interaction between independent buyers and sellers.

B. Use of Out-of-Country Sources to Derive the Cost of Production

7. Ukraine is correct that the panel and Appellate Body in *EU – Biodiesel* "did not exclude the possibility that an investigating authority may use information and evidence outside the country of origin to determine the prices in the country of origin." Rather, as the Appellate Body explained, when an authority rejects cost data under the second condition of the first sentence of Article 2.2.1.1, information from out-of-country sources could be used to arrive at the cost of production in the country of origin, albeit the benchmark chosen may need to be adapted to reflect the market conditions in the origin country.

8. The Appellate Body in *EU – Biodiesel* correctly differentiated "costs" from "information or evidence" used to establish "costs" by observing "that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin." As the Appellate Body recognized, "these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country." Accordingly, Articles 2.2 and 2.2.1.1 do not preclude an investigating authority from looking to sources outside the country of origin for information or evidence about costs associated with the production of the product under consideration and may use such information or evidence to determine an exporter's or producer's cost of production in the country of origin.

II. CLAIMS REGARDING THE RELATIONSHIP BETWEEN ARTICLES 3 AND 11.3

9. The obligations set forth in Article 3 do not apply directly to likelihood-of-injury determinations in sunset reviews conducted under Article 11.3. As the Appellate Body observed in *US – Oil Country Tubular Goods Sunset Reviews*, the Anti-Dumping Agreement distinguishes between "'determination[s] of injury' addressed in Article 3, and determinations of likelihood of 'continuation or recurrence . . . of injury', addressed in Article 11.3." Article 11.3 contains no cross-reference to Article 3 that would make Article 3 provisions applicable to sunset reviews. As further explained by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, "for the 'review' of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3."

10. Although Article 3.1 does not apply to sunset reviews, the United States nonetheless agrees with Russia that investigating authorities must base likelihood-of-injury determinations on an objective examination of positive evidence under Article 11.3, and the authority's evaluation of the evidence must be unbiased and objective. An authority may look to Article 3 for guidance in conducting its likelihood-of-injury analysis, but it is not required to do so.

11. Finally, an investigating authority's likelihood-of-injury determination under Article 11.3 must be made in an objective manner based on positive facts, but Article 11.3 does not prescribe the particular factors that must be considered or the methodology used by an authority. Trade barriers in third country markets can be relevant to an authority's likelihood-of-injury determination. Therefore, an authority could reasonably find that trade barriers in third country markets make an increase in subject import volume after expiry of a duty more likely by limiting the availability of other export markets to absorb any additional exports from the subject producers and exporters.

III. CLAIMS REGARDING ARTICLE 6.8 AND ANNEX II

12. Article 6.8 and Annex II set forth the conditions under which an investigating authority may make a determination on the basis of facts available. They do not govern how an investigating authority is to calculate dumping margins. Those conditions are provided for in Article 2. Therefore, the United States agrees with Ukraine that the cooperation of Russian respondents is not pertinent to the question of whether Ukraine's decision not to rely on the cost data reported by those parties with respect to its determination of dumping is consistent with its obligations under Article 2.2.1.1 of the Anti-Dumping Agreement.

IV. CLAIMS REGARDING ARTICLES 6.2 AND 6.9

13. Article 6.2 provides, in part, that all parties shall have a full opportunity to defend their interests throughout an anti-dumping investigation. Article 6.9 further requires that an investigating authority, "before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." The disclosure obligation of Article 6.9, while it does not extend to all facts, does extend to those facts which are "salient for a decision to apply definitive measures."

14. Absent a full disclosure of the "essential facts" forming the basis for consideration of an underlying dumping determination, it might not be possible for an interested party to identify whether the determination contains clerical or mathematical errors or even whether the investigating authority properly considered the factual information before it. In this regard, the United States agrees with the panel in *China – Broiler Products* that an investigating authority, with respect to a determination of the existence and margin of dumping, should disclose: (1) the data used in the determinations of normal value (including constructed value) and export price; (2) sales that were used in comparison between normal value and export price; (3) any adjustments for differences that affect price comparability; and (4) the formulas applied to the data. Failure to provide this information could result in an interested party being unable to defend its interests within the meaning of Articles 6.2 and 6.9 because it would not be able to sufficiently identify which issues, if any, are adverse to its interests.

V. CLAIMS REGARDING ARTICLES 12.2 AND 12.2.2

15. Article 12.2 obligates investigating authorities to set forth "the findings and conclusions on all issues of fact and law considered material by the investigating authorit[y]." To this end, Article 12.2.2 provides that the authority's public notice or separate report on a final affirmative determination shall contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . as well as the reasons for the acceptance or rejection of relevant arguments or claims made by exporters or importers." Therefore, disclosure by the investigating authority, including a mere reference to data in possession of an interested party, may not necessarily constitute disclosure of "relevant information on matters of fact and law and reasons which have led to the imposition of final measures," because an interested party may not be able to discern from the reference whether the data in its possession was accurately used, or whether there were mathematical errors in the calculation using the data.

