



UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

AB-2018-5

*Report of the Appellate Body*

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## 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
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	Ministry of Economic Development and Trade of Ukraine
reported gas cost	price of gas that the Russian producers under investigation paid and reported in their records
SCM Agreement	Agreement on Subsidies and Countervailing Measures
surrogate price of gas	price of gas exported from Russia at the German border, adjusted for transportation expenses
Working Procedures	Working Procedures for Appellate Review
WTO	World Trade Organization

## PANEL EXHIBITS CITED IN THIS REPORT

Panel Exhibit No.	Short title (if applicable)	Description
RUS-2b	2008 original decision	ICIT, Decision on the application of definitive anti-dumping measures on imports of ammonium nitrate originating in Russia No. <b>AD-176/2008/143-47</b> (21 May 2008)
RUS-3b		ICIT, Notice on the initiation and conduct of the interim review of the anti-dumping measures on imports of ammonium nitrate originating in Russia No. <b>AD-296/2013/4423-06</b> (4 July 2013)
RUS-4b	2014 extension decision	ICIT, Notice on the changes and extension of anti-dumping measures on imports of ammonium nitrate originating in Russia (8 July 2014)
RUS-5b	Judgment of the Appellate Court	Judgment No. <b>2-a-8850/08</b> by the Kiev Appellate Administrative Court (26 August 2009)
RUS-6b	Judgment of the District Court	Judgment No. <b>5/411</b> by the District Administrative Court of Kiev (6 February 2009)
RUS-7b	Judgment of the Higher Court	Judgment No. <b>K-42562/09</b> by the Higher Administrative Court of Ukraine (20 May 2010)
RUS-8b	2010 amendment	ICIT, Decision implementing court orders regarding EuroChem (25 October 2010)
RUS-10b	Investigation Report	MEDT, Materials on interim and expiry reviews of the anti-dumping measures on imports of ammonium nitrate originating in Russia (25 June 2014)
RUS-12b	2008 amended decision	ICIT, Consolidated version of the Decision on the application of definitive anti-dumping measures on imports of ammonium nitrate originating in Russia No. <b>AD-176/2008/143-47</b> (21 May 2008, as amended on 25 October 2010)

Panel Exhibit No.	Short title (if applicable)	Description
RUS-27b		ICIT, Notice on the initiation and conduct of the expiry review of the anti-dumping measures on imports of ammonium nitrate originating in Russia No. <b>AD-294/2013/4423-06</b> (24 May 2013)
UKR-9		Law of Ukraine "On Protection of the National Producer Against Dumped Imports" (22 December 1998)
UKR-10		Extracts from the Code of Administrative Procedure of Ukraine
UKR-12		Resolution of the Plenum of the High Commercial Court of Ukraine No. 15 (26 December 2011)
UKR-13		Resolution of the District Administrative Court of Kiev in case No. 826/11526/14 (23 September 2014)
UKR-14		Ruling of Kiev Administrative Court of Appeal in case No. 826/11526/14 (3 December 2014)
UKR-15 (BCI)		Application of EuroChem to the Supreme Court of Ukraine in case No. 826/11526/14 (12 February 2015)
UKR-16		Resolution of the Supreme Court of Ukraine No. 21-122a15 (21 April 2015)
UKR-42b (BCI)		ICIT, Decision on application of definitive anti-dumping measures on imports into Ukraine of glass containers used for medical purposes up to 0.15 litres originating from Russia No. <b>AD-293/2013/4423-06</b> (24 May 2013)
UKR-43		Code of Administrative Procedure of Ukraine, Extracts
UKR-44		Law of Ukraine "On Enforcement Proceedings", Extracts
UKR-53b (BCI)		Letter dated 8 October 2010 from MEDT to ICIT regarding the agenda for the ICIT meeting on 15 October 2010
UKR-54b (BCI)		ICIT, Meeting agenda of 25 October 2010
UKR-55b (BCI)		Letter dated 21 October 2010 from MEDT to ICIT regarding the agenda for the ICIT meeting on 25 October 2010
UKR-56b (BCI)		MEDT, Information on appeal of ICIT Decision on the application of definitive anti-dumping measures on imports of ammonium nitrate originating in Russia No. <b>AD-176/2008/143-47</b>

## CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Panel Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, p. 575
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>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</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p. 1131
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
<i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3

Short Title	Full Case Title and Citation
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>EU – Biodiesel (Argentina)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871
<i>EU – Biodiesel (Argentina)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R, DSR 2016:VI, p. 3077
<i>EU – Fatty Alcohols (Indonesia)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> , WT/DS442/AB/R and Add.1, adopted 29 September 2017, DSR 2017:VI, p. 2613
<i>EU – PET (Pakistan)</i>	Appellate Body Report, <i>European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan</i> , WT/DS486/AB/R and Add.1, adopted 28 May 2018
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>Indonesia – Import Licensing Regimes</i>	Panel Report, <i>Indonesia – Importation of Horticultural Products, Animals and Animal Products</i> , 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, DSR 2017:VII, p. 3131
<i>Indonesia – Iron or Steel Products</i>	Appellate Body Report, <i>Indonesia – Safeguard on Certain Iron or Steel Products</i> , WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741
<i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i>	Panel Report, <i>Ukraine – Anti-Dumping Measures on Ammonium Nitrate</i> , WT/DS493/R, Add.1 and Corr.1, circulated to WTO Members 20 July 2018
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Anti-Dumping Methodologies (China)</i>	Panel Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/R and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R, DSR 2017:IV, p. 1589

Short Title	Full Case Title and Citation
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
<i>US – Countervailing Measures (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS437/AB/RW and Add.1, circulated to WTO Members 16 July 2019
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – OCTG (Korea)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea</i> , WT/DS488/R and Add.1, adopted 12 January 2018
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

WORLD TRADE ORGANIZATION  
APPELLATE BODY

Ukraine – Anti-Dumping Measures on Ammonium Nitrate

Ukraine, *Appellant*  
Russian Federation, *Appellee*

Argentina, *Third Participant*  
Australia, *Third Participant*  
Brazil, *Third Participant*  
Canada, *Third Participant*  
China, *Third Participant*  
Colombia, *Third Participant*  
European Union, *Third Participant*  
Japan, *Third Participant*  
Mexico, *Third Participant*  
Norway, *Third Participant*  
United States, *Third Participant*

AB-2018-5

Appellate Body Division:

Zhao, Presiding Member  
Bhatia, Member  
Servansing, Member

## 1 INTRODUCTION

1.1. Ukraine appeals certain issues of law and legal interpretations developed in the Panel Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*<sup>1</sup> (Panel Report). The Panel was established on 22 April 2016<sup>2</sup> to consider a complaint by the Russian Federation<sup>3</sup> (Russia) with respect to certain measures taken by Ukraine regarding the imposition of anti-dumping duties on imports of ammonium nitrate from Russia.

1.2. Duties were originally imposed on ammonium nitrate from Russia by Ukraine's Intergovernmental Commission on International Trade (ICIT) through its decision of 21 May 2008 (2008 original decision).<sup>4</sup> Russian producer JSC MCC EuroChem (EuroChem) successfully challenged the 2008 original decision before domestic courts in Ukraine, following which ICIT issued an amendment (2010 amendment) to the 2008 original decision (as amended, 2008 amended decision).<sup>5</sup> Subsequently, following interim and expiry reviews conducted by the Ministry of Economic Development and Trade of Ukraine (MEDT), ICIT issued a decision (2014 extension decision), which imposed anti-dumping duties at modified rates, including with respect to EuroChem.<sup>6</sup> The factual aspects of this dispute are set forth in greater detail in the Panel Report and in section 5 of this Report.

<sup>1</sup> WT/DS493/R, 20 July 2018.

<sup>2</sup> Minutes of the Dispute Settlement Body (DSB) Meeting held on 22 April 2016, WT/DSB/M/377, para. 6.4.

<sup>3</sup> Request for the Establishment of a Panel by the Russian Federation, WT/DS493/2 (Russia's panel request).

<sup>4</sup> Panel Report, para. 2.1 (referring to ICIT, 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) (Panel Exhibit RUS-2b)). In this Report, Panel exhibit numbers that are followed by the letter "b" refer to the English version of the relevant document.

<sup>5</sup> Panel Report, para. 2.1 (referring to ICIT, Decision implementing court orders regarding EuroChem (25 October 2010) (2010 amendment) (Panel Exhibit RUS-8b)); ICIT, Consolidated version of the 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, as amended on 25 October 2010) (2008 amended decision) (Panel Exhibit RUS-12b). See also *ibid.*, paras. 7.18-7.19.

<sup>6</sup> Panel Report, para. 2.2 (referring to 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) (Panel Exhibit RUS-4b)).



1.3. Before the Panel, Russia challenged Ukraine's measures under various provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).<sup>7</sup> The Panel made the following findings in its Report.

1.4. With respect to the Panel's terms of reference, the Panel found that: (i) measures consisting of the 2008 amended decision and the 2010 amendment were within its terms of reference<sup>8</sup>; (ii) certain claims under Articles 5.8 and 11.1-11.3 of the Anti-Dumping Agreement, as well as certain claims under Article 6.8 and paragraphs 3, 5, and 6 of Annex II, were within its terms of reference<sup>9</sup>; and (iii) certain claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement fell outside its terms of reference.<sup>10</sup>

1.5. With respect to Russia's claims concerning dumping and likelihood-of-dumping determinations in the interim and expiry reviews, the Panel found that:

- a. Ukraine acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because Ukrainian investigating authorities<sup>11</sup> rejected the price of gas that the investigated Russian producers paid and reported in their records (reported gas cost) without providing an adequate basis under the second condition of Article 2.2.1.1<sup>12</sup>;
- b. Ukraine acted inconsistently with Article 2.2 of the Anti-Dumping Agreement because, when constructing normal value, Ukrainian investigating authorities used a cost for gas that did not reflect the cost of production "in the country of origin", i.e. Russia<sup>13</sup>;
- c. Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in conducting their ordinary-course-of-trade test, Ukrainian investigating authorities relied on costs that were calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement<sup>14</sup>; and
- d. Ukraine acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement because Ukrainian investigating authorities relied 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.<sup>15</sup>

1.6. With respect to Russia's claims concerning the non-termination of the investigation against EuroChem, the Panel found that Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because Ukrainian investigating authorities:

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

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<sup>7</sup> Panel Report, para. 3.1. Russia also raised one consequential claim under Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994). (Ibid., para. 3.1.g)

<sup>8</sup> Panel Report, para. 8.1.a.

<sup>9</sup> Panel Report, para. 8.1.b.

<sup>10</sup> Panel Report, para. 8.1.c. The Panel also considered moot Ukraine's request for a ruling that certain claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement fall outside its terms of reference. (Ibid., para. 8.1.d)

<sup>11</sup> We use the terms "Ukrainian investigating authorities" and "investigating authorities" interchangeably to refer to both ICIT and MEDT.

<sup>12</sup> Panel Report, para. 8.2.a.

<sup>13</sup> Panel Report, para. 8.2.b.

<sup>14</sup> Panel Report, para. 8.2.c.

<sup>15</sup> Panel Report, para. 8.2.d. The Panel further found that Russia failed to establish that Ukraine acted inconsistently with Article 2.1 of the Anti-Dumping Agreement, and exercised judicial economy with regard to certain additional claims under Articles 2.2, 2.2.1.1, 2.4, and 11.1 of the Anti-Dumping Agreement. (Ibid., para. 8.2.e-i)

- c. included EuroChem within the scope of the review determinations and imposed anti-dumping duties on it through the 2014 extension decision.<sup>16</sup>

1.7. The Panel further found that, with respect to Russia's claims challenging the investigating authorities' conduct in the interim and expiry reviews, Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because Ukrainian investigating authorities failed to disclose certain essential facts and to give interested parties sufficient time to comment on MEDT's disclosure.<sup>17</sup>

1.8. Pursuant to Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Panel recommended that Ukraine bring its measures into conformity with its obligations under the Anti-Dumping Agreement.<sup>18</sup>

1.9. On 23 August 2018, Ukraine notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>19</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>20</sup> (Working Procedures). On 10 September 2018, Russia filed an appellee's submission.<sup>21</sup> On 13 September 2018, Argentina, Australia, Brazil, the European Union, Japan, and the United States each filed a third participant's submission.<sup>22</sup> On the same day, Canada, China, Colombia, Mexico, and Norway each notified its intention to appear at the oral hearing as a third participant.<sup>23</sup>

1.10. By letter dated 28 September 2018, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Appellate Body Member Mr Shree Baboo Chekitan Servansing to complete the disposition of this appeal, even though his term of office was due to expire before the completion of the appellate proceedings.

1.11. By letter dated 22 October 2018, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, for the reasons mentioned therein.<sup>24</sup> For the reasons explained in the letter, work on this appeal could gather pace only in March 2019. By letter dated 31 July 2019, the Chair of the Appellate Body informed the Chair of the DSB that the Report in these proceedings would be circulated on 12 September 2019.<sup>25</sup>

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<sup>16</sup> Panel Report, para. 8.3.a. The Panel then exercised judicial economy with regard to certain related claims under Articles 11.1-11.3 of the Anti-Dumping Agreement concerning the non-termination of the investigation against EuroChem. (Ibid., para. 8.3.b) Moreover, the Panel found that Russia failed to establish certain violations under Articles 11.1-11.3 in connection with the investigating authorities' alleged determination of and reliance on injury not established in accordance with Articles 3.1 and 3.4 in making their likelihood-of-injury determination. (Ibid., para. 8.4)

<sup>17</sup> Panel Report, para. 8.5.a-b. The Panel further found that Russia failed to establish certain violations under Articles 6.2, 6.8, and 6.9 and paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement, and exercised judicial economy with regard to additional claims under Article 6.2. (Ibid., para. 8.5.c-f) Moreover, regarding Russia's claims of consequential violations, the Panel found that Russia failed to establish that Ukraine acted inconsistently with Article VI of the GATT 1994 as a consequence of alleged violations under the Anti-Dumping Agreement, and exercised judicial economy with respect to Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement. (Ibid., para. 8.6)

<sup>18</sup> Panel Report, para. 8.8.

<sup>19</sup> WT/DS493/6 (contained in Annex A-1 of the Addendum to this Report, WT/DS493/AB/R/Add.1).

<sup>20</sup> WT/AB/WP/6, 16 August 2010.

<sup>21</sup> Pursuant to Rule 22 of the Working Procedures.

<sup>22</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>23</sup> Pursuant to Rule 24(2) of the Working Procedures. Kazakhstan and Qatar, which were third parties before the Panel, are not third participants in these appellate proceedings as they did not file a written submission pursuant to Rule 24(1) of the Working Procedures or appear at the oral hearing.

<sup>24</sup> The Chair of the Appellate Body referred to the size of the Panel record and the complex issues appealed, and further noted that, in view of the backlog of appeals pending with the Appellate Body, and the overlap in the composition of all divisions resulting in part from the reduced number of Appellate Body Members, it would not be possible for the Division to focus on the consideration of this appeal and for it to be fully staffed for some time. (WT/DS493/7)

<sup>25</sup> WT/DS493/8.

1.12. The oral hearing in this appeal was held on 20-21 May 2019. The participants and seven third participants (Argentina, Australia, Brazil, the European Union, Mexico, Norway, and the United States) made oral statements. The participants and third participants also responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

## 2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.<sup>26</sup> The Notice of Appeal and the executive summaries of the participants' claims and arguments are contained in Annexes A and B of the Addendum to this Report, WT/DS493/AB/R/Add.1.

## 3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of those third participants that filed a written submission are reflected in the executive summaries of their written submissions provided to the Appellate Body<sup>27</sup>, which are contained in Annex C of the Addendum to this Report, WT/DS493/AB/R/Add.1.

## 4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal of the Panel Report:

- a. with respect to the claims under Articles 6.2, 7.1, and 11 of the DSU relating to the original investigation phase:
  - i. whether the Panel erred in its analysis under Article 6.2 of the DSU in finding that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in Russia's panel request;
  - ii. whether the Panel erred under Articles 7.1 and 11 of the DSU by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment; and
  - iii. whether the Panel erred under Article 11 of the DSU by failing to examine properly the arguments and evidence presented by Ukraine regarding the authority of Ukrainian courts and investigating authorities to calculate dumping margins under Ukrainian law; and
- b. with respect to the claims under Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement relating to MEDT's determinations of dumping in the interim and expiry reviews:
  - i. whether the Panel erred in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in finding that MEDT did not provide an adequate basis for rejecting the reported gas cost under that condition;
  - ii. whether the Panel consequently erred in finding that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in conducting its ordinary-course-of-trade test, MEDT relied on costs calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement; and

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<sup>26</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

<sup>27</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings". (WT/AB/23, 11 March 2015)

- iii. whether the Panel erred in its interpretation and application of Article 2.2 of the Anti-Dumping Agreement in finding that, when constructing normal value, MEDT failed to calculate the cost of production "in the country of origin".

## 5 RELEVANT BACKGROUND INFORMATION

5.1. We first provide an overview of relevant background information concerning Ukraine's anti-dumping proceedings regarding imports of ammonium nitrate from Russia.

5.2. ICIT is responsible for initiating anti-dumping investigations, as well as for terminating, extending, or changing anti-dumping measures.<sup>28</sup> For its part, MEDT is responsible for conducting anti-dumping investigations and reviews, as well as for preparing final reports containing its conclusions and recommendations that serve as the basis for ICIT decisions.<sup>29</sup>

5.3. Following an anti-dumping investigation on imports of ammonium nitrate from Russia into Ukraine, ICIT imposed anti-dumping duties on such imports through the 2008 original decision.<sup>30</sup> In doing so, ICIT accepted the recommendations and dumping margins proposed by MEDT<sup>31</sup>, which resulted in the imposition of an anti-dumping duty of 10.78% on EuroChem.<sup>32</sup>

5.4. EuroChem successfully challenged the 2008 original decision before Ukraine's domestic courts.<sup>33</sup> The District Administrative Court of Kiev (District Court) held that MEDT had erroneously applied discounts in calculating dumping margins for EuroChem where no discount had actually been provided.<sup>34</sup> The Panel noted that the District Court "concluded that there was 'absence of dumping' by EuroChem in the original investigation" and that the District Court "found that the case files reaffirmed the calculations presented by EuroChem showing that its dumping margin had a 'negative value/rate'".<sup>35</sup> The District Court judgment was upheld by the Kiev Appellate Administrative Court (Appellate Court) and the Higher Administrative Court of Ukraine (Higher Court).<sup>36</sup>

5.5. Following the Ukrainian courts' judgments, ICIT issued the 2010 amendment, which amended the 2008 original decision, resulting in the 2008 amended decision.<sup>37</sup> In the 2010 amendment, ICIT imposed a 0% duty on EuroChem "in pursuance of" the judgments of Ukraine's domestic courts, including the District Court.<sup>38</sup>

5.6. Subsequently, interim and expiry reviews were initiated, and MEDT issued "[m]aterials" in connection with these reviews (Investigation Report)<sup>39</sup>, which contained findings and recommendations on the continued imposition of anti-dumping duties at modified rates on imports of ammonium nitrate originating in Russia.<sup>40</sup> On the basis of the Investigation Report, ICIT then issued the 2014 extension decision, thereby imposing anti-dumping duties at modified rates<sup>41</sup>,

<sup>28</sup> Panel Report, fn 11 to para. 2.1 (referring to Ukraine's response to Panel question No. 1, paras. 1-2).

<sup>29</sup> Panel Report, fn 11 to para. 2.1 (referring to Ukraine's response to Panel question No. 1, para. 3).

<sup>30</sup> Panel Report, para. 2.1 (referring to 2008 original decision (Panel Exhibit RUS-2b)).

<sup>31</sup> Panel Report, para. 7.136.

<sup>32</sup> Panel Report, para. 7.136 (referring to Ukraine's response to Panel question No.19(a), para. 75; Russia's response to Panel question No. 19(a), para. 38).

<sup>33</sup> Panel Report, paras. 2.1, 7.18 and fn 59 thereto, 7.134, and 7.137.

<sup>34</sup> Panel Report, fn 238 to para. 7.136 (referring to Judgment No. 5/411 by the District Administrative Court of Kiev (6 February 2009) (Judgment of the District Court) (Panel Exhibit RUS-6b)).

<sup>35</sup> Panel Report, para. 7.147 (referring to *ibid.*, para. 7.136).

<sup>36</sup> Panel Report, paras. 7.18 and fn 59 thereto, and 7.137 and fn 259 thereto (referring to Judgment No. 2-a-8850/08 by the Kiev Appellate Administrative Court (26 August 2009) (Judgment of the Appellate Court) (Panel Exhibit RUS-5b); **Judgment No. K-42562/09** by the Higher Administrative Court of Ukraine (20 May 2010) (Judgment of the Higher Court) (Panel Exhibit RUS-7b)). The Panel quoted the Higher Court, which found that "no discounts were granted by [EuroChem] in the ordinary course of trade operations." (*Ibid.*, fn 239 to para. 7.137 (quoting Judgment of the Higher Court (Panel Exhibit RUS-7b)))

<sup>37</sup> Panel Report, paras. 2.1 and 7.137 (referring to 2010 amendment (Panel Exhibit RUS-8b)); 2008 amended decision (Panel Exhibit RUS-12b).

<sup>38</sup> Panel Report, paras. 7.19, 7.137, and 7.147 (quoting 2010 amendment (Panel Exhibit RUS-8b)).

<sup>39</sup> MEDT, Materials on interim and expiry reviews of the anti-dumping measures on imports of ammonium nitrate originating in Russia (25 June 2014) (Investigation Report) (Panel Exhibit RUS-10b).

<sup>40</sup> Panel Report, para. 2.2 (referring to Investigation Report (Panel Exhibit RUS-10b)).

<sup>41</sup> Panel Report, para. 2.2 (referring to 2014 extension decision (Panel Exhibit RUS-4b)).

including a duty of 36.03% on EuroChem.<sup>42</sup> For the purpose of its dumping margin calculations in the interim and expiry reviews, MEDT constructed the normal value of ammonium nitrate for two investigated Russian producers on the basis of their cost of production.<sup>43</sup> In doing so, MEDT rejected the reported gas cost<sup>44</sup>, and replaced it with the price of gas exported from Russia at the German border, adjusted for transportation expenses (surrogate price of gas).<sup>45</sup> MEDT also used the surrogate price of gas in its ordinary-course-of-trade test, that is, when considering that the domestic sales of these investigated Russian producers were not in the ordinary course of trade by reason of price and thus could be disregarded in calculating normal value. In that regard, MEDT stated 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)".<sup>46</sup>

5.7. In the Investigation Report, MEDT stated that it was rejecting the reported gas cost because the records did "not completely reflect the costs associated with production and sale of the [product under consideration], in particular, the gas expenses".<sup>47</sup> This conclusion was based on the following grounds: (i) the gas price in Russia was not a market price, as the State controlled this price<sup>48</sup>; (ii) 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 Canada, the European Union, Japan, or the United States<sup>49</sup>; and (iii) calculations showed that JSC Gazprom (Gazprom), a Russian supplier of gas, was selling below its cost of production and that its profitability was due to export sales.<sup>50</sup> MEDT further considered that the export price of gas from Russia at the German border was representative and could thus be used to calculate the investigated Russian producers' cost of production, subject to an adjustment for transportation expenses.<sup>51</sup> In that regard, MEDT noted that Germany was the biggest consumer of Russian natural gas and that the export price of gas from Russia at the German border had been revised to reflect market conditions in 2012.<sup>52</sup>

## 6 ANALYSIS OF THE APPELLATE BODY

### 6.1 Claims under Articles 6.2, 7.1, and 11 of the DSU relating to the original investigation phase

#### 6.1.1 Introduction

6.1. In this section, we address Ukraine's three claims on appeal that relate to the Panel's analysis regarding the 2008 amended decision and the 2010 amendment, which are brought under Articles 6.2, 7.1, and 11 of the DSU. First, Ukraine claims that the Panel erred in its analysis under Article 6.2 of the DSU in finding that the 2008 amended decision and the 2010 amendment were identified as measures at issue in Russia's panel request.<sup>53</sup> Second, Ukraine claims that the Panel erred under Articles 7.1 and 11 of the DSU by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment.<sup>54</sup> Ukraine argues that Russia's claim under Article 5.8 of the Anti-Dumping Agreement, as identified in Russia's panel request, was not made with respect to these measures but only with respect to the 2014 extension decision.<sup>55</sup> Third, Ukraine claims that the Panel erred under Article 11 of the DSU by failing to examine properly the arguments and evidence presented by Ukraine regarding the 2010 amendment and the Ukrainian court judgments that ICIT implemented in concluding that

<sup>42</sup> Panel Report, paras. 7.134 and 7.138 (referring to Investigation Report (Panel Exhibit RUS-10b), p. 28; 2014 extension decision (Panel Exhibit RUS-4b)).

<sup>43</sup> Panel Report, para. 7.72.

<sup>44</sup> Before the Panel, the parties did not dispute the fact that the reported gas cost was the price actually paid by the investigated Russian producers. (Panel Report, para. 7.73)

<sup>45</sup> Panel Report, para. 7.72, 7.94, and 7.99 (referring to Investigation Report (Panel Exhibit RUS-10b), p. 23). See also *ibid.*, para. 7.114 (referring to Ukraine's response to Panel question No. 50, paras. 17-18).

<sup>46</sup> Panel Report, para. 7.113 (quoting Investigation Report (Panel Exhibit RUS-10b), pp. 25-26). (emphasis added by the Panel omitted)

<sup>47</sup> Panel Report, para. 7.73 (quoting Investigation Report (Panel Exhibit RUS-10b), p. 23).

<sup>48</sup> Panel Report, para. 7.73.a (referring to Investigation Report (Panel Exhibit RUS-10b), pp. 21-22).

<sup>49</sup> Panel Report, para. 7.73.b (referring to Investigation Report (Panel Exhibit RUS-10b), p. 22).

<sup>50</sup> Panel Report, para. 7.73.c (referring to Investigation Report (Panel Exhibit RUS-10b), pp. 22-23).

<sup>51</sup> Panel Report, para. 7.99 (referring to Investigation Report (Panel Exhibit RUS-10b), p. 23).

<sup>52</sup> Panel Report, para. 7.99 (referring to Investigation Report (Panel Exhibit RUS-10b), p. 23).

<sup>53</sup> Ukraine's appellant's submission, paras. 5-26; Notice of Appeal, para. a.

<sup>54</sup> Ukraine's appellant's submission, paras. 27-36; Notice of Appeal, para. b.

<sup>55</sup> Ukraine's appellant's submission, para. 34.

Ukraine had acted inconsistently with Article 5.8 of the Anti-Dumping Agreement in relation to the 2008 amended decision, the 2010 amendment, and the 2014 extension decision.<sup>56</sup> Russia requests that we reject these claims.<sup>57</sup>

6.2. We begin by summarizing the relevant Panel findings before addressing each of these three claims in turn.

### 6.1.2 The Panel's findings

#### 6.1.2.1 The Panel's findings under Article 6.2 of the DSU

6.3. Before the Panel, Ukraine argued that the 2008 amended decision and the 2010 amendment fell outside the Panel's terms of reference because, in its panel request, Russia challenged only the determinations made by Ukrainian investigating authorities in the interim and expiry reviews.<sup>58</sup>

6.4. The Panel recalled the factual background to this dispute, namely: (i) following an investigation, Ukrainian investigating authorities imposed the original anti-dumping measures on EuroChem in 2008; (ii) EuroChem successfully challenged these measures before Ukrainian courts; (iii) Ukrainian investigating authorities issued the 2010 amendment to implement these court judgments by reducing the anti-dumping duty rate for EuroChem from 10.78% to 0%; (iv) Ukrainian investigating authorities initiated interim and expiry reviews of the original anti-dumping measures; and (v) Ukrainian investigating authorities issued the 2014 extension decision imposing anti-dumping duties at modified rates, revising EuroChem's anti-dumping duty rate from 0% to 36.03%.<sup>59</sup>

6.5. Turning to the requirements of Article 6.2 of the DSU, the Panel noted that the panel request must identify the specific measures at issue, and that measures not properly identified fall outside a panel's terms of reference and cannot be the subject of panel findings or recommendations.<sup>60</sup> Further, measures at issue must be "identified with sufficient precision so that what is referred to adjudication may be discerned from the panel request".<sup>61</sup> The Panel added that this will be the case if a measure is identified with "sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".<sup>62</sup> Accordingly, the Panel framed the issue as "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".<sup>63</sup>

6.6. Subsequently, the Panel analysed the language in Russia's panel request. It noted that: (i) footnote 2 to the opening paragraph of Russia's panel request refers to the 2008 amended decision; (ii) item number 1 alleges violations under Articles 5.8 and 11.1-11.3 of the Anti-Dumping Agreement because of the failure by Ukrainian investigating authorities to exclude a certain Russian exporter from the "anti-dumping measures"; and (iii) the term "anti-dumping measures" in item number 1 is followed by footnote 3, which refers to the 2010 amendment and notes that it amended the 2008 original decision.<sup>64</sup> The Panel considered that the references to the 2008 amended decision and the 2010 amendment showed that Russia took issue in its panel request with the alleged failure to exclude a Russian exporter from the 2008 amended decision. Therefore, in the Panel's view, Russia's panel request was "sufficiently precise to identify" the 2008 amended decision and the 2010 amendment as measures at issue.<sup>65</sup>

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<sup>56</sup> Ukraine's appellant's submission, paras. 100-152; Notice of Appeal, para. f.

<sup>57</sup> Russia's appellee's submission, paras. 56, 80, and 371-372.

<sup>58</sup> Panel Report, para. 7.11. The Panel noted that Russia did not challenge the 2008 original decision. (Ibid., para. 7.20)

<sup>59</sup> Panel Report, paras. 2.1-2.2 (referring to 2008 original decision (Panel Exhibit RUS-2b); 2010 amendment (Panel Exhibit RUS-8b); 2014 extension decision (Panel Exhibit RUS-4b)), 7.18-7.19 (referring to Judgment of the District Court (Panel Exhibit RUS-6b); Judgment of the Appellate Court (Panel Exhibit RUS-5b); Judgment of the Higher Court (Panel Exhibit RUS-7b); 2010 amendment (Panel Exhibit RUS-8b)), and 7.134 (referring to 2014 extension decision (Panel Exhibit RUS-4b)).

<sup>60</sup> Panel Report, para. 7.21 (referring to Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 120; *EC and certain member States – Large Civil Aircraft*, para. 790).

<sup>61</sup> Panel Report, para. 7.21 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 168).

<sup>62</sup> Panel Report, para. 7.21 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 169).

<sup>63</sup> Panel Report, para. 7.21.

<sup>64</sup> Panel Report, para. 7.24.

<sup>65</sup> Panel Report, para. 7.24.

6.7. The Panel then addressed two arguments made by Ukraine.<sup>66</sup> First, the Panel disagreed with Ukraine that the phrase "in connection with the expiry and interim reviews" in the opening paragraph of the panel request restricted Russia's challenge to the interim and expiry reviews.<sup>67</sup> The Panel reasoned that the opening paragraph of a panel request cannot be read in isolation from the remainder of that panel request and recalled that both footnote 2 and item number 1 covered the 2008 amended decision and the 2010 amendment.<sup>68</sup> Next, the Panel rejected Ukraine's argument that footnotes cannot determine a panel's terms of reference. It considered that nothing in Article 6.2 of the DSU prohibits identifying measures in footnotes in panel requests, and that the Appellate Body has found that footnotes are part of the text of a panel request and therefore may be relevant to identifying measures at issue.<sup>69</sup>

6.8. The Panel therefore concluded that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in the panel request and fell within its terms of reference.<sup>70</sup>

6.9. Subsequently, the Panel considered whether item number 1 of Russia's panel request satisfied the second requirement of Article 6.2 to provide a brief summary of the claim sufficient to present the problem clearly.<sup>71</sup> The Panel articulated that this requirement is met where the panel request explains how or why a measure at issue is considered to violate the World Trade Organization (WTO) obligation in question, and that a panel request must plainly connect challenged measures with the provisions of the covered agreements claimed to have been infringed.<sup>72</sup>

6.10. The Panel then analysed item number 1 of the panel request and found that Russia's use of the word "because" twice suggested that Russia challenged two aspects of the measures at issue, namely: (i) Ukraine failed to exclude a Russian exporter whose dumping margin was *de minimis* from the "anti-dumping measures"; and (ii) Ukraine subjected that exporter to interim and expiry reviews.<sup>73</sup> The Panel considered that footnote 3 explains "anti-dumping measures" by referring to the 2008 amended decision, the 2010 amendment, and the Ukrainian court judgments that the 2010 amendment implemented.<sup>74</sup> The Panel also referred to the language and nature of the obligations under Articles 5.8 and 11.1-11.3 of the Anti-Dumping Agreement.<sup>75</sup> For the Panel, these elements together made it sufficiently clear that Russia intended to challenge the failure by Ukrainian investigating authorities to exclude EuroChem from the original investigation phase, and the decision to subject EuroChem to interim and expiry reviews when it should have terminated the investigation against it.<sup>76</sup> On that basis, the Panel considered that Russia's panel request provided a brief summary of the legal basis sufficient to present the problem clearly in accordance with Article 6.2 of the DSU.<sup>77</sup> The Panel thus found that the claims presented in item number 1 of Russia's panel request were within its terms of reference.<sup>78</sup>

#### 6.1.2.2 The Panel's findings under Article 5.8 of the Anti-Dumping Agreement

6.11. Before the Panel, Ukraine argued that there was no determination of a *de minimis* dumping margin within the meaning of the second sentence of Article 5.8 of the Anti-Dumping Agreement because Ukrainian courts did not have the legal competence to calculate a dumping margin, and Ukrainian investigating authorities never recalculated a *de minimis* dumping margin in the original investigation.<sup>79</sup> Accordingly, Ukrainian courts could not have recalculated EuroChem's dumping margin under domestic law, and ICIT in implementing these court judgments imposed a 0% duty

<sup>66</sup> Panel Report, paras. 7.25-7.27.

<sup>67</sup> Panel Report, paras. 7.25.a-7.26 (referring to Ukraine's opening statement at the first Panel meeting, para. 12).

<sup>68</sup> Panel Report, para. 7.26.

<sup>69</sup> Panel Report, paras. 7.25.b (referring to Ukraine's opening statement at the first Panel meeting, para. 19) and 7.27 (quoting Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.39; referring to Panel Report, *Indonesia – Import Licensing Regimes*, preliminary ruling of the panel, para. 3.15).

<sup>70</sup> Panel Report, paras. 7.28 and 8.1.a.

<sup>71</sup> Panel Report, paras. 7.30-7.35.

<sup>72</sup> Panel Report, para. 7.30.

<sup>73</sup> Panel Report, paras. 7.31-7.34.

<sup>74</sup> Panel Report, para. 7.33.

<sup>75</sup> Panel Report, paras. 7.33-7.34.

<sup>76</sup> Panel Report, para. 7.34.

<sup>77</sup> Panel Report, para. 7.35.

<sup>78</sup> Panel Report, paras. 7.35 and 8.1.b.i.

<sup>79</sup> Panel Report, paras. 7.144-7.146.

without itself recalculating a dumping margin.<sup>80</sup> Therefore, Ukraine argued that there was no dumping determination that could trigger the obligations under the second sentence of Article 5.8 of the Anti-Dumping Agreement.<sup>81</sup>

6.12. The Panel observed that the parties did not disagree on the legal interpretation of the second sentence 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*".<sup>82</sup> Rather, they disagreed as to whether the obligation to terminate had been triggered in the circumstances of this case. Specifically, the Panel understood Ukraine's argument as being that the obligations were not triggered as there was no legally valid *de minimis* dumping margin determined for EuroChem in the original investigation phase.<sup>83</sup> Consequently, the Panel inquired whether a *de minimis* dumping margin was determined for EuroChem in the original investigation phase.<sup>84</sup>

6.13. The Panel noted the following elements: (i) the District Court had concluded that there was an "absence of dumping" by EuroChem in the original investigation and that the case files reaffirmed the calculations presented by EuroChem, showing that the dumping margin had a "negative value/rate"<sup>85</sup>; (ii) the District Court's judgment had been upheld by higher courts, which found that the District Court had correctly established the circumstances of the case, and thoroughly investigated the existing evidence<sup>86</sup>; (iii) ICIT had itself implemented the 2010 amendment in "pursuance" of these judgments, which made the anti-dumping duty on EuroChem 0%<sup>87</sup>; (iv) nothing in the 2010 amendment or other evidence on the record suggested that ICIT disputed the Ukrainian court findings that EuroChem had a negative value/rate of dumping<sup>88</sup>; and (v) Ukraine does not challenge the legal validity of these Ukrainian court judgments.<sup>89</sup> On that basis, the Panel concluded that the "combined effect" of the court judgments and their implementation by the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*.<sup>90</sup>

6.14. The Panel then noted Ukraine's arguments as to why no "legally valid" dumping margin had been "calculated" for EuroChem: (i) the Ukrainian court findings were based on calculations provided by EuroChem alone, because, according to ICIT's policy, ICIT could not provide evidence of confidential information in public court proceedings; (ii) only ICIT and MEDT have authority under Ukrainian law to calculate dumping margins, and Ukrainian courts do not; (iii) the 2010 amendment enforced the Ukrainian court rulings but did not recalculate a dumping margin for EuroChem; and (iv) ICIT could not recalculate EuroChem's dumping margin without specific instructions from Ukrainian courts to reopen the investigation and apply a particular methodology, and thus had to reduce the duty to 0%.<sup>91</sup>

6.15. The Panel considered that these arguments comprised matters of Ukrainian domestic law.<sup>92</sup> The Panel recalled that, while it is for each WTO Member to decide how to implement the decisions of its courts, such arrangements, however, are not determinative of issues raised in WTO dispute

<sup>80</sup> Panel Report, para. 7.145 (referring to Ukraine's first written submission to the Panel, para. 253; response to Panel question No. 21, para. 83; opening statement at the first Panel meeting, para. 138).

<sup>81</sup> Panel Report, para. 7.145 (referring to Ukraine's first written submission to the Panel, para. 256).

<sup>82</sup> Panel Report, para. 7.146. The Panel set out its interpretation in paragraphs 7.139-7.140 of the Panel Report. In particular, the Panel recalled that the parties agree that "immediate termination" is required where a "zero or *de minimis* dumping margin" is determined in the original investigation, and that the imposition of a 0% duty does not amount to termination. Instead, relevant producers must be excluded from the scope of the anti-dumping order. (Ibid., para. 7.140 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 217, 219, and 305; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140)).

<sup>83</sup> Panel Report, para. 7.146.

<sup>84</sup> Panel Report, para. 7.146.

<sup>85</sup> Panel Report, paras. 7.136 (quoting Judgment of the District Court (Panel Exhibit RUS-6b)) and 7.147.

<sup>86</sup> Panel Report, para. 7.147 and fn 239 to para. 7.137 (referring to Judgment of the Appellate Court (Panel Exhibit RUS-5b); quoting Judgment of the Higher Court (Panel Exhibit RUS-7b)).

<sup>87</sup> Panel Report, para. 7.147.

<sup>88</sup> Panel Report, para. 7.146.

<sup>89</sup> Panel Report, para. 7.147 (referring to Ukraine's first written submission to the Panel, para. 253).

<sup>90</sup> Panel Report, para. 7.147.

<sup>91</sup> Panel Report, para. 7.148 (referring to Ukraine's response to Panel question No. 21, paras. 83-85, and Panel question No. 22, paras. 92-93; opening statement at the first Panel meeting, paras. 138 and 142; second written submission to the Panel, para. 97).

<sup>92</sup> Panel Report, para. 7.149.



settlement proceedings.<sup>93</sup> On that basis, the Panel found that Ukraine's arguments did not show that no *de minimis* dumping margin had been determined for EuroChem in the original investigation phase.<sup>94</sup> The Panel further considered that even if ICIT had been unable to present evidence before Ukrainian courts, the restraints on ICIT were matters of domestic law and did not affect the probative value before the Panel of the judgments as implemented by ICIT.<sup>95</sup> The Panel noted that the court judgments found that EuroChem had a negative rate of dumping, and ICIT implemented those judgments; there was accordingly no basis for Ukraine to argue that no negative or *de minimis* margin had been found in the original investigation phase.<sup>96</sup> The Panel thus considered that Ukraine had failed to rebut Russia's arguments that evidence on the record showed the absence of dumping by EuroChem.<sup>97</sup>

6.16. On that basis, the Panel agreed that the obligation under the second sentence of Article 5.8 of the Anti-Dumping Agreement was triggered because EuroChem had a *de minimis* dumping margin in the original investigation phase. Therefore, Ukraine had to terminate immediately the investigation with regard to EuroChem and accordingly exclude it from the scope of the anti-dumping measures.<sup>98</sup> Based on the foregoing, the Panel found that Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because it failed to exclude EuroChem from the scope of the original anti-dumping measures, specifically the 2008 amended decision, and instead imposed a 0% anti-dumping duty on EuroChem through the 2010 amendment.<sup>99</sup>

6.17. The Panel then considered Russia's claim under Article 5.8 of the Anti-Dumping Agreement with respect to the interim and expiry reviews.<sup>100</sup> Ukraine contended that the obligation under the second sentence of Article 5.8 had not been triggered because there was no legally valid *de minimis* dumping determination, and that, in any event, a *de minimis* dumping determination did not require investigating authorities to terminate a review.<sup>101</sup> The Panel rejected Ukraine's first argument on the basis of its prior reasoning.<sup>102</sup> As to Ukraine's second argument, the Panel reasoned that the relevant question did not concern whether a *de minimis* standard applied to interim or expiry reviews, but instead concerned "the consequences of a finding that a producer had a *de minimis* dumping margin in the original investigation phase" and the attendant obligation to terminate immediately that investigation with respect to that producer "on the subsequent interim or expiry review".<sup>103</sup> The Panel therefore considered that the question before it was "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".<sup>104</sup>

6.18. The Panel found that once an investigation is terminated against a producer by excluding it from the original investigation, the producer cannot be subjected to administrative or changed circumstances reviews.<sup>105</sup> Therefore, including such a producer in interim or expiry reviews would be inconsistent with the obligation under the second sentence of Article 5.8 of the Anti-Dumping Agreement to terminate immediately the original investigation.<sup>106</sup> On that basis, the Panel found that Ukraine acted inconsistently with Article 5.8 because Ukrainian investigating authorities

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<sup>93</sup> Panel Report, para. 7.149 (referring to Appellate Body Report, *US – Softwood Lumber IV* (Article 21.5 – Canada), para. 82).

<sup>94</sup> Panel Report, para. 7.149.

<sup>95</sup> Panel Report, para. 7.150 (referring to Appellate Body Report, *US – Zeroing (Japan)* (Article 21.5 – Japan), fn 452 to para. 175) and fn 271 thereto.

<sup>96</sup> Panel Report, para. 7.150.

<sup>97</sup> Panel Report, para. 7.150. The Panel also observed that Ukraine had changed its factual arguments during the course of the proceedings on whether, as a matter of Ukrainian law, Ukrainian investigating authorities can recalculate dumping margins in the course of a review, or only when instructed to do so by Ukrainian courts. (Panel Report, fn 272 to para. 7.150)

<sup>98</sup> Panel Report, para. 7.151.

<sup>99</sup> Panel Report, paras. 7.152 and 8.3.a.i-8.3.a.ii.

<sup>100</sup> Panel Report, paras. 7.153-7.157.

<sup>101</sup> Panel Report, para. 7.153.

<sup>102</sup> Panel Report, para. 7.154 (referring to *ibid.*, para. 7.151).

<sup>103</sup> Panel Report, para. 7.154 (referring to Russia's opening statement at the second Panel meeting, para. 160).

<sup>104</sup> Panel Report, para. 7.155. (emphasis original)

<sup>105</sup> Panel Report, para. 7.156. See also *ibid.*, para. 7.140 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 217, 219, and 305; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140).

<sup>106</sup> Panel Report, para. 7.156.

included EuroChem within the scope of the interim and expiry reviews and imposed anti-dumping duties on it through the 2014 extension decision.<sup>107</sup>

### 6.1.3 Whether the Panel erred in its analysis under Article 6.2 of the DSU in finding that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in Russia's panel request

6.19. Ukraine claims that the Panel erred in its analysis under Article 6.2 of the DSU in finding that the 2008 amended decision and the 2010 amendment were identified as measures at issue in Russia's panel request.<sup>108</sup> Ukraine therefore requests that we reverse the Panel's findings under Article 6.2 of the DSU in paragraphs 7.24, 7.26-7.28, and 8.1.a of the Panel Report.<sup>109</sup> Russia requests that we uphold the Panel's findings at issue.<sup>110</sup>

6.20. A panel request governs a panel's terms of reference and thereby "delimits the scope of [its] jurisdiction".<sup>111</sup> In doing so, it fulfils a due process objective by providing the respondent and third parties with notice regarding the nature of the complainant's case and to enable them to respond accordingly.<sup>112</sup> Compliance with the requirements of Article 6.2 of the DSU must be determined on the face of the panel request<sup>113</sup>, in light of attendant circumstances<sup>114</sup>, and on a case-by-case basis.<sup>115</sup> Panels must, on the basis of an objective examination, "scrutinize carefully the panel request, read as a whole, and on the basis of the language used".<sup>116</sup> In addition, the Appellate Body has previously recognized that "footnotes are part of the text 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."<sup>117</sup>

6.21. We recall that the requirement under Article 6.2 of the DSU to identify the "specific measures at issue" may be satisfied by reference to the name, number, date, and/or place of promulgation of a particular law or regulation.<sup>118</sup> However, the fact that a panel request does not specify the relevant law, regulation, or other legal instrument to which a claim relates would not necessarily render a panel request inconsistent with Article 6.2 of the DSU, so long as the panel request contains "sufficient information that effectively identifies the precise measures at issue".<sup>119</sup> We further recall that Article 6.2 of the DSU requires that measures at issue be discernible from a panel request, reading the panel request as a whole.<sup>120</sup>

<sup>107</sup> Panel Report, paras. 7.157 and 8.3.a.iii.

<sup>108</sup> Ukraine's appellant's submission, para. 5.

<sup>109</sup> Ukraine's appellant's submission, para. 5; Notice of Appeal, para. a.

<sup>110</sup> Russia's appellee's submission, para. 6.

<sup>111</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.12. See also Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; *US – Carbon Steel*, para. 124.

<sup>112</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:1, p. 186; *US – Carbon Steel*, para. 126; *EC and certain member States – Large Civil Aircraft*, para. 640; *Chile – Price Band System*, para. 164; *US – Continued Zeroing*, para. 161).

<sup>113</sup> Appellate Body Reports, *US – Carbon Steel*, para. 127; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13. Defects in a panel request cannot be cured by the parties' subsequent submissions made during panel proceedings, but such submissions or statements may be consulted to confirm the meaning of the words used in the panel request. (Appellate Body Report, *US – Carbon Steel*, para. 127 (referring to Appellate Body Report, *EC – Bananas III*, paras. 142-143))

<sup>114</sup> Appellate Body Reports, *Korea – Dairy*, paras. 124-127; *US – Carbon Steel*, para. 127.

<sup>115</sup> Appellate Body Reports, *Korea – Dairy*, para. 127; *China – Raw Materials*, para. 220.

<sup>116</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 562 (fn omitted)).

<sup>117</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.39.

<sup>118</sup> See e.g. Panel Report, *Argentina – Footwear (EC)*, para. 8.40.

<sup>119</sup> Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10 (quoting Panel Report, *Canada – Wheat Exports and Grain Imports*, preliminary ruling of the panel, para. 36).

<sup>120</sup> Appellate Body Report, *US – Continued Zeroing*, paras. 161 and 168.

6.22. At the outset, we note that the participants do not take issue with the Panel's articulation of the legal standard under Article 6.2 of the DSU.<sup>121</sup> For its part, although Ukraine accepts that the elements of a panel request cannot be read in isolation, and that a panel request including its footnotes must be read as a whole<sup>122</sup>, Ukraine considers that the Panel erred by failing to demand sufficient precision in applying that standard to Russia's panel request.<sup>123</sup>

6.23. In evaluating whether the 2008 amended decision and the 2010 amendment were within the Panel's terms of reference, the Panel relied on language in two portions of Russia's panel request.<sup>124</sup> First, the Panel pointed to the opening paragraph of the panel request.<sup>125</sup> That paragraph indicates that Russia had requested consultations regarding the interim and expiry reviews, and then notes in footnote 2 that these "anti-dumping measures" were imposed through a number of instruments, including the 2008 original decision, as it was amended by the 2010 amendment, resulting in the 2008 amended decision. The Panel marked in bold the language in footnote 2, which refers to 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.<sup>126</sup>

6.24. Second, the Panel observed that item number 1 of the panel request states that Russia claims violations under Articles 5.8 and 11.1-11.3 of the Anti-Dumping Agreement because of the alleged failure by Ukrainian authorities to exclude a certain Russian exporter from the "anti-dumping measures".<sup>127</sup> The Panel marked in bold the language in footnote 3 to that item, which refers to 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".<sup>128</sup>

6.25. According to the Panel, the reference to the "anti-dumping measures" in the text of item number 1 is followed by footnote 3, "which refers to the 2010 amendment, and notes that it amended the 2008 original decision".<sup>129</sup> The Panel thus considered that 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".<sup>130</sup> Accordingly, the Panel considered that Russia's panel request "was sufficiently precise to identify the measures, i.e. [the] 2008 amended decision[] and the 2010 amendment, which were being referred for adjudication".<sup>131</sup>

6.26. This matter relates to Russia's claim under Article 5.8 of the Anti-Dumping Agreement as to whether Ukrainian investigating authorities – following successful court challenges by EuroChem – were required to have excluded EuroChem from the anti-dumping proceedings instead of imposing a 0% anti-dumping duty. The process by which the dumping margin assigned to EuroChem in the

<sup>121</sup> At the oral hearing, Ukraine maintained that what is contained in a consultations request may be relevant under Article 6.2 of the DSU and that the 2008 amended decision and the 2010 amendment were not sufficiently identified in Russia's consultations request. (Ukraine's response to questioning at the oral hearing) Ukraine presented no claim regarding Russia's consultations request in its Notice of Appeal and made no reference in its appellant's submission to this argument. In its third participant's submission, the United States submits that the Panel erred by failing to compare the terms of Russia's panel request and its consultations request when conducting its analysis under Article 6.2 of the DSU. (United States' third participant's submission, paras. 35-39)

<sup>122</sup> Ukraine's appellant's submission, para. 15.

<sup>123</sup> Ukraine's appellant's submission, paras. 8 and 26.

<sup>124</sup> Panel Report, paras. 7.22-7.24.

<sup>125</sup> Panel Report, para. 7.22.

<sup>126</sup> Panel Report, para. 7.22 (quoting Russia's panel request, fn 2). (emphasis omitted)

<sup>127</sup> Panel Report, paras. 7.23-7.24.

<sup>128</sup> Panel Report, para. 7.23 (quoting Russia's panel request, fn 3). (emphasis omitted)

<sup>129</sup> Panel Report, para. 7.24.

<sup>130</sup> Panel Report, para. 7.24.

<sup>131</sup> Panel Report, para. 7.24.

2008 original decision was invalidated and a 0% duty imposed was through the 2010 amendment, which amended the 2008 original decision, resulting in the 2008 amended decision. Accordingly, when the panel request refers in item number 1 to an allegation of inconsistency with Article 5.8 with respect to the "anti-dumping measures" at issue, the only proper way to understand the legal question as to whether EuroChem should have been excluded from the subsequent interim and expiry reviews is to assess the basis for its non-exclusion at the time that the 2008 amended decision and the 2010 amendment were issued. We therefore understand the Panel to have read the panel request as having established a link – by virtue of the reference to "anti-dumping measures" and the footnote reference to the relevant decisions – between the challenged interim and expiry reviews and the underlying instruments that related to EuroChem's status, including the 2008 amended decision and the 2010 amendment.<sup>132</sup>

6.27. The Panel then addressed two specific contentions by Ukraine. First, the Panel responded to Ukraine's argument 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.<sup>133</sup> The Panel considered that this phrase could not be read in isolation from other parts of the panel request, including the language in item number 1 and the corresponding footnotes.<sup>134</sup> As the Panel noted, based on its reading of the panel request, "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."<sup>135</sup>

6.28. The Panel also rejected Ukraine's contention that footnotes cannot determine a panel's terms of reference.<sup>136</sup> As the Panel remarked, "nothing in Article 6.2 of the DSU specifically prohibits the identification of the specific measures in the footnotes of a panel request."<sup>137</sup> The Panel further found support for its analysis in a statement by the Appellate Body in *US – Countervailing and Anti-Dumping Measures (China)* that "footnotes are part of the text 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."<sup>138</sup>

6.29. On the basis of the foregoing, we understand the Panel to have concluded that, although the 2008 amended decision and the 2010 amendment are referenced only in footnotes of the panel request, the question whether EuroChem should have been excluded from the interim and expiry reviews was linked to the decision by Ukrainian courts to invalidate the basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem, as reflected in the 2008 amended decision and the 2010 amendment. In this respect, we understand the Panel to have concluded that the references to these two instruments, including in the footnote detailing what the "anti-dumping measures" in item number 1 consisted of, were sufficiently precise in order to "identify the specific measures at issue" within the meaning of Article 6.2 of the DSU.

6.30. Ukraine contends that the specific measures at issue should be listed clearly in the portion of the panel request said to identify the measures at issue.<sup>139</sup> Ukraine quotes the opening paragraph of Russia's panel request and notes that only the 2014 extension decision is specifically identified.<sup>140</sup> Ukraine then suggests that if footnotes are to be relied on, they must adopt explicit language that

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<sup>132</sup> See Panel Report, paras. 7.22-7.24. We note that a footnote corresponding to footnote 2 in Russia's panel request is also contained in Russia's consultations request, and likewise refers to the 2008 original decision and its amendment by the 2010 amendment, resulting in the 2008 amended decision. Further, we note that item number 7 of Russia's consultations request, which corresponds to item number 1 in Russia's panel request, alleges an inconsistency with Article 5.8 of the Anti-Dumping Agreement "because Ukraine failed to completely exclude [EuroChem], for which a *de minimis* margin of dumping was determined in the course of judicial review, from the scope of the decision establishing original anti-dumping duties, the interim and expiry reviews and newly imposed anti-dumping duties". (Request for Consultations by the Russian Federation, WT/DS493/1) (fn omitted) We therefore do not see that the reasoning of the Panel would have differed had it explicitly addressed Russia's consultations request.

<sup>133</sup> Panel Report, paras. 7.25.a and 7.26.

<sup>134</sup> Panel Report, para. 7.26.

<sup>135</sup> Panel Report, para. 7.26.

<sup>136</sup> Panel Report, paras. 7.25.b and 7.27.

<sup>137</sup> Panel Report, para. 7.27.

<sup>138</sup> Panel Report, para. 7.27 (quoting Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.39; referring to Panel Report, *Indonesia – Import Licensing Regimes*, preliminary ruling of the Panel, para. 3.15).

<sup>139</sup> Ukraine's appellant's submission, paras. 9-12 and 18.

<sup>140</sup> Ukraine's appellant's submission, paras. 11-12.

clarifies what measures and claims are being brought, and on what conditions.<sup>141</sup> Although Ukraine accepts that footnote 2 mentions the 2008 amended decision and the 2010 amendment, it argues that they are not identified as measures at issue.<sup>142</sup>

6.31. Russia responds that Ukraine's analysis relies on particular portions of the panel request and is therefore incompatible with reading the panel request as a whole.<sup>143</sup> For instance, Russia remarks that Ukraine relies on specific passages as limiting the scope of the panel request, such as "in connection with expiry and interim reviews", and ignores the context and clarification provided by the opening paragraph, footnote 2, item number 1, and footnote 3.<sup>144</sup> Russia notes that, in any event, the 2014 extension decision itself refers to the 2008 amended decision.<sup>145</sup> Further, Russia argues that Article 6.2 of the DSU does not require Russia to list the 2008 amended decision, the 2010 amendment, and the 2014 extension decision together as measures at issue or refer to them expressly as measures at issue.<sup>146</sup>

6.32. We recall that Article 6.2 of the DSU requires that measures at issue must be identified with sufficient precision such that they are discernible from a panel request, reading the panel request as a whole.<sup>147</sup> While the location of certain information in a panel request – and, in particular, whether such information is in the body text or in a footnote – may have some relevance for understanding whether the measures at issue are discernible, it is unlikely to be dispositive given the need to read the panel request as a whole.

6.33. Ukraine relies on language in footnotes of a panel request in *Indonesia – Import Licensing Regimes* as an example of the degree of specificity required of a footnote, which Ukraine claims is not exhibited by footnote 2 of Russia's panel request.<sup>148</sup> In particular, Ukraine maintains that the footnotes in that panel request contained "explicit language clarifying what measures and claims were being brought and on what condition".<sup>149</sup> Russia responds that the footnotes in that panel request are similar to footnotes 2 and 3 in Russia's panel request in this case.<sup>150</sup> Given the inherent case-by-case approach to scrutinizing panel requests, we do not consider that a textual comparison of footnotes in different panel requests in different disputes is of much assistance in assessing whether the 2008 amended decision and the 2010 amendment are discernible measures at issue in Russia's panel request. We emphasize that whether the 2008 amended decision and the 2010 amendment are identified as specific measures at issue turns on whether these measures are discernible in the panel request, read as a whole, and that footnotes 2 and 3 form part of the text of Russia's panel request and may be relevant to the identification of the measures at issue.<sup>151</sup> We consider that, by this standard, footnotes need not necessarily contain the type of explicit language Ukraine points to in another dispute in order to be relevant to the identification of the specific measures at issue.

6.34. Ukraine further argues that, although footnotes 2 and 3 of Russia's panel request – as distinct from the opening paragraph and item number 1 – mention the 2008 amended decision and the 2010 amendment, these references amount to background information and should not have been taken into account by the Panel in examining whether the 2008 amended decision and the 2010 amendment were identified as measures at issue.<sup>152</sup> Ukraine argues that the language in footnote 2 does not indicate that Russia took issue with the 2008 amended decision and the 2010 amendment; rather, it provides background information and does not identify that they are specific measures at

<sup>141</sup> Ukraine's appellant's submission, fn 5 to para. 15 (referring to *Indonesia – Import Licensing Regimes*, Request for the Establishment of a Panel by New Zealand, WT/DS477/9, in particular fn 5).

<sup>142</sup> Ukraine's appellant's submission, para. 14.

<sup>143</sup> Russia's appellee's submission, para. 24.

<sup>144</sup> Russia's appellee's submission, paras. 23-24.

<sup>145</sup> Russia's appellee's submission, paras. 26-27.

<sup>146</sup> Russia's appellee's submission, para. 45.

<sup>147</sup> Appellate Body Report, *US – Continued Zeroing*, paras. 161 and 168-169.

<sup>148</sup> Ukraine's appellant's submission, fn 5 to para. 15 (referring to *Indonesia – Import Licensing Regimes*, Request for the Establishment of a Panel by New Zealand, WT/DS477/9, in particular fn 5).

<sup>149</sup> Ukraine's appellant's submission, paras. 15-16 and fn 5 to para. 15 (referring to *Indonesia – Import Licensing Regimes*, Request for the Establishment of a Panel by New Zealand, WT/DS477/9, in particular fn 5).

<sup>150</sup> Russia's appellee's submission, paras. 34-36.

<sup>151</sup> See Appellate Body Reports, *US – Continued Zeroing*, paras. 161 and 168-169; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.39.

<sup>152</sup> Ukraine's appellant's submission, paras. 17 and 23.

issue.<sup>153</sup> Russia responds that it specifically listed the 2008 amended decision and the 2010 amendment to clarify the scope of "anti-dumping measures" in the opening paragraph and item number 1 of the panel request, and disagrees that background information cannot be part of the identification of measures at issue.<sup>154</sup>

6.35. The participants refer to the Appellate Body Report in *Indonesia – Iron or Steel Products* in support of their arguments regarding what information can be used from a panel request in order to inform the scope of the measures at issue. In that dispute, the Appellate Body was asked to consider whether the measure referred to by the language "specific duty imposed as a safeguard measure" was limited to the specific duty as a safeguard measure or comprised the specific duty itself, which the complainant alleged to have been discriminatory and inconsistent with Article I:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994).<sup>155</sup> The Appellate Body considered that this language explained how the measure arose (as a safeguard measure) and could not be read to restrict the panel's understanding of the measure at issue.<sup>156</sup> Contrary to Ukraine's submission, we do not understand the Appellate Body to have decided in *Indonesia – Iron or Steel Products* that background information is not capable of assisting with the identification of a specific measure at issue. Rather, we understand the Appellate Body's report to illustrate that whether information is capable of contributing to the identification of the specific measures at issue will depend on the circumstances and facts of each case.

6.36. Finally, we note that, while the opening paragraph of the panel request refers to "Ukraine's measures imposing anti-dumping duties ... set forth in the [2014 extension decision]", the 2014 extension decision itself sets out "to amend the antidumping measures applied by [the 2008 amended decision]".<sup>157</sup> Further, under item number 1 of Russia's panel request, Russia alleged an inconsistency with "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".<sup>158</sup> The Panel noted that the use of the word "because" twice in this sentence suggested that Russia challenged two aspects of the measures at issue, namely, that Ukrainian investigating authorities: (i) failed to exclude EuroChem from the "anti-dumping measures"; and (ii) subjected EuroChem to expiry and interim reviews.<sup>159</sup> We note that the reference to "anti-dumping measures" is followed by footnote 3, which refers to the 2010 amendment, which amended the 2008 original decision, and that both determinations were made in the original investigation phase. Footnote 3 also identifies the Ukrainian court judgments, which the 2010 amendment implemented.<sup>160</sup> We further recall that Article 5.8 of the Anti-Dumping Agreement requires that there shall be immediate termination of an investigation in cases where the authorities determine that the margin of dumping is *de minimis*. It therefore seems reasonable for the Panel to have concluded that the first aspect of item number 1 concerned the failure by Ukrainian investigating authorities to exclude EuroChem from the scope of the original anti-dumping investigation, and, in particular, the 2008 amended decision and the 2010 amendment, as is suggested in the accompanying footnote 3. In this respect,

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<sup>153</sup> Ukraine's appellant's submission, para. 17 (referring to Appellate Body Report, *Indonesia – Iron or Steel Products*, para. 5.92).

<sup>154</sup> Russia's appellee's submission, paras. 39-44 (referring to Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.85-5.93).

<sup>155</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.92-5.93.

<sup>156</sup> Appellate Body Report, *Indonesia – Iron or Steel Products*, paras. 5.92-5.93. The Appellate Body considered that the language "specific duty imposed as a safeguard measure" was "consonant with the factual background in the panel requests that precedes both the identification of the specific measures at issue and the legal basis of the complaint", namely, that the "specific duty" was discriminatory and inconsistent with Article I:1 of the GATT 1994. Next, the Appellate Body considered the extent to which "imposed as a safeguard measure" could be read as "going beyond providing a factual background", and concluded that such language went to arguments about the proper legal characterization of the measure, not its identification. (*Ibid.*, para. 5.92)

<sup>157</sup> 2014 extension decision (Panel Exhibit RUS-4b), p. 2. We also note that the underlying notices concerning the initiation of the interim and expiry reviews refer to the 2008 amended decision and the 2010 amendment (ICIT, Notice on the initiation and conduct of the interim review of the anti-dumping measures on imports of ammonium nitrate originating in Russia No. AD-296/2013/4423-06 (4 July 2013) (Panel Exhibit RUS-3b); ICIT, Notice on the initiation and conduct of the expiry review of the anti-dumping measures on imports of ammonium nitrate originating in Russia No. AD-294/2013/4423-06 (24 May 2013) (Panel Exhibit RUS-27b)).

<sup>158</sup> Russia's panel request. (fn omitted)

<sup>159</sup> Panel Report, para. 7.32.

<sup>160</sup> Russia's panel request, fn 3.

the narrative of the panel request does not have a limiting effect, as Ukraine contends; rather, it highlights that the challenged interim and expiry reviews reflected in the 2014 extension decision are necessarily linked to the decision to impose a 0% duty on EuroChem and not to exclude EuroChem from the anti-dumping proceeding, as reflected in the 2008 amended decision and the 2010 amendment.

6.37. We underscore that, in accordance with Article 6.2 of the DSU, panel requests delimit a panel's terms of reference and play an important due process function for parties and third parties. Parties to disputes must not leave it to panels to divine the identity of measures at issue. Nevertheless, a panel request will satisfy the requirement in Article 6.2 of the DSU to identify the specific measures at issue if such measures are discernible from the panel request.<sup>161</sup> In assessing a panel request, panels must "scrutinize carefully the panel request, read as a whole"<sup>162</sup>, which includes footnotes.<sup>163</sup> For the reasons outlined above, we consider that the Panel properly reasoned that the 2008 amended decision and the 2010 amendment were discernible from the panel request. We therefore do not consider that Ukraine has established that the Panel erred in its analysis under Article 6.2 of the DSU in finding that the 2008 amended decision and the 2010 amendment were identified as measures at issue in Russia's panel request.

#### 6.1.4 Whether the Panel erred under Articles 7.1 and 11 of the DSU by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement with respect to the 2008 amended decision and the 2010 amendment

6.38. Ukraine claims that the Panel erred under Articles 7.1 and 11 of the DSU by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement with respect to the 2008 amended decision and the 2010 amendment because such a claim was not made in Russia's panel request and therefore did not form part of the Panel's terms of reference.<sup>164</sup> Ukraine considers that the Panel retroactively justified including this claim by referring to information provided by Russia subsequent to its panel request.<sup>165</sup> Ukraine requests that we reverse the Panel's findings in paragraphs 7.147, 7.149-7.152, and 8.3.a.i-8.3.a.ii of the Panel Report.<sup>166</sup> Russia requests that we uphold these Panel findings.<sup>167</sup>

6.39. We recall that the measures and claims identified in a panel request in accordance with Article 6.2 of the DSU constitute the "matter referred to the DSB", which serves as a basis for the panel's terms of reference under Article 7.1 of the DSU.<sup>168</sup> We note that we have found that Ukraine has not established that the Panel erred under Article 6.2 of the DSU in finding that the 2008 amended decision and the 2010 amendment were identified as measures at issue in Russia's panel request. Ukraine has not appealed the Panel's finding that Russia had provided, in accordance with Article 6.2 of the DSU, a brief summary of the legal basis for its claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment.<sup>169</sup> Further, Ukraine has not advanced any other grounds in support of its challenge under Articles 7.1 and 11 of the DSU<sup>170</sup>, and confirmed at the oral hearing that if we were to uphold the Panel's finding

<sup>161</sup> Appellate Body Report, *US – Continued Zeroing*, para. 170.

<sup>162</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.13 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 562 (fn omitted)).

<sup>163</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.39.

<sup>164</sup> Ukraine's appellant's submission, paras. 27-29 and 34-36.

<sup>165</sup> Ukraine's appellant's submission, paras. 35-36.

<sup>166</sup> Ukraine's appellant's submission, para. 29; Notice of Appeal, para. b.

<sup>167</sup> Russia's appellee's submission, paras. 57 and 80.

<sup>168</sup> Appellate Body Reports, *Guatemala – Cement I*, paras. 72-73; *US – Carbon Steel*, para. 125; *China – Raw Materials*, para. 219.

<sup>169</sup> In paragraph b of its Notice of Appeal, Ukraine directs its challenge to the Panel's substantive analysis contained in section 7.5.3.1 of the Panel Report, where the Panel concluded that Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement, because Ukrainian investigating authorities failed to exclude EuroChem from the anti-dumping measures as reflected in the 2008 amended decision and the 2010 amendment. Ukraine does not refer in its Notice of Appeal to paragraphs 7.30-7.35 of the Panel Report, which contain the Panel's findings in relation to the requirement to provide a brief summary of the legal basis of the complaint under Article 6.2 of the DSU. At the oral hearing, Ukraine confirmed that it has not appealed this section of the Panel Report. (Ukraine's response to questioning at the oral hearing)

<sup>170</sup> Ukraine's appellant's submission, paras. 27-36. While the Appellate Body has previously assessed allegations of breach under Article 7.1 of the DSU that did not relate to the requirements under Article 6.2 of the DSU, this is not the case in the present dispute. See Appellate Body Reports, *EU – PET (Pakistan)*, paras. 5.28, 5.40, and 5.51; *China – Raw Materials*, para. 237.

that the 2008 amended decision and the 2010 amendment formed part of the Panel's terms of reference, there would be no basis to entertain Ukraine's claims under Articles 7.1 and 11.<sup>171</sup> Accordingly, we find that Ukraine has not established that the Panel erred under Articles 7.1 and 11 of the DSU by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment.

#### 6.1.5 Whether the Panel erred under Article 11 of the DSU by failing to examine properly the arguments and evidence presented by Ukraine regarding the authority of Ukrainian courts and investigating authorities to calculate dumping margins under Ukrainian law

6.40. Ukraine claims that the Panel acted inconsistently with Article 11 of the DSU by failing to examine properly the arguments and evidence presented by Ukraine regarding the authority of Ukrainian courts and investigating authorities to calculate dumping margins under Ukrainian law.<sup>172</sup> Ukraine's claim under Article 11 of the DSU concerns the Panel's analysis regarding the second sentence of Article 5.8 of the Anti-Dumping Agreement, which requires immediate termination of an anti-dumping investigation, and therefore exclusion of a producer or exporter from the scope of that investigation, where a *de minimis* dumping margin has been determined for that producer or exporter.<sup>173</sup> Ukraine principally maintains that the Panel failed to consider that neither Ukrainian investigating authorities nor Ukrainian courts recalculated – or, in these circumstances, had the competence to recalculate – the dumping margin for EuroChem.<sup>174</sup> Ukraine therefore requests that we reverse the Panel's findings in paragraphs 7.147, 7.149-7.152, 7.154, 7.157, and 8.3.a of the Panel Report.<sup>175</sup> Russia requests that we uphold the Panel's findings at issue.<sup>176</sup>

6.41. Article 11 of the DSU imposes on panels a comprehensive obligation to make an "objective assessment of the matter", which embraces "all aspects of a panel's examination of the 'matter', both factual and legal".<sup>177</sup> Thus, panels are required to make an "objective assessment of the facts", of the "applicability" of the covered agreements, and of the "conformity" of the measures at issue with the covered agreements.<sup>178</sup> Moreover, the Appellate Body has stated that, in conducting an objective assessment of the matter, a panel must provide reasoned and adequate explanations and coherent reasoning.<sup>179</sup> A claim that a panel has failed to conduct an objective assessment of the matter before it is "a very serious allegation".<sup>180</sup> Participants must therefore identify specific errors regarding the objectivity of a panel's assessment<sup>181</sup> and explain why the alleged error has a bearing on the objectivity of a panel's assessment.<sup>182</sup> Not every error amounts to a failure by the panel to comply with its duties under Article 11, only those which, taken together or singly, undermine the objectivity of the panel's assessment of the matter before it.<sup>183</sup>

6.42. Article 11 of the DSU requires a panel to consider all of the arguments and evidence presented before it, in order to treat the parties' arguments and evidence in an even-handed manner, and to

<sup>171</sup> Ukraine's response to questioning at the oral hearing.

<sup>172</sup> Ukraine's appellant's submission, paras. 100-152.

<sup>173</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 217, 219, and 305. We note that the parties did not dispute the interpretation of the second sentence of Article 5.8 of the Anti-Dumping Agreement before the Panel. (Panel Report, paras. 7.140 and 7.146)

<sup>174</sup> Ukraine's appellant's submission, paras. 116-152.

<sup>175</sup> Ukraine's appellant's submission, para. 152; Notice of Appeal, para. f.

<sup>176</sup> Russia's appellee's submission, paras. 313 and 371.

<sup>177</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.

<sup>178</sup> Appellate Body Reports, *US – Hot-Rolled Steel*, para. 54; *Indonesia – Iron or Steel Products*, para. 5.31.

<sup>179</sup> Appellate Body Reports, *Colombia – Textiles*, para. 5.18; *EC and certain member States – Large Civil Aircraft*, para. 1317 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, fn 618 to para. 293); *US – COOL*, para. 299.

<sup>180</sup> Appellate Body Report, *Peru – Agricultural Products*, para. 5.66 (quoting Appellate Body Reports, *China – Rare Earths*, para. 5.227 (fn omitted)).

<sup>181</sup> Appellate Body Report, *Peru – Agricultural Products*, para. 5.66 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 442).

<sup>182</sup> See Appellate Body Report, *EC – Fasteners (China)*, para. 442.

<sup>183</sup> Appellate Body Reports, *Peru – Agricultural Products*, para. 5.66; *EC and certain member States – Large Civil Aircraft*, para. 1318; *US – COOL*, paras. 300 and 321.



not disregard the arguments or evidence relevant to a party's case.<sup>184</sup> Within these parameters, it is within the panel's discretion to decide which arguments or evidence it addresses or relies on in reaching its findings.<sup>185</sup> An allegation that the panel did not expressly refer to particular arguments or evidence may not be sufficient to bring a successful claim under Article 11. Rather, the Appellate Body must be satisfied that the panel exceeded its authority as the trier of facts or failed to exercise that authority to conduct a proper analysis.<sup>186</sup> In addition, the Appellate Body has cautioned participants against recasting their arguments made before the Panel "under the guise of an Article 11 claim" on appeal.<sup>187</sup>

6.43. Moreover, in assessing the consistency of domestic measures with WTO law, a panel may be called upon to examine a Member's domestic law, and must make an objective assessment of the matter before it in accordance with Article 11 of the DSU, including an objective assessment of the facts of the case and the applicability of and conformity with the covered agreements.<sup>188</sup> In doing so, a panel should undertake "a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies".<sup>189</sup>

6.44. On the basis of the foregoing discussion, we now turn to examine the Panel's analysis. The Panel referred to Ukraine's contention that the judgments of its courts did not amount to a legally valid determination of a *de minimis* dumping margin warranting the exclusion of EuroChem pursuant to the second sentence of Article 5.8 of the Anti-Dumping Agreement. Indeed, the Panel took note of Ukraine's contentions that "the Ukrainian courts did not have the authority under domestic law to recalculate EuroChem's dumping margin" and that "ICIT imposed an anti-dumping duty of 0% on EuroChem to implement the court orders, but never recalculated its dumping margin."<sup>190</sup> On that basis, the Panel inquired whether a *de minimis* dumping margin was determined for EuroChem in the original investigation phase, which would have required termination of the original investigation against EuroChem under Article 5.8.<sup>191</sup>

6.45. In its analysis, the Panel referenced three Ukrainian court judgments, as well as the 2010 amendment.<sup>192</sup> Regarding the court judgments, the Panel noted that the District Court found that in the original investigation, MEDT had erroneously considered that EuroChem had provided a discount on the domestic sales prices that were used to calculate the normal value, and thus incorrectly adjusted the normal value by adding the value of the discount to domestic sales prices when calculating the dumping margin.<sup>193</sup> As the Panel explained, the District Court found that no such discount had been given by EuroChem, and thus the adjustment to the normal value was not correct.<sup>194</sup> The Panel accordingly noted the District Court's conclusions that there was an "absence

<sup>184</sup> See Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1317; *US – COOL*, para. 299; *Brazil – Retreaded Tyres*, para. 185; *Canada – Continued Suspension*, paras. 553 and 615; *US – Continued Suspension*, paras. 553 and 615; *EC – Fasteners (China)*, para. 441; *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 292-293 (referring to Appellate Body Reports, *Korea – Dairy*; para. 137, *Korea – Alcoholic Beverages*, para. 164).

<sup>185</sup> Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1317 (quoting Appellate Body Report, *EC – Hormones*, para. 135); *US – COOL*, para. 299; *EC – Poultry*, para. 135. See also Appellate Body Report, *EC – Fasteners (China)*, para. 511.

<sup>186</sup> Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1317 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 151); *US – COOL*, para. 300.

<sup>187</sup> Appellate Body Reports, *US – COOL*, para. 301 (quoting Appellate Body Reports, *EC – Fasteners (China)*, para. 442; *US – Clove Cigarettes*, para. 229).

<sup>188</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.98.

<sup>189</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.101. In addition, the Appellate Body has previously stated that a panel's examination of a Member's law may involve both legal and factual characterizations, depending on the circumstances of the case. (Ibid., para. 4.101 (referring to Appellate Body Report, *US – Carbon Steel*, para. 157))

<sup>190</sup> Panel Report, para. 7.145 (referring to Ukraine's first written submission to the Panel, paras. 238 and 253; response to Panel question No. 21, para. 83; opening statement at the first Panel meeting, para. 138).

<sup>191</sup> Panel Report, para. 7.146.

<sup>192</sup> Panel Report, para. 7.147.

<sup>193</sup> Panel Report, fn 238 to para. 7.136 (referring to Judgment of the District Court (Panel Exhibit RUS-6b)).

<sup>194</sup> Panel Report, fn 238 to para. 7.136 (referring to Judgment of the District Court (Panel Exhibit RUS-6b)).

of dumping" by EuroChem and that the case files reaffirmed that the calculations presented by EuroChem showed that its dumping margin had a "negative value/rate".<sup>195</sup>

6.46. The Panel then referred to the fact that the judgment of the District Court was upheld twice on appeal.<sup>196</sup> The Panel recalled the Appellate Court's conclusion that the District Court had "correctly established the circumstances of the case" and that Ukrainian investigating authorities "did not prove the lawfulness of the [2008 original decision]".<sup>197</sup> The Panel then recalled the Higher Court's conclusions that: it "follow[ed] from the case files that no discounts were granted by [EuroChem] in the ordinary course of trade operations"; Ukrainian investigating authorities "did not have any grounds for adjustment"; and the District Court and the Appellate Court had correctly established the circumstances of the case and thoroughly investigated existing evidence.<sup>198</sup>

6.47. In addition, the Panel evaluated what transpired subsequent to the Ukrainian court judgments.<sup>199</sup> First, the Panel noted that ICIT had itself implemented the judgments by issuing the 2010 amendment in "pursuance" of these judgments.<sup>200</sup> Second, the Panel considered that nothing in the 2010 amendment or other evidence on the record suggested that ICIT disputed the Ukrainian court findings that EuroChem had a negative value/rate of dumping.<sup>201</sup> Third, the Panel considered that Ukraine did not challenge the legal validity of these judgments.<sup>202</sup> Fourth, the Panel acknowledged Ukraine's contention that a 0% duty does not equate to a determination of a negative or *de minimis* dumping margin.<sup>203</sup> However, the Panel did not consider that Ukraine's allegations regarding ICIT's conduct indicated that it had not accepted the courts' findings that EuroChem had a negative rate of dumping. Moreover, the Panel considered that Ukraine had not explained how the exhibits it had advanced supported its position.<sup>204</sup>

6.48. On the basis of these considerations, the Panel concluded that the "combined effect" of the Ukrainian court judgments and their implementation by the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*.<sup>205</sup> Consequently, the Panel found 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."<sup>206</sup> The Panel further **found that, although "the Ukrainian [investigating] authorities would have been required ... to immediately terminate the investigation against EuroChem", they "failed to exclude EuroChem from the scope of the original anti-dumping measures, specifically the 2008 amended decision", and they "imposed a 0% anti-dumping duty on EuroChem through the 2010 amendment".**<sup>207</sup> The Panel noted that Ukrainian investigating authorities also included EuroChem within the scope of the review determinations and imposed anti-dumping duties on EuroChem through the 2014 extension

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<sup>195</sup> Panel Report, paras. 7.136 (quoting Judgment of the District Court (Panel Exhibit RUS-6b)) and 7.147.

<sup>196</sup> Panel Report, para. 7.137 and fn 239 thereto (referring to Judgment of the Appellate Court (Panel Exhibit RUS-5b); Judgment of the Higher Court (Panel Exhibit RUS-7b)).

<sup>197</sup> Panel Report, fn 239 to para. 7.137 (quoting Judgment of the Appellate Court (Panel Exhibit RUS-5b)).

<sup>198</sup> Panel Report, fn 239 to para. 7.137 (quoting Judgment of the Higher Court (Panel Exhibit RUS-7b)), and para. 7.147.

<sup>199</sup> Panel Report, para. 7.147.

<sup>200</sup> Panel Report, para. 7.147.

<sup>201</sup> Panel Report, para. 7.147 and fn 263 thereto.

<sup>202</sup> Panel Report, para. 7.147 (referring to Ukraine's first written submission to the Panel, para. 253).

<sup>203</sup> Panel Report, fn 263 to para. 7.147 (referring to Ukraine's response to Panel question No. 21, para. 82).

<sup>204</sup> Panel Report, fn 263 to para. 7.147 (referring to Letter dated 8 October 2010 from MEDT to ICIT regarding the agenda for the ICIT meeting on 15 October 2010 (Panel Exhibit UKR-53b (BCI)); ICIT, Meeting agenda of 25 October 2010 (Panel Exhibit UKR-54b (BCI)); Letter dated 21 October 2010 from MEDT to ICIT regarding the agenda for the ICIT meeting on 25 October 2010 (Panel Exhibit UKR-55b (BCI)); MEDT, Information on appeal of ICIT Decision on the application of definitive anti-dumping measures on imports of ammonium nitrate originating in Russia No. AD-176/2008/143-47 (Panel Exhibit UKR-56b (BCI))).

<sup>205</sup> Panel Report, para. 7.147.

<sup>206</sup> Panel Report, para. 7.151.

<sup>207</sup> Panel Report, para. 7.151. The Panel noted that "the only way to terminate the investigation against a producer found to have a *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." (Ibid., para. 7.151 (referring to *ibid.*, para. 7.140))

decision.<sup>208</sup> The Panel considered that, for all of these reasons, Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement.<sup>209</sup>

6.49. Based on our review of the Panel's analysis, we understand the Panel to have considered that, irrespective of whether the relevant court judgments and the 2010 amendment refer to a specific dumping margin, the outcome of these decisions was that there was, at that point, no basis for a dumping margin or an anti-dumping duty with respect to EuroChem, and that this therefore amounted to a determination of a *de minimis* dumping margin. According to the Panel, the error that was identified by Ukrainian courts, which resulted in the Ukrainian court orders to reverse the 2008 original decision with respect to EuroChem, related to the improper allocation of discounts by Ukrainian investigating authorities.<sup>210</sup> The Panel further noted that this resulted in the District Court concluding that there was an "absence of dumping" by EuroChem and reaffirming that EuroChem's dumping margin had a "negative value/rate".<sup>211</sup> Thus, the Panel appears to have concluded that the Ukrainian court judgments and the 2010 amendment invalidated the basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem. It was on these grounds that the Panel found 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*."<sup>212</sup>

6.50. Ukraine argues that, because Ukrainian courts are not competent to calculate dumping margins, they could not have calculated a dumping margin for EuroChem.<sup>213</sup> In particular, Ukraine argues that the Panel failed to consider adequately its submissions regarding Ukrainian law, including: (i) the division of competences between Ukrainian courts, ICIT, and MEDT; (ii) the role ICIT and MEDT have in anti-dumping investigations and ICIT's exclusive right to decide on the presence or absence of dumping and methods for calculating dumping margins; and (iii) that Ukrainian courts can only review the decisions of Ukrainian investigating authorities.<sup>214</sup>

6.51. Ukraine further argues that neither Ukrainian courts nor investigating authorities calculated a dumping margin for EuroChem. Regarding its courts, Ukraine contends that: (i) the Panel selectively quoted the District Court's judgment, obscuring the fact that the District Court itself did not make any calculations<sup>215</sup>; and (ii) the operative section of the District Court's judgment did not contain a dumping margin, but rather a finding of unlawfulness and a decision to repeal partially the 2008 original decision.<sup>216</sup> As to its investigating authorities, Ukraine submits that they did not recalculate a dumping margin for EuroChem in the 2010 amendment, but instead imposed a 0% duty on EuroChem.<sup>217</sup> In that regard, Ukraine argues that: (i) MEDT documentation underlying the 2010 amendment issued by ICIT does not indicate which dumping margin would apply to EuroChem

<sup>208</sup> Panel Report, para. 7.157.

<sup>209</sup> Panel Report, paras. 7.151-7.152, 7.157, and 8.3.

<sup>210</sup> Panel Report, para. 7.136 and fn 238 thereto.

<sup>211</sup> Panel Report, paras. 7.136 and 7.147.

<sup>212</sup> Panel Report, para. 7.147.

<sup>213</sup> Ukraine's appellant's submission, paras. 130 and 137.

<sup>214</sup> Ukraine's appellant's submission, paras. 130-139. In support of these points, Ukraine relies on several provisions of Ukrainian law (*ibid.*, para. 130 (referring to Ukraine's first written submission to the Panel, paras. 248-253, in turn referring to Law of Ukraine "On Protection of the National Producer Against Dumped Imports" (22 December 1998) (Panel Exhibit UKR-9); Extracts from the Code of Administrative Procedure of Ukraine (Panel Exhibit UKR-10))). See also Ukraine's second written submission to the Panel, para. 97 (referring to response to Panel question No. 22, paras. 92-93, in turn referring to Law of Ukraine "On Enforcement Proceedings" (Panel Exhibit UKR-44)). Ukraine also relies on Ukrainian court judgments (*ibid.*, paras. 131-135 (referring to Resolution of the Plenum of the High Commercial Court of Ukraine No. 15 (26 December 2011) (Panel Exhibit UKR-12); Resolution of the District Administrative Court of Kiev in case No. 826/11526/14 (23 September 2014) (Panel Exhibit UKR-13); Ruling of Kiev Administrative Court of Appeal in case No. 826/11526/14 (3 December 2014) (Panel Exhibit UKR-14); Application of EuroChem to the Supreme Court of Ukraine in case No. 826/11526/14 (12 February 2015) (Panel Exhibit UKR-15 (BCI)); Resolution of the Supreme Court of Ukraine No. 21-122a15 (21 April 2015) (Panel Exhibit UKR-16))). Panel Exhibits UKR-13, UKR-14, UKR-15 (BCI), and UKR-16 relate to Ukrainian court proceedings instigated by EuroChem to challenge the 2014 extension decision.

<sup>215</sup> Ukraine's appellant's submission, paras. 122-129 and 136 (referring to Judgment of the District Court (Panel Exhibit RUS-6b)). Ukraine contends that the calculations, provided by EuroChem in its expert report conducted by a specialist of the Kiev Forensic Examination Research Institute, were flawed as they did not apply an ordinary-course-of-trade test to determine the normal value. (*Ibid.*, para. 128)

<sup>216</sup> Ukraine's appellant's submission, para. 129 (quoting Judgment of the District Court (Panel Exhibit RUS-6b)).

<sup>217</sup> Ukraine's appellant's submission, para. 116.

following the Ukrainian court judgments<sup>218</sup>; (ii) WTO Members are constrained only by Article 9.3 of the Anti-Dumping Agreement, which caps an anti-dumping duty at the margin of dumping, such that the 0% duty imposed on EuroChem did not actually indicate what the dumping margin was in the original investigation phase<sup>219</sup>; and (iii) the Panel erred because it failed to recognize Ukraine's administrative practice, reflected in Panel Exhibit UKR-42b (BCI)<sup>220</sup>, of explicitly stating in a decision when a dumping margin is below *de minimis* and to exclude the relevant producer from the scope of the anti-dumping measure.<sup>221</sup>

6.52. Russia responds that the Panel addressed Ukraine's arguments on competence and notes that the Panel considered that Ukraine's explanation of its domestic law provisions had varied throughout the proceedings.<sup>222</sup> Russia agrees with the Panel that Ukraine's arguments raise matters of Ukrainian law, and that investigating authorities should not be able to circumvent their obligations under Article 5.8 by not re-establishing a dumping margin based on domestic law justifications.<sup>223</sup> In addition, Russia contends that, if Ukraine's arguments on competence circumscribe when a *de minimis* dumping margin may be determined, this would amount to treating the same transaction differently for the purpose of applying Article 5.8 of the Anti-Dumping Agreement.<sup>224</sup>

6.53. Moreover, Russia considers that Ukraine mischaracterizes the Panel's findings in asserting that the Panel concluded that Ukrainian courts had found that a dumping margin for EuroChem had been incorrectly calculated.<sup>225</sup> According to Russia, (i) EuroChem had argued before Ukrainian courts that Ukrainian investigating authorities had erred in their calculation of the dumping margin; (ii) Ukrainian courts found that there was an "absence of dumping"; (iii) the Panel concluded that Ukrainian courts found there was an "absence of dumping"; and (iv) the Panel addressed Ukraine's arguments about evidence before Ukrainian courts, and found that any constraint on Ukrainian investigating authorities in providing evidence arose as a matter of Ukrainian law and did not affect the probative value of the Ukrainian court judgments.<sup>226</sup> Russia further argues that Ukrainian law constraints cannot be relied on to avoid complying with WTO obligations.<sup>227</sup> Russia also contends that the Panel addressed Ukraine's arguments concerning the 0% anti-dumping duty rate in the Panel Report, and that, in relation to Ukraine's administrative practice, the Panel had discretion to choose what evidence to rely on in making its findings, and to decide on the meaning and weight of such evidence.<sup>228</sup>

6.54. We note that the Panel referred to Ukraine's submission that Ukrainian courts did not have authority to, and did not, recalculate a dumping margin. We recall that the Panel considered that Ukraine had "changed its factual arguments" on whether, as a matter of Ukrainian law, Ukrainian courts or investigating authorities have the competence to make dumping determinations and

<sup>218</sup> Ukraine's appellant's submission, para. 117 (referring to Letter dated 8 October 2010 from MEDT to ICIT regarding the agenda for the ICIT meeting on 15 October 2010 (Panel Exhibit UKR-53b (BCI)); ICIT, Meeting agenda of 25 October 2010 (Panel Exhibit UKR-54b (BCI)); Letter dated 21 October 2010 from MEDT to ICIT regarding the agenda for the ICIT meeting on 25 October 2010 (Panel Exhibit UKR-55b (BCI)); MEDT, Information on appeal of ICIT Decision on the application of definitive anti-dumping measures on imports of ammonium nitrate originating in Russia No. AD-176/2008/143-47 (Panel Exhibit 56b (BCI))).

<sup>219</sup> Ukraine's appellant's submission, paras. 118-119.

<sup>220</sup> ICIT, Decision on application of definitive anti-dumping measures on imports into Ukraine of glass containers used for medical purposes up to 0.15 litres originating from Russia No. AD-293/2013/4423-06 (24 May 2013) (Panel Exhibit UKR-42b (BCI)). Panel Exhibit UKR-42b (BCI) is an ICIT decision concerning an anti-dumping investigation on imports of glass containers used for medical purposes. ICIT made a "negative determination on the existence of dumped imports" for OstrivJuice LLC and decided to "terminate an anti-dumping investigation, to the extent related to OstrivJuice LLC ... **and to impose no anti-dumping measures**". (Ibid.)

<sup>221</sup> Ukraine's appellant's submission, paras. 120-122 (referring to Ukraine's response to Panel question No. 20, para. 81; ICIT, Decision on application of definitive anti-dumping measures on imports into Ukraine of glass containers used for medical purposes up to 0.15 litres originating from Russia No. AD-293/2013/4423-06 (24 May 2013) (Panel Exhibit UKR-42b (BCI))).

<sup>222</sup> Russia's appellee's submission, para. 357 (referring to Panel Report, para. 7.148.b; Annex E-1 to the Panel Report (Interim Review), paras. 36-37 and fn 40 to para. 38).

<sup>223</sup> Russia's appellee's submission, paras. 344-348 and 358-359.

<sup>224</sup> Russia's appellee's submission, paras. 344-348.

<sup>225</sup> Russia's appellee's submission, para. 336 (referring to Ukraine's appellant's submission, para. 102).

<sup>226</sup> Russia's appellee's submission, paras. 336-337 and 350-352.

<sup>227</sup> Russia's appellee's submission, paras. 354-355 (referring to Appellate Body Report, *US – Zeroing (Japan)* (Article 21.5 – Japan), fn 452 to para. 175).

<sup>228</sup> Russia's appellee's submission, para. 343 (referring to Appellate Body Reports, *EC – Hormones*, para. 135; *Australia – Salmon*, para. 267).

concluded that these arguments did not support Ukraine's position.<sup>229</sup> However, we do not regard the Panel as having sought to determine whether Ukrainian courts have the competence to, or in fact did, calculate dumping margins, and we do not see that the Panel made any such findings. Rather, the Panel understood that, by rejecting MEDT's application of discounts in calculating dumping margins for EuroChem in the 2008 original decision, the Ukrainian court rulings invalidated the basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem. We therefore do not see that the Panel took issue with Ukraine's submissions before it concerning the respective competence or actions of Ukrainian investigating authorities and courts regarding the calculation of dumping margins. Rather, the Panel concluded that, by virtue of the Ukrainian court judgments and the 2010 amendment, there was at that point no basis under Ukrainian law for a dumping margin or an anti-dumping duty with respect to EuroChem, and that this amounted to a *de minimis* dumping determination under WTO law. Accordingly, the Panel found that this triggered Ukraine's obligation under the second sentence of Article 5.8 of the Anti-Dumping Agreement to exclude EuroChem from the scope of the investigation, and that such an obligation could not be satisfied by the imposition of a 0% duty.<sup>230</sup>

6.55. Furthermore, in relation to Ukraine's contention that the imposition of a 0% duty is not the same as a determination of a zero dumping margin<sup>231</sup>, we do not see how the fact that ICIT does not refer in the 2010 amendment to a specific dumping margin was relevant to, or would have altered, the Panel's analysis. The reasoning of the Panel did not turn on whether a specific dumping margin was set by Ukrainian courts and/or Ukrainian investigating authorities, but rather focused on the fact that the "combined effect" of the Ukrainian court judgments and the ensuing decision by ICIT invalidated the basis at that point for the imposition of an anti-dumping duty on EuroChem.<sup>232</sup> Ukraine is correct in noting that the Panel did not expressly refer to Panel Exhibit UKR-42b (BCI)<sup>233</sup>, which Ukraine considers is indicative of its administrative practice of explicitly stating in a decision when a dumping margin is below *de minimis* and to exclude the relevant producer from the scope of the anti-dumping measure. However, we do not see how this exhibit is relevant to this appeal, given that, in this exhibit, ICIT is not implementing a court judgment following a successful challenge before domestic courts to original anti-dumping measures. As a result, we do not consider that express treatment of Panel Exhibit UKR-42b (BCI) in the Panel Report would have had any bearing on the Panel's analysis or its findings.

6.56. Finally, we turn to Ukraine's challenge to the Panel's reasoning that certain arguments Ukraine raised before it are irrelevant because they would enable Ukraine to rely on features of its domestic

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<sup>229</sup> Panel Report, fn 272 to para. 7.150. The Panel referred to Ukraine's submissions: that (i) Ukrainian investigating authorities can only recalculate dumping margins in the course of a review; (ii) Ukrainian courts must specifically instruct ICIT to reopen an investigation and adopt a particular methodology; and (iii) Ukrainian law requires that the District Court would have had to instruct ICIT to reopen the investigation and adopt a particular methodology to recalculate EuroChem's dumping margin in the operative part of its judgment. The Panel considered these to be contradictory arguments because, on one view, they suggest Ukrainian investigating authorities can only recalculate dumping margins in a review (and therefore not pursuant to a court judgment), whereas alternatively, they suggest that Ukrainian courts can order ICIT to recalculate dumping margins in the absence of a review. (Ibid. (referring to Ukraine's first written submission to the Panel, fn 85 to para. 245; response to Panel question No. 22, para. 94); second written submission to the Panel, para. 97; response to Panel question No. 22, para. 92, in turn referring to Code of Administrative Procedure of Ukraine, Extracts (Panel Exhibit UKR-43); Law of Ukraine "On Enforcement Proceedings", Extracts (Panel Exhibit UKR-44))

<sup>230</sup> As the Panel noted, "immediate termination" is required where a "zero or *de minimis* dumping margin" is determined in the original investigation, and the imposition of a 0% duty does not amount to termination. Instead, relevant producers must be excluded from the scope of the anti-dumping order. (Panel Report, para. 7.140 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 217, 219, and 305; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140)) As we noted, the parties did not dispute the interpretation of the second sentence of Article 5.8 of the Anti-Dumping Agreement before the Panel. (Ibid., paras. 7.140 and 7.146)

<sup>231</sup> Ukraine's appellant's submission, paras. 116-119.

<sup>232</sup> Panel Report, para. 7.147.

<sup>233</sup> We note that Ukraine referred to Panel Exhibit UKR-42b (BCI) in its response to Panel question No. 20, para. 81. See footnote 220 above.

law as a means of avoiding its WTO obligations.<sup>234</sup> Ukraine maintains that it is not relying on domestic law to avoid its WTO obligations, but as evidence of the "fact" that Ukrainian courts did not recalculate a dumping margin with respect to EuroChem.<sup>235</sup> Russia considers that a number of Ukraine's arguments derive from "restraints" on the competence of Ukrainian courts and investigating authorities under Ukrainian law.<sup>236</sup> Russia submits that a Member's domestic law arrangements are not determinative of issues in WTO dispute settlement proceedings, and cannot be used to justify Ukraine's conduct in the present case with respect to Article 5.8 of the Anti-Dumping Agreement.<sup>237</sup>

6.57. We consider that the Panel's reasoning is consistent with its understanding that the "combined effect" of the court judgments and the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*. We recall that, as an example, the Panel stated that the fact that, in implementing the court judgments, ICIT did not, or could not, recalculate the dumping margin itself is a matter of domestic law, and did not, in the Panel's view, diminish the probative value of these court judgments or ICIT's order implementing them.<sup>238</sup> Accordingly, we understand that Ukraine's arguments concerning ICIT's authority to recalculate a dumping margin for EuroChem following the court judgments were not germane to the Panel's reasoning that the "combined effect" of the Ukrainian court judgments and the 2010 amendment was that there was no basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem. In light of the arguments and evidence of the parties, and the manner in which the Panel reasoned its conclusion, we consider that the Panel was objective in rejecting Ukraine's contentions that the obligation under Article 5.8 of the Anti-Dumping Agreement had not been triggered, because its domestic law prevented the recalculation of EuroChem's dumping margin once it had been invalidated by Ukrainian courts.

6.58. On the basis of our examination of the Panel's explanations and reasoning, we do not consider that the Panel acted inconsistently with Article 11 of the DSU. Having considered that the Ukrainian court rulings invalidated the basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem, the Panel provided a reasoned and coherent explanation in reaching the conclusion 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*."<sup>239</sup> Although Ukraine cites certain arguments and evidence that it claims the Panel overlooked, we consider that the Panel, consistent with its duty under Article 11 of the DSU, conducted an objective assessment of the arguments and evidence necessary to resolve the claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment. For these reasons, we also see no reason to consider that the Panel did not conduct an objective assessment to resolve Russia's claim under Article 5.8 as it relates to the 2014 extension decision. Accordingly, we find that Ukraine has not established that the Panel acted inconsistently with Article 11 of the DSU in examining the arguments and evidence presented by Ukraine regarding the authority of Ukrainian courts and investigating authorities to calculate dumping margins under Ukrainian law.

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<sup>234</sup> Ukraine's appellant's submission, paras. 140-141. See also Panel Report, paras. 7.148-7.150 and fn 265 to para. 7.147. On appeal, in response to the Panel's reasoning in footnote 265 to paragraph 7.147 of the Panel Report, Ukraine argues that EuroChem could have petitioned Ukrainian courts for an order requiring Ukrainian investigating authorities to recalculate its dumping margin. Ukraine considers the fact that no *de minimis* dumping margin was determined was therefore a result of EuroChem's own conduct. (Ukraine's appellant's submission, paras. 142-147 (referring to Panel Report, fn 265 to para. 7.147)) We do not consider that the possibility of making such a petition was relevant to the Panel's reasoning or affects the Panel's conclusion that the "combined effect" of the court judgments and the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*. Given that there was no basis at that point for a dumping margin or an anti-dumping duty for EuroChem, we do not see that the reason there was no recalculation of EuroChem's dumping margin was relevant to the Panel's assessment.

<sup>235</sup> Ukraine's appellant's submission, para. 141.

<sup>236</sup> Russia's appellee's submission, para. 355.

<sup>237</sup> Russia's appellee's submission, paras. 355 and 359.

<sup>238</sup> Panel Report, para. 7.150. As noted by the Panel, Ukraine submitted before the Panel that ICIT is able to recalculate dumping margins only in the course of a review of anti-dumping duties, or when asked by Ukrainian courts to reopen an investigation and apply a particular methodology to calculate a dumping margin. (Panel Report, fn 272 to para. 7.150 (referring to Ukraine's first written submission to the Panel, fn 85 to para. 245; response to Panel question No. 22, para. 94))

<sup>239</sup> Panel Report, para. 7.147.

### 6.1.6 Conclusion

6.59. In sum, the language in Russia's panel request, including express references in footnotes, refers to the 2008 amended decision and the 2010 amendment and sufficiently links these measures to Russia's claim under Article 5.8 of the Anti-Dumping Agreement. We therefore agree with the Panel's assessment that the 2008 amended decision and the 2010 amendment were discernible and accordingly identified as specific measures at issue in Russia's panel request.

6.60. Therefore, we find that the Panel did not err under Article 6.2 of the DSU in finding that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in Russia's panel request. Consequently, we uphold the Panel's finding, in paragraphs 7.28 and 8.1.a of the Panel Report, that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in Russia's panel request, and thus fell within the Panel's terms of reference.

6.61. We recall that the measures and claims identified in a panel request in accordance with Article 6.2 of the DSU constitute the "matter referred to the DSB", which serves as a basis for the panel's terms of reference under Article 7.1 of the DSU. We have upheld the Panel's finding that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in Russia's panel request, and Ukraine has not appealed the Panel's finding that Russia had provided a brief summary of the legal basis for its claim under Article 5.8 of the Anti-Dumping Agreement as it relates to these measures. Moreover, Ukraine has not advanced any other grounds in support of its challenge under Articles 7.1 and 11 of the DSU. Therefore, we find that the Panel did not err under Articles 7.1 and 11 of the DSU by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment.

6.62. We consider that the Panel provided a reasoned and coherent explanation in reaching the conclusion that the combined effect of the Ukrainian court judgments and the implementation by the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*, triggering Ukraine's obligation under Article 5.8 of the Anti-Dumping Agreement to exclude EuroChem from the scope of the anti-dumping investigation. We further consider that the Panel, consistent with its duty under Article 11 of the DSU, conducted an objective assessment of the arguments and evidence necessary to resolve the claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision, the 2010 amendment, and the 2014 extension decision.

6.63. Therefore, we find that the Panel did not act in a manner inconsistent with Article 11 of the DSU, in concluding that the combined effect of the Ukrainian court judgments and their implementation by the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*.

6.64. For the reasons above, we uphold the Panel's findings, in paragraphs 7.152, 7.157, and 8.3.a of the Panel Report, that Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement in relation to the 2008 amended decision, the 2010 amendment, and the 2014 extension decision.

## 6.2 Claims under Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement relating to MEDT's determinations of dumping in the interim and expiry reviews

### 6.2.1 Introduction

6.65. In this section, we address three closely related claims of error raised by Ukraine under Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement, with respect to MEDT's determinations of dumping in the interim and expiry reviews. First, Ukraine claims that the Panel erred in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1 in finding that MEDT did not provide an adequate basis for rejecting the reported gas cost under that condition.<sup>240</sup> Second, Ukraine claims that these same errors also led the Panel to err in finding that Ukraine acted inconsistently with Article 2.2.1 because, in conducting its

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<sup>240</sup> Ukraine's appellant's submission, para. 37; Notice of Appeal, para. c.

ordinary-course-of-trade test, MEDT relied on costs calculated inconsistently with Article 2.2.1.1.<sup>241</sup> Third, Ukraine claims that the Panel erred in its interpretation and application of Article 2.2 in finding that, when constructing normal value, MEDT failed to calculate the cost of production "in the country of origin".<sup>242</sup> Russia requests that we reject these claims.<sup>243</sup>

6.66. We begin by summarizing the Panel's findings at issue. We then provide an overview of relevant aspects of the legal standard in Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement. Next, we consider whether the Panel erred in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1, namely, the condition that the records kept by the exporter or producer under investigation "reasonably reflect the costs associated with the production and sale of the product under consideration", and thus erred in finding that Ukraine acted inconsistently with Article 2.2.1.1 and, consequently, with Article 2.2.1. Finally, we consider whether the Panel erred in its interpretation and application of the phrase "cost of production in the country of origin" in Article 2.2, which relates to the construction of normal value when it cannot be determined on the basis of domestic sales.

## 6.2.2 The Panel's findings

6.67. Before the Panel, Russia contended that Ukraine acted inconsistently with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because, in calculating the cost of production of the investigated Russian producers as part of its dumping determinations: (i) MEDT rejected the reported gas cost<sup>244</sup>; and (ii) MEDT replaced it with the surrogate price of gas.<sup>245</sup> Russia also contended that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in conducting its ordinary-course-of-trade test, MEDT used a cost of production that was calculated inconsistently with Article 2.2.1.1.<sup>246</sup>

### 6.2.2.1 The Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement

6.68. The Panel first addressed Russia's claim under Article 2.2.1.1 of the Anti-Dumping Agreement pertaining to the rejection of the reported gas cost. The Panel considered whether MEDT provided an adequate basis to reject the reported gas cost because the records of the investigated Russian producers did not reasonably reflect the costs associated with the production and sale of ammonium nitrate under the second condition in the first sentence of Article 2.2.1.1.<sup>247</sup>

6.69. The Panel observed that Ukraine relied heavily on the panel's observations in *EU – Biodiesel (Argentina)* that, under the second condition in the first sentence of Article 2.2.1.1, investigating authorities are free to "examine non-arms-length transactions or other practices which may affect the reliability of the reported costs".<sup>248</sup> Having recalled the context in which these observations were made, the Panel considered them 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 in the first sentence of Article 2.2.1.1, may not reasonably reflect the costs associated with the production and sale of the product under consideration.<sup>249</sup> For its part, the Panel recognized that investigating authorities are free to examine the reliability and accuracy of the costs in the records of the investigated exporter or producer.<sup>250</sup> The Panel, however, did not consider that "either the panel or the Appellate Body in *EU – Biodiesel (Argentina)* 'carved out' an open-ended 'exception' for

<sup>241</sup> Ukraine's appellant's submission, paras. 96 and 98; Notice of Appeal, para. e.

<sup>242</sup> Ukraine's appellant's submission, para. 71; Notice of Appeal, para. d.

<sup>243</sup> Russia's appellee's submission, paras. 81, 239, 305, and 312.

<sup>244</sup> Panel Report, para. 7.64.a and 7.82.

<sup>245</sup> Panel Report, para. 7.64.b and 7.93.

<sup>246</sup> Panel Report, para. 7.104.

<sup>247</sup> Panel Report, para. 7.81. Relying on the use of the word "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, Ukraine had also asserted that MEDT was permitted to depart from the obligation to 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. (Ibid., para. 7.78 (referring to Ukraine's first written submission to the Panel, para. 162)) The Panel considered Ukraine's arguments in that regard to be *ex post facto* rationalizations, which it could not consider. The Panel therefore limited its review to the parties' arguments with respect to the second condition in the first sentence of Article 2.2.1.1, which the Panel found had been invoked by MEDT to reject the reported gas cost. (Ibid., para. 7.80 and fn 164 to para. 7.92)

<sup>248</sup> Panel Report, para. 7.84 (quoting Panel Report, *EU – Biodiesel (Argentina)*, fn 400 to para. 7.242).

<sup>249</sup> Panel Report, para. 7.85.

<sup>250</sup> Panel Report, para. 7.85.



'non-arm's-length transactions or other practices' as Ukraine appear[ed] to suggest."<sup>251</sup> The Panel therefore did not find it necessary to assess, in the abstract, whether the conditions in the domestic Russian market and the conditions of sale of gas met the definition of "non-arm's-length transactions" proposed by Ukraine, or its interpretation of what Ukraine referred to as an "other-practices" "exception".<sup>252</sup> Instead, the Panel understood the pertinent question to be whether the records of the exporters or producers reasonably reflect the costs associated with the production and sale of the product under consideration. The Panel added that this question needed to be assessed on a case-by-case basis, in light of the evidence before the investigating authority and its determination.<sup>253</sup> The Panel thus considered that it was called upon to 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".<sup>254</sup>

6.70. The Panel recalled that MEDT had found, in its Investigation Report, that the gas price in the domestic Russian market was not a market price as the State controlled this price, it was artificially lower than the export price of gas from Russia as well as the price of gas in other countries, and Gazprom's gas prices were below its cost of production.<sup>255</sup> The Panel first considered that MEDT had examined whether, due to government regulation of gas prices in Russia, the costs incurred by these producers were lower than prices in other countries or export prices of gas from Russia. To the Panel, this showed that MEDT's inquiry 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".<sup>256</sup> The Panel considered that this was not the purpose of the inquiry under the second condition in the first sentence of Article 2.2.1.1.<sup>257</sup>

6.71. Turning to MEDT's view that Gazprom sells gas in the domestic Russian market below cost, the Panel found nothing in the Investigation Report showing that this affected the reliability of the records of the investigated Russian producers.<sup>258</sup> In particular, the Panel noted that MEDT had not found that Gazprom was affiliated with the investigated producers or even considered who supplied these producers with gas.<sup>259</sup> The Panel also noted Ukraine's acknowledgement that EuroChem had other gas suppliers and that there was no reference to EuroChem's suppliers in the Investigation Report.<sup>260</sup> Moreover, there was no determination by MEDT that the records of the investigated producers, insofar as they reflected the prices paid to these suppliers, were unreliable. In addition, though Ukraine argued that prices of other gas suppliers were affected by Gazprom's prices, the Panel found nothing in MEDT's determinations to support that view.<sup>261</sup> The Panel characterized Ukraine's arguments in that respect as *ex post facto* rationalizations and concluded that there was no correlation in MEDT's determinations between alleged below-cost sales by Gazprom and the reliability of the records of the investigated Russian producers.<sup>262</sup> Moreover, considering that Article 2 of the Anti-Dumping Agreement deals with the pricing behaviour of individual exporters and producers, the Panel stated that the prices paid by a producer to unrelated suppliers would form part of the costs that it incurs to produce the product under consideration.<sup>263</sup> The Panel did not consider that the investigated producers' own records could be said to be "unreliable", or not to 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.<sup>264</sup>

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<sup>251</sup> Panel Report, fn 152 to para. 7.85 (referring to Ukraine's opening statement at the first Panel meeting, para. 91).

<sup>252</sup> Panel Report, para. 7.85.

<sup>253</sup> Panel Report, para. 7.85.

<sup>254</sup> Panel Report, para. 7.86.

<sup>255</sup> Panel Report, paras. 7.73 and 7.88 (referring to Investigation Report (Panel Exhibit RUS-10b), pp. 21-23; Ukraine's second written submission to the Panel, para. 31).

<sup>256</sup> Panel Report, para. 7.89.

<sup>257</sup> Panel Report, para. 7.89. See also *ibid.*, para. 7.69 and fn 111 thereto.

<sup>258</sup> Panel Report, para. 7.90.

<sup>259</sup> Panel Report, para. 7.90.

<sup>260</sup> Panel Report, fn 159 to para. 7.90 (referring to Ukraine's response to Panel question No. 8, fn 10).

<sup>261</sup> Panel Report, fn 159 to para. 7.90.

<sup>262</sup> Panel Report, fn 159 to para. 7.90. See also *ibid.*, para. 7.74.

<sup>263</sup> Panel Report, para. 7.90.

<sup>264</sup> Panel Report, para. 7.90.

6.72. In these circumstances, the Panel concluded that the findings relied on by MEDT in the Investigation Report did not provide a sufficient basis to conclude that the records of the investigated producers did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.<sup>265</sup> Consequently, the Panel found that Ukraine acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because MEDT did not provide an adequate basis under the second condition in the first sentence of that provision to reject the reported gas cost.<sup>266</sup>

#### 6.2.2.2 The Panel's findings under Article 2.2 of the Anti-Dumping Agreement

6.73. The Panel next turned to Russia's claim under Article 2.2 of the Anti-Dumping Agreement pertaining to MEDT's replacement of the reported gas cost with the surrogate price of gas in calculating the cost of production of the investigated Russian producers. The Panel considered whether the surrogate price of gas was the cost in the "country of origin", i.e. Russia.<sup>267</sup>

6.74. The Panel observed that the panel and the Appellate Body in *EU – Biodiesel (Argentina)* had addressed a similar claim under Article 2.2.<sup>268</sup> As the Panel recalled, in that case, having found that the domestic price of soybeans 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 had used the price they considered Argentinian producers would have paid in the absence of distortions created by this tax system.<sup>269</sup> Specifically, the EU authorities had used the average reference price of soybeans published by Argentina's Ministry of Agriculture for export, free on board, minus fobbing costs.<sup>270</sup> Given that this price had been selected to remove the perceived distortions and precisely because it was not the price used in Argentina, the panel in that dispute concluded that the European Union acted inconsistently with Article 2.2 because the average reference price did not constitute the cost in the "country of origin".<sup>271</sup> The Appellate Body in that dispute likewise found that the EU authorities had specifically selected a surrogate price to remove the perceived distortions in the cost of soybeans in Argentina.<sup>272</sup>

6.75. Having recalled these panel and Appellate Body findings in *EU – Biodiesel (Argentina)*, the Panel in the present dispute observed that, in the interim and expiry reviews, MEDT had concluded that the export price of gas from Russia at the German border was representative and could be used in calculating the cost of production of ammonium nitrate, because Germany was the biggest consumer of Russian natural gas and this price had been revised according to market conditions in 2012.<sup>273</sup> The Panel recognized 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."<sup>274</sup> However, the Panel found that, except for an adjustment for transportation expenses, the record did not show how MEDT adapted the export price to reflect the prices in Russia.<sup>275</sup> The Panel did 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".<sup>276</sup> To the contrary, the Panel considered MEDT's explanation to suggest that it selected the export price of gas because it was an out-of-country benchmark and that it did not adapt this price to reflect costs in Russia.<sup>277</sup> In these circumstances, the Panel did not

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<sup>265</sup> Panel Report, para. 7.90. The Panel considered its conclusions to be consistent with the legal findings and interpretation developed by the panel and the Appellate Body in *EU – Biodiesel (Argentina)*. (Ibid., para. 7.91)

<sup>266</sup> Panel Report, paras. 7.92 and 8.2.a. In light of this finding under Article 2.2.1.1 of the Anti-Dumping Agreement, the Panel exercised judicial economy with respect to Russia's claim under Article 2.2 of the Anti-Dumping Agreement pertaining to MEDT's rejection of the reported gas cost. (Ibid., para. 7.92)

<sup>267</sup> Panel Report, para. 7.95. See also *ibid.*, paras. 7.71 and 7.93.

<sup>268</sup> Panel Report, para. 7.95.

<sup>269</sup> Panel Report, para. 7.96 (referring to Panel Report, *EU – Biodiesel (Argentina)*, para. 7.257).

<sup>270</sup> Panel Report, para. 7.96 (referring to Panel Report, *EU – Biodiesel (Argentina)*, para. 7.257).

<sup>271</sup> Panel Report, para. 7.97 (referring to Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.258-7.259).

<sup>272</sup> Panel Report, para. 7.98 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.81).

<sup>273</sup> Panel Report, para. 7.99 (referring to Investigation Report (Panel Exhibit RUS-10b), p. 23).

<sup>274</sup> Panel Report, para. 7.99.

<sup>275</sup> Panel Report, para. 7.99.

<sup>276</sup> Panel Report, para. 7.99.

<sup>277</sup> Panel Report, para. 7.99.

consider the adjustment for transportation expenses to have been sufficient to adapt the export price to reflect the cost of gas in Russia.<sup>278</sup>

6.76. The Panel also addressed Ukraine's argument that MEDT could not use the 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.<sup>279</sup> In this context, Ukraine had relied on the Appellate Body's finding under Article 14(d) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) in *US – Softwood Lumber IV* 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.<sup>280</sup> Disagreeing with Ukraine's argument, the Panel recalled its earlier finding that MEDT did not provide a proper basis to reject the reported gas cost.<sup>281</sup> The Panel also considered the Appellate Body's finding in *US – Softwood Lumber IV* not to be relevant to its interpretation of Article 2.2.<sup>282</sup> In the Panel's view, the Appellate Body in that dispute recognized that, where the entire domestic market is distorted because of a government's role, comparing prices at which the government provides goods with prices of private suppliers in the domestic market could indicate an artificially low benefit, meaning that the full extent of the subsidy would not be captured.<sup>283</sup> The Panel took the view that the purpose of cost calculation under Article 2.2 of the Anti-Dumping Agreement and that of the calculation of benefit under Article 14(d) of the SCM Agreement are different and should not be conflated.<sup>284</sup> The Panel added that the interim and expiry reviews concern a determination in an anti-dumping proceeding and that the question of ascertaining the benefit granted to a producer through the governmental provision of goods and services does not arise.<sup>285</sup>

6.77. Based on the foregoing, the Panel found that Ukraine acted inconsistently with Article 2.2 of the Anti-Dumping Agreement because, when constructing normal value, MEDT failed to calculate the cost of production "in the country of origin".<sup>286</sup>

### 6.2.2.3 The Panel's findings under Article 2.2.1 of the Anti-Dumping Agreement

6.78. With respect to Article 2.2.1 of the Anti-Dumping Agreement, the Panel stated that this provision describes a methodology for determining whether below-cost sales may be treated as not being made in the ordinary course of trade.<sup>287</sup> The Panel added that the first sentence of Article 2.2.1 requires investigating authorities to: (i) identify sales that are made at prices below "per unit (fixed and variable) costs of production plus administrative, selling and general costs"; and (ii) determine whether such below-cost sales are made within an extended period of time, in substantial quantities, and at prices which do not provide for the recovery of all costs within a reasonable period of time.<sup>288</sup>

6.79. The Panel noted that, in the interim and expiry reviews, MEDT had used the surrogate price of gas, rather than the reported gas cost, to identify below-cost sales and assess whether they could be treated as not being made in the ordinary course of trade within the meaning of Article 2.2.1.<sup>289</sup> Recalling its finding that MEDT's rejection of the reported gas cost was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement, the Panel took the view that "the use of costs that

<sup>278</sup> Panel Report, para. 7.99. The Panel noted that the panel and the Appellate Body in *EU – Biodiesel (Argentina)* had reached a similar conclusion under Article 2.2 of the Anti-Dumping Agreement. (Ibid., para. 7.99)

<sup>279</sup> Panel Report, para. 7.100 (referring to Ukraine's opening statement at the first Panel meeting, para. 105).

<sup>280</sup> Panel Report, para. 7.100 (referring to Ukraine's first written submission to the Panel, para. 179).

<sup>281</sup> Panel Report, para. 7.101.

<sup>282</sup> Panel Report, para. 7.102.

<sup>283</sup> Panel Report, para. 7.101 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 100).

<sup>284</sup> Panel Report, para. 7.102.

<sup>285</sup> Panel Report, para. 7.102.

<sup>286</sup> Panel Report, paras. 7.103 and 8.2.b. In light of this finding under Article 2.2 of the Anti-Dumping Agreement, the Panel exercised judicial economy with respect to Russia's claim under Article 2.2.1.1 of the Anti-Dumping Agreement pertaining to MEDT's replacement of the reported gas cost with the surrogate price of gas.

<sup>287</sup> Panel Report, para. 7.109 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.231).

<sup>288</sup> Panel Report, para. 7.110 (referring to Panel Report, *EC – Salmon (Norway)*, para. 7.233).

<sup>289</sup> Panel Report, para. 7.114. As the Panel observed, MEDT had 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*)". (Ibid., para. 7.113 (quoting Investigation Report (Panel Exhibit RUS-10b), pp. 25-26) (emphasis added by the Panel))

were calculated inconsistently with Article 2.2.1.1 tainted MEDT of Ukraine's ordinary-course-of-trade test."<sup>290</sup>

6.80. Before the Panel, Ukraine contended that a finding that MEDT calculated costs inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement cannot lead to a violation of Article 2.2.1 of that Agreement.<sup>291</sup> The Panel noted that Ukraine had put forward two arguments in this respect, namely, that: (i) 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 (ii) Russia had not made a *prima facie* case that if costs had not been calculated on the basis of the methodology adopted by MEDT, the results of the ordinary-course-of-trade test under Article 2.2.1 would have been different.<sup>292</sup> With respect to Ukraine's first argument, the Panel observed that Article 2.2.1.1 applies to "[p]aragraph 2", which covers Article 2.2.1.<sup>293</sup> The Panel thus took the 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.<sup>294</sup> With respect to Ukraine's second argument, the Panel considered that it was not permitted to examine whether the results of MEDT's ordinary-course-of-trade test would have been different had it calculated the costs consistently with Article 2.2.1.1, as such an examination would have required a *de novo* review of the evidence on the record.<sup>295</sup> Furthermore, while Ukraine argued that the outcome of the ordinary-course-of-trade test would not have changed had MEDT calculated the costs of the investigated producers consistently with Article 2.2.1.1, the Panel did not consider "such an argument of harmless error to be relevant to [its] analysis".<sup>296</sup>

6.81. Based on the foregoing, the Panel found that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in conducting its ordinary-course-of-trade test, MEDT relied on costs that had been calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>297</sup>

### 6.2.3 Overview of relevant aspects of the legal standard in Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement

6.82. Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement form part of the disciplines concerning the determination of dumping in Article 2 of that Agreement. Article 2.1 provides that a product is being dumped when it is "introduced into the commerce of another country" at an export price that is "less than its normal value". Pursuant to Article 2.1, the normal value of the product refers to "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The other provisions of Article 2 set out the rules regarding the determination of normal value and export price, and the comparison to be made between the two for the purpose of determining the margin of dumping.

6.83. While normal value will typically be based on domestic sales prices pursuant to Article 2.1<sup>298</sup>, Article 2.2 of the Anti-Dumping Agreement identifies circumstances in which an investigating authority need not determine normal value on the basis of such domestic sales.<sup>299</sup> One such circumstance is "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country". The other circumstance outlined in Article 2.2 is when domestic sales do not permit a proper comparison, either because of "the particular market situation or the low volume of the sales in the domestic market of the exporting country".<sup>300</sup> When one of these circumstances exists, the margin of dumping shall be determined by comparing the export

<sup>290</sup> Panel Report, para. 7.114.

<sup>291</sup> Panel Report, para. 7.115.

<sup>292</sup> Panel Report, para. 7.115 (referring to Ukraine's response to Panel question No. 15, paras. 67-72).

<sup>293</sup> Panel Report, para. 7.116.

<sup>294</sup> Panel Report, para. 7.116. The Panel considered that there is nothing in the text of Article 2.2.1 or Article 2.2.1.1 of the Anti-Dumping Agreement to support the view that an investigating authority is free to disregard the specific rules under Article 2.2.1.1 when calculating the cost of production used for the purpose of the ordinary-course-of-trade test under Article 2.2.1. (Ibid.)

<sup>295</sup> Panel Report, para. 7.117.

<sup>296</sup> Panel Report, para. 7.117 (referring to Panel Reports, *EC – Salmon (Norway)*, fn 763 to para. 7.624; *US – Anti-Dumping Methodologies (China)*, para. 7.92).

<sup>297</sup> Panel Report, paras. 7.118 and 8.2.c.

<sup>298</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 569.

<sup>299</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.13.

<sup>300</sup> Fn omitted. As explained in footnote 375 below, Ukraine's appeal does not require us to address these aspects of Article 2.2 of the Anti-Dumping Agreement and, in particular, the notion of "particular market situation" in that provision.

price with: (i) "a comparable price of the like product when exported to an appropriate third country, provided that this price is representative"; or (ii) "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits". With regard to the construction of normal value, the fact that "the cost of production" is that "in the country of origin" defines the parameters of that inquiry. This phrase indicates that whatever information or evidence is used to determine the "cost of production", it must be apt to yield or capable of yielding a cost of production "in the country of origin".<sup>301</sup> Therefore, an investigating authority must ensure that the information it collects is used to arrive at the "cost of production in the country of origin", and compliance with this obligation may require the investigating authority to adapt that information.<sup>302</sup>

6.84. Articles 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement elaborate on various aspects of Article 2.2. Article 2.2.1 sets out when sales of the like product in the domestic market or to a third country may be treated as not being in the ordinary course of trade and disregarded in determining normal value. For its part, Article 2.2.1.1 deals with "costs" while Article 2.2.2 concerns the determination of the amounts for administrative, selling and general costs and for profits.

6.85. The first sentence of Article 2.2.1 refers to "[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". Such 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 authorities determine that they are made: (i) within an extended period of time; (ii) in substantial quantities; and (iii) at prices which do not provide for the recovery of all costs within a reasonable period of time. The second sentence of Article 2.2.1 specifies that "[i]f 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."

6.86. The first sentence of Article 2.2.1.1 begins with the phrase "[f]or the purpose of paragraph 2". This indicates that, when normal value is being constructed because it cannot be determined on the basis of domestic sales, the calculation of "the cost of production in the country of origin" is subject to Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>303</sup> The first sentence of Article 2.2.1.1 directs the investigating authority normally to base its calculations of costs on the records of the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles (GAAP) of the exporting country, and that they "reasonably reflect the costs associated with the production and sale of the product under consideration". The first

<sup>301</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

<sup>302</sup> The Appellate Body has stated:

In circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to alternative bases to calculate some or all such costs. Yet, Article 2.2 does not specify precisely to what evidence an authority may resort. This suggests that, 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. 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". Indeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of 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". Compliance with this obligation may require the investigating authority to adapt the information that it collects.

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

<sup>303</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.24 and 6.44. In *EU – Biodiesel (Argentina)*, the Appellate Body stated that the reference to the records kept by the exporter or producer under investigation indicates that the first sentence of Article 2.2.1.1 "is concerned with establishing the cost for the specific exporter or producer under investigation". (*Ibid.*, para. 6.17) (emphasis original) The Appellate Body, however, also clarified that the second condition in the first sentence of Article 2.2.1.1 does not allow an investigating authority to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production *in the country of origin*. (*Ibid.*, para. 6.23) In making these statements, the Appellate Body recognized that production cost calculations pursuant to Article 2.2.1.1 assist in determining the cost of production in the country of origin pursuant to Article 2.2.

condition relates to whether the records of a specific exporter or producer conform to the accounting principles, standards, and procedures that are generally accepted and apply to such records in the relevant jurisdiction – i.e. the exporting country. This condition concerns the general accounting and reporting practices of the exporter or producer.<sup>304</sup> The second condition in the first sentence of Article 2.2.1.1 in turn concerns whether the records reasonably reflect the costs associated with the production and sale of the product under consideration in a specific anti-dumping proceeding.<sup>305</sup> The second and third sentences of Article 2.2.1.1 then provide rules concerning the allocation of costs.

6.87. We observe that the first sentence of Article 2.2.1.1 requires that costs "normally" be calculated on the basis of records kept by the exporter or producer under investigation, provided that the two conditions set out in that sentence are met. In other words, when these two conditions are met, investigating authorities are "normally" to use the records of the exporter or producer under investigation. The word "normally" may be defined as "under normal or ordinary conditions; as a rule".<sup>306</sup> Read in conjunction with the words "provided that", which introduce the two conditions of the first sentence of Article 2.2.1.1, the word "normally" indicates that when these two conditions are met, "under normal or ordinary conditions" or "as a rule", records shall be used. The Appellate Body has held that "the qualification of an obligation with the adverb 'normally' does not, necessarily, alter the characterization of that obligation as constituting a 'rule' ... [r]ather, ... the use of the term 'normally' ... indicates that the rule ... admits of derogation under certain circumstances."<sup>307</sup> Given the reference to "normally" in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply.<sup>308</sup>

6.88. We further observe that, under the second condition in the first sentence of Article 2.2.1.1, it is the "records" of the individual exporter or producer under investigation that are subject to the condition to "reasonably reflect" the "costs associated with the production and sale of the product under consideration". We thus consider that there is no standard of reasonableness under that condition that governs the meaning of "costs" itself, which would allow investigating authorities to disregard domestic input prices when such prices are lower than other prices internationally.<sup>309</sup> The phrase "reasonably reflect" may be understood as meaning to mirror, reproduce, or correspond to something suitably and sufficiently.<sup>310</sup> In addition, we recall that the word "costs" in the second condition in the first sentence of Article 2.2.1.1, which can be understood as referring to the price paid or to be paid to acquire or produce something<sup>311</sup>, is followed by the phrase "associated with the production and sale of the product under consideration". The phrase "associated with" may be defined as "join[ed], unite[d]", "combine[d]", and "[c]onnect[ed] as an idea".<sup>312</sup> This definition suggests a genuine relationship between the costs reasonably reflected in the records of the exporter or producer under investigation and the production and sale of the specific product under consideration. The second condition in the first sentence of Article 2.2.1.1 can thus be understood to refer to whether the records kept by the exporter or producer suitably and sufficiently correspond

<sup>304</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.21.

<sup>305</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.21.

<sup>306</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1945.

<sup>307</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 273.

<sup>308</sup> We observe that the Panel rejected Ukraine's arguments based on the use of the word "normally" in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement because the Panel considered that they constituted *ex post facto* rationalizations. (Panel Report, para. 7.80) Ukraine does not challenge this finding on appeal and confirmed at the oral hearing that its claim of error on appeal is limited to the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. (Ukraine's response to questioning at the oral hearing) We thus do not consider it necessary in the context of this appeal to consider further whether, in light of the word "normally", there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply and what these circumstances might be in the context of the first sentence of Article 2.2.1.1.

<sup>309</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.37 and 6.56.

<sup>310</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.20 (referring to *Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 2, pp. 2481 and 2506).

<sup>311</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.18 (referring to *Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 531).

<sup>312</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 122 to para. 6.19 (quoting *Shorter Oxford English Dictionary*, 6th edn (Oxford University Press, 2007), Vol. 1, p. 137).

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.<sup>313</sup>

6.89. We recognize that there may be different circumstances in which an investigating authority will be justified, under the first sentence of Article 2.2.1.1, in not calculating costs on the basis of the records kept by the exporter or producer under investigation. However, we recall that the first sentence of Article 2.2.1.1 starts with the phrase "[f]or the purpose of paragraph 2". Article 2.2.1.1 thus includes rules that also pertain to the calculation of the "cost of production" for the purpose of constructing normal value under Article 2.2. Thus, even where an investigating authority is justified in not calculating production costs on the basis of the exporter's or producer's records under the first sentence of Article 2.2.1.1, it remains subject to the disciplines set out in Article 2.2, including its relevant subparagraphs, regarding the construction of normal value.<sup>314</sup>

#### 6.2.4 Whether the Panel erred in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in finding that MEDT did not provide an adequate basis for rejecting the reported gas cost under that condition

6.90. Ukraine's claim on appeal under Article 2.2.1.1 of the Anti-Dumping Agreement focuses on the second condition in the first sentence of that provision, namely, the condition that the records kept by the exporter or producer under investigation "reasonably reflect the costs associated with the production and sale of the product under consideration".<sup>315</sup> Ukraine contends that, in finding that MEDT did not provide an adequate basis for rejecting the reported gas cost under the second condition in the first sentence of Article 2.2.1.1, the Panel erred in its interpretation and application of that condition.<sup>316</sup> Ukraine contends that these errors vitiate the Panel's findings under Article 2.2.1.1 as well as those under Article 2.2.1 of the Anti-Dumping Agreement.<sup>317</sup> Ukraine therefore requests that we reverse the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement in paragraphs 7.89-7.92 and 8.2.a of the Panel Report, and the Panel's findings under Article 2.2.1 of the Anti-Dumping Agreement in paragraphs 7.114, 7.116-7.118, and 8.2.c of the Panel Report.<sup>318</sup> Russia requests that we uphold the Panel's findings at issue.<sup>319</sup>

6.91. At the outset, we note that Ukraine challenges both the Panel's interpretation and application of the second condition in the first sentence of Article 2.2.1.1.<sup>320</sup> We further note that Ukraine has not identified separate arguments concerning the Panel's application of this condition, and we therefore address Ukraine's interpretation and application claims together.

6.92. Ukraine contends that the relevant inquiry under the second condition in the first sentence of Article 2.2.1.1 is one that pertains to "the *reliability and accuracy* of the costs recorded in the records of the producers/exporters".<sup>321</sup> Crucially, Ukraine understands the panel and the Appellate Body in *EU – Biodiesel (Argentina)* to have recognized "non-arm's length transactions" and "other practices" "exceptions" under that second condition, as such transactions and practices may affect the "reliability" of the records.<sup>322</sup> According to Ukraine, despite referring to the panel report in

<sup>313</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.26 and 6.56.

<sup>314</sup> An investigating authority remains subject to those disciplines irrespective of the reason for which normal value cannot be determined on the basis of domestic sales under Article 2.2 of the Anti-Dumping Agreement.

<sup>315</sup> Ukraine's appellant's submission, para. 37. As explained above, given the reference to "normally" in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply. However, for the purpose of resolving this dispute, we do not consider it necessary to consider further whether, in light of the word "normally", there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply and what these circumstances might be in the context of the first sentence of Article 2.2.1.1. (See paragraph 6.87 and footnote 308 thereto above)

<sup>316</sup> Ukraine's appellant's submission, para. 37.

<sup>317</sup> Ukraine's appellant's submission, paras. 70 and 98.

<sup>318</sup> Ukraine's appellant's submission, paras. 70 and 99; Notice of Appeal, paras. c and e.

<sup>319</sup> Russia's appellee's submission, paras. 81, 239, 306, and 312.

<sup>320</sup> Ukraine's appellant's submission, para. 37.

<sup>321</sup> Ukraine's appellant's submission, para. 49 (quoting Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41, in turn quoting Panel Report, *EU – Biodiesel (Argentina)*, fn 400 to para. 7.242). (emphasis added by Ukraine) See also *ibid.*, para. 44.

<sup>322</sup> Ukraine's appellant's submission, paras. 44-45, 49, and 66.

*EU – Biodiesel (Argentina)*, "the Panel refused to consider whether the conditions in the domestic Russian market and the conditions of sales of gas met the definitions of 'non-arm's length' and 'other practices'".<sup>323</sup> Ukraine thus takes issue with the fact that "the Panel merely assessed whether the factual basis [relied on by MEDT] was adequate to find that the records of the Russian producers did not reasonably reflect the costs associated with the production of ammonium nitrate."<sup>324</sup>

6.93. Russia acknowledges that the panel in *EU – Biodiesel (Argentina)* referred to non-arm's-length transactions or other practices that may affect the reliability of the reported costs.<sup>325</sup> However, Russia considers that non-arm's-length transactions and other practices cannot be qualified as exceptions.<sup>326</sup> Russia also stresses that Article 2.2.1.1 does not contain the terms "non-arm's length transactions" or "reliability".<sup>327</sup> To Russia, the only inquiry envisaged under the second condition in the first sentence of Article 2.2.1.1 is whether the records of the investigated exporter or producer reasonably reflect the costs associated with the production and sale of the product under consideration.<sup>328</sup>

6.94. We begin by observing that the terms "non-arm's-length transactions" and "other practices" are not found in Article 2.2.1.1 or elsewhere in the Anti-Dumping Agreement. The phrase "non-arms-length transactions or other practices which may affect the reliability of the reported costs", which is at the heart of Ukraine's appeal, appears in the panel report in *EU – Biodiesel (Argentina)*. Examining a claim under the second condition in the first sentence of Article 2.2.1.1, the panel in that dispute stated:

[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.<sup>329</sup>

6.95. On appeal, the Appellate Body in *EU – Biodiesel (Argentina)* reproduced these observations in questioning the European Union's reading of that panel report.<sup>330</sup> The Appellate Body considered that, in light of these observations, the panel's interpretation of Article 2.2.1.1 in that dispute appeared to be more nuanced than the European Union's argument suggested.<sup>331</sup>

<sup>323</sup> Ukraine's appellant's submission, para. 44 (referring to Panel Report, para. 7.85). See also *ibid.*, para. 50. At the oral hearing, Ukraine clarified that, in its view, the Panel erred by failing first to set out the proper interpretation of these terms and then to assess whether the transactions at issue qualified as either "non-arm's-length transactions" or as an "other practice". (Ukraine's response to questioning at the oral hearing)

<sup>324</sup> Ukraine's appellant's submission, para. 44 (referring to Panel Report, para. 7.89).

<sup>325</sup> See e.g. Russia's appellee's submission, paras. 138 and 207.

<sup>326</sup> Russia's appellee's submission, para. 120 and fn 102 thereto.

<sup>327</sup> Russia's appellee's submission, paras. 132, 160, 180, and 206.

<sup>328</sup> Russia's appellee's submission, para. 131. Moreover, according to Russia, in arguing that the Panel erred by refusing to examine whether the definitions of "non-arm's-length transactions" or "other practices" were met in this case, Ukraine essentially alleges that the Panel denied Ukraine fairness in addressing its arguments and evidence and was not objective in its analysis of the facts. In this context, Russia submits that Ukraine has not made a claim under Article 11 of the DSU. (Russia's appellee's submission, paras. 138-139)

<sup>329</sup> Panel Report, *EU – Biodiesel (Argentina)*, fn 400 to para. 7.242. (emphasis added)

<sup>330</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41.

<sup>331</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41. See also Panel Report, fn 149 to para. 7.84 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41).



6.96. The panel in *EU – Biodiesel (Argentina)* also stated that "while the costs in the records might be consistent with GAAP, they may still not accord with how they would need to be considered in the context of an anti-dumping investigation, such as in respect of the proper allocation of costs for depreciation or amortization or the relevant time periods."<sup>332</sup> As "another example" of records that may not reasonably reflect the costs associated with the production and sale of the product under consideration, that panel referred to an investigated exporter or producer that is "part of a vertically-integrated group of companies in which the actual cost of production of particular inputs is spread across different companies' records, or in which transactions between such companies are not at arm's-length or indicative of the actual costs involved in the production of the product under consideration".<sup>333</sup> The Appellate Body agreed with the panel that records 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.<sup>334</sup> To the Appellate Body, "[t]his 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."<sup>335</sup>

6.97. We do not subscribe to Ukraine's reading of the panel report or the Appellate Body report in *EU – Biodiesel (Argentina)*. In our view, it is clear from the language used in these reports that the panel and the Appellate Body provided only examples of circumstances in which records may be found, depending on the case at hand, not to reasonably reflect the costs associated with the production and sale of the product under consideration. We do not see that, in specifying these examples, the panel or the Appellate Body read the second condition in the first sentence of Article 2.2.1.1 to prescribe exceptions to, or otherwise limit in the abstract, the circumstances allowing for the rejection of records under that condition. Therefore, while we note Ukraine's understanding of arm's-length transactions<sup>336</sup>, like the Panel, we do not read the panel or Appellate Body reports in *EU – Biodiesel (Argentina)* as having understood the second condition in the first sentence of Article 2.2.1.1 to contain open-ended "non-arm's-length transactions" or "other practices" "exceptions".<sup>337</sup> Nor do we consider such exceptions to be embodied in that second condition. As set out above, the second condition in the first sentence of Article 2.2.1.1 relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration.<sup>338</sup> We thus agree with the Panel that the question under the second condition in the first sentence of Article 2.2.1.1 is whether the records of the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration and that this question is to be assessed on a case-by-case basis, in light of the evidence before the investigating authority and its determination.<sup>339</sup> Consequently, we do not consider that the Panel erred in examining "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".<sup>340</sup>

<sup>332</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.232.

<sup>333</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.232.

<sup>334</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33.

<sup>335</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33 (referring to Panel Report, *EU – Biodiesel (Argentina)*, para. 7.232). The Appellate Body thus referred to transactions that are not at arm's length, but did not use the term "other practices" in the context of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

<sup>336</sup> Ukraine states that, for a transaction to be considered at arm's length, it needs to be between two willing parties that are unrelated, acting independently from each other, and pursuing their own best interests. (Ukraine's appellant's submission, paras. 51-52)

<sup>337</sup> Panel Report, fn 152 to para. 7.85 (referring to Ukraine's opening statement at the first Panel meeting, para. 91). The Panel did not find it necessary to consider, in the abstract, whether the conditions in the domestic Russian market and the conditions of sale of gas met the definitions of "non-arm's-length transactions" proposed by Ukraine, or its interpretation of what Ukraine referred to as an "other-practices" "exception". (Ibid., para. 7.85)

<sup>338</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.26 and 6.56.

<sup>339</sup> Panel Report, para. 7.85.

<sup>340</sup> Panel Report, para. 7.86.

6.98. Ukraine further contends that the Panel erred because "the Panel seem[s] to suggest that the records can only be deemed unreliable when the parties [to input transactions] are affiliated."<sup>341</sup> In other words, according to Ukraine, the Panel appears to have drawn a distinction between affiliated and non-affiliated parties to input transactions for the purposes of the second condition in the first sentence of Article 2.2.1.1. To Ukraine, however, the rationale for determining whether records are "unreliable" under that condition is the dependent and uncommercial character of the relevant input transactions, and any legal affiliation between transacting parties is only an "indication that these practices may more easily occur".<sup>342</sup> In support of its understanding of the second condition in the first sentence of Article 2.2.1.1, Ukraine refers to several WTO disputes in which a panel or the Appellate Body allegedly assessed whether transactions were at arm's length by considering "*whether commercial principles had been respected or whether market prices were applied*", instead of focusing on whether the parties to such transactions were affiliated.<sup>343</sup> Ukraine also refers to the second *Ad Note* to Article VI of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement as relevant context, which in its view confirms that the Anti-Dumping Agreement does not preclude the possibility that certain government practices may render prices "unreliable".<sup>344</sup>

6.99. Russia disagrees with Ukraine's reading of the Panel Report. To Russia, the Panel did not suggest that, under the second condition in the first sentence of Article 2.2.1.1, records can be deemed "unreliable" only when parties to relevant input transactions are affiliated, but instead focused on addressing the facts at issue as well as Ukraine's arguments.<sup>345</sup> Russia also disagrees with Ukraine's proposition that government regulation of input prices may result in a determination that transactions between investigated producers or exporters and their suppliers of input are not at arm's length, thereby allowing the investigating authority to reject recorded input costs under the second condition in the first sentence of Article 2.2.1.1.<sup>346</sup> Russia contends that this second condition deals with the quality of the records of the exporter or producer under investigation, and, as such, does not allow an investigating authority to reject recorded costs because it considers them to be "unreliable" due to certain government intervention.<sup>347</sup>

6.100. The Panel addressed MEDT's reasons for rejecting the reported gas cost under the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. The Panel recalled that MEDT had found that the gas price in the domestic Russian market was not a market price as the State controlled this price, it was artificially lower than the export price of gas from Russia as well as the price of gas in other countries, and Gazprom's gas prices were below its cost of production.<sup>348</sup>

6.101. The Panel first examined MEDT's consideration that, due to government regulation of gas prices in Russia, the costs incurred by the investigated Russian producers were lower than prices in other countries or export prices of gas from Russia. To the Panel, in that respect, "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

<sup>341</sup> Ukraine's appellant's submission, paras. 45-46 (quoting Panel Report, para. 7.90). Ukraine states that "the Panel's suggestion that the fact that the gas prices were fixed by the Russian government below the cost of production could have only made the records unreliable if MEDT of Ukraine had demonstrated that the gas suppliers and the exporters were legally affiliated, is flawed." (Ibid., para. 59)

<sup>342</sup> Ukraine's appellant's submission, para. 58.

<sup>343</sup> Ukraine's appellant's submission, paras. 53-56 (referring to Panel Reports, *EU – Biodiesel (Argentina)*, para. 7.232; *US – OCTG (Korea)*, para. 7.197; Appellate Body Report, *US – Hot-Rolled Steel*, para. 141). (emphasis original)

<sup>344</sup> Ukraine's appellant's submission, paras. 62-65. Ukraine contends that the second *Ad Note* to Article VI of the GATT 1994 suggests that "prices may be rendered unreliable as a consequence of a complete or substantial monopoly of trade and/or state fixation of the domestic prices." (Ibid., para. 63) Turning to Article 2.2 of the Anti-Dumping Agreement, Ukraine contends that this provision enables an investigating authority to disregard domestic prices where such prices are affected by a particular market situation, which Ukraine understands to be "a market structure, where the interaction of supply and demand and free price determination, is interfered with by government intervention". (Ibid., para. 64)

<sup>345</sup> Russia's appellee's submission, para. 151.

<sup>346</sup> Russia's appellee's submission, paras. 181-182.

<sup>347</sup> See e.g. Russia's appellee's submission, paras. 86, 182, 199, and 236-237. Moreover, Russia submits that Ukraine is essentially taking issue with factual findings made by the Panel in paragraph 7.90 and footnote 159 thereto regarding MEDT's determinations in the interim and expiry reviews, which Ukraine should have challenged under Article 11 of the DSU. (Ibid., para. 153)

<sup>348</sup> Panel Report, paras. 7.73 and 7.88 (referring to Investigation Report (Panel Exhibit RUS-10b), pp. 21-23; Ukraine's second written submission to the Panel, para. 31).

to be normal circumstances, i.e. in the absence of the alleged distortions in the domestic Russian market for gas."<sup>349</sup> The Panel found that the examination under the second condition in the first sentence of Article 2.2.1.1 does not concern whether the costs contained in the records are not reasonable because, for instance, they are lower than those in other countries, which is what MEDT examined in the interim and expiry reviews.<sup>350</sup>

6.102. As set out above, to the extent costs are genuinely related to the production and sale of the product under consideration, there is no additional or abstract standard of "reasonableness" that governs the meaning of "costs" in the second condition in the first sentence of Article 2.2.1.1.<sup>351</sup> Like the Panel, we consider that the examination under the second condition in the first sentence of Article 2.2.1.1 is not one that pertains to whether the costs contained in the records are not reasonable because, for instance, they are lower than those in other countries.<sup>352</sup> Moreover, we see no reason to question the Panel's conclusion, in paragraph 7.89 of the Panel Report, that MEDT's examination of the gas costs incurred by the investigated Russian producers, as compared with prices in other countries or export prices of gas from Russia, pertained to whether the cost of gas incurred by these producers was reasonable, rather than to whether the records reasonably reflect the costs associated with the production and sale of ammonium nitrate. Ukraine has indeed not advanced arguments that take issue with that conclusion by the Panel. Ukraine merely reiterates on appeal that domestic gas prices were lower than the export price of the Russian gas suppliers.<sup>353</sup> Ukraine's arguments on appeal otherwise appear to focus on paragraph 7.90 of the Panel Report, which Ukraine reads as suggesting that, to the Panel, recorded costs may not be rejected under the second condition in the first sentence of Article 2.2.1.1 when domestic input prices are fixed by the State at a level below cost of production unless the parties to the relevant input transactions are related.<sup>354</sup>

6.103. Addressing MEDT's consideration that Gazprom sells gas in the domestic Russian market below cost, the Panel did not consider that this was sufficient for MEDT 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.<sup>355</sup> The Panel made several factual findings concerning MEDT's determinations in the Investigation Report that were key to its reasoning and conclusion in this respect. The Panel considered that "there is nothing in [the Investigation Report] that shows that [Gazprom's below-cost domestic sales] 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."<sup>356</sup> The Panel noted both the absence of a determination by MEDT that Gazprom was affiliated with the investigated Russian producers and the fact that MEDT did not even consider who supplied these producers with gas.<sup>357</sup> The Panel further elaborated on the absence of a determination by MEDT that Gazprom was in fact the gas supplier of the two Russian producers of ammonium nitrate at issue. The Panel noted that, as Ukraine acknowledged, "MEDT of Ukraine did not ask the investigated Russian producers the names of their gas suppliers" and that "EuroChem had ... suppliers" other than Gazprom.<sup>358</sup> Moreover, while Ukraine contended that prices of other gas suppliers were affected by the prices of Gazprom, the Panel found nothing in the Investigation Report to support this view.<sup>359</sup> Crucially, the Panel considered that "[t]here is no reference to such suppliers of EuroChem in the Investigation Report", nor is there "any finding [by MEDT] that the records of the investigated Russian producers, insofar as they reflected the prices paid to these suppliers, were unreliable".<sup>360</sup> The Panel added that "there is no correlation in MEDT of Ukraine's findings [in the Investigation Report] between alleged below-cost sales by Gazprom and the reliability of the records of the investigated Russian producers."<sup>361</sup> These Panel statements show

<sup>349</sup> Panel Report, para. 7.89.

<sup>350</sup> Panel Report, para. 7.89.

<sup>351</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.37 and 6.56. See also *ibid.*, paras. 6.30 and 6.55.

<sup>352</sup> Panel Report, para. 7.89.

<sup>353</sup> Ukraine's appellant's submission, para. 60.

<sup>354</sup> Ukraine's appellant's submission, paras. 42, 59, and 69.

<sup>355</sup> Panel Report, para. 7.90.

<sup>356</sup> Panel Report, para. 7.90.

<sup>357</sup> Panel Report, para. 7.90.

<sup>358</sup> Panel Report, fn 159 to para. 7.90 (referring to Ukraine's response to Panel question No. 9, para. 31; response to Panel question No. 8, fn 10).

<sup>359</sup> Panel Report, fn 159 to para. 7.90 (referring to Ukraine's response to Panel question No. 10(a), para. 35).

<sup>360</sup> Panel Report, fn 159 to para. 7.90.

<sup>361</sup> Panel Report, fn 159 to para. 7.90.

that the Panel's analysis is tailored to the specific circumstances of this case, where no determination was made by MEDT that Gazprom was the gas supplier of the investigated Russian producers or that Gazprom's prices affected other gas suppliers' prices.

6.104. The Panel went on to state that Article 2 of the Anti-Dumping Agreement is concerned with the pricing behaviour of individual exporters and producers.<sup>362</sup> The Panel added that a producer may source inputs used to produce the product under consideration from multiple *unrelated suppliers* and that 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.<sup>363</sup> The Panel did 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."<sup>364</sup>

6.105. These references by the Panel to "unrelated suppliers", read in isolation, could arguably be read to suggest that, in the Panel's view, records may not be disregarded under the first sentence of Article 2.2.1.1 on the sole basis that input prices are set by the government below cost of production when the producers or exporters of the product under investigation and the input suppliers are unrelated (but might be when these entities are related). To the extent the Panel Report suggests as much, we have reservations regarding the relevance of drawing a distinction between related parties to input transactions, on the one hand, and unrelated parties to such transactions, on the other hand, for the inquiry under the first sentence of Article 2.2.1.1 as to whether cost calculations should be based on records kept by the exporter or producer under investigation.<sup>365</sup> Simply because parties to input transactions are considered to be unrelated does not mean that cost calculations should necessarily be based on records kept by the exporter or producer under the first sentence of Article 2.2.1.1. In particular, as explained above, given the reference to "normally" in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances, other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply. However, to the extent the Panel's statements regarding unrelated suppliers can be understood to have been made in the limited context of the second condition in the first sentence of Article 2.2.1.1, we do not take issue with the Panel's proposition that the prices paid by the producer to unrelated suppliers would form part of the costs that it incurs to produce the product under consideration.<sup>366</sup> We recall in that regard that the second condition in the first sentence of Article 2.2.1.1 relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration.

6.106. In any event, the factual findings on which the Panel relied indicate to us that the Panel's analysis and conclusion with respect to MEDT's view that Gazprom sells gas below cost were tailored to the specific facts and arguments before it. The Panel's statement that the records could not be rejected under the second condition in the first sentence of Article 2.2.1.1 on the basis that unrelated suppliers' prices are "*allegedly* priced below their cost of production"<sup>367</sup> confirms our understanding. To us, this highlights a key element of the Panel's analysis, namely, that while MEDT determined that Gazprom sells gas below cost, MEDT did not make such a determination with respect to the actual gas suppliers of the two investigated Russian producers at issue, as MEDT did not inquire who supplied these producers with gas. Given the Panel's case-specific approach and given that the Panel's conclusion relies on the absence of a determination by MEDT that Gazprom was the gas supplier of the investigated Russian producers or that Gazprom's prices affected these suppliers' prices, we see no reason to find error with the Panel's conclusion that Gazprom's below-cost prices did not constitute a sufficient factual basis for MEDT to conclude that the records did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.

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<sup>362</sup> Panel Report, para. 7.90.

<sup>363</sup> Panel Report, para. 7.90.

<sup>364</sup> Panel Report, para. 7.90. (emphasis added)

<sup>365</sup> We note that there are various factors that may inform the degree to which parties are related.

<sup>366</sup> Panel Report, para. 7.90.

<sup>367</sup> Panel Report, para. 7.90. (emphasis added)

6.107. In light of the above, we do not consider that Ukraine has established that the Panel erred in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in finding that MEDT did not provide an adequate basis under that second condition to reject the reported gas cost.<sup>368</sup>

6.108. We recall that Ukraine also challenges the Panel's finding that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in conducting its ordinary-course-of-trade test, MEDT relied on costs calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>369</sup> In that regard, Ukraine argues that the Panel's finding of inconsistency with Article 2.2.1 is vitiated by the Panel's errors of interpretation and application with respect to the second condition in the first sentence of Article 2.2.1.1.<sup>370</sup> Noting that Ukraine's challenge under Article 2.2.1 is consequential to its challenge under the second condition in the first sentence of Article 2.2.1.1, Russia responds that the Panel did not err in its analysis under Article 2.2.1.1.<sup>371</sup> As summarized above, Article 2.2.1 sets out when sales of the like product in the domestic market or to a third country may be treated as not being in the ordinary course of trade and disregarded in determining normal value. In reaching its finding of inconsistency with Article 2.2.1 of the Anti-Dumping Agreement, the Panel relied on its earlier finding that MEDT's rejection of the reported gas cost was inconsistent with Article 2.2.1.1 of that Agreement.<sup>372</sup> Ukraine's arguments on appeal are limited to alleging that the Panel's errors with respect to the interpretation and application of the second condition in the first sentence of Article 2.2.1.1 also vitiate the Panel's finding under Article 2.2.1.<sup>373</sup> At the oral hearing, Ukraine confirmed that its claim of error under Article 2.2.1 is dependent on us reversing the Panel's findings under Article 2.2.1.1.<sup>374</sup> Therefore, given our conclusion that the Panel did not err in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, we see no reason to disturb the Panel's finding that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement.

#### 6.2.5 Whether the Panel erred in its interpretation and application of Article 2.2 of the Anti-Dumping Agreement in finding that, when constructing normal value, MEDT failed to calculate the cost of production "in the country of origin"

6.109. We now turn to Ukraine's claim that the Panel erred in its interpretation and application of Article 2.2 of the Anti-Dumping Agreement in finding that MEDT failed to calculate the cost of production "in the country of origin" when constructing normal value for two investigated Russian producers of ammonium nitrate.<sup>375</sup> As a result, Ukraine requests that we reverse the Panel's findings in paragraphs 7.99, 7.101-7.103, and 8.2.b of the Panel Report.<sup>376</sup> Russia requests that we uphold the Panel's findings at issue.<sup>377</sup>

6.110. As set out above, in addressing Russia's claims concerning MEDT's gas cost calculations in constructing normal value in the interim and expiry reviews, the Panel first assessed whether MEDT provided an adequate basis to reject the reported gas cost under the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>378</sup> The Panel subsequently assessed whether, having rejected the reported gas cost without providing an adequate basis to do so under

<sup>368</sup> Panel Report, paras. 7.92 and 8.2.a.

<sup>369</sup> Ukraine's appellant's submission, para. 96.

<sup>370</sup> Ukraine's appellant's submission, para. 98.

<sup>371</sup> Russia's appellee's submission, paras. 310-311.

<sup>372</sup> In addressing Russia's claim under Article 2.2.1 of the Anti-Dumping Agreement, the Panel started by observing that, in the interim and expiry reviews, MEDT had used the surrogate price of gas to identify the below-cost sales and assess whether they could be treated as not being made in the ordinary course of trade. The Panel then recalled its earlier finding that MEDT's rejection of the reported gas cost was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement. To the Panel, the use of costs that had been calculated inconsistently with Article 2.2.1.1 tainted MEDT's ordinary-course-of-trade test. In addition, the Panel disagreed with Ukraine's view that a finding that MEDT calculated costs inconsistently with Article 2.2.1.1 cannot lead to a violation of Article 2.2.1 of the Anti-Dumping Agreement. (Panel Report, paras. 7.114-7.115)

<sup>373</sup> Ukraine's appellant's submission, paras. 96 and 98; Notice of Appeal, para. e.

<sup>374</sup> Ukraine's response to questioning at the oral hearing.

<sup>375</sup> Ukraine's claim on appeal concerns the phrase "cost of production in the country of origin" in Article 2.2 of the Anti-Dumping Agreement. This appeal does not raise the issue of the circumstances in which an investigating authority may construct normal value. In particular, the resolution of this dispute does not require us to address the notion of "particular market situation" in Article 2.2 of the Anti-Dumping Agreement.

<sup>376</sup> Ukraine's appellant's submission, paras. 71 and 95; Notice of Appeal, para. d.

<sup>377</sup> Russia's appellee's submission, paras. 240 and 305.

<sup>378</sup> Panel Report, paras. 7.81-7.92.

that condition, MEDT failed to construct normal value on the basis of the cost of production in the country of origin within the meaning of Article 2.2 by using the surrogate price of gas.<sup>379</sup> The Panel considered that Article 2.2 does not preclude the possibility that an investigating authority may have to use out-of-country evidence to construct normal value, provided that such evidence is apt to yield or capable of yielding the cost of production in the country of origin.<sup>380</sup> The Panel did not see "any explanations in the Investigation Report as to why adjustments for ... transportation expenses were adequate to adapt the ... export price from Russia at the German border[]" to reflect the cost of the investigated Russian producers in the country of origin".<sup>381</sup> Rather, the Panel considered MEDT's explanation in the Investigation Report to suggest that it had selected this export price because "[it] was an out-of-country benchmark, and that it did not adapt this price to reflect costs in Russia."<sup>382</sup> In these circumstances, the Panel did not consider that the adjustment for transportation expenses was sufficient to adapt the export price of gas from Russia at the German border to reflect the cost in Russia.<sup>383</sup> The Panel then dismissed Ukraine's argument that MEDT could not use domestic gas prices in Russia because there was no undistorted domestic market for gas in Russia, relying on its earlier finding that MEDT had not provided a proper basis to reject the reported gas cost.<sup>384</sup>

6.111. In challenging these Panel findings on appeal, Ukraine first argues that the Panel's interpretation and application of Article 2.2 of the Anti-Dumping Agreement rely on the Panel's erroneous finding that Ukraine acted inconsistently with Article 2.2.1.1.<sup>385</sup> Ukraine submits that, for this reason alone, we should reverse the Panel's finding under Article 2.2.<sup>386</sup> Ukraine makes a series of additional arguments challenging the Panel's interpretation and application of Article 2.2 that are premised on finding error with the Panel's interpretation or application of the second condition in the first sentence of Article 2.2.1.1. In particular, Ukraine submits that it would be circular and void of economic logic to calculate the cost of production under Article 2.2 on the basis of costs rejected under Article 2.2.1.1 of the Anti-Dumping Agreement.<sup>387</sup> In that regard, Ukraine relies on the Appellate Body reports in *EC – Fasteners (China) (Article 21.5 – China)* and *US – Softwood Lumber IV* as standing for the proposition that "once a particular cost item is found to be unreliable or distorted, an investigating authority cannot be forced to make an adjustment to re-introduce the **very same condition ... that rendered the price unreliable in the first place.**"<sup>388</sup> According to Ukraine, "MEDT of Ukraine could not simply take the regulated gas price on the domestic market in Russia as the basis for the calculation of the cost of production in the country of origin, as this price was deemed to be unreliable."<sup>389</sup>

6.112. Russia responds that the Panel did not err in finding that Ukraine acted inconsistently with Article 2.2.1.1, and that, in any event, the Panel's findings under Article 2.2 are not dependent on its findings under Article 2.2.1.1.<sup>390</sup> In that regard, Russia argues that both the factual and legal bases for these Panel findings are different.<sup>391</sup> Russia also challenges Ukraine's reliance on the Appellate Body reports in *EC – Fasteners (China) (Article 21.5 – China)* and *US – Softwood*

<sup>379</sup> Panel Report, paras. 7.93-7.103.

<sup>380</sup> Panel Report, paras. 7.71 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70 and 6.73) and 7.99.

<sup>381</sup> Panel Report, para. 7.99.

<sup>382</sup> Panel Report, para. 7.99.

<sup>383</sup> Panel Report, para. 7.99.

<sup>384</sup> Panel Report, paras. 7.100-7.102.

<sup>385</sup> Ukraine's appellant's submission, paras. 75, 78, and 86.

<sup>386</sup> Ukraine's appellant's submission, paras. 75, 78, and 86.

<sup>387</sup> Ukraine's appellant's submission, para. 81. See also *ibid.*, para. 84.

<sup>388</sup> Ukraine's appellant's submission, paras. 87-88.

<sup>389</sup> Ukraine's appellant's submission, para. 87. Ukraine argues that, having determined that the domestic gas prices in Russia could not be used under the second condition in the first sentence of Article 2.2.1.1, it is unclear what adjustments MEDT should have made, other than adjusting the export price of gas on account of transportation expenses. (*Ibid.*, paras. 86-87)

<sup>390</sup> Russia's appellee's submission, paras. 256-257, 263, 265, and 282.

<sup>391</sup> Russia emphasizes that the Panel's finding under Article 2.2.1.1 of the Anti-Dumping Agreement concerns the *rejection* of the reported gas cost and whether there was an adequate basis for MEDT to conclude that the reported gas cost did not reasonably reflect the costs associated with the production and sale of ammonium nitrate under the second condition in the first sentence of that provision. By contrast, Russia considers that the Panel's finding under Article 2.2 of the Anti-Dumping Agreement concerns the *replacement* of the reported gas cost with the surrogate price of gas and whether this is in keeping with the obligation in Article 2.2 that the costs be those "in the country of origin". (Russia's appellee's submission, paras. 258-263)

*Lumber IV*, arguing that, in these reports, the Appellate Body did not address issues under Article 2.2 of the Anti-Dumping Agreement.<sup>392</sup>

6.113. We understand Ukraine's arguments under Article 2.2 in this regard to be dependent on its claim that the Panel erred in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1. In particular, Ukraine's argument, relying on the Appellate Body reports in *EC – Fasteners (China) (Article 21.5 – China)* and *US – Softwood Lumber IV*, that it would be circular and void of economic logic to calculate the cost of production under Article 2.2 on the basis of costs adequately rejected under the second condition in the first sentence of Article 2.2.1.1, assumes that there was an adequate basis to reject such costs under that condition. As we have found above, Ukraine has not established that the Panel erred in its interpretation or application of Article 2.2.1.1 in finding that MEDT did not provide an adequate basis to reject the reported gas cost under the second condition in the first sentence of that provision. We therefore reject Ukraine's arguments on appeal challenging the Panel's findings under Article 2.2 of the Anti-Dumping Agreement insofar as such arguments are dependent on alleged errors by the Panel in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.

6.114. Having reached this conclusion, we now address Ukraine's arguments on appeal concerning the Panel's interpretation and application of Article 2.2 that Ukraine has identified as not being dependent on us finding error with the Panel's interpretation or application of the second condition in the first sentence of Article 2.2.1.1. Ukraine specified that, in its view, irrespective of whether the Panel erred in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1, the Panel erred in: (i) its interpretation of Article 2.2 in considering that certain Appellate Body's findings under Article 14(d) of the SCM Agreement in *US – Softwood Lumber IV* were not relevant to that interpretation; and (ii) its application of Article 2.2 in finding that the export price of gas was not properly adapted to reflect the cost "in the country of origin".<sup>393</sup>

6.115. Starting with Ukraine's interpretative arguments, we observe that Ukraine challenges the Panel's interpretation of Article 2.2 of the Anti-Dumping Agreement by relying on certain Appellate Body findings with respect to Article 14(d) of the SCM Agreement in *US – Softwood Lumber IV*. Specifically, Ukraine submits that the Panel erred in considering that these Appellate Body findings are not relevant by analogy to the interpretation of the phrase "cost of production in the country of origin" in Article 2.2 and that, consequently, recourse to an out-of-country benchmark is not justified under that provision.<sup>394</sup> Russia disagrees and cautions that Article 14(d) of the SCM Agreement should not be transposed into the framework of the Anti-Dumping Agreement.<sup>395</sup> Russia highlights that the primary focus of determining the existence of a subsidy under the SCM Agreement lies in the analysis of a government's actions, while the rules on determination of dumping focus on the investigated producer's or exporter's pricing behaviour.<sup>396</sup>

6.116. The Panel noted that Article 14(d) of the SCM Agreement is concerned with the assessment of the benefit granted to a subsidy recipient due to the governmental provision of goods and services.<sup>397</sup> The Panel stressed that, unlike Article 14(d) of the SCM Agreement, the purpose of Article 2.2 of the Anti-Dumping Agreement is not to ascertain the benefit conferred by the governmental provision of goods and services, and the extent of that benefit. The Panel concluded that the purpose of cost calculation under Article 2.2 of the Anti-Dumping Agreement and that of the calculation of benefit under Article 14(d) of the SCM Agreement are different and should not be conflated.<sup>398</sup> The Panel added that the interim and expiry reviews concern a determination in an anti-dumping proceeding, rather than an anti-subsidy proceeding, and that the question of ascertaining the benefit granted through the governmental provision of goods and services thus does not arise in the present case.<sup>399</sup> The Panel therefore did not consider the

<sup>392</sup> Russia's appellee's submission, paras. 268 and 284-288.

<sup>393</sup> Ukraine's response to questioning at the oral hearing. See also Ukraine's appellant's submission, paras. 76, 79-80, and 89-94.

<sup>394</sup> Ukraine's appellant's submission, paras. 76-77.

<sup>395</sup> Russia's appellee's submission, paras. 268-273.

<sup>396</sup> Russia's appellee's submission, para. 271.

<sup>397</sup> Panel Report, para. 7.101.

<sup>398</sup> Panel Report, para. 7.102.

<sup>399</sup> Panel Report, para. 7.102.

Appellate Body's findings under Article 14(d) of the SCM Agreement in *US – Softwood Lumber IV* to be relevant to its interpretation of Article 2.2 of the Anti-Dumping Agreement.<sup>400</sup>

6.117. We begin by recalling that Article 14(d) of the SCM Agreement contains guidelines for the calculation of the amount of a subsidy in terms of the benefit to the recipient. Article 14(d) provides, *inter alia*, that the provision of goods or services by a government shall not be considered as conferring a benefit unless such a provision is made for less than adequate remuneration, and that adequacy of remuneration "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision". As the Panel observed, in *US – Softwood Lumber IV*, the Appellate Body stated that a government's role in providing a financial contribution, in terms of the provision of goods, may be so predominant that it effectively determines the price at which private suppliers sell the same or similar goods.<sup>401</sup> 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 is 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.<sup>402</sup>

6.118. We acknowledge that Article 2.2 of the Anti-Dumping Agreement and Article 14(d) of the SCM Agreement bear certain textual similarities. Article 2.2 refers to the cost of production "in the country of origin" and Article 14(d) to the adequacy of remuneration to be determined in relation to prevailing market conditions "in the country of provision". Article 14(d), however, also contains the phrase "in relation to prevailing market conditions", which is not found in Article 2.2.<sup>403</sup> Importantly, these two provisions do not serve the same function. The function of Article 14(d) of the SCM Agreement is to ascertain the benefit conferred on the recipient of a subsidy by, *inter alia*, the governmental provision of goods and services. By contrast, Article 2.2 of the Anti-Dumping Agreement concerns the establishment of normal value when it cannot be determined on the basis of domestic sales.<sup>404</sup> In light of these differences, the Appellate Body's findings with respect to Article 14(d) of the SCM Agreement in *US – Softwood Lumber IV* do not speak to the costs that may be used to construct normal value under Article 2.2 of the Anti-Dumping Agreement. Therefore, in our view, the Panel did not err in its interpretation of Article 2.2 in considering that these Appellate Body findings were not relevant to its interpretative exercise.<sup>405</sup> In light of the foregoing, we reject Ukraine's claim challenging the Panel's interpretation of Article 2.2 of the Anti-Dumping Agreement.

6.119. We now turn to Ukraine's claim that the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement in finding that, when constructing normal value, MEDT failed to calculate the cost of production "in the country of origin". Ukraine claims that the Panel erred in considering that adjusting the export price of gas from Russia at the German border on account of transportation

<sup>400</sup> Panel Report, para. 7.102.

<sup>401</sup> Panel Report, para. 7.101 (referring to Appellate Body Report, *US – Softwood Lumber IV*, paras. 93 and 101).

<sup>402</sup> Panel Report, para. 7.101 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 100). In *US – Countervailing Measures (China) (Article 21.5 – China)*, the Appellate Body clarified that "[c]entral to the inquiry under Article 14(d) of the SCM Agreement in identifying an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention" and that "[w]hat would allow an investigating authority to reject in-country prices is a finding of price distortion resulting from government intervention in the market, not the presence of government intervention in the market itself." The Appellate Body also recognized that different types of government interventions could lead to price distortion, such that recourse to out-of-country prices is warranted, beyond the situation in which the government's role is so predominant that it effectively determines the price of the goods in question. (Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.147)

<sup>403</sup> To the Appellate Body, the phrase "in relation to" implies a "broader sense of 'relation, connection, reference'", suggesting that a benchmark other than private prices is not excluded under Article 14(d) of the SCM Agreement. (Appellate Body Report, *US – Softwood Lumber IV*, para. 89) As for the term "prevailing market conditions", it has been found to "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150) In addition, in *US – Softwood Lumber IV*, the Appellate Body found merit in the United States' submission that the term "guidelines" in Article 14 of the SCM Agreement, which is equally not found in Article 2.2 of the Anti-Dumping Agreement, suggests that paragraphs (a) through (d) should not be interpreted as rigid rules that purport to contemplate every conceivable factual circumstance. (Appellate Body Report, *US – Softwood Lumber IV*, para. 92)

<sup>404</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24 (referring to Panel Reports, *Thailand – H-Beams*, para. 7.112; *US – Softwood Lumber V*, para. 7.278).

<sup>405</sup> Panel Report, paras. 7.101-7.102.



expenses was not sufficient to adapt this price to reflect prices in Russia.<sup>406</sup> In that regard, Ukraine states that "other than apparently requesting domestic state-fixed prices to be used for the purpose of the calculation of the cost of production, none of the interested parties in the investigation pointed to any differences in the market conditions in Russia (other than prices being fixed by the state) and market conditions relating to the export prices, which would necessitate further adjustments to the export gas prices."<sup>407</sup> According to Ukraine, in these circumstances, "MEDT of Ukraine cannot be faulted for limiting the adaptation to the gas export price to an adjustment on account of transportation expenses."<sup>408</sup>

6.120. Russia responds that the Panel correctly found that the export price of gas from Russia at the German border was not properly adapted to reflect the cost of gas in the country of origin as required under Article 2.2.<sup>409</sup> In that regard, Russia argues that the Panel correctly made the following factual findings: (i) "the export price from Russia to Germany was not the cost of gas for the investigated Russian producers in Russia"; (ii) "the record does not show how MEDT of Ukraine adapted this export price to reflect the prices in Russia"; and (iii) MEDT "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".<sup>410</sup> Russia further argues that the analysis under Article 2.2 does not relate to the market conditions for inputs in different countries, but to whether the surrogate price of gas reflects the domestic price of gas in Russia.<sup>411</sup> According to Russia, the Panel correctly considered that it did not.<sup>412</sup> Moreover, Russia argues that the obligation under Article 2.2 lies with the investigating authority regardless of whether interested parties request adjustments to ensure that a price relied on to construct normal value reflects the cost in the country of origin.<sup>413</sup>

6.121. As set out above, the phrase "cost of production in the country of origin" indicates that whatever information or evidence is used to determine the "cost of production", it must be apt to yield or capable of yielding a cost of production "in the country of origin".<sup>414</sup> Therefore, an investigating authority has to ensure that the information it collects is used to arrive at the "cost of production in the country of origin" and compliance with this obligation may require the investigating authority to adapt that information.<sup>415</sup>

6.122. The Panel's analysis focuses on MEDT's explanations in the Investigation Report regarding whether the export price of gas from Russia at the German border was adapted to reflect the cost of production in the country of origin. The Panel did not see any explanation by MEDT in the Investigation Report as to why adjustments for transportation expenses were adequate to adapt the export price from Russia at the German border to reflect the cost of the investigated Russian producers in the country of origin.<sup>416</sup> The Panel also recalled its earlier finding under the second

<sup>406</sup> Ukraine's appellant's submission, paras. 76 and 86-87.

<sup>407</sup> Ukraine's appellant's submission, para. 89. See also *ibid.*, paras. 92-93.

<sup>408</sup> Ukraine's appellant's submission, para. 94.

<sup>409</sup> Russia's appellee's submission, paras. 294-295.

<sup>410</sup> Russia's appellee's submission, paras. 294-295 (quoting Panel Report, para. 7.99). (emphasis added by Russia)

<sup>411</sup> Russia's appellee's submission, para. 296.

<sup>412</sup> Russia's appellee's submission, para. 296.

<sup>413</sup> Russia's appellee's submission, paras. 298 and 302.

<sup>414</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

<sup>415</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. The phrase "cost of production in the country of origin" suggests that, in constructing normal value, an investigating authority will naturally look for information on the cost of production "in the country of origin" from sources inside the country. The first sentence of Article 2.2.1.1 directs the investigating authority normally to base its calculations of costs on the records of the exporter or producer under investigation, provided that the records are in accordance with the GAAP of the exporting country and that they reasonably reflect the costs associated with the production and sale of the product under consideration. In some circumstances, however, the information in the records kept by the exporter or producer under investigation may need to be analysed or verified using documents, information, or evidence from other sources. This may, for example, be so where the producer under investigation purchases inputs abroad to produce the product under consideration. Moreover, in circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to alternative bases to calculate some or all such costs. (See *ibid.*, paras. 6.70 and 6.73, and fn 228 to para. 6.71)

<sup>416</sup> Panel Report, para. 7.99.

condition in the first sentence of Article 2.2.1.1<sup>417</sup>, a finding with which we agreed above.<sup>418</sup> Other than pointing to the deduction of transportation expenses, Ukraine has not asserted, either before the Panel or before us, that MEDT otherwise adapted the export price of gas used in its calculations in order to ensure that it reflected the cost of production in Russia. We therefore see no basis to question the Panel's conclusion that the adjustment for transportation expenses made by MEDT was not sufficient to adapt the export price from Russia to reflect the cost of production in the country of origin, i.e. Russia. In reaching this conclusion, we are mindful of the fact that, in the particular circumstances of this case, given that MEDT did not provide an adequate basis to reject the reported gas cost under the second condition in the first sentence of Article 2.2.1.1, there may not have been a basis to rely on costs other than those reflected in the records of the investigated producers.<sup>419</sup>

6.123. In light of the foregoing, we reject Ukraine's claim challenging the Panel's application of Article 2.2 of the Anti-Dumping Agreement. Accordingly, we consider that Ukraine has not demonstrated that the Panel erred in its interpretation or application of Article 2.2 of the Anti-Dumping Agreement in finding that, when constructing normal value, MEDT failed to calculate the cost of production "in the country of origin".

### 6.2.6 Conclusion

6.124. In sum, we consider that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs that have a genuine relationship with the production and sale of the specific product under consideration. Under the second condition in the first sentence of Article 2.2.1.1, it is the "records" of the individual exporter or producer under investigation that are subject to the condition to "reasonably reflect" the "costs associated with the production and sale of the product under consideration". We thus consider that there is no standard of reasonableness under that condition that governs the meaning of "costs" itself, which would allow investigating authorities to disregard domestic input prices when such prices are lower than other prices internationally. Moreover, we observe that the first sentence of Article 2.2.1.1 directs the investigating authority normally to base its calculations of costs on the records of the exporter or producer under investigation, provided that such records are in accordance with the GAAP of the exporting country and that they reasonably reflect the costs associated with the production and sale of the product under consideration. Given the reference to "normally", we do not exclude that there might be circumstances other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records does not apply. The second condition in the first sentence of Article 2.2.1.1, however, does not contain open-ended "non-arm's-length transactions" or "other practices" "exceptions", as Ukraine seems to suggest. Therefore, we consider that the Panel did not err in examining whether MEDT 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.

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<sup>417</sup> Panel Report, para. 7.101.

<sup>418</sup> See paragraphs 6.100-6.108 above.

<sup>419</sup> Moreover, we observe that Article 2.2 provides that when the circumstances set out in the first part of that provision occur, the margin of dumping *shall* be determined by comparison with a comparable price of the like product when exported to an appropriate third country or with the cost of production in the country of origin. In our view, although interested parties may have a role to play in that regard, it is for the investigating authority to determine normal value consistently with Article 2.2 when domestic sales cannot be used. We are therefore not convinced by Ukraine's argument that "MEDT of Ukraine cannot be faulted for limiting the adaptation to the gas export price to an adjustment on account of transportation expenses" because none of the interested parties in the interim and expiry reviews pointed to necessary adjustments to ensure that the price of gas used reflected the cost of production in the country of origin. (Ukraine's appellant's submission, para. 94) We are also not convinced by Ukraine's argument that any claim with respect to an adjustment on account of a 30% export tax on gas, which Russia argued MEDT should have considered in adapting the export price of gas to reflect the cost of production in the country of origin, should necessarily be dealt with under Article 2.4 of the Anti-Dumping Agreement. (Ibid., paras. 91 and 93 (quoting Russia's second written submission to the Panel, para. 344)) The obligation to conduct a fair comparison between the export price and the normal value pursuant to Article 2.4 "presupposes that the component elements of the comparison – i.e. the normal value and the export price – have already been established". (Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.21) In this case, the issue of the export tax arises in the context of MEDT's replacement of the reported gas cost with the surrogate price of gas when constructing normal value, and thus would precede any adjustments that are to be made in accordance with Article 2.4.

6.125. We also consider that the Panel did not err in its assessment of MEDT's reasons for rejecting the reported gas cost under the second condition in the first sentence of Article 2.2.1.1. The Panel noted that, in the Investigation Report, MEDT examined whether, due to government regulation, the gas costs incurred by the investigated Russian producers were lower compared with prices in other countries or other export prices of gas from Russia. Ukraine has not advanced any reason for us to question the Panel's conclusion that MEDT's examination in that regard pertained to whether the cost of gas incurred by these producers was reasonable, and that this was thus not an adequate basis to conclude that the producers' records did not reasonably reflect the costs associated with the production and sale of ammonium nitrate. The Panel also noted that, in the Investigation Report, MEDT took the view that Gazprom sells gas in the domestic Russian market below cost. Given the Panel's factual finding that no determination was made by MEDT that Gazprom was the gas supplier of the investigated Russian producers or that Gazprom's prices affected these suppliers' prices, we see no reason to find error with the Panel's conclusion that Gazprom's below-cost prices did not constitute a sufficient factual basis for MEDT 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.

6.126. Therefore, we find that the Panel did not err in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Consequently, we uphold the Panel's finding, in paragraphs 7.92 and 8.2.a of the Panel Report, that Ukraine acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because MEDT did not provide an adequate basis under the second condition in the first sentence of that provision to reject the reported gas cost.

6.127. We observe that Ukraine's claim on appeal under Article 2.2.1 of the Anti-Dumping Agreement is dependent on us reversing the Panel's finding of inconsistency with Article 2.2.1.1 of the Anti-Dumping Agreement. Given the consequential nature of Ukraine's claim on appeal, and having upheld the Panel's finding under Article 2.2.1.1 of the Anti-Dumping Agreement, we uphold the Panel's finding, in paragraphs 7.118 and 8.2.c of the Panel Report, that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in conducting its ordinary-course-of-trade test, MEDT relied on costs calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.

6.128. Ukraine raises certain arguments under Article 2.2 of the Anti-Dumping Agreement that are dependent on us finding error with the Panel's findings under Article 2.2.1.1. Given our finding that the Panel did not err in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1, we reject these arguments by Ukraine. In light of the differences in text and function between Article 2.2 of the Anti-Dumping Agreement and Article 14(d) of the SCM Agreement, we also consider that the Panel did not err in its interpretation of Article 2.2 in considering that certain Appellate Body interpretations with respect to Article 14(d) of the SCM Agreement were not relevant to its interpretative exercise under Article 2.2. We also consider that the Panel did not err in its application of Article 2.2 in finding that the export price of gas was not properly adapted to reflect the cost "in the country of origin". An investigating authority has to ensure that the information it collects is used to arrive at the "cost of production in the country of origin" and compliance with this obligation may require the investigating authority to adapt that information. The Panel did not see any explanation by MEDT in the Investigation Report as to why adjustments for transportation expenses were adequate to adapt the export price from Russia at the German border to reflect the cost of the investigated Russian producers in the country of origin. The Panel also recalled its earlier finding under the second condition in the first sentence of Article 2.2.1.1, a finding with which we agreed above. Other than pointing to the deduction of transportation expenses, Ukraine has not asserted, either before the Panel or before us, that MEDT otherwise adapted the export price of gas used in its calculations in order to ensure that it reflected the cost of production in Russia. We therefore see no basis to question the Panel's conclusion that the adjustment for transportation expenses made by MEDT was not sufficient to adapt the export price from Russia to reflect the cost of production in the country of origin, i.e. Russia. In reaching this conclusion, we are mindful of the fact that, in the particular circumstances of this case, given that MEDT did not provide an adequate basis to reject the reported gas cost under the second condition in the first sentence of Article 2.2.1.1, there may not have been a basis to rely on costs other than those reflected in the records of the investigated producers.

6.129. Therefore, we find that the Panel did not err in its interpretation and application of Article 2.2 of the Anti-Dumping Agreement. Consequently, we uphold the Panel's finding, in paragraphs 7.103

and 8.2.b of the Panel Report, that Ukraine acted inconsistently with that provision because MEDT failed to calculate the cost of production "in the country of origin".

## 7 FINDINGS AND CONCLUSIONS

7.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

### 7.1 Claims under Articles 6.2, 7.1, and 11 of the DSU relating to the original investigation phase

7.2. The language in Russia's panel request, including express references in footnotes, refers to the 2008 amended decision and the 2010 amendment and sufficiently links these measures to Russia's claim under Article 5.8 of the Anti-Dumping Agreement. We therefore agree with the Panel's assessment that the 2008 amended decision and the 2010 amendment were discernible and accordingly identified as specific measures at issue in Russia's panel request.

- a. Therefore, we find that the Panel did not err under Article 6.2 of the DSU in finding that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in Russia's panel request.
- b. Consequently, we uphold the Panel's finding, in paragraphs 7.28 and 8.1.a of the Panel Report, that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in Russia's panel request, and thus fell within the Panel's terms of reference.

7.3. We recall that the measures and claims identified in a panel request in accordance with Article 6.2 of the DSU constitute the "matter referred to the DSB", which serves as a basis for the panel's terms of reference under Article 7.1 of the DSU. We have upheld the Panel's finding that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in Russia's panel request, and Ukraine has not appealed the Panel's finding that Russia had provided a brief summary of the legal basis for its claim under Article 5.8 of the Anti-Dumping Agreement as it relates to these measures. Moreover, Ukraine has not advanced any other grounds in support of its challenge under Articles 7.1 and 11 of the DSU.

- a. Therefore, we find that the Panel did not err under Articles 7.1 and 11 of the DSU by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment.

7.4. We consider that the Panel provided a reasoned and coherent explanation in reaching the conclusion that the combined effect of the Ukrainian court judgments and the implementation by the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*, triggering Ukraine's obligation under Article 5.8 of the Anti-Dumping Agreement to exclude EuroChem from the scope of the anti-dumping investigation. We further consider that the Panel, consistent with its duty under Article 11 of the DSU, conducted an objective assessment of the arguments and evidence necessary to resolve the claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision, the 2010 amendment, and the 2014 extension decision.

- a. Therefore, we find that the Panel did not act in a manner inconsistent with Article 11 of the DSU, in concluding that the combined effect of the Ukrainian court judgments and their implementation by the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was *de minimis*.
- b. For the reasons above, we uphold the Panel's findings, in paragraphs 7.152, 7.157, and 8.3.a of the Panel Report, that Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement in relation to the 2008 amended decision, the 2010 amendment, and the 2014 extension decision.

## 7.2 Claims under Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement relating to MEDT's determinations of dumping in the interim and expiry reviews

7.5. We consider that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs that have a genuine relationship with the production and sale of the specific product under consideration. Under the second condition in the first sentence of Article 2.2.1.1, it is the "records" of the individual exporter or producer under investigation that are subject to the condition to "reasonably reflect" the "costs associated with the production and sale of the product under consideration". We thus consider that there is no standard of reasonableness under that condition that governs the meaning of "costs" itself, which would allow investigating authorities to disregard domestic input prices when such prices are lower than other prices internationally. Moreover, we observe that the first sentence of Article 2.2.1.1 directs the investigating authority normally to base its calculations of costs on the records of the exporter or producer under investigation, provided that such records are in accordance with the GAAP of the exporting country and that they reasonably reflect the costs associated with the production and sale of the product under consideration. Given the reference to "normally", we do not exclude that there might be circumstances other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records does not apply. The second condition in the first sentence of Article 2.2.1.1, however, does not contain open-ended "non-arm's-length transactions" or "other practices" "exceptions", as Ukraine seems to suggest. Therefore, we consider that the Panel did not err in examining whether MEDT 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.

7.6. We also consider that the Panel did not err in its assessment of MEDT's reasons for rejecting the reported gas cost under the second condition in the first sentence of Article 2.2.1.1. The Panel noted that, in the Investigation Report, MEDT examined whether, due to government regulation, the gas costs incurred by the investigated Russian producers were lower compared with prices in other countries or other export prices of gas from Russia. Ukraine has not advanced any reason for us to question the Panel's conclusion that MEDT's examination in that regard pertained to whether the cost of gas incurred by these producers was reasonable, and that this was thus not an adequate basis to conclude that the producers' records did not reasonably reflect the costs associated with the production and sale of ammonium nitrate. The Panel also noted that, in the Investigation Report, MEDT took the view that Gazprom sells gas in the domestic Russian market below cost. Given the Panel's factual finding that no determination was made by MEDT that Gazprom was the gas supplier of the investigated Russian producers or that Gazprom's prices affected these suppliers' prices, we see no reason to find error with the Panel's conclusion that Gazprom's below-cost prices did not constitute a sufficient factual basis for MEDT 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.

- a. Therefore, we find that the Panel did not err in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.
- b. Consequently, we uphold the Panel's finding, in paragraphs 7.92 and 8.2.a of the Panel Report, that Ukraine acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because MEDT did not provide an adequate basis under the second condition in the first sentence of that provision to reject the reported gas cost.

7.7. We observe that Ukraine's claim on appeal under Article 2.2.1 of the Anti-Dumping Agreement is dependent on us reversing the Panel's finding of inconsistency with Article 2.2.1.1 of the Anti-Dumping Agreement.

- a. Given the consequential nature of Ukraine's claim on appeal, and having upheld the Panel's finding under Article 2.2.1.1 of the Anti-Dumping Agreement, we uphold the Panel's finding, in paragraphs 7.118 and 8.2.c of the Panel Report, that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in conducting its ordinary-course-of-trade test, MEDT relied on costs calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.

7.8. Ukraine raises certain arguments under Article 2.2 of the Anti-Dumping Agreement that are dependent on us finding error with the Panel's findings under Article 2.2.1.1. Given our finding that the Panel did not err in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1, we reject these arguments by Ukraine. In light of the differences in text and function between Article 2.2 of the Anti-Dumping Agreement and Article 14(d) of the SCM Agreement, we also consider that the Panel did not err in its interpretation of Article 2.2 in considering that certain Appellate Body interpretations with respect to Article 14(d) of the SCM Agreement were not relevant to its interpretative exercise under Article 2.2. We also consider that the Panel did not err in its application of Article 2.2 in finding that the export price of gas was not properly adapted to reflect the cost "in the country of origin". An investigating authority has to ensure that the information it collects is used to arrive at the "cost of production in the country of origin", and compliance with this obligation may require the investigating authority to adapt that information. The Panel did not see any explanation by MEDT in the Investigation Report as to why adjustments for transportation expenses were adequate to adapt the export price from Russia at the German border to reflect the cost of the investigated Russian producers in the country of origin. The Panel also recalled its earlier finding under the second condition in the first sentence of Article 2.2.1.1, a finding with which we agreed above. Other than pointing to the deduction of transportation expenses, Ukraine has not asserted, either before the Panel or before us, that MEDT otherwise adapted the export price of gas used in its calculations in order to ensure that it reflected the cost of production in Russia. We therefore see no basis to question the Panel's conclusion that the adjustment for transportation expenses made by MEDT was not sufficient to adapt the export price from Russia to reflect the cost of production in the country of origin, i.e. Russia. In reaching this conclusion, we are mindful of the fact that, in the particular circumstances of this case, given that MEDT did not provide an adequate basis to reject the reported gas cost under the second condition in the first sentence of Article 2.2.1.1, there may not have been a basis to rely on costs other than those reflected in the records of the investigated producers.

- a. Therefore, we find that the Panel did not err in its interpretation and application of Article 2.2 of the Anti-Dumping Agreement.
- b. Consequently, we uphold the Panel's finding, in paragraphs 7.103 and 8.2.b of the Panel Report, that Ukraine acted inconsistently with that provision because MEDT failed to calculate the cost of production "in the country of origin".

### 7.3 Recommendation

7.9. The Appellate Body recommends that the DSB request Ukraine to bring its measures found in this Report, and in the Panel Report as upheld by this Report, to be inconsistent with the Anti-Dumping Agreement, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 30th day of July 2019 by:



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Hong Zhao  
Presiding Member



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Ujal Singh Bhatia  
Member



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Shree Baboo Chekitan Servansing  
Member



## UKRAINE – ANTI -DUMPING MEASURES ON AMMONIUM NITRATE

AB-2018-5

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS493/AB/R.

The Notice of Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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## ANNEX A-1

UKRAINE'S NOTICE OF APPEAL<sup>1</sup>

Pursuant to Article 16.4 of the DSU Ukraine hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *Ukraine – Anti-Dumping Measures on Ammonium Nitrate* (WT/DS493). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, Ukraine simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, Ukraine appeals, and requests the Appellate Body to reverse the findings, conclusions and recommendations of the Panel, with respect to the following errors contained in the Panel Report:<sup>2</sup>

- a. the Panel erred when finding that Russia's Panel Request identified the 2008 and the 2010 Decisions as measures at issue within the meaning of Article 6.2 of the DSU and that these measures consequently fell within the Panel's terms of reference. As a result, Ukraine requests the Appellate Body to reverse the Panel's findings in paragraphs 7.24, 7.26, 7.27, 7.28 and 8.1 (a);
- b. the Panel violated Article 7.1 and Article 11 of the DSU by making findings on a claim that Russia never made in its Panel Request, First Written Submission and Russia's Opening Statement at the First Substantive Meeting with the Panel. As a result, Ukraine requests the Appellate Body to reverse the Panel's findings in paragraphs 7.147, 7.149, 7.150, 7.151, 7.152 and 8.3 (a)(i) and 8.3 (a)(ii);
- c. the Panel erred when finding that Ukraine acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers. As a result, Ukraine requests the Appellate Body to reverse the Panel's findings in paragraphs 7.89, 7.90, 7.91, 7.92 and 8.2 (a) which are based on its legally erroneous reasoning in paragraphs 7.85-7.88;
- d. the Panel erred in the interpretation and application of Article 2.2 of the Anti-Dumping Agreement when finding that Ukraine violated Article 2.2 of the Anti-Dumping Agreement by not using the actual costs "in the country of origin" when calculating the cost of production of the investigated Russian producers. As a result, Ukraine requests the Appellate Body to reverse the Panel's findings in paragraphs 7.99, 7.101, 7.102, 7.103 and 8.2 (b);
- e. the Panel erred in the application of Article 2.2.1. of the Anti-Dumping Agreement by finding that MEDT of Ukraine relied on the costs that were calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement for the purpose of performing the ordinary-course-of-trade test. As a result, Ukraine requests the Appellate Body to reverse the Panel's findings in paragraphs 7.114, 7.116, 7.117, 7.118 and 8.2 (c); and
- f. the Panel failed to make an objective assessment of the matter before it, and thus violated Article 11 DSU, when examining the scope, meaning and content of the 2010 Decision and the judgments of the Ukrainian Courts, and in particular the decision of the Kiev Administrative District Court and the Panel erred when concluding that the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement. As a result, Ukraine requests the Appellate Body to reverse the Panel's findings in paragraphs 7.147, 7.149, 7.150, 7.151, 7.152, 7.154, 7.157 and 8.3 (a).

<sup>1</sup> This document, dated 23 August 2018, was circulated to Members as document WT/DS493/6.

<sup>2</sup> Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of Ukraine to refer to other paragraphs of the Panel Report in the context of its appeal.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

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## ANNEX B-1

## EXECUTIVE SUMMARY OF UKRAINE'S APPELLANT'S SUBMISSION

## I. PROCEDURAL ISSUES

## A. The Panel erred in finding that the 2008 and the 2010 Decisions were identified in the panel request

1. Ukraine submits that the Russian Federation's Panel Request did not identify the 2008 and the 2010 Decision as measures at issue. First, in the main text of the paragraph identifying the measures at issue, the Russian Federation only mentioned the 2014 Decision.<sup>1</sup> Second, footnote 2 of the Panel Request does not indicate that the Russian Federation intended to *challenge* the 2008, 2010 and 2013 Decisions or that the Russian Federation takes issue with what was determined in those decisions. Footnote 2 provides background information relating to the preceding anti-dumping proceedings. Third, Ukraine submits that Item number 1 of the Panel Request does not refer to the original anti-dumping measures but merely to "anti-dumping measures" and there is again no mention of the 2008 or the 2010 Decisions. Last, contrary to what the Panel found, footnote 3 does not seek to clarify the term "the anti-dumping measures" but refers to the alleged *de minimis* findings by the Ukrainian Courts. In light of this, Ukraine submits that the Russian Federation's Panel Request did not sufficiently clearly identify the measures at issue within the meaning of Article 6.2 DSU and therefore the Panel erred when finding that the 2008 and the 2010 Decisions fell within its terms of reference.

## B. The Panel made a finding on a claim that was not made by the Complainant

2. The Panel made findings on the inconsistency of the original anti-dumping measures with Article 5.8 of the Anti-Dumping Agreement. Despite the fact that this claim is neither included in the Panel Request, nor in the Russian Federation's First Written Submission, the Panel added this claim to the Russian Federation's requests for findings in chapter 3 of the Panel Report and made findings on this claim under subheading 7.5.3.1. The Panel refers to paragraphs 57 and 58 of the Russian Federation's response to Panel question No. 24 to justify adding this new claim.<sup>2</sup> Nevertheless, a panel's terms of reference are not determined by the responses of the complainant after the first substantive panel meeting. In light of this, Ukraine submits that the Panel violated Article 7.1 and Article 11 of the DSU.

## II. THE PANEL ERRED BY FINDING THAT THE UKRAINIAN AUTHORITIES FAILED TO PROVIDE "AN ADEQUATE BASIS" FOR REJECTING THE REPORTED GAS COST OF THE INVESTIGATED RUSSIAN PRODUCERS UNDER THE SECOND CONDITION OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

3. Ukraine submits that the Panel's interpretation of the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement is erroneous and inconsistent with the findings in *EU – Biodiesel*. In particular, the Panel refused to consider whether the conditions in the domestic Russian market and the conditions of sales of gas met the definitions of "non-arm's length" and "other practices".<sup>3</sup>
4. First, with regard to "non-arm's length" transactions, the Panel seemed to suggest that only non-arm's length transactions between *legally affiliated parties* could affect the reliability of the producers' records. Ukraine contends that for a transaction to be considered at arm's length in anti-dumping-cost context, the following conditions must be met: (1) the transaction needs to be between two willing parties that are unrelated; (2) the parties must act independently from each other; and (3) the parties must pursue their own best interest. Consequently, even where parties are "unrelated", when the second or/and third condition(s)

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<sup>1</sup> Russian Federation's Panel Request, p 1.

<sup>2</sup> Panel Report, para. 7.135, fn 234.

<sup>3</sup> Panel Report, para. 7.85.

is/are not met, a transaction cannot be considered at arm's length from the point of view of an independent auditor. In past case law, the determining factor was never *the legal affiliation* of the parties, but *whether commercial principles had been respected or whether market prices were applied*.

5. Based on this, Ukraine submits that the transactions between the Russian exporters and the gas suppliers are not at "arm's length", as properly established by MEDT of Ukraine. The Russian parties were not free to independently determine the prices of the gas sales transactions since the prices were fixed by the Russian state. Moreover, the prices fixed by the state were below cost and were much below the price that results from free market forces. Therefore, the transactions are also not based on commercial principles.
6. Second, with regard to "other practices", Ukraine notes that the Panel did also not consider its arguments that the Russian dual pricing system for gas qualifies as "other practices" which in turn renders the records of the Russian investigated exporters unreliable.

### III. THE PANEL ERRED WHEN FINDING 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"

7. Ukraine submits that the Panel erred (1) in the interpretation of Article 2.2 of the Anti-Dumping Agreement and (2) in finding that the surrogate price was not properly adapted to reflect the costs "in the country of origin".
8. First, Ukraine submits that the Appellate Body's interpretation of Article 14 (d) of the SCM Agreement applies by analogy to anti-dumping cases in situations where domestic prices in the country of origin are found to be unreliable. In the present dispute, the Russian domestic prices are unreliable given the state's intervention in fixing gas prices. It would therefore be illogical to force an investigating authority to construct the cost of production based on an unreliable, already rejected price.
9. Second, Ukraine would like to highlight the fact that the possibility to have recourse to an out-of-country benchmark in an anti-dumping case is in line with WTO law provided that it is properly adapted to reflect the cost of production in the country of origin. In this regard, Ukraine submits that it did make the necessary adjustment for transport expenses to net the export price back to the country of origin.

### IV. THE PANEL ERRED WHEN FINDING THAT 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

10. Ukraine further contends that the Panel's finding regarding Article 2.2.1.1 of the Anti-Dumping Agreement is vitiated by errors of interpretation and application of the second condition in the first sentence of this provision. Given that the Panel's finding related to Article 2.2.1 of the Anti-Dumping Agreement is purely consequential to its erroneous finding of the violation of Article 2.2.1.1 of the Anti-Dumping Agreement, Ukraine requests the Appellate Body to reverse the Panel's findings in paras 7.114, 7.118, 8.2(c) of its report.

### V. THE PANEL VIOLATED ARTICLE 11 OF THE DSU WHEN IT CONCLUDED THAT THE 2010 DECISION AND THE JUDGMENTS OF THE UKRAINIAN COURTS DETERMINED A BELOW *DE MINIMIS* DUMPING MARGIN

11. Ukraine submits that by failing to apply the correct legal standard for ascertaining the correct meaning of municipal law, and particularly the Panel's failure to undertake a proper holistic assessment of all the evidence before it, the Panel failed to make an objective assessment of the matter before it, within the meaning of Article 11 of the DSU. This, in turn, resulted in the erroneous conclusion that the 2010 Decision and the judgment of the Kiev Administrative District Court determined a below *de minimis* dumping margin for EuroChem.

12. In the 2010 decision, MEDT of Ukraine and ICIT did not calculate a dumping margin but merely determined a zero duty. Similarly, the court did not calculate a dumping margin, it only ruled that the 2008 decision imposed an illegal duty on EuroChem. In reaching this conclusion the Kiev Administrative District Court relied on the evidence before it, which were the dumping calculations calculated by EuroChem itself since ICIT (or MEDT of Ukraine) did not present any dumping margin calculation or any other data allowing the Kiev Administrative District Court to calculate a dumping margin. Furthermore, the fact that the competence of the Ukrainian courts is limited to reviewing the legality of anti-dumping measures that have been adopted – but not to recalculate dumping margins absent the illegality identified by a court – explains why, contrary to the Panel's conclusion, the Kiev Administrative District Court did not calculate a (new) dumping margin for EuroChem. Therefore, Ukraine submits that the Panel erred when it concluded that a below *de minimis* dumping margin was established by the 2010 Decision or by the judgments of the Ukrainian Courts.
13. Ukraine also disagrees with the Panel's finding that the grounds advanced by Ukraine are essentially matters under Ukrainian domestic law and are not determinative of issues raised in WTO dispute settlement proceedings.<sup>4</sup>

## VI. CONCLUSION

14. In light of this, Ukraine requests the Appellate Body to reverse the Panel's findings on all the aforementioned issues.

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<sup>4</sup> Panel Report, para. 7.148.

## ANNEX B-2

## EXECUTIVE SUMMARY OF RUSSIA'S APPELLEE'S SUBMISSION

## A. The Panel Correctly Found that the Panel Request Identified the 2008 and 2010 Decisions as Measures at Issue

1. The Russian Federation supports the Panel's findings that the 2008 and 2010 Decisions were correctly identified as measures at issue. Compliance with Article 6.2 of the DSU must be assessed having considered the panel request as a whole. By singling out abstracts of the Panel Request, Ukraine misleadingly seeks support for its claim that the 2008 and 2010 Decisions were not identified. The Panel Request identifies the measures at issue in the opening paragraph as Ukraine's anti-dumping measures on ammonium nitrate. These measures are explicitly detailed in footnote 2. An additional reference to the 2008 and 2010 Decisions in item 1 and footnote 3 of the Panel Request leaves no doubt that these decisions were considered as measures at issue.
2. Footnote 2 of the Panel Request does not provide "background information". It specifically characterizes and develops references to the "anti-dumping measures" being challenged as measures at issue. The 2008 and 2010 Decisions were clearly designated in the Panel Request as being challenged. Footnote 3 of the Panel Request identifying – again and in clear terms – the 2008 and 2010 Decisions, was correctly considered by the Panel, when considering the Panel Request as a whole.
3. The Russian Federation therefore submits that the Panel was right in ruling that, when considering the opening paragraph, footnote 2, item 1 and footnote 2 of the Panel Request in conjunction, and not in isolation, the 2008 and 2010 Decisions were appropriately identified as measures at issue.

## B. Ukraine's Claims Under Article 7.1 and Article 11 of the DSU are Without Merits

4. The Russian Federation supports the Panel's finding that the compliance of the 2008 and 2010 Decisions with Article 5.8 of the Anti-Dumping Agreement falls within its terms of reference. Ukraine wrongfully advances that this claim was not included in the Panel Request or Russian Federation's First Written Submission. This claim was contained in item 1 of the Panel Request, and later developed in Russian Federation's subsequent submissions. Ukraine in fact lodged a Request for Preliminary Ruling against that claim and has presented arguments throughout the procedure before the Panel on this claim.
5. The Russian Federation agrees with the Panel's finding that item 1 of the Panel Request identified clearly, by using the word "because" twice, that it was challenging the measures at issue under Article 5.8 of the Anti-Dumping Agreement in two respects: by failing to exclude a Russian exporter whose dumping margin was *de minimis* from the anti-dumping measures and by subjecting this exporter to subsequent reviews. The Russian Federation notes that it was only obliged, in the Panel Request, to identify claims and not arguments, as the latter naturally need to be developed in subsequent submissions.
6. The Russian Federation therefore submits that the Panel rightfully concluded that the claim made by the Russian Federation on the inconsistency of the 2008 and 2010 Decisions with Article 5.8 of the Anti-Dumping Agreement was within its terms of reference and correspondingly ruled on such claim.



C. [The Panel Correctly Found that 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](#)

7. The Russian Federation supports the Panel's finding that the factual findings relied upon by MEDT of Ukraine, and set out in paragraph 7.73 of the Panel Report, did not provide 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. In particular, the Panel was correct in its factual finding that MEDT of Ukraine's enquiry was focused on whether the cost of gas incurred by the investigated Russian 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. The Panel's reliance on the legal findings and interpretation developed in *EU – Biodiesel (Argentina)* was also correct. The Russian Federation also supports the Panel's finding that for resolving this dispute it was *not* necessary to consider whether the conditions in the domestic Russian market and the conditions of sale of gas met the definitions of "non-arm's length transactions" proposed by Ukraine, or its interpretation of "other practices".
8. The Panel correctly found that 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.

[Ukraine's Arguments on the "Non-arm's-length" Test are Legally Flawed, Irrelevant and Should be Rejected](#)

9. With reference to footnote 400 to para. 7.242 of the panel report in *EU – Biodiesel (Argentina)* where the term "non-arm's length transactions" originally appeared in connection with the phrase "reasonably reflect" in the text of Article 2.2.1.1, Ukraine developed its own test to determine whether a transaction between the investigated exporter or producer and its supplier of input is at arm's length, and thus reliable or not. Ukraine defined the term "a transaction at arm's length" on the basis of the US Generally Accepted Auditing Standards and the International Standards on Auditing and referred to three WTO cases (*EU – Biodiesel (Argentina)*, the Appellate Body Report in *US – Hot-Rolled Steel*, and the panel Report in *US – OCTG*) where, in Ukraine's view, a panel or the Appellate Body "had to assess whether the transactions were at arm's length". Ukraine argues that the determining factor was never the legal affiliation of the parties, but whether commercial principles had been respected or whether market prices were applied. The Russian Federation submits that Ukraine's arguments with respect to "non-arm's length test" and its application are legally flawed, irrelevant and should be rejected.
10. Article 2.2.1.1 of the Anti-Dumping Agreement does not contain the term "non-arm's length transaction", and thus there is no legal basis for an additional enquiry whether a transaction between the investigated exporter or producer and its supplier of input is at non-arm's length or not. The only enquiry under the second condition of Article 2.2.1.1 is whether the records of the investigated exporter or producer reasonably reflect the costs associated with the production and sale of the product under consideration.<sup>1</sup>
11. In this dispute, the Panel noted Ukraine's arguments based on Article 2.3 and ruled that this provision is not applicable to the circumstances of this case.<sup>2</sup> In its reliance on Article 2.3, Ukraine ignores the textual difference between Article 2.2.1.1 which contains rules for the calculation of costs to determine normal value and Article 2.3 which allows construction of

<sup>1</sup> The Russian Federation recalls that the Appellate Body concluded that "the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement ... relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration". The second condition does not include a general standard of "reasonableness". (Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56)

<sup>2</sup> Panel Report, *Ukraine – Ammonium Nitrate*, fn 163 to para. 7.91.

export prices of the product under consideration where the actual export price may be found unreliable due to the association between the exporter and the importer. The absence of similar wording in Article 2.2.1.1 strongly indicates that such a test was not intended.

12. Contrary to Ukraine's position, the US Generally Accepted Auditing Standards and the International Standards on Auditing and their definitions are *irrelevant* to both the legal interpretation of Article 2.2.1.1 and to this dispute. The text of Article 2.2.1.1 clearly demonstrates that WTO Members did not agree to apply these auditing standards for the interpretation and application of this provision.
13. With respect to Ukraine's reference to three WTO cases, the Russian Federation notes that in *EU – Biodiesel (Argentina)* the panel did not assess whether transactions of Argentinian producers were at arm's length in its consideration of Argentina's claim under Article 2.2.1.1. The Appellate Body's observations in para. 141 of its Report in *US – Hot-Rolled Steel* are specific to the circumstances of that dispute and the claim of violation of Article 2.1 of the Anti-Dumping Agreement, and thus should not be transposed to the test under Article 2.2.1.1 and the present dispute. In *US – OCTG (Korea)*, the panel's observations in para. 7.197 of its Report were made in light of the circumstances of that dispute, the complainant's arguments and identified legal issues which are different in comparison with the dispute before the Appellate Body.
14. Article 2.2.1.1 of the Anti-Dumping Agreement does not permit an investigating authority to examine government regulation of prices and to reject the recorded prices because the authority considers them as "unreliable" due to government regulation. The Appellate Body in *EU – Biodiesel (Argentina)* ruled that Article 2.2.1.1 does not permit an investigating authority to disregard recorded costs because it considers them to be unreasonable or to not be a cost that the exporter or producer would incur under normal circumstances, i.e. in the absence of the alleged distortion caused by government action.
15. The Russian Federation also notes that, contrary to Ukraine's definition of non-arm's length transaction and provided explanation, the text of Article 2.3 indicates that the government regulation of price does not affect the reliability of the export price of the product under consideration. The term "association" in the context of Article 2.3 concerns relationships between economic operators, and not government regulation.
16. Also, Ukraine's argument disregards the fact that dumping arises from the pricing *behaviour* of an exporter or foreign producer of the product under consideration, but not government regulation. The investigated exporter or producer cannot be responsible for government regulation, including regulation of input prices, and for prices and costs of suppliers of inputs.
17. The Russian Federation does not agree with Ukraine's consideration that "the Panel seemed to suggest that the records can *only* be deemed unreliable when the parties are affiliated". It is not necessary for the Panel to consider in abstract all circumstances in which records of the investigated exporters or producers may not meet the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement. The Panel focused on the factual circumstances of this dispute and replied to Ukraine's argument: "[w]e 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".
18. Contrary to Ukraine's suggestion, Article 2.2.1.1 of the Anti-Dumping Agreement does not allow an investigating authority to go through records of the supplier of input – a company which is not under investigation – to pick and choose the input price that the authority prefers, considering such price as more "reasonable", "reliable" or "the freely determinable market prices". A price of input selected by an investigating authority, for example because it is "the freely determinable market price" in comparison with the actually incurred price, will not have "a genuine relationship with the production and sale of the specific product under consideration" in a specific anti-dumping proceeding.

19. Ukraine submits that MEDT of Ukraine established that the transactions between the Russian exporters and the gas suppliers are not at arm's length, but this is not true. The Panel correctly found, *inter alia*, that there is not any finding in the Investigation Report that the records of the investigated Russian producers, insofar as they reflected the prices paid to gas suppliers, were unreliable. Ukraine's arguments based on the term "non-arm's length" constitute *ex post facto* rationalizations.
20. Ukraine argues that the present case is different from *EU – Biodiesel (Argentina)* and *EU – Biodiesel (Indonesia)*. The Russian Federation disagrees with Ukraine's position and refers to paras. 26-29 of its Second Written Submission, where the Russian Federation described at least 11 similarities between *EU – Biodiesel (Argentina)* and the present dispute.

**Ukraine's Arguments on the "Other Practices" Are Legally Flawed, Irrelevant and Should be Rejected**

21. The category of "other practices" mentioned by the panel and the Appellate Body in *EU – Biodiesel (Argentina)* comprises only those accounting, reporting and business practices of investigated producers and exporters that may affect the quality of the reported costs to the effect that such practices impede the investigating authority in the performance of its duty to ascertain whether costs recorded suitably and sufficiently correspond to or reproduce "all the actual costs incurred by the particular producer or exporter under consideration" in the production and sale of the product under consideration. Article 2.2.1.1 Anti-Dumping Agreement does not contain the terms "reliability", "reliable", "unreliable". In contrast with Article 2.2.1.1, Article 2.3 of the same Agreement provides that the export price may be constructed, *inter alia*, in cases "where 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". The absence of a similar wording in Article 2.2.1.1 and other provisions relevant to normal value indicates that Article 2.3 should not be applied for the calculation of the cost of production, establishment or construction of normal value. Ukraine's arguments on the "other practices" are legally flawed, irrelevant and should be rejected.

**Ukraine's Interpretation of the Second Ad Note to Paragraph 1 of Article VI of the GATT 1994 is Legally Flawed, Irrelevant and Should be Rejected**

22. Contrary to Ukraine's assertions, the second Ad Note to Article VI to GATT 1994 contains no such word as "unreliable". Second, the text of this provision does not combine conjunctions and/or. The text of the second Ad Note to Article VI in Annex I to the GATT 1994 explicitly sets two *cumulative* conditions when special difficulties may exist in determining price comparability for the purpose of Article VI: 1 of the GATT 1994: "in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State".<sup>3</sup> Both of these conditions should be met for this provision to be applied. This paragraph of Ad Note to Article VI also provides that "in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate".

**Ukraine's Interpretation of the Term "the Particular Market Situation" in Article 2.2 of the Anti-Dumping Agreement is Erroneous, Irrelevant and Should be Rejected**

23. Neither negotiating history of 1967 Kennedy Round and 1979 Tokyo Round anti-dumping codes, nor subsequent discussions of any issues with regard to these documents are relevant for the interpretation of Article 2.2 of the Anti-Dumping Agreement as they are documents related to other treaties. Anti-Dumping Codes are distinct from the Anti-Dumping Agreement, i.e. these are legally different treaties and each of them has its own negotiation history. Ukraine's position that the term "the particular market situation" implies "a market structure,

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<sup>3</sup> Emphasis added.

where the interaction of supply and demand and free price determination, is interfered with by government intervention" has no legal basis.

**Practice of Other WTO Members is Irrelevant for the Interpretation of the Term "the Particular Market Situation" under Article 2.2 of the Anti-Dumping Agreement**

24. The practice of other WTO Members is irrelevant for the interpretation of the term "the particular market situation" under Article 2.2 of the Anti-Dumping Agreement. First, decisions and other documents referred to by Ukraine constitute internal law of some WTO Members. Second, as it follows from the principles of treaty interpretation set out in Articles 31 and 32 of the Vienna Convention practice of other WTO Members referred to by Ukraine cannot be taken into account in the interpretation of either Article 2.2 or any other provision of the Anti-Dumping Agreement.

**The Analogy between Articles 2.2 and 2.2.1.1 in a Way Proposed by Ukraine is Unsubstantiated, Legally Flawed and Should be Rejected**

25. Contrary to Ukraine's assertion Article 2.2 of the Anti-Dumping Agreement does not contain word "unreliable", as well as there are no grounds to reject the cost data in the country of origin. Second, the Anti-Dumping Agreement targets *only* the individual pricing behaviour of exporters or foreign producers that engage in practices that result in situations of injurious dumping. In particular, Article 2.2.1.1 of the Anti-Dumping Agreement refers to the "records kept by the exporter or producer under investigation". Thus, Ukraine's argument that "there is nothing in the wording of Article 2.2.1.1 that would suggest that only particular actions of private parties may lead to the lack of reliability of the recorded costs"<sup>4</sup> is legally flawed.

**D. The Panel Correctly Found that Ukraine Acted Inconsistently with Article 2.2 of the Anti-Dumping Agreement**

26. The Russian Federation supports the Panels finding that Ukraine acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and requests the Appellate Body to uphold it and reject Ukraine's assertions these findings were in error.
27. First, the rulings of the Appellate Body in *US – Softwood Lumber IV* are not instructive for the anti-dumping proceedings. That dispute concerns the application of Article 14(d) of the SCM Agreement, and thus the panel and the Appellate Body considered different legal issues in comparison with the present dispute. The Russian Federation would like to stress that GATT/WTO provisions on subsidies shall *not* be transposed to provisions on anti-dumping. In the WTO, while subsidies are regulated by the Agreement on Subsidies and Countervailing Measures, anti-dumping measures are governed by the Anti-Dumping Agreement. It follows that the Agreement on Subsidies and Countervailing Measures is irrelevant for the interpretation of Article 2 of the Anti-Dumping Agreement.
28. Second, the Panel Correctly Found That the Gas Price Was Not Properly Adapted to Reflect the Costs "In the Country of Origin". In this regard, the Russian Federation submits that Article 2.2 of the Anti-Dumping Agreement clearly requires that when constructing the normal value the investigating authority shall use "the cost of production in the country of origin". Article 2.2 of the Anti-Dumping Agreement use the word "shall". The auxiliary verb "shall" indicates that this provision is of mandatory character as the word "shall" is "commonly used in legal texts to express a mandatory rule".<sup>5</sup>
29. Contrary to Ukraine's assertion, Article 2.2 of the Anti-Dumping Agreement does not provide the investigating authority with discretion to choose a benchmark that will "vary depending on the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents". Article 2.2 of the Anti-Dumping Agreement is precise in requiring from an investigating

<sup>4</sup> Ukraine's Appellant Submission, para. 65.

<sup>5</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 316.

authority to use "the cost of production in the country of origin" in construction of normal value.

E. **The Panel Correctly Found that Ukraine Acted Inconsistently with Article 2.2.1 of the Anti-Dumping Agreement**

30. The Panel did not err in finding that Ukraine violated its obligation under Article 2.2.1.1 of the Anti-Dumping Agreement since Ukraine relied on costs calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement. Accordingly, the Panel's finding that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement is correct.

F. **Ukraine's Claim Under Article 11 of the DSU Is Without Merit and The Panel Correctly Found that the Ukrainian Authorities Acted Inconsistently with Article 5.8 of the Anti-Dumping Agreement**

31. As a preliminary remark, The Russian Federation considers that Ukraine's arguments as to the findings of the Panel that the Ukrainian authorities determined that EuroChem was not dumping during the original investigation period are matters of fact that fall outside the jurisdiction of the Appellate Body pursuant to Article 17.6 of the DSU.
32. In any event, the Russian Federation considers that the Panel objectively analyzed the evidence presented by Ukraine and its probative value. As acknowledged by the Panel, the Ukrainian Courts' Judgments concluded to the absence of dumping on the part of EuroChem. "In pursuance of" these judgments, the Intergovernmental Commission adopted the 2010 Decision. Therefore, taken together, the Ukrainian Court's Judgments and the Ukrainian authorities' decision constituted a determination that the dumping margin for EuroChem in the original investigation was *de minimis*.
33. The Russian Federation considers that the Panel conducted a thorough review of the justifications advanced by Ukraine and rejected them based on reasoned and adequate explanations. First, Ukraine's claim that the Ukrainian authorities did not recalculate EuroChem's dumping margin was correctly dismissed by the Panel because Ukraine brought no evidence that the 2010 Decision adopted "in pursuance of" the Ukrainian Courts' Judgments did not endorse such judgments and the findings that EuroChem was not dumping during the original investigation. The Panel correctly noted that, accepting Ukraine's arguments, would open the door for circumvention of Article 5.8 of the Anti-Dumping Agreement. Secondly, Ukraine's claim that the Ukrainian Courts' findings were based on evidence presented by EuroChem was correctly dismissed by the Panel because the restraints alleged by Ukraine were rooted in domestic law. Such a restraint obviously cannot justify a departure from Article 5.8 of the Anti-Dumping Agreement. Third, the Panel rightly rejected Ukraine's claim that Ukrainian Courts are not competent to recalculate dumping margins and that, based on the Ukrainian Courts' judgments, the Ukrainian authorities could not recalculate a dumping margin, again, because this corresponds to a matter of domestic rather than WTO law.
34. The Russian Federation fully supports the conclusions of the Panel. All arguments brought by Ukraine correspond to restraints or justifications under municipal law, which cannot justify a departure from WTO law. The record shows that the Ukrainian Courts concluded that EuroChem was not dumping during the original investigation. The Intergovernmental Commission implemented this ruling without objection. Hence, there was a determination that EuroChem was not dumping during the original investigation, i.e. that it had a zero, negative or *de minimis* dumping margin. In that respect, Ukraine simply reiterates the claims made before the Panel, which is not the purpose of an appellate proceeding.
35. The Russian Federation therefore considers that the Panel's assessment of Ukraine's arguments complies with Article 11 of the DSU. Having established that Ukraine determined that EuroChem was not dumping during the original investigation, the Panel rightfully concluded that Ukraine acted in violation of Article 5.8 of the Anti-Dumping Agreement.
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## ANNEX C

## ARGUMENTS OF THE THIRD PARTICIPANTS

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ANNEX C-1

EXECUTIVE SUMMARY OF ARGENTINA'S THIRD PARTICIPANT'S SUBMISSION<sup>1</sup>

- I. Existence of an "adequate basis" for rejecting the cost reported by the investigated producers pursuant to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement. Factual findings.
- Argentina agrees with the Panel's findings - which are based on the Appellate Body's finding in *EU – Biodiesel* - to the effect that an "adequate basis" for concluding that the records of the investigated producers reasonably reflected the costs associated with the production and sale under the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement does not involve an examination of the reasonableness of the costs.
  - There is no additional standard of reasonableness that applies to "costs" in the second condition under Article 2.2.1.1 of the Anti-Dumping Agreement. The condition is fulfilled when the costs are genuinely related to the production and sale of the product under consideration.
  - The reference to "non-arm's length transactions or other practices" that may affect the reliability of the costs in the records should not be seen as an exception that permits the analysis of the reasonableness of costs instead of the reasonableness of the records.
- II. Calculation of the cost of production in the country of origin. Replacement of the cost in the country of origin by a surrogate price.
- The Appellate Body's findings under Article 14(d) of the SCM Agreement are not relevant in helping us to interpret Article 2.2 of the Anti-Dumping Agreement.

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<sup>1</sup> The original version of the executive summary and submission were submitted in Spanish.

## ANNEX C-2

### EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION

#### I. EXECUTIVE SUMMARY

1. Australia's submission addresses the interpretation of the Anti-Dumping Agreement in the context of government price setting.

#### A. Interpretation of Article 2.2.1.1

2. The interpretation of Article 2.2.1.1 must be subject to the "basic purpose" of cost construction under Article 2.2 – identifying an appropriate proxy for the normal value of the product under consideration.<sup>1</sup> Costs calculated under Article 2.2.1.1 must be capable of generating such a proxy.<sup>2</sup>
3. The setting of input prices by government is an anomalous circumstance in which recorded costs may not accurately reflect how *actual* costs have been apportioned between relevant transacting entities. If an input price set by government is above the market price, this will result in a net cost to the producer of the product; a price set below the market price will result in a net cost to the seller of the input. Neither such net costs would be reflected in the price paid, nor in the producer's records. It may therefore be necessary to adjust such prices to reflect the actual apportionment of costs between transacting parties.

#### B. Interpretation of Article 2.2

4. Determining the "cost of production in the country of origin" is also subject to this "basic purpose" of Article 2.2.
5. Any adjustments made to ensure an out-of-country benchmark reflects the cost of production in the country of origin must not reintroduce inaccuracies or unreliabilities – including any arising from government price setting – that would prevent the benchmark from yielding a reliable proxy for the normal value of the product.

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<sup>1</sup> Panel Report, *EU – Biodiesel (Argentina)*, para 7.233.

<sup>2</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.



## ANNEX C-3

## EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

## I. Ukraine's contentions under Article 2.2.1.1 of the ADA

1. The panel's and Appellate Body's findings in *EU – Biodiesel (Argentina)* do not provide the proper interpretative context for an assessment of whether an investigating authority could disregard properly recorded costs because they are not set on the basis of market-determined prices. The discussion focused on whether the producers' records reasonably reflected their costs and not on the costs themselves.
2. The term "normally" in Article 2.2.1.1 should have meaning and effect. The word "normally" implies that there may be "abnormal" circumstances where the producers' records could be put aside to calculate normal value. Thus, it should be interpreted in a strict manner.
3. The term "reasonably" in Article 2.2.1.1 refers to the correspondence between the costs registered on the records and those effectively incurred by the producer<sup>1</sup>. Therefore, the general disciplines of the GATT and of the Antidumping Agreement do not allow investigating authorities to dismiss the costs on producers' records solely because investigators deem costs themselves to be "unreasonable".
4. The mere fact of government participation or presence in a given market – short of the situation described in the first *Ad Note* to Article VI of the GATT – does not in itself indicate price distortions that should warrant deviation from in-country prices. In *US – Softwood Lumber IV*, in the context of Article 14 of the Subsidies Agreement, the Appellate Body found that this assessment should be made on a case-by-case basis.

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<sup>1</sup> *EU – Biodiesel (Argentina)*, Appellate Body Report, para. 6.39.

ANNEX C-4

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION

I. EXECUTIVE SUMMARY

A. Terms of reference issues

1. The European Union agrees with the Panel that a panel request has to be read as a whole. The European Union also recalls that information provided as background information is not part of the identification of the measure at issue. Whether a panel request sufficiently identifies a measure has to be assessed on a case-by-case basis.

B. Substantive aspects

2. In light of the International Standards on Auditing definition of arm's length transactions it may have been useful to also explore the fulfilment of the first condition in Article 2.2.1.1, namely that the records are in accordance with the generally accepted accounting principles of Russia.
3. In the context of the second condition in Article 2.2.1.1 it is important to examine in particular to which extent the third element is fulfilled (i.e. parties pursuing their own best interests).
4. The establishment of the domestic gas prices in Russia may fall under the category of "other practices" which may affect the reliability of the reported costs.
5. Certain government actions can be at the source of dumping and material injury, as confirmed by the Appellate Body in *United States – Anti-Dumping and Countervailing Duties (China)*.
6. The Appellate Body has held that when the relevant data may not be relied upon for the purpose of establishing normal value in the country of origin, an investigating authority may have recourse to information from outside the country of origin. To the extent necessary, such information must be adjusted to reflect normal market conditions in the country of origin. However, such data does not need to be adjusted back to an amount that is the same as the amount that would result from use of the very data rejected as unreliable.

ANNEX C-5

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. First, while Ukraine questions the Panel's interpretation of the second condition of the first sentence of Article 2.2.1.1, the Panel correctly found and Japan generally agrees that an investigating authority cannot reject the records of the investigated exporter or producer simply because the relevant input is priced below cost due to governmental regulation.
2. For example, based on universal service obligations, prices for certain customers could be below cost but this below-cost pricing can be explained by legitimate policy reasons, provided the regulated pricing is profitable overall based upon commercial principles. Thus, these circumstances alone do not necessarily raise questions about the reliability of the records.
3. Second, Ukraine argues that the Panel erred in the interpretation and application of Article 2.2. However, Japan sees no error in the Panel's interpretation recognizing that "investigating authorities *may* use out-of-country evidence [ ] provided they adapt this evidence to reflect the cost in the country of origin."<sup>1</sup>
4. In Japan's view, the required adjustments will depend on the type of information that is used to calculate. The investigating authority has certain discretion provided it ensures that the calculated cost represents the cost in the country of origin and adequately explains its adjustments. Japan also understands this does not mean that some kind of "adjustment" or "adaptation" is always necessary. If it is the case that adjustment is unnecessary, the investigating authority would be required to prepare an adequate explanation of why so.

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<sup>1</sup> Panel Report, para. 7.99.

## ANNEX C-6

## EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION

1. In this submission, the United States addresses the interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement, the use of out-of-country sources to derive the cost of production in the country of origin under Article 2.2 of the Anti-Dumping Agreement, and the inclusion in the terms of reference of Ukraine's 2008 original decision, as amended by the 2010 amendment, and the 2010 amendment itself.
2. First, an investigating authority may focus on State interference in the marketplace to ascertain under Article 2.2.1.1 whether the records kept by an investigated firm reasonably reflect the costs associated with the production and sale of the product under consideration. Ukraine provided a reasoned and adequate explanation for its decision to examine the records kept by the investigated firms given possible State interference in the marketplace for natural gas. The Panel therefore erred as a matter of law when it held that Ukraine's decision to examine the records of the investigated firms was not consistent with the second condition of Article 2.2.1.1.
3. Second, nothing in the text of Article 2.2 proscribes the use of out-of-country information to evaluate recorded costs, or to adjust or replace recorded costs when formulating the appropriate cost for an individual producer. Further, nothing in the text of Article 2.2 requires an investigating authority to adapt an out-of-country source for an input price back to the cost that had been rejected because it was not capable of generating an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country. An investigating authority therefore is not required under Article 2.2 to adapt an out-of-country source for an input price so as to match the rejected cost for that input.
4. Third, the Panel erred as a matter of law when it failed to compare the terms of Russia's consultations request to the terms of Russia's panel request before deciding if the 2008 decision and the 2010 amendment were properly within its terms of reference. Indeed, a comparison of the measures identified in Russia's consultations request to the measures identified in its panel request demonstrates that the Panel's legal conclusion was wrong, because the 2008 decision and the 2010 amendment were not identified and could not have been subject to consultations. The Appellate Body therefore should reverse the Panel's legal conclusions and findings with respect to these two measures that are outside the Panel's terms of reference.