



20 July 2018

(18-4552)

Page: 1/96

Original: English

## UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

### REPORT OF THE PANEL

#### *Addendum*

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

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

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## **ANNEX A**

### WORKING PROCEDURES OF THE PANEL

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## **ANNEX A-1**

### **WORKING PROCEDURES OF THE PANEL**

*Adopted on 3 April 2017 and revised on 21 September 2017*

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

#### **General**

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

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

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

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

#### **Submissions**

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

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

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

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

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

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

### **Questions**

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

### **Substantive meetings**

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

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

- a. The Panel shall invite the Russian Federation to make an opening statement to present its case first. Subsequently, the Panel shall invite Ukraine to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the Russian Federation presenting its statement first.

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

- a. The Panel shall ask Ukraine if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Ukraine to present its opening statement, followed by the Russian Federation. If Ukraine chooses not to avail itself of that right, the Panel shall invite the Russian Federation to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

### **Third parties**

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

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

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

- a. All third parties may be present during the entirety of this session.
- b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.
- c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.
- d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in

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

### **Descriptive part**

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

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

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

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

### **Interim review**

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

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

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

### **Service of documents**

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

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

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

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

- b. By 5 p.m. the next working day following the electronic filing, each party and third party shall file one paper copy of all documents it submits to the Panel, including the exhibits with the DS Registry. The DS Registrar shall stamp the documents with the date and time of the filing.
- c. The Panel shall provide the parties with the descriptive part, the interim report and the final report, as well as of other documents as appropriate, via the DDSR. When the Panel provides the parties or third parties both paper and electronic versions of a document, the electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute.

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



## **ANNEX A-2**

### **ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION**

*Adopted on 3 April 2017*

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

1. For the purposes of these Panel proceedings, BCI includes:
  - a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.
  - b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.
2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the anti-dumping investigation at issue in this dispute may not be designated as BCI if the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.
3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.
4. No person may have access to BCI except a member of the Secretariat assisting the Panel or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.
5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.
6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.
7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The

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

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

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

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

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

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

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## **ANNEX B**

### **ARGUMENTS OF THE PARTIES**

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## **ANNEX B-1**

### **FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF RUSSIA**

#### **I. INTRODUCTION**

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

#### **II. SUMMARY OF FACTS**

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

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

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

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

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

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

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

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

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

### **III. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS**

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

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

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

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

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

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

<sup>3</sup> Appellate Body Report, *EU – Biodiesel*, paras. 6.22, 6.30, 6.56.

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

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

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

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

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

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

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

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

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

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

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

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<sup>4</sup> Appellate Body Report, *EU – Biodiesel*, para. 6.22.

<sup>5</sup> Appellate Body Report, *China – HP-SSST (Japan)*, para. 5.22. (emphasis original)

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>7</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.272.

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

<sup>9</sup> Appellate Body Report, *US – Corrosion-Resistant Steel*, paras. 127, 130.

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

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

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

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

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

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

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

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

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<sup>10</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 217. (emphasis added)

<sup>11</sup> Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, paras. 305-306.

<sup>12</sup> Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, paras. 305-306. (emphasis original)



**V. SUBSTANTIVE CLAIMS RELATING TO THE LIKELIHOOD OF INJURY DETERMINATION**

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

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

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

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

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

38. Besides, it made affirmative conclusions on the likelihood of a future increase of imports from the Russian Federation based on an assumption regarding the future dynamics of imports attributable to this producer. Thus, the process of reviews carried out by Ukraine was not based on "positive evidence" and "objective examination" but favoured its domestic industry's interests.

39. Taking into account that provisions of Article 3 of the Anti-Dumping Agreement "contemplate a logical progression in an authority's examination leading to the ultimate injury and causation determination"<sup>13</sup> the fact that the Investigating Authority included in its injury analysis not dumped imports led to infection of all the conclusions regarding the effect of imports from the Russian Federation on the state of the Ukrainian domestic industry. Hence, Ukraine breached Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement.

**(B) The evaluation of economic factors and indices having a bearing on the state of the Ukrainian domestic industry was not based on an "objective examination" of "positive evidence"**

40. Ukraine breached its obligations under Articles 11.2, 11.3 and 3.4 of the Anti-Dumping Agreement since it: (a) failed to give an objective examination of factors and indices having a bearing on the state of domestic industry; (b) based its injury finding on a single factor, i.e. deterioration of financial results; (c) failed to give an objective examination of the substantial increase in the costs of production as a key factor having bearing on the state of domestic industry.

41. The evidence on the record shows that the likelihood-of-injury determination consisted of two steps: (1) determination of the current state of the domestic industry and (2) prospective analyses of what happens should the anti-dumping measures lapse. As to the first step, the Investigating Authority stated that the domestic industry had been suffering injury. Yet, a number of economic factors demonstrated strong positive trends not in line with this conclusion, i.e. upward trends *inter alia* in the volume of production, capacity utilization, market share and investments.

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<sup>13</sup> See Appellate Body Report, *China – GOES*, para. 143.

42. The injury analysis was based on selective use of information. In its likelihood of injury determination, the Investigating Authority attributed considerable weight to financial results of the domestic industry, but failed to provide any explanation on why this particular factor outweighed all the others. In fact, the Investigating Authority based its injury findings on the sole negative trend in profitability of the domestic industry.

43. The evidence on the record conclusively indicated that Ukrainian domestic industry's financial results were deteriorating due to an increase in production costs. But the Investigating Authority did not explain how the increase of production costs influenced the domestic industry.

44. An objective and unbiased investigating authority would not have made an affirmative determination on the likelihood of continuation (recurrence) of injury on the basis of the sole factor given the positive trends in other economic factors and indices. Investigating Authority's assessment of the current state of the domestic industry was done contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement. As a result, Ukraine failed to meet its obligations under Articles 11.1, 11.2, 11.3 of the Anti-Dumping Agreement.

## **VI. PROCEDURAL ISSUES AND CLAIMS**

### **A. Ukraine committed several procedural violations of its obligations under Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement**

45. Ukraine acted inconsistently with Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement for four reasons. Firstly, Ukraine resorted to the facts available in a situation when the Russian investigated producers and exporters cooperated and provided necessary information within a reasonable period of time. The Investigating Authority did not make any findings suggesting that Russian exporters and producers of ammonium nitrate either refused access to or otherwise failed to provide any necessary information within a reasonable period or significantly impeded the investigation and determinations.

46. Secondly, despite the cooperation of the Russian exporters and producers under the investigation and their appropriate submission of verifiable information in a timely fashion so that it could be used in the investigation without undue difficulties, the Investigating Authority rejected some information provided by them with respect to some of the costs associated with the production of the product under consideration and instead used in its determinations information from alternative sources. The completeness, correctness and accuracy of the information provided by investigated producers and exporters in their replies to the anti-dumping questionnaire were not questioned by the Investigating Authority.

47. Thirdly, the Investigating Authority failed to inform the investigated producers and exporters in advance of the fact that their responses to the anti-dumping questionnaire about some of the costs information had been rejected and of the reasons therefor. Finally, the Investigating Authority failed to give the Russian exporters and producers an opportunity to provide further explanations within a reasonable period of time.

### **B. Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement by not disclosing the essential facts**

48. Articles 6.2 and 6.9 of the Anti-Dumping Agreement provide for separate obligations for investigating authorities, which relate to disclosure of the essential facts.

49. The confidentiality of information could be a legitimate justification of a failure to disclose all the essential facts without violation of Article 6.9 of the Anti-Dumping Agreement. However, it could be the case only if a non-confidential summary of such information is disclosed, provided that such summary enables an interested party to understand the essential facts, comment on them, correct miscalculations and, thus, to defend its interests.

50. Investigating Authority sent to the interested parties the Disclosure containing its findings on dumping and injury made during the interim and expiry reviews. These findings did not sufficiently cover the essential facts about the likelihood of injury determination. Nor did they

contain precise figures and calculations sufficient for the parties concerned to understand how the Investigating Authority arrived at the conclusions on dumping determinations.

51. The lack of facts in the Disclosure prevented the Russian exporters and producers from commenting on these facts and, thus, deprived them of their rights to defend their interests guaranteed by Article 6.2 of the Anti-Dumping Agreement. What is more, Ukraine frustrated the purpose of the "essential facts" disclosure requirement by denying interested parties an opportunity to "provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts".<sup>14</sup> Consequently, the Russian producers were effectively deprived of the right to defend their interests because they were unable to present the rebutting arguments or address the errors in Investigating Authority's analyses. Therefore, Ukraine violated Articles 6.2 and 6.9 of the Anti-Dumping Agreement.

**C. Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by not providing sufficient time to comment on the Disclosure**

52. On 25 June 2014, the Investigating Authority sent the Disclosure to the interested parties imposing the deadline of 27 June 2014 for them to comment on this document. Thus, it provided only two calendar days for comments. One Russian producer with a negative dumping margin requested an extension of the deadline by 14 days. However, that request was not satisfied.

53. In the context of Article 6.9 of the Anti-Dumping Agreement, the ability of interested parties to defend their interests is strongly connected with their ability to submit arguments on the facts under consideration. In its turn, the ability to submit arguments is dependent upon the time when the disclosure of those facts was made. The two days deadline for commenting on essential facts which formed the basis for the decision made as a result of interim and expiry reviews was not sufficient for the parties to defend their interests. Accordingly, the Russian producers and exporters were effectively deprived of the right to defend their interests under Article 6.9 of the Anti-Dumping Agreement.

**VII. OTHER CLAIMS**

**A. Ukraine breached Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement**

54. Under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, an investigating authority has to provide in sufficient detail in form of a public notice the findings and conclusions reached on all issues of fact and law it considered in making its preliminary and final determinations, which have led to the imposition of the measures. As the Appellate Body indicated in *China – GOES*,<sup>15</sup> confidentiality concerns cannot excuse an investigating authority from its obligation to provide all materials relevant to its dumping determination and injury margin calculation.

55. The publication of the Disclosure and the 2014 Extension Decision do not constitute a public notice within the meaning of these provisions as Ukraine failed to report calculation methodology, whether in the form of worksheets and computer output or the description of the data and formulas applied, as well as all relevant information on the matters of fact and law which have led to the calculation of dumping margin. Besides, Ukraine did not provide all relevant information which formed the basis for its affirmative findings in respect of injury. In particular, it did not disclose data characterizing the state of the Ukrainian industry. Thus Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement were violated.

**B. Ukraine violated Articles 1, 18.1 of the Anti-Dumping Agreement and Article VI of the GATT due to its WTO-inconsistent behaviour described above**

56. Both determinations of dumping and extension by Ukraine of anti-dumping duties imposed on imports of ammonium nitrate originating in the Russian Federation violate numerous provisions of the Anti-Dumping Agreement. These measures also entail violations of Articles 1 and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

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<sup>14</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.805.

<sup>15</sup> Appellate Body Report, *China – GOES*, para. 259.

**VIII. UKRAINE'S REQUEST FOR A PRELIMINARY RULING SHOULD BE REJECTED IN ITS TOTALITY**

57. Ukraine alleged that the 2008 and 2010 Decisions are not sufficiently clear indicated in the Panel Request. Yet, both the claim itself and the Panel Request, read in its entirety, including the footnotes, indicate that these decisions have been duly identified as a challenged measure. Likewise, all claims of the Russian Federation are within the Panel's Terms of Reference and should be examined by the Panel.

58. First, the Panel Request sufficiently informed Ukraine and third parties about the Russian Federation's complaint on Ukraine's violation of Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement (Claim 1 in the Panel Request). The same is correct for Claim 17 and Claim 4 of the Panel Request.

59. The Russian Federation's Claim 17 is similarly reflected in the Panel Request with sufficient clarity. In addition to that, this claim (violation of Articles 11.1, 11.2, 11.3, 3.1 and 3.4) concerns the aspects of injury deriving from Claims 14-16 of the Panel Request. In Claim 4 of the Panel Request (breach of Articles 6.8 and paragraphs 3, 5 and 6 of Annex II of the Anti-Dumping Agreement), the Russian Federation also provided a brief summary of the corresponding factual background to enable Ukraine and third parties to understand the issue clearly.

60. Second, none of the claims made in the Panel Request expand the scope of the dispute or change the essence of the complaint. A combined reading of the Panel Request and the Request for Consultations shows that the legal basis of Claim 7 in the Panel Request (violation of Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement) naturally evolved from the legal basis of Claim 10 of the Request for Consultations (violation of Article 6.9 of the Anti-Dumping Agreement).

61. The inclusion of Claim 17 in the Panel Request (breach of Articles 11.1, 11.2, 11.3, 3.1 and 3.4 of the Anti-Dumping Agreement) was due to the fact that additional information was received during consultations and contributed to a better understanding of the operation of a challenged measure which warranted revisiting the list of treaty provisions with which the measure is inconsistent. This claim evolved from Claim 13 and 14 (Articles 6.6 and 11.2, and Articles 6.6 and 11.3 of the Anti-Dumping Agreement accordingly), as well as from Claim 7 set forth in the Request for Consultations (violation of Article 5.8 of the Anti-Dumping Agreement).

## **ANNEX B-2**

### **FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE**

#### **I. UKRAINE'S REQUEST FOR PRELIMINARY RULING**

##### **1. Measures not specified in the Panel Request**

1. The Russian Federation breached Article 6.2 DSU since it included a measure in its First Written Submission that was not identified in its Panel Request. While the Russian Federation's Panel Request clearly identifies the 2014 Decision as the measure at issue, nothing in the Panel Request indicates that this is also the case for the 2008 Decision. Quite on the contrary, the first two sentences of the Panel Request explicitly limit the scope of the dispute to the 2014 Decision by referring only to the measures "in connection with expiry and interim reviews. (...) as set forth in the [2014 Decision]." A use of plural or the mere mentioning of the 2008 Decision in a footnote is not sufficiently clear according to the panel in *China - Publications and Audiovisual Products* to comply with the requirements of Article 6.2 DSU.

##### **2. Claims having no basis in the Request for Consultations**

2. Ukraine submits that Claims 7 and 17 in the Panel Request have no basis in the Request for Consultations and therefore fall outside the terms of reference of the Panel. The Appellate Body held that it is not necessary that the claims in the request for consultations are identical to those set out in the panel request, provided that the legal basis in the panel request may reasonably be said to have evolved from the legal basis that formed the subject of consultations.<sup>1</sup> This last requirement has often been interpreted to require a close correlation between the provisions.

###### **(a) Claim 7 of the Panel Request**

3. With respect to Claim 7 of the Panel Request, it cannot be said that claims under Article 6.9 Anti-Dumping Agreement have evolved from the same legal basis as claims under Article 12.2 and 12.2.2 Anti-Dumping Agreement. The only similarity between these articles is that they contain an obligation to disclose information. However, as confirmed in WTO case law, the nature of these obligations is different. Article 6.9 relates to information and facts that must be disclosed to provide the parties with an opportunity to defend their interests, while Article 12.2 and 12.2.2 requires the investigating authority to disclose the reasoning of its final determination. Moreover, Article 6.9 requires the disclosure of facts before the final determination is made and Article 12.2 and 12.2.2 require the public notice after the final determination is made. A third difference relates to the purpose of the articles. The purpose of Article 6.9 is to provide the parties with the opportunity to defend their interests. Articles 12.2 and 12.2.2, on the other hand, is to ensure that the investigating authority's reasons for making the final determination can be discerned and understood by the public. For those reasons, Ukraine submits that there is no correlation between Article 6.9 and Articles 12.2 and 12.2.2.

###### **(b) Claim 17 of the Panel Request**

4. The Russian Federation argues that Claim 17 has evolved from the legal basis of Claims 7, 13 and 14 of the Request for Consultations. Contrary to the legal standard, the Russian Federation does not argue that the legal basis of Claim 17 is closely related to the legal basis of the Claims 7, 13 and 14. With regard to the correlation with Claim 7 of the Request for Consultations, the Russian Federation instead argues that the same factual circumstances – the inclusion of a producer with a *de minimis* dumping margin in the scope of the expiry and interim review – led to the violation of the Articles 5.8, 11.1, 11.2, 2.2, 2.4, 11.3, 9.2 and 9.3 listed in Claim 7 of the Request for Consultations and a violation of Articles 3.1 and 3.4 mentioned in the Panel Request. Nevertheless, case law has held that the mere fact that claims under two different articles are premised on the same or related factual basis, does not imply that such claims concern the same matter or that one claim has evolved from the other.

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<sup>1</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.

5. With respect to the correlation with Claims 13 and 14 of the Request for Consultations, the Russian Federation submits that because Claims 13 and 14 mention the word "injury", its claims under Article 3 naturally evolved from its claim under Articles 6.6, 11.2 and 11.3. However, case law has exhaustively explained the difference in nature and purpose between these articles. Consequently, the obligations under Article 3, on the one hand, and Articles 11.2 and 11.3, on the other hand differ in nature as to "what" has to be analyzed and evaluated. Article 3 calls for an analysis of whether the domestic industry is presently suffering from material injury caused by dumped imports, whereas Articles 11.2 and 11.3 call for the examination of the future situation following the termination of the anti-dumping order. Furthermore, in performing the analysis of the presently existing material injury as opposed to the evaluation of the future situation, the investigating authority has to comply with different obligations: Article 3 in the first scenario and Articles 11.2 and 11.3 in the second. Thus, there is clearly no correlation between the claims under Article 3 and the claims under Articles 11.2 and 11.3 which results in Claim 17 not falling within the terms of reference of the Panel.

## **II. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS**

### **(a) Article 2.2.1.1 Anti-Dumping Agreement**

6. Ukraine submits that the reliance by the Russian Federation on *EU – Biodiesel* is misplaced. First, the Russian Federation has selectively quoted certain portions from that proceeding while ignoring other equally important parts. Second, the factual circumstances in *EU – Biodiesel* were entirely different. The Russian Federation has then selectively applied certain legal considerations from that case to a whole different set of factual circumstances. The factual differences consist of the fact that:

- (i) the governmental price-fixing of the domestic Russian gas which is called dual pricing is WTO inconsistent. This is different from the export taxes that were in place in Argentina;
- (ii) the domestic Russian gas prices were found to be below cost, different from the prices of soybeans in Argentina;
- (iii) the government intervention was direct as opposed to the indirect effect of the export taxes in Argentina; and
- (iv) the result of the intervention in the Russian gas prices has been measurable and significant, whereas in Argentina, the prices were merely depressed. It is important to note that Gazprom is the predominant overall gas supplier in Russia (>70%), moreover, it accounts for virtually all gas supplies to the Agro-Chemical Industry to which ammonium nitrate producers belong.

7. Turning to the legal provisions under investigation, contrary to what the Russian Federation argues, the Appellate Body held in *EU – Biodiesel* that an investigating authority is certainly free to examine the reliability and accuracy of the costs recorded in the records of the exporters to determine whether all costs incurred are captured, understated and whether non-arm's-length transactions or other practices affect the reliability of the reported costs. Ukraine recalls that the Appellate Body provided three additional exceptions to reject the costs recorded in the records of the exporters; (i) non-arm's length transaction; (ii) other practices; and (iii) situations which are not 'normal'. Ukraine submits that its actions with respect to disregarding the cost of gas as pictured in the records of the Russian exporters fall within these exceptions.

8. The notion of non-arm's length is neither defined in the Covered Agreements, nor in Appellate Body case law. Since we are dealing with the most specific accounting provision within the Anti-Dumping Agreement, i.e. Article 2.2.1.1, Ukraine submits that for the definition of 'arm's length' the Panel should be guided by the relevant specific accounting definitions. GAAS and ISA provide that an arm's length transaction is "[a] transaction conducted on such terms and conditions between a willing buyer and a willing seller who are unrelated and are acting independently of each other and pursuing their own best interests." The domestic sales transactions of gas were not at arm's length since those prices do not reflect an interaction between independent buyers and sellers, pursuing their own best interests. This non-arm's length

nature of the practice therefore falls squarely within the first exception provided by the Appellate Body in *EU – Biodiesel*. Accordingly, the cost rectification by the Ukrainian authority was therefore in line with exception foreseen by the Appellate Body and is not inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.

9. Second, the factual situation in the Russian Federation's gas market is significantly unique to qualify as such 'other practice'. The facts demonstrate that there exists a clear practice in the Russian Federation which is definitely 'other' than which is usual in the commercial world, and which is also distinctly different from the factual situation in *EU – Biodiesel*. The illegal price fixing by the Government, the mandatory domestic gas sales below cost and the direct governmental intervention are all aspects of something that is not typical of most, if not all, other anti-dumping proceedings of WTO members. Such facts, therefore, clearly warrant denomination as an 'other practice' in the sense of one of the exceptions described by the Appellate Body in *EU – Biodiesel*. Since this practice can therefore be identified as 'other', it justifies a rectification of the line item for gas purchases in the records of the producers.

10. It is submitted that we do not need to get to the discussion of 'normally' since the particular situation in the Russian Federation already falls squarely in one of the two regular exceptions discussed above (non-arm's length or other practices). However, should the Panel deem it useful, Ukraine will be pleased to discuss as to why it considers that the domestic gas prices in the Russian Federation and their reflection in the accounting records are not normal. In such situation, Ukraine submits that the above described specific factual circumstances in this case (a) governmental price fixing, (b) prices fixed below cost, (c) direct governmental intervention which is (d) measurable warrant deviation from the obligation to normally base the cost on the records.

**(b) Article 2.2 of the Anti-Dumping Agreement**

11. Ukraine recalls that the situation before us is again vastly different than the one in *EU – Biodiesel*, where there was no need to look elsewhere for information. The persuasive reasoning of *US – Softwood Lumber IV* in the context of the *Agreement on Subsidies and Countervailing Measures*, as repeated by *EU – Biodiesel* in the context of the *Anti-Dumping Agreement* is instructive. In very specific and unique circumstances, such as the one that the Ministry of Economic Development and Trade of Ukraine (MEDTU) was facing, interpretation must be given to a legal concept in light of the economic facts that underpin it. In this case, as a result of the artificial and pervasive nature of the domestic gas prices in the Russian Federation, the investigating authority was compelled to resort to information and evidence from outside the country of origin to arrive at and determine the cost inside the country of origin. Compliance with this obligation may then require the investigating authority to adapt the information. This is exactly what the investigating authority did. It considered prices of Russian gas sold on a free market. It adjusted these prices back so as to arrive to the price within the Russian Federation. In so doing it carefully limited itself to the distorted line item of gas prices and did not substitute the entire cost of the product under consideration.

**(c) Article 2.2.1 of the Anti-Dumping Agreement**

12. This claim represents not much more than a repetition of the Russian Federation's discontent with the calculation of the normal value inclusive of the cost rectification. To this extent, claim 3 is therefore consequential to claim 1. Ukraine submits that the Russian Federation's argument has no merit as the investigating authority did not violate the provisions of Article 2.2.1.1 of the Anti-Dumping Agreement.

13. In any event, MEDTU conducted the ordinary course of trade test on the basis of the determined cost of production and found that the sales of the Russian producers were not made in the ordinary course of trade. When making this determination, MEDTU assessed whether (i) the sales were made at a loss within an extended period of time; (ii) the sales were made at a loss in substantial quantities; and (iii) the prices did not provide for recovery of all the costs within a reasonable period of time. Based on this assessment, MEDTU concluded that the sales of the Russian producers were not in ordinary course of trade.

14. Further, even if the Panel were to uphold the claim that Article 2.2.1.1 of the Anti-Dumping Agreement had been violated, this does not mean that the obligations under Article 2.2.1 have

been violated as a consequence. Article 2.2.1.1 and Article 2.2.1 contain distinct obligations that should not be mixed.

**(d) Article 2.4 of the Anti-Dumping Agreement**

15. The "difference" that the Russian Federation claims "affects price comparability" between the normal value and the export price, such that "due allowance" should have been made in order to ensure a "fair comparison" under Article 2.4, arose from the methodology used by MEDTU to determine the normal value. Unlike the examples in the illustrative list in Article 2.4, the alleged "difference" is not a characteristic of the transactions being compared. It was a methodological approach that affected the cost of ammonium nitrate, but it did not affect the price comparability of the normal value and the export price. This approach has been confirmed by the Appellate Body in *US – Zeroing (EC)*.

16. Furthermore, the Appellate Body held in *EU – Biodiesel* that Article 2.2.1.1 and Article 2.4 serve different functions in the context of determinations of dumping whereby the former assists an investigating authority in the calculation of costs for purposes of constructing the normal value; whereas the latter concerns the fair comparison between the normal value and the export price.<sup>2</sup> Similarly, the panel held in *EU – Footwear (China)* that "[n]othing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price."<sup>3</sup>

**III. VIOLATION OF ARTICLES 5.8, 11.2 AND 11.3 OF THE ANTI-DUMPING AGREEMENT BY INCLUDING A RUSSIAN PRODUCER WITH A NEGATIVE DUMPING MARGIN IN THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS**

17. First, the 2008 Decision, as amended by the 2010 Decision, falls outside of the scope of the Panel's terms of reference. Therefore, the only issue before the Panel is whether the 2014 Decision violates Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement. Since the Russian Federation did not specify which actions of MEDTU violate these legal provisions, the claim under Articles 11.1, 11.2 and 11.3 should be dismissed as unfounded since the Russian Federation has failed to provide a *prima facie* case.

18. The claim under Article 5.8 must equally be dismissed since the Russian Federation erroneously relied on the findings of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. The findings of the Appellate Body relate to the determination of a zero or *de minimis* dumping margin by the investigating authority. MEDTU, in fact, found dumping margins of 40.5% and 82.2%. Therefore, there was no obligation to terminate the investigation. Moreover, the Appellate Body held, in line with the findings of several panels, that the obligation is only limited to original investigations and that no such obligation arises in the context of interim reviews, expiry reviews and administrative reviews.

19. Finally, if the Panel is of the view that a case could have been brought against the 2008 Decision, as amended by the 2010 Decision, Ukraine submits that this claim should be rejected. Based on case law, there are three cumulative conditions that must be met before an investigating authority needs to terminate an investigation. These are that (1) it relates to an original investigation; (2) a negative or *de minimis* dumping margin is determined; and (3) this dumping margin determination is made by the investigating authority. These conditions are not met since, first, the 2008 Decision found a dumping margin for EuroChem of 10.78%. Second, no investigating authority ever found a zero or *de minimis* dumping margin. The 2010 Decision – taken following a series of decisions by the Ukrainian courts – did not determine that EuroChem's dumping margin was negative, zero or *de minimis*. The 2010 Decision merely enforced the rulings of the Ukrainian courts that EuroChem's dumping margin was not correctly determined. Rather than recalculating EuroChem's dumping margin, the Interdepartmental Commission on International Trade only modified the anti-dumping *duty* rate – and not the *margin* – applicable to EuroChem and changed this duty rate to zero.

20. Panels previously made a clear distinction between the purpose of an original investigation and a duty assessment procedure under Article 9.3 of the Anti-Dumping Agreement when it

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<sup>2</sup> Appellate Body Report, *EU – Biodiesel*, para. 6.48

<sup>3</sup> Panel Report, *EU – Footwear (China)*, para. 7.263. See also Panel Report, *EU – Biodiesel*, para. 7.296



quoted the panel's findings in *US – DRAMS* that "...in the context of Article 5.8, the function of the *de minimis* test is to determine whether or not an exporter is subject to an anti-dumping order. In the context of Article 9.3 duty assessment procedures, however, the function of any *de minimis* test applied by Members is to determine whether or not an exporter should pay a duty."<sup>4</sup> Similarly to an Article 9.3 duty assessment procedure, the 2010 Decision merely set a new duty level for EuroChem but did not calculate a new dumping margin for that producer.

21. Since the three conditions are not met, no obligation to terminate the investigation existed upon MEDTU. Claim 7 of the First Written Submission must therefore be dismissed.

#### **IV. SUBSTANTIVE CLAIMS REGARDING LIKELIHOOD OF RECURRENCE AND/OR CONTINUATION OF INJURY DETERMINATION**

##### **(a) The Russian Federation's reliance on Article 3 Anti-Dumping Agreement**

22. Ukraine notes that it is a well-established rule in WTO jurisprudence that provisions of Article 3 of the Anti-Dumping Agreement do not apply to likelihood of recurrence or continuation of injury determinations in expiry and interim reviews. Ukraine agrees that in the course of expiry and interim reviews, an investigating authority is obliged to base its findings on an objective examination of positive evidence. However, the source of this obligation are Articles 11.2 and 11.3 themselves and not Article 3. Consequently, Ukraine asks the Panel not to consider any of the Russian Federation's claims based on the alleged violations of Article 3 of the Anti-Dumping Agreement.

##### **(b) Proper interpretation of MEDTU findings**

23. The arguments of the Russian Federation are based on an erroneous interpretation of the obligations of an investigating authority under Articles 11.2 and 11.3 of the Anti-Dumping Agreement. It should be pointed out that neither Article 11.2 nor Article 11.3 of the Anti-Dumping Agreement obligate an investigating authority to make a determination that the domestic industry is suffering material injury. Instead, the investigating authority is tasked with making a determination in respect of the likelihood of recurrence or continuation of dumping and injury should the anti-dumping measures be terminated.

24. Most of the Russian Federation's arguments are premised on the erroneous presumption that MEDTU made a finding that the Ukrainian industry was suffering material injury and that such a finding was the basis for MEDTU's determination of the likelihood of recurrence of injury. MEDTU did not determine that the Ukrainian industry was suffering from material injury. Instead, MEDTU determined that (i) during the period of investigation of the interim and expiry review, the Russian producers continued to export dumped products; (ii) there was no indication that the pricing behavior would change; (iii) the Russian producers were also exporting dumped products to other markets; (iv) in case the duties would be terminated, the Russian producers would increase their exports which would have an impact on the prices in the market; and (v) patterns showed the increase in Russian imports in the periods when the application of the anti-dumping duty was suspended.

##### **(c) EuroChem imports**

25. The Russian Federation claims that EuroChem should not have been included in the determination on likelihood of injury since its dumping margin was zero. However, in an expiry review, an investigating authority is under no obligation to exclude from the likelihood of recurrence of injury analysis the volume of imports from a producer currently not found to be engaged in dumping (which was not the case here in any event). Nevertheless, nothing in Articles 11.1, 11.2 and 11.3 prohibits an investigating authority from analysing the import volume trends in respect of the product subject to a zero anti-dumping duty in order to make a determination as to the likely behaviour of producers subject to the anti-dumping duties, once such duties are removed. The analysis of EuroChem's export and prices indicated that a surge of imports was to be expected if the duties were terminated.

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<sup>4</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.142 (emphasis added).

**(d) Alleged undue reliance on the profitability of the Ukrainian industry**

26. Contrary to what the Russian Federation is arguing, MEDTU did not solely make a determination on the likelihood of the recurrence of injury based on the decrease of profitability of the Ukrainian industry. Instead, it determined that there was a likelihood of recurrence of injury based on (i) the likely increase of the dumped imports should the anti-dumping measures be terminated; (ii) the impact of the dumped imports on the prices of the national producers; and (iii) the consequential impact on the state of the Ukrainian industry. Secondly, taking into account the dramatic drop in profitability of the domestic industry, it was not unreasonable for MEDTU to conclude that the Ukrainian industry was still in a fragile state.

**(e) Analysis of the costs of production of the Ukrainian industry**

27. Finally, the Russian Federation argues that MEDTU failed to examine the cost of production as a factor having a bearing on the state of the industry under Article 3.4 of the Anti-Dumping Agreement. In that respect, it suffices to note that the Russian Federation's claim is based on an incorrect understanding of the facts of the case. MEDTU in fact examined the increase in the cost of production of the Ukrainian industry. MEDTU determined that the cost of production significantly increased, at a pace exceeding the increase in the sales prices, thus resulting in a significant decrease of the profitability.

**V. PROCEDURAL CLAIMS**

**(a) Alleged recourse to facts available**

28. The Russian Federation argues that MEDTU's decision to disregard the costs for gas in the records of the investigated producers equates to a decision to resort to facts available under Article 6.8 of the Anti-Dumping Agreement. It is clear, based on the investigation record, that the information about costs of gas in the producers' records was not rejected on evidentiary grounds under Article 6.8 of the Anti-Dumping Agreement. Instead, the information regarding the costs of gas in the records of the investigated producers was accepted into evidence, analyzed by MEDTU and thereafter rectified based on the substantive rules regarding the determination of costs under Article 2.2.1.1 of the Anti-Dumping Agreement. The Russian Federation tries to blur the lines between the procedural and evidentiary rules in Article 6.8 on the one hand, and substantive rules in Article 2.2.1.1 regarding the dumping determination, on the other hand. However, Article 6.8 and Annex II do not govern how an investigating authority is to calculate dumping margins.

**(b) Alleged deficiencies in the disclosure of the essential facts**

29. The Russian Federation's claim regarding the disclosure of essential facts in the likelihood of recurrence of injury relates first to the figures and price effects analysis and second, to the figures in Tables 11.3.1 to 11.3.6 in the Disclosure. First, The Russian Federation bases its arguments on the findings of the Appellate Body in *China – GOES*. Nevertheless, this case concerned an original investigation whereas the investigation at issue is a combined interim and expiry review. Moreover, as far as the data in Tables 11.3.1 through 11.3.6 is concerned, the Russian Federation did not advance any argument at all to demonstrate that such data would constitute essential data within the meaning of Article 6.9 of the Anti-Dumping Agreement.

30. Further, Ukraine recalls that the disclosure obligations under Article 6.9 of the Anti-Dumping Agreement relate to essential facts on the record of the investigating authority and not to reasoning or explanations.<sup>5</sup> Since neither of the Russian Federation's two complaints deal with the disclosure of facts, they do not fall within the scope of Article 6.9 of the Anti-Dumping Agreement.

31. Finally, Ukraine notes that the information in Tables 11.3.1 through 11.3.6 was properly disclosed to the interested parties taking into account MEDTU's confidentiality obligations under Article 6.5 of the Anti-Dumping Agreement. The disclosure of trends' data instead of absolute figures is a generally used method for providing non-confidential summaries of confidential data and this does not render the disclosure concerning price effects inconsistent with the requirements of Article 6.9 of the Anti-Dumping Agreement.

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<sup>5</sup> Appellate Body Report, *China – Autos (US)*, para. 7.145.

32. Regarding the essential facts in the dumping calculations, MEDTU disclosed the essential facts underlying its dumping determinations in sufficient detail so as to enable the Russian exporting producers to understand clearly which data was used for the calculation of the dumping margins. MEDTU explained the applied methodology in detail and referred to precise information in the questionnaire responses of the investigated Russian producers used to calculate the dumping margin. The actual figures are indeed not reflected in the Disclosure. Nevertheless, sufficient details were given and disclosure took place by form of reference to the specific data which was in the possession of the investigated Russian producers.

#### **VI. CLAIMS UNDER ARTICLES 12.2 AND 12.2.2**

33. In respect of the Russian Federation's claims under Articles 12.2 and 12.2.2, Ukraine reiterates its position as set out in Ukraine's First Written Submission. Further, Ukraine notes that the Russian Federation's claim under Articles 12.2 and 12.2.2 is limited to the lack of disclosure in respect of the dumping margin calculations. In its First Written Submission, however, the Russian Federation additionally argues that Ukraine violated Articles 12.2 and 12.2.2 by not disclosing in sufficient details the data regarding injury margin calculations and determination of the likelihood of the recurrence of injury. Since claim 7 in the Panel Request only mentioned the deficiency of the disclosure in respect of the dumping margin calculations, the Russian Federation's claims in respect of the injury margin calculations and determination of the likelihood of the recurrence of injury are outside the Panel's terms of reference.

#### **VII. CONCLUSIONS**

34. Ukraine has demonstrated the lawfulness of the anti-dumping action that Ukraine has taken in respect of the injuriously dumped ammonium nitrate from the Russian Federation.

## ANNEX B-3

### SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF RUSSIA

#### I. INTRODUCTION

1. In this second integrated executive summary the Russian Federation summarizes arguments presented to the Panel in its second written submission, its opening and closing oral statements at the second substantive meeting and its responses to the Panel's questions after the second substantive meeting.

#### II. PRELIMINARY ISSUES – TERMINOLOGY AND ADMISSION OF EVIDENCE

2. The Russian Federation objects to both the use of the term "Investigation Report" and the designation of Report on the Gas Market of Russian Federation prepared by the Ukrainian State Enterprise "Ukrpromvneshekspertiza" by Ukraine as "underlying the investigation report" and respectfully requests the Panel to use the term "Disclosure" in its references to Exhibit RUS-10 and Exhibit UKR-17 in its Report.

3. Also, the Russian Federation does not agree with the usage of the term "rectification" or "rectify", which is a misrepresentation by Ukraine of what actually was a *substitution* of natural gas prices actually paid by the Russian producers with a surrogate price for natural gas destined for export charged at the "border with Germany".

4. Along with the request to disregard Exhibits from UKR-1 to UKR-8, the Russian Federation respectfully asks the Panel to disregard Ukraine's exhibits from UKR-31 to UKR-40. These exhibits are irrelevant to the consideration of the Russian Federation's claims. They are acts of *ex post* rationalization since none of them are referenced in the Disclosure and some of them even postdate the Disclosure. Legal acts and anti-dumping practices of other WTO Members referred to by Ukraine are also irrelevant since they are part of internal law of other WTO Members and concern anti-dumping investigations based on the facts that are not before the Panel in this dispute.

#### III. SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

##### **A. Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because it failed to calculate the cost of production of ammonium nitrate in the Russian Federation on the basis of the records kept by the Russian producers of ammonium nitrate**

##### **(A) Facts of the present case are similar to those in EU – Biodiesel**

5. The Russian Federation considers that the findings of the panel and the Appellate Body in *EU – Biodiesel* are highly relevant to the present dispute. The factual circumstances at hand are similar to those in *EU-Biodiesel*: (i) the measures concerned are anti-dumping measures; (ii) in both cases investigating authorities (1) did not allege that the records of the investigated producers were improper, flawed, or otherwise inconsistent with the generally accepted accounting principles of the exporting countries; (2) did not allege that the prices for raw materials in the records kept by the investigated producers did not represent the actual prices incurred by those producers, thus in both disputes input prices were considered as recorded correctly; (3) considered that Article 2.2.1.1 of the Anti-Dumping Agreement allows them to examine the "reasonableness" of the costs reflected in the records of the investigated producers and exporter; (4) disregarded the actual prices of raw materials, correctly reflected in the records of the investigated producers and exporters; (5) relied explicitly on the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement to justify such rejection; (6) replaced input prices actually incurred by the investigated companies with the surrogate prices of raw materials and used them in the calculation of the cost of production of the products under consideration; (7) concluded that domestic sales of the product were not made in the ordinary course of trade and the normal value had to be constructed; (8) used the cost of production of the product under consideration, and replaced the raw material prices with surrogate prices, to construct the normal value of the products; (9) used the surrogate prices for raw materials that did not represent the cost of raw materials in the domestic market of the products under consideration for their producers or

exporters; (iii) in both cases inconsistencies with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement are claimed.

6. In addition, Ukraine's reference to the Appellate Body Report in *EU – Biodiesel* into its first written submission indicates its agreement with the Appellate Body's interpretation of Article 2.2.1.1 and the application of that Article in that case.

**(B) Arguments based on the analysis of prices of natural gas in the Russian Federation are irrelevant**

7. The examination of the reasonableness of prices paid for input (i.e. natural gas), as well as the government regulation of prices on inputs, falls outside the scope of provisions of Article 2, in particular Articles 2.2, 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement. Thus, all arguments concerning the alleged "factual differences" between the present dispute and *EU – Biodiesel* presented by Ukraine do not offer any valid reasons, let alone legal grounds for deviation from the findings of the Appellate Body in *EU – Biodiesel*.

8. Russian commitments envisaged in the Working Party Report on Russia's Accession to the WTO and corresponding arguments of Ukraine are irrelevant to this dispute and outside the Panel's terms of reference. Their consideration would be contrary to Article 3.10 of the DSU as an attempt to link several distinct matters in the same proceedings. The paragraphs of the Working Party Report cited by Ukraine do not contain a special commitment of the Russian Federation on price comparability for the purpose of anti-dumping proceedings. Any discussions and commitments reflected in these paragraphs are irrelevant for the examination of Russia's claims in the dispute at issue. In addition, Members of the Working Party on Russia's accession were satisfied with the explanations provided by the representative of the Russian Federation, including those on the pricing policies; they knew that some prices on natural gas were regulated in the Russian Federation, and agreed that some prices on gas in the Russian Federation would be regulated in the future. Reference to the Working Party Report on Russia's Accession to the WTO provided in the Disclosure is irrelevant and approach of Ukrainian authorities in reading of accession documents and evaluation of its own and Russia's regulation of prices on natural gas highlight that they were not objective during the anti-dumping proceedings on imports of ammonium nitrate from the Russian Federation.

9. The question of whether Russian gas suppliers conduct their business practice in accordance with Article XVII:1(b) of the GATT 1994 is irrelevant for this dispute. The measure at issue in this dispute is not about the business practice of Russian gas suppliers, but about the consistency of Ukraine's anti-dumping measures with the WTO Agreements. Article 2.2.1.1, as well as other provisions of Article 2 of the Anti-Dumping Agreement, do not provide a legal basis for an investigating authority's analysis of whether an investigated producer or exporter, or a supplier of raw materials to an investigated producer or exporter, is a state trading enterprise and of whether such an enterprise acts in accordance with Article XVII of the GATT 1994. The preparatory work during the Uruguay and Tokyo rounds confirm this understanding.

10. Any arguments related to the Supplementary Provision to Article VI:1 in Annex I to the GATT 1994 (the second Ad Note to Article VI of the GATT 1994) or "the particular market situation" are irrelevant to this dispute. These arguments were not considered by Ukrainian authorities while conducting underlying reviews and therefore constitute *ex post* rationalization considerations contrary to Article 17.6(i) of the Anti-Dumping Agreement.

11. Ukrainian authorities' "determination" on the gas supplier cost of production of natural gas is irrelevant and WTO-inconsistent. In the current case: (i) the product under consideration and the like product are both ammonium nitrate originating in the Russian Federation; (ii) natural gas is a raw material used to produce ammonium nitrate, and, thus, natural gas is not a like product to ammonium nitrate; (iii) the investigated producers are the Russian producers of ammonium nitrate and not the producers of natural gas; (iv) the investigated producers purchase natural gas; (v) the records of the investigated producers correctly reproduced the cost of production of ammonium nitrate including prices paid by these producers for natural gas. Taking these and the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement into account, the examination of the investigating authority should have been focused on whether the records of the investigated producers of ammonium nitrate reasonably reflect the costs *actually* incurred by them for the product under consideration, including *actual prices* paid for natural gas.

12. However, Ukrainian authorities went further and examined the reasonableness of prices for *natural gas*. In this analysis, Ukrainian authorities compared the recorded actually paid prices for natural gas with some hypothetical costs that might have been incurred under a different set of

circumstances and with gas prices in other markets. Neither Articles 2.2.1.1, 2.2.1, 2.2 nor any other disciplines (including Article 6.6) of the Anti-Dumping Agreement allow assessment of prices for inputs in determination of normal value.

13. The Russian Federation emphasizes that gas suppliers were *not* "the investigated producers" for the purpose of the anti-dumping proceedings. That means *inter alia* that the cost of production of natural gas was neither reviewed, nor commented on by the Russian gas suppliers. Finally, Ukrainian authorities erroneously presumed and in fact never determined the identity of the supplier of gas to the investigated producers of ammonium nitrate. Had Ukrainian authorities checked the identity of the suppliers of gas to the Russian exporting producers, they would have found, for instance, that they were supplied with gas by different gas producers and not just the one that was wrongly presumed by Ukraine to be the sole supplier of gas to the investigated producers. On the basis of these considerations, all Ukraine's arguments, reasons and evidence related to the costs of production of natural gas in the Russian Federation shall be rejected.

14. Moreover, Ukraine's characterization of government regulation of natural gas prices and its alleged effect is irrelevant to the settlement of this dispute since Article 2.2.1.1 of the Anti-Dumping Agreement does not allow to examine government regulation and its effect. Instead it prescribes examination of the quality of records of "the exporter or producer under investigation" and the proper allocation of costs. This is in line with the general concept of dumping which "relates to the pricing behavior of exporters or foreign producers".<sup>1</sup>

15. By characterizing the government regulation at issue as alleged "direct intervention", Ukraine tries, on the one hand, to downplay the situation in Argentina explored in *EU – Biodiesel*, and, on the other hand, to exaggerate the situation in the Russian Federation. The situation in Argentina cannot be even compared with the regulation of some prices for natural gas in the Russian Federation. While price regulation and export duties are both government regulations, Article 2.2.1.1 of the Anti-Dumping Agreement does not require any analysis related to government regulation, including its nature (whether it is direct or not), thus rendering such determination irrelevant for the present dispute.

16. As to evaluation of the alleged effect of the government regulation of prices on natural gas in the Russian Federation in comparison to the regulation analyzed by the panel in *EU-Biodiesel*, the EU authorities, contrary to Ukraine's allegations, were able to measure the effect of government regulation quite precisely.

**(C) Arguments based on footnote 400 of the panel report in *EU – Biodiesel* are irrelevant and legally flawed**

17. In its search for the legal basis justifying its measures, Ukraine attempts to invoke footnote 400 of the panel report in *EU – Biodiesel*. First, its reference to this footnote, as well as to paragraphs of the Appellate Body Report that refer to footnote 400, is an act of *ex post* rationalization, and therefore should be rejected in its totality. Second, neither "non-arm's length transactions" nor "other practices" in footnote 400 of the panel report in *EU – Biodiesel* can be qualified as "legal exceptions" from application of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement. The Anti-Dumping Agreement under no circumstances permits measures inconsistent with its provisions, since there are no exceptions in this Agreement like, for example, general exceptions in the GATT 1994. Third, footnote 400 of the panel report in *EU – Biodiesel* constitutes *obiter dictum*, since neither the Appellate Body, nor the panel made any particular affirmative findings based on substantive statements of this footnote. Therefore footnote 400 of the panel report in *EU – Biodiesel* does not constitute legal basis in a manner Ukraine claims it to be.

18. In addition, Ukraine arguments based on the "arm's length" test for determination of normal value are irrelevant for several reasons, including: (i) Article 