16. At a minimum, the calculations employed by an investigating authority to determine dumping margins, and the data underlying the calculations, constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2. Such calculations are the mathematical basis for arriving at the dumping margins imposed by an authority. They thus are highly "relevant" to the decision to apply final measures, and because they consist of sales and cost data and mathematical uses of these data, they are "matters of fact" within the meaning of Articles 12.2 and 12.2.2.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

17. Contrary to Russia's position, Articles 2.2.1.1 and 2.2 permit an investigating authority to reject or adjust recorded prices or costs where that authority's decision to do so is based on a reasoned and adequate explanation. None of the parties or third parties appear to dispute that recorded costs may be rejected or adjusted where they are artificial transfer prices between affiliated entities. In such a situation, where a producer charges its affiliate an artificially low price for a production input, an authority may reject or adjust the transfer price of that input to reflect

its real cost in the domestic market. A non-arm's-length transaction for an input subsequently used in producing merchandise subject to an anti-dumping proceeding therefore provides a clear example where an authority may look beyond the four corners of a respondent's records to determine whether they "reasonably reflect the costs associated with the production and sale of the product under consideration" within the meaning of Article 2.2.1.1.

18. As Ukraine characterizes the facts, the situation created by the Russian Government's intervention is analogous to a non-arm's-length transaction because the recorded cost for natural gas in Russia is set by the Russian Government and is "not the result of market forces." In these circumstances, an unbiased and objective investigating authority could have found that the price for natural gas in Russia is an artificial price in that it does not reasonably reflect the price that would otherwise be determined by independent interactions between a seller and a buyer in a free market. This then could be another practice, similar to the recordation of non-arm's-length transactions, which may affect the reliability of the reported costs. Accordingly, these circumstances could well constitute grounds to substitute or adjust that cost under Article 2.2.1.1, depending on the facts of the case and the conclusions the authority draws from those facts.

19. Finally, as the Appellate Body explained in *EU – Biodiesel*, when an authority rejects cost data under the second condition of Article 2.2.1.1, information from out-of-country sources could be used to arrive at the cost of production in the country of origin. In certain circumstances, the proxy chosen may need to be adapted to reflect market conditions in the country of origin. That said, in doing so, the authority should not be required to adapt those costs in a way that reintroduces the distortions that led it to substitute the recorded cost.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

20. The Panel's question asks whether "an investigating authority [is] permitted to examine the reasonableness of the costs themselves." The premise of this question does not comport either with the text and structure of Article 2.2.1.1 of the Anti-Dumping Agreement, or with the U.S. understanding of the correct interpretation of this provision.

21. First, the phrase "costs themselves" used in the question seems to imply that an authority must otherwise limit its examination to the figures recorded in the books and records of the producers. This proposition is inconsistent with, and even contrary to, what is provided for in Article 2.2.1.1. Indeed, Article 2.2.1.1 affirmatively provides that an authority may consider whether the producer's "records . . . reasonably reflect the costs associated with the production and sale of the product under consideration." That is, two items should be compared: (1) the recorded costs should be compared with (2) those costs (whether or not contained somewhere in the producer's books and records) associated with the production and sale of the product under consideration. The authority thus is clearly not limited to examining the recorded "costs themselves."

22. Second, the phrase "reasonableness of the costs" is vague and misleading – this phrase is not contained in Article 2.2.1.1, and is not an element of what the United States understands to be the proper interpretation of Article 2.2.1.1. Rather, the inquiry under this second condition in the first sentence of Article 2.2.1.1 is whether the producer's "records . . . *reasonably reflect* the costs associated with the production and sale of the product under consideration." Thus, the application of Article 2.2.1.1 – contrary to what is arguably implied by the question – does not turn on some vague inquiry into the "reasonableness of costs." Rather, the inquiry is aimed at the extent to which the figures recorded in the books and records correspond to those costs associated with the production and sale of the product at issue.

23. Turning to Norway's reading of Article 2.2.1.1, Norway's interpretation does not accurately reflect the text of this article, especially when read in context with Articles 2.1 and 2.2 of the Anti-Dumping Agreement. First, Article 2.1 requires an investigating authority to include in the calculation of normal value only those sales "in the ordinary course of trade." As the Appellate Body has noted, there could be many reasons why sales of the like product, destined for consumption in the exporting country, may be incompatible with market-determined, "'normal' commercial practices" or principles, and thus not an appropriate basis for the calculation of normal value.

24. Second, when no sales of the like product in the ordinary course of trade exist in the domestic market of the exporting country, or such sales do not permit a proper comparison because of "the particular market situation" or the low volume of sales in the domestic market, Article 2.2 prescribes two alternative data sources that may provide for a "proper comparison." Under either alternative, the margin of dumping shall be determined by comparison with a "normal value" that reflects normal commercial practices or principles.

25. If the investigating authority decides to calculate normal value based on cost data, Article 2.2.1.1, together with Article 2.2.2, provides the framework for this determination. Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration." The term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product under consideration and supports an economic conception of costs. Pursuant to Article 2.2.1.1, and as the Appellate Body has concluded, the "costs associated with the production and sale of the product under consideration" must be considered as referring to "those costs that have a genuine relationship with the production and sale of the product under consideration. This is because these are the costs that, together with other elements, would otherwise form the basis for the [comparable] price of the like product if it were sold in the ordinary course of trade in the domestic market."

26. The term "normally" as it appears in Article 2.2.1.1 further suggests that this provision should not be read to limit "costs" to those actually incurred. Definitions for the term "normally" include "in a regular manner," "under . . . ordinary conditions," or "as a rule, ordinarily." The term "normally" thus indicates that there may be conditions in which costs should not be calculated based on the records kept by the exporter or producer under investigation.

27. Finally, the Appellate Body in *EU – Biodiesel* confirmed that an authority, in ascertaining whether the records kept by the exporter or producer under investigation reasonably reflect the costs of production, could "'examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine, in particular, whether all costs incurred are captured, whether the costs incurred have been over- or understated and whether non-arms-length transactions or other practices affect the reliability of the reported costs."

28. In sum, Article 2.2.1.1 cannot be interpreted such that the costs reported in the records kept by the exporter or producer under investigation must be accepted without any consideration. To the contrary, an authority may examine such records. That examination may include, *inter alia*, a consideration of whether the costs kept by the exporter or producer under investigation do not "reasonably reflect" the real economic costs associated with the production and sale of the product under consideration. In such a situation, an unbiased and objective investigating authority would have a basis under the Anti-Dumping Agreement to reject or adjust a cost that does not reflect a normal commercial practice or principle, so long as its determination was based on a reasoned and adequate explanation.

ANNEX D

PANEL COMMUNICATIONS

ANNEX D-1

COMMUNICATION DATED 23 AUGUST 2017 REGARDING DEADLINES SET OUT IN THE TIMETABLE FOR THIS DISPUTE

In this communication, we address issues arising out of Ukraine's refusal to submit a written response to the questions posed to it by the Russian Federation (Russia) following the first substantive meeting, on the ground that it did not receive these questions from Russia by 5 p.m. on the due date set out in the timetable. In addressing these issues, we have considered the comments made by Ukraine and Russia on this matter, including those presented on 18 August 2017.

We recall that the deadline set out in the timetable for each party to pose questions to the other party following the first substantive meeting, to which it wished to receive a response in writing was 5 p.m. on 28 July 2017. The deadline for the other party to submit its written response to these questions was 5 p.m. on 14 August 2017. The Working Procedures adopted in this dispute require parties to file all submissions, including the written questions to the other party through the Digital Dispute Settlement Registry (DDSR), which is the electronic platform maintained by the WTO Secretariat for official filings in this dispute.[1]

Russia informed us through email, at 6.47 p.m. on 28 July 2017, that while it uploaded its questions to Ukraine at 4.57 p.m. on 28 July 2017, due to a technical error in the DDSR, these questions were not released to the other users, including Ukraine at that time.[2] Russia further explained that after it became aware of this technical error, it re-uploaded these questions on the DDSR at 5.57 p.m. on 28 July 2017. The DDSR time log shows that the questions became available to other users, including Ukraine at 5.57 p.m. Ukraine does not suggest otherwise. Thus, Ukraine had access to these questions on 28 July, albeit 57 minutes after the deadline of 5 p.m. Further, Ukraine was copied on this email from Russia, and thus aware as of 28 July 2017 about Russia's explanations for this delay.

Ukraine did not object to this 57 minutes delay at any time prior to the expiry of the deadline on 14 August 2017 for receipt of its written response to questions posed by Russia, or inform us that it would not file its response on account of this delay. We became aware of Ukraine's decision to not file this response only on 15 August 2017, when, in response to a query by the Secretariat, Ukraine stated that it would not be filing this response as it did not receive Russia's questions within the deadline.

In these circumstances, we deeply regret that Ukraine unilaterally decided to not file its response on account of this delay, and then failed to communicate its decision on this matter to the Panel and Russia in a timely manner. We also regret that despite having sufficient time to do so, Ukraine failed to raise its objections regarding the delay faced in accessing Russia's questions in a timely fashion.

Nonetheless, having considered the parties' comments on this matter, and taking into account the minimal delay faced by Ukraine in accessing these questions, the Panel asks Ukraine to provide its written response to the questions posed by Russia to Ukraine on 28 July 2017, **by 5 p.m. on 25 August 2017.** The Panel will not grant any request for an extension of this deadline.

[1] Working Procedures, para. 26. This paragraph also sets out circumstances wherein official filings may be made through a system other than the DDSR.

[2] We have no reason to question Russia's explanations regarding the technical error on the DDSR, and it does appear that the DDSR did not release these written questions at 5 p.m. on 28 July 2017 to other users because of a technical issue in the system. The issue was that instead of releasing the questions initially uploaded by Russia to other users, including Ukraine at 5 p.m. on 28 July 2017, the DDSR system incorrectly applied a different release deadline of 5 p.m. on 24 November 2017.

ANNEX D-2

COMMUNICATION DATED 23 AUGUST 2017 REGARDING UKRAINE'S FIRST INTEGRATED EXECUTIVE SUMMARY

The Panel notes Ukraine's clarification on 21 August 2017 that as part of its first integrated executive summary, it has submitted an (i) executive summary of the first written submission of Ukraine and (ii) executive summary of the oral statement of Ukraine. The combined length of these two documents, excluding the cover pages, exceeds 15 pages.

Paragraph 20 of the Working Procedures states that each "integrated executive summary shall be limited to no more than 15 pages". Thus, Ukraine's submission in this regard exceeds the page limit set out in the Working Procedures.

Considering Ukraine has submitted two separate executive summaries as part of its integrated executive summary, and bearing in mind the two documents combined exceed the page limit specified in the Working Procedures, the Panel will accept only one of the two executive summaries filed by Ukraine as the integrated executive summary for the purposes of paragraph 20 of the Working Procedures. Please let the Panel know by **5 p.m. on 28 August 2017** which of the two executive summaries filed by Ukraine should be treated by the Panel as the first integrated executive summary for the purpose of paragraph 20 of the Working Procedures.

No new submissions may be made at this stage as part of the first integrated executive summary.

ANNEX D-3

COMMUNICATION DATED 30 AUGUST 2017

The Panel takes note of Ukraine's message of 29 August 2017 that it did not have access to the DDSR system from 24-28 August 2017, on account of public holidays in Ukraine between 24-27 August, and technical difficulties in accessing the DDSR on 28 August. Thus, Ukraine was unable to access the communications sent by the Panel at around 8.14 p.m. (Geneva time) on 23 August 2017, including the communication asking Ukraine to respond to the written questions posed to it by Russia following the first substantive meeting by **5 p.m. on 28 August 2017**.

The Panel recalls that in its communication it had stated that it would not grant any request for an extension of the deadline of 5 p.m. on 28 August for Ukraine to respond to the written questions posed by Russia. However, the Panel acknowledges the particular difficulties faced by Ukraine due to which it could not file its response within the set deadline. The Panel asks Ukraine to provide its written response to the questions posed by Russia on 28 July 2017, by **5 p.m. on Friday, 1 September**, in accordance with paragraph 26 of the Working Procedures.

In setting this new deadline, the Panel has taken into consideration the fact that the original deadline to respond to these questions was 14 August 2017, Ukraine chose not to submit its response on this date on account of a 57 minutes delay faced in accessing these questions, and failed to inform the Panel of its decision to not file a response for this reason till 15 August 2017.

The Panel also acknowledges Ukraine's submission that the integrated executive summary of its oral statements should be treated as the first integrated executive summary for the purposes of this dispute.

ANNEX D-4

COMMUNICATION DATED 12 SEPTEMBER 2017

Having considered Russia's communication of 6 September 2017, and the communications cross-referred therein, the Panel has decided as follows:

2 EXTENSION OF DEADLINE FOR REBUTTAL SUBMISSION (SECOND WRITTEN SUBMISSION)

The Panel acknowledges Russia's concern that while Ukraine's written response to questions posed to it by Russia following the first substantive meeting was due on 14 August 2017, the responses were ultimately filed on 1 September 2017. The reasons for this delay and the Panel's decisions in this regard, are discussed in the Panel's communications of 23 August 2017 and 30 August 2017.

Russia submits that this delay deprived it of an adequate opportunity to prepare its rebuttal submission, which, per the timetable is due on 15 September 2017. Russia requests the Panel to extend the deadline for the rebuttal submission to 25 September 2017.

Upon consideration of the reasons put forth by Russia for its request for extension, the Panel agrees to extend the deadline for the rebuttal submissions by Russia and Ukraine to **5 p.m.** on **25 September 2017**.

3 RUSSIA'S CONCERNS REGARDING PANEL'S COMMUNICATION OF 23 AUGUST 2017

The Panel refers to Russia's statement in its communication of 6 September 2017, about its deep concerns regarding the wording used in the Panel's communication of 23 August 2017 characterizing the situation that occurred in relation to Ukraine's response to Russia's questions. Russia does not identify the specific wording in this communication that it has concerns about, but asks the Panel to note, for the record of this dispute, that Russia met the deadline for submitting its questions to the other party. Russia welcomes, *inter alia*, in the Panel Report a correction highlighting that Russia met the deadline for filing its questions to the other party following the first substantive meeting.

In the Panel's view, its communication of 23 August 2017 does not suggest that Russia did not file its questions to Ukraine following the first substantive meeting within the deadline of 5 p.m. on 28 July 2017. On the contrary, the communication acknowledges Russia's statement in its email of 28 July 2017 that it uploaded these questions at 4.57 p.m. on 28 July 2017, which is before the deadline of 5 p.m., and that due to a technical error in the DDSR, these questions were not released to other users, including Ukraine at that time. In footnote 2 of the communication, the Panel states that it has no reason to question Russia's explanations regarding the technical error in the DDSR, and further clarifies that it does appear that the "DDSR did not release these written questions at 5 p.m. on 28 July 2017" to other users because of a "technical issue in the system". Thus, we consider the communication is clear that due to a technical issue in the DDSR, rather than due to an error on part of Russia, Ukraine had access to the questions at 5.57 p.m., instead of 5 p.m. The communication also notes a delay of 57 minutes in Ukraine having "access" to the questions, not in Russia filing them.

Thus, to the extent Russia's concern is that the Panel's communication of 23 August 2017 suggests that Russia did not file the questions to Ukraine following the first substantive meeting by the deadline of 5 p.m. on 28 July 2017, the Panel does not share Russia's concern, and does not consider any revision to this communication to be necessary.

Procedural issues arising in this dispute, including this one, will be appropriately reflected in the descriptive part of the Panel Report.

4 PROPOSED MODIFICATION TO WORKING PROCEDURES

The Panel proposes a modification to the working procedures for this dispute to more specifically address situations where a party uploads submissions or exhibits on the DDSR without facing any apparent technical difficulty, but other users, including the other party, do not have access to them due to, *inter alia*, technical issues relating to the DDSR.

In particular, the Panel proposes the addition of the following footnote (underlined) to paragraph 26(a) of the Working Procedures:

> Each party and third party shall submit all documents to the Panel by filing them via the Digital Dispute Settlement Registry (DDSR) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute. Upload into the DDSR shall also constitute electronic service on the Panel, the other party, and the third parties.[1] In case any party or third party is unable to meet the 5.00 p.m. deadline because of technical difficulties in uploading these documents into the DDSR, the party or third party concerned shall contact the DS Registry without delay and provide an electronic version of all documents to be submitted to the Panel by e-mail, except for any exhibits. The e-mail shall be addressed to DSRegistry@wto.org and the other party and, where appropriate, the third parties. The documents sent by email shall be filed no later than 5.30 p.m. on the date due.The exhibits shall also be filed with the DS Registry (office No. 2047) and provided to the other party and, where appropriate, the third parties by no later than 5:30 p.m., but shall be submitted on a CD-ROM, DVD, or USB stick, together with the DDSR E-docket template.
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> **1** When a party uploads a document on the DDSR, in accordance with this paragraph, it shall also send a message on the DDSR to the Panel, through the Secretariat, and the other party, identifying the document, including exhibits uploaded. The other party shall inform, through the DDSR, the DS Registry and the party which uploaded the document, promptly and in any case, no later than 5 p.m. the next working day, if it does not have access to any document identified in that message.

The parties are requested to provide their comments on the proposed modification to the working procedures by **5 p.m.** on **15 September 2017**.

ANNEX D-5

COMMUNICATION DATED 21 SEPTEMBER 2017

Pursuant to Russia's communication of 6 September 2017, the Panel proposed a modification to the working procedures for this dispute to more specifically address situations where a party uploads submissions and/or exhibits into the DDSR without facing any apparent technical difficulty, but other users, including the other party, do not have access to them due to, *inter alia*, technical issues relating to the DDSR. The Panel invited comments from the parties on this proposed modification on 12 September 2017.

Having considered the parties' responses on 15 September 2017, the Panel has amended the working procedures by adding a footnote to Paragraph 26(a). No other change has been made to the working procedures. The revised working procedures have been uploaded into the DDSR.

ANNEX D-6

COMMUNICATION DATED 16 OCTOBER 2017

Having considered the requests made by the Russian Federation (Russia) in its letter of 29 September 2017, and Ukraine's comments on 10 October 2017 on these requests, the Panel has decided as follows:

a. The Panel declines Russia's request to ask Ukraine, pursuant to Article 13 of the DSU, to provide full confidential version of the questionnaire responses filed by the domestic industry, including all exhibits thereto, or at least the information contained in sections 4.2, 7 and 8 of these questionnaire responses, as the Panel does not find it necessary to seek this information at this stage.

b. The Panel notes Russia's objections to Ukraine's designation of Exhibits UKR-42, UKR-53, UKR-54 and UKR-55 as BCI.

   Regarding Exhibit UKR-42, Ukraine acknowledges that this exhibit was inadvertently designated as BCI. In light of this acknowledgment, the Panel will not treat Exhibit UKR-42 as BCI, pursuant to the BCI procedures.

   With respect to Exhibits UKR-53, UKR-54 and UKR-55, the Panel notes that pursuant to paragraph 3 of its BCI procedures, in deciding "whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, [the Panel] will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information." Ukraine invokes Article 32 of its domestic anti-dumping law to justify the BCI designation of these exhibits.

   The Panel intends to pose questions to the parties at the second substantive meeting to gain more clarity on this justification put forth by Ukraine, and then take a decision as to whether Exhibits UKR-53, UKR-54 and UKR-55 should continue to be treated as BCI for the purpose of these proceedings. Pending the Panel's decision in this regard, the parties should continue to treat these exhibits as BCI.

c. The Panel notes Russia's request that the Panel oblige Ukraine to submit an English translation in full of Exhibits UKR-46A, UKR-47A, UKR-48-A and UKR-49A, which are in the Ukrainian language. The Panel recalls that these exhibits were submitted by Ukraine in its written responses to Russia's questions following the first substantive meeting. Ukraine filed certain parts of these exhibits in English because it considers that only certain parts of these exhibits were relevant to answer the questions posed by Russia. The limited English translation is in Exhibits UKR-46B, UKR-47B, UKR-48-B and UKR-49B.

   In its responses, Ukraine also filed Exhibit UKR-50, and stated that this exhibit provides an overview of the parts of Exhibits UKR-46 – UKR-49 where confidentiality has been claimed by the relevant domestic producers. The Panel notes that the cross references in Exhibit UKR-50 appear to be to the Ukrainian version of the exhibits, and not the English version.

   In the Panel's view, while it is for each party to decide how to respond to questions posed by the other party, those responses must be filed in accordance with the Working Procedures. In this regard, paragraph 9 of the Working Procedures stipulates that "[w]here the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time".

   Considering Exhibits UKR-46A, UKR-47A, UKR-48A and UKR-49A are not in an official WTO language, the Panel will limit its review to those parts of the exhibits that are filed in English, namely, Exhibits UKR-46B, UKR-47B, UKR-48B and UKR-49B. If Ukraine wishes that the Panel take into account any other part of these exhibits, in part, or in full, it should file these exhibits in a WTO working language, consistent with paragraph 9 of the Working Procedures.

ANNEX E

INTERIM REVIEW

ANNEX E-1

INTERIM REVIEW

1 INTRODUCTION

1. In accordance with Article 15.3 of the DSU, this Annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in light of the parties' comments. In addition, we have made certain editorial changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the parties. The footnote numbers in the Final Report have changed due to these revisions. The footnote numbers indicated in this Annex pertain to those in the Final Report, but we have also indicated the footnote numbers in the Interim Report where they differ from those in the Final Report. The paragraph numbers in the Final Report remain unchanged.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 7.62

2. Russia requests us to modify this paragraph to accurately reflect its arguments under Article 11.1 of the Anti-Dumping Agreement.[1] Ukraine asks us to reject Russia's request because it sees no merit in it.[2]

3. We have made some minor changes to more closely reflect the actual language used by Russia in its submissions. However, we do not find it necessary to modify this paragraph in the manner proposed by Russia as we consider the changes that we made to be sufficient to accurately reflect Russia's arguments.

2.2 Paragraph 7.64, footnote 107

4. Russia requests us to add two additional sentences in footnote 107 to paragraph 7.64 in order to reflect two additional arguments.[3] First, Russia asserts that in footnote 294 of its second written submission it questioned the accuracy of the transportation costs used by MEDT of Ukraine to calculate the surrogate price of gas and asks us to reflect this argument in the Final Report. Second, Russia asks us to reflect its argument that the surrogate price of gas could not be considered to be the price of gas in Russia. Ukraine asks us to reject Russia's request as the original footnote in the Interim Report was clear and correct.[4] Ukraine also asserts that the arguments referred by Russia were submitted at a late stage in panel proceedings, and should therefore not be accepted.[5]

5. We consider the additions requested by Russia to be unnecessary. We note that parties are free to reflect their arguments in their executive summaries, annexed to the Final Report, as they deem fit, and we see no reason to reproduce these specific arguments in the Final Report. We also note that the second argument is adequately reflected in paragraph 7.94 of this Report. Therefore, we decline Russia's request.

2.3 Paragraphs 7.71, 7.95, and 7.99

6. Russia requests us to make certain changes to accurately reflect the text of Article 2.2 of the Anti-Dumping Agreement.[6] Ukraine asks us to reject Russia's request because it does not see any problem in these paragraphs.[7]

[1] Russia's request for interim review, para. 2.
[2] Ukraine's comments on Russia's request for interim review, para. 3.
[3] Russia's request for interim review, para. 3.
[4] Ukraine's comments on Russia's request for interim review, para. 5.
[5] Ukraine's comments on Russia's request for interim review, para. 5.
[6] Russia's request for interim review, para. 5.

7. We have made the changes suggested by Russia to accurately reflect the text of Article 2.2 of the Anti-Dumping Agreement.

2.4 Paragraph 7.74

8. Ukraine requests us to reflect in the Final Report the additional reasons that it presented in its submissions, apart from the dominant position of Gazprom in domestic Russian market, for why the gas prices set by other independent suppliers in Russia were aligned with the gas price of Gazprom.[8] Russia asks us to decline Ukraine's request because the Interim Report accurately and fully reflects Ukraine's position on the matter.[9] Russia also asserts that contrary to what Ukraine alleges in its request, Gazprom's dominant position in the domestic Russian market was the only reason that Ukraine provided in its submissions for the alleged pricing behaviour of independent gas suppliers.[10]

9. We reject Ukraine's request as we do not find it necessary to reflect these additional reasons presented by Ukraine as they do not add to the clarity or accuracy of the Final Report, which already reflects the main arguments of Ukraine on this matter.[11]

2.5 Paragraph 7.75

10. Russia requests us to make three specific modifications to more accurately reflect its arguments. First, Russia asks us to replace the word "provide" with the word "constitute" to more accurately reflect the language that it used in its submissions.[12] Second, Russia asks us to add a footnote to this paragraph to reflect certain arguments that it made in its submissions.[13] Third, Russia asks us to modify footnote 129 to paragraph 7.75 to reflect the "focal point" of Russia's position that "all [of] Ukraine's arguments, reasons and evidence related to the cost of production of an input used for manufacturing of the product under consideration are irrelevant to this dispute".[14] Ukraine states that the Interim Report already reflects Russia's arguments on this point, submits that no further modification or addition in this paragraph is necessary, and asks us to not add a footnote to this paragraph, as requested by Russia.[15]

11. We have made the first modification proposed by Russia to more closely reflect the language that it used in its submissions. We decline to make the second and third modifications proposed by Russia as we do not find it necessary to reflect these arguments in the Final Report. Parties, as noted above, are free to reflect their arguments in their executive summaries as they deem fit.

2.6 Paragraph 7.80

12. Russia requests us to delete a part of the fourth sentence of this paragraph to avoid any assumptions based on hypothetical situations that are not necessary for the effective resolution of this dispute, and which in its view may have far reaching and misleading effects well beyond the scope of this dispute.[16] Ukraine asks us to reject Russia's request.[17]

13. We note that we made the observation alluded by Russia in rejecting, as *ex post facto* rationalization, Ukraine's argument based on the use of the word "normally" in Article 2.2.1.1. We limited our review to the parties' arguments on the second condition of Article 2.2.1.1 and offered no views on whether an investigating authority's rejection of certain costs incurred by an exporter or producer could be justified based on the use of the word "normally" in Article 2.2.1.1.

[7] Ukraine's comments on Russia's request for interim review, para. 7.
[8] Ukraine's request for interim review, para. 5.
[9] Russia's comments on Ukraine's request for interim review, para. 4.
[10] Russia's comments on Ukraine's request for interim review, para. 7.
[11] As noted in footnote 159 of the Report, MEDT of Ukraine did not find that the gas prices of independent suppliers were aligned with the gas price of Gazprom. Ukraine has not suggested in its comments on the interim report that MEDT of Ukraine actually made such a finding. Thus, the additional reasons provided by Ukraine are not integral to our evaluation and findings.
[12] Russia's request for interim review, para. 7.
[13] Russia's request for interim review, para. 8.
[14] Russia's request for interim review, para. 9.
[15] Ukraine's comments on Russia's request for interim review, para. 9.
[16] Russia's request for interim review, para. 10.
[17] Ukraine's comments on Russia's request for interim review, para. 11.

Therefore, we do not consider, and Russia does not explain why, our observations will have the "far reaching and misleading effects" contemplated by Russia. In addition, we note that deleting part of the fourth sentence in the manner proposed by Russia will make the sentence less clear. Therefore, we decline Russia's request.

2.7 Paragraph 7.82

14. Russia requests us to make certain additions in this paragraph to properly reflect its arguments.[18] Ukraine asks us to reject Russia's request.[19]

15. We decline Russia's request as the additions proposed by Russia are unnecessary, and will also affect the clarity of the Final Report.

2.8 Paragraph 7.83

16. Russia requests us to add a footnote to this paragraph to reflect its arguments in full.[20] Ukraine asks us to reject Russia's request.[21]

17. We decline Russia's request as the additions proposed by Russia are unnecessary, and will also affect the clarity of the Final Report.

2.9 Paragraph 7.88

18. Russia requests us to make certain changes in paragraph 7.88 to accurately reflect the facts of this dispute.[22] In particular, Russia objects to the part of this paragraph, where, while recalling the factual 2basis of MEDT of Ukraine's findings set out in paragraph 7.73 of the Interim Report, we stated that MEDT of Ukraine had found that the gas prices in the domestic Russian market were not based "on commercial considerations" due to governmental regulation of the domestic gas prices in Russia.[23] Russia submits that MEDT of Ukraine only referred to the absence of "commercial considerations" in gas prices set in Russia when alluding to the discussions of WTO Members during the accession process of Russia to the WTO.[24] Thus, in Russia's view, MEDT of Ukraine did not make any finding as such that gas prices in Russia were not set based on commercial considerations. Ukraine asks us to reject Russia's request.[25]

19. We recall that while setting out the factual basis of MEDT of Ukraine's findings in paragraph 7.73 of the Interim Report with respect to cost adjustments, we noted MEDT of Ukraine's finding that the gas price in the domestic Russian market was not a "market price", as the state controlled the price of gas. However, while cross-referring in paragraph 7.88 to the factual basis of MEDT of Ukraine's findings set out in paragraph 7.73 we stated that it had found that the price in Russia was not based on "commercial considerations". For consistency in our use of terminologies across the Final Report, and specifically paragraphs 7.73 and 7.88, we have deleted the reference to a price not based on commercial considerations in paragraph 7.88. Instead, we note in paragraph 7.88, like we did in paragraph 7.73, that MEDT of Ukraine found that the gas price in Russia was not a market price. This change does not affect our analysis with respect to Russia's claim under Article 2.2.1.1 of the Anti-Dumping Agreement.

2.10 Paragraph 7.89

20. Russia requests us to insert quotation marks around the terms "normal" or "normal circumstances" in the third sentence of paragraph 7.89 so as to clarify that these terms refer to

[18] Russia's request for interim review, para. 11.
[19] Ukraine's comments on Russia's request for interim review, para. 13.
[20] Russia's request for interim review, para. 12.
[21] Ukraine's comments on Russia's request for interim review, para. 15.
[22] Russia's request for interim review, para. 13.
[23] Russia's request for interim review, para. 13.
[24] Russia's request for interim review, para. 13.
[25] Ukraine's comments on Russia's request for interim review, para. 17.

Ukraine's own views on the matter. Russia also requests us to add a citation to Ukraine's first written submission at the end of this paragraph.[26] Ukraine does not comment on this request.

21. The third sentence of paragraph 7.89 reflects our own assessment, and not Ukraine's arguments. Thus, we do not find it necessary to cite Ukraine's first written submission at the end of this sentence, or add the quotation marks suggested by Russia. Nonetheless, we have slightly modified this sentence to enhance the clarity of our analysis.

2.11 Paragraph 7.90

22. Russia requests us to insert a footnote after the first sentence of paragraph 7.90 to reflect an additional argument that it made.[27] Ukraine asks us to dismiss Russia's request.[28]

23. The additions proposed by Russia are not integral to our evaluation and findings, and do not add to the clarity of the Final Report. Therefore, we deny Russia's request.

2.12 Paragraph 7.93

24. Russia requests us to add certain citations in footnote 165 to paragraph 7.93 to make references to Russia's arguments complete and accurate.[29] Ukraine does not comment on this request.

25. We have added the citations suggested by Russia.

2.13 Paragraph 7.94

26. Russia requests us to make certain additions in this paragraph to more completely reflect its arguments.[30] Ukraine asks us to dismiss this request.[31]

27. We reject Russia's request as the proposed arguments are adequately reflected in other parts of this Report.[32]

2.14 Paragraph 7.104

28. Russia requests us to make certain additions in this paragraph to more completely reflect its arguments with respect to its claim under Article 2.2.1 of the Anti-Dumping Agreement.[33] Ukraine asks us to reject this request.[34]

29. The additions proposed by Russia are not integral to our evaluation and findings. Therefore, we reject Russia's request.

2.15 Paragraph 7.105

30. Russia requests us to add certain citations in footnote 188 to paragraph 7.105 to make references to Russia's arguments more complete and accurate.[35] Ukraine does not comment on this request.

31. We have added the citations suggested by Russia.

[26] Russia's request for interim review, para. 14.
[27] Russia's request for interim review, para. 15.
[28] Ukraine's comments on Russia's request for interim review, para. 19.
[29] Russia's request for interim review, para. 16.
[30] Russia's request for interim review, para. 17.
[31] Ukraine's comments on Russia's request for interim review, para. 21.
[32] See, e.g. Panel Report, para. 7.93.
[33] Russia's request for interim review, para. 19.
[34] Ukraine's comments on Russia's request for interim review, para. 23.
[35] Russia's request for interim review, para. 18.

2.16 Paragraph 7.125

32. Russia requests us to include a reference to Article 2.2 of the Anti-Dumping Agreement in paragraph 7.125.[36] Ukraine does not comment on this request.

33. We have added a reference to Article 2.2 of the Anti-Dumping Agreement to this paragraph pursuant to Russia's request.

2.17 Paragraph 7.128

34. Russia requests us to insert a footnote in this paragraph reflecting additional citations to Russia's submissions to make references to its arguments complete and accurate.[37] Ukraine does not comment on this request.

35. We have inserted a new footnote (footnote 225) reflecting the additional citations suggested by Russia.

2.18 Section 7.5

36. Ukraine observes that Section 7.5 does not contain: (a) a detailed description regarding the competence of the Ukrainian courts in the Ukrainian legal order; and (b) reference to the fact that the Ukrainian courts confirmed that MEDT of Ukraine had correctly included EuroChem in the underlying reviews.[38] Ukraine requests us to add these descriptions in the Final Report. Russia asks us to reject Ukraine's requests. In particular, Russia finds Ukraine's requests to be unclear, vague, and imprecise, and considers them to go beyond the requirement under Article 15.2 of the DSU that a request for review be limited to "precise aspects" of the Interim Report.[39]

37. With respect to Ukraine's request that we add a detailed description regarding the competence of the Ukrainian courts in the Ukrainian legal order, we note that we have already set out the facts necessary to resolve Russia's claim, and support our reasoning. While Ukraine requests us to add a description regarding the Ukrainian legal order, it does not propose any particular edits or specify the precise additions that it wishes us to make in this regard. We do not consider that such additional descriptions would add to the clarity of the Final Report. We accordingly reject this aspect of Ukraine's request.

38. Regarding Ukraine's request to add a reference to the fact that the Ukrainian courts confirmed that MEDT of Ukraine had correctly included EuroChem in the underlying reviews, we do not consider that such additions would add to the clarity of the Report, or be necessary to resolve the claim. Therefore, we also reject this aspect of Ukraine's request.[40]

2.19 Paragraph 7.150, footnote 272 (footnote 271 of Interim Report)

39. Ukraine requests us to modify this footnote to correctly reflect the title of the Constitution of Ukraine.[41] Russia does not comment on this request.

40. We have made the change suggested by Ukraine.

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[36] Russia's request for interim review, para. 20.
[37] Russia's request for interim review, para. 21.
[38] Ukraine's request for interim review, paras. 8.
[39] Russia's comments on Ukraine's request for interim review, paras. 11-12.
[40] We recall that in the Interim Report we found that the combined effect of Ukrainian court judgments, which found that EuroChem had a negative rate of dumping, and the implementation of these judgments through ICIT's 2010 amendment was that dumping margin for this producer in the original investigation phase was *de minimis*. We thus found that the obligation under the second sentence of Article 5.8 that authorities terminate the investigation against an exporter or producer found to have a *de minimis* dumping margin in the original investigation was applicable in this case, and thus the Ukrainian authorities should have terminated the investigation against EuroChem. We do not consider that the references to court judgments that upheld the Ukrainian authorities' decision to initiate the underlying reviews against Eurochem affect the probative value of the evidence we relied upon to find that in the original investigation phase EuroChem was found to have a negative rate of dumping.
[41] Ukraine's request for interim review, para. 7.

2.20 Paragraph 7.193

41. Russia requests us to reflect its argument that in the underlying reviews MEDT of Ukraine *de facto* resorted to facts available in rejecting the reported gas cost, and using the surrogate price of gas to calculate the cost of production of the investigated Russian producers.[42] Ukraine does not comment on this request.

42. We have made the change suggested by Russia.

2.21 Paragraph 7.233

43. Russia requests us to make two sets of changes in this paragraph. First, Russia requests us to add a sentence in footnote 424 (footnote 422 of Interim Report) to paragraph 7.233 to more completely reflect its arguments.[43] Second, Russia requests us to insert a new footnote in this paragraph noting that at the second substantive meeting of the Panel, Russia replied to the "defence" raised by Ukraine under Article 6.5 of the Anti-Dumping Agreement in response to Russia's claim under Article 6.9 of the Anti-Dumping Agreement.[44] Ukraine asks us to reject Russia's request. In particular, Ukraine considers the additions proposed by Russia to be confusing, notes that Russia's arguments under Article 6.5 were adequately reflected in paragraph 7.230 of the Interim Report, and disagrees with Russia's characterization of Ukraine's arguments under Article 6.5 as a "defence".

44. We do not consider that the additional references to Russia's arguments to be necessary as they do not add to the clarity of the Final Report. Therefore, we reject Russia's requests.

2.22 Paragraph 7.250

45. Russia requests us to add certain citations in footnote 452 (footnote 450 of Interim Report) to paragraph 7.250.[45] Ukraine does not comment on this request.

46. We have added certain citations in footnote 452, including those proposed by Russia.

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[42] Russia's request for interim review, para. 22.
[43] Russia's request for interim review, para. 23.
[44] Russia's request for interim review, para. 24.
[45] Russia's request for interim review, para. 25.

WORLD TRADE ORGANIZATION

WT/DS493/R/Corr.1

21 August 2018

(18-5279)

UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

REPORT OF THE PANEL

Corrigendum

In paragraph 1.8, the issuance date of the descriptive part of the Panel's Report to the parties should be 29 January 2018.

In footnote 12, the reference to "CIT" should be replaced by "ICIT".

In paragraph 8.6, the article "the" before Russia should be deleted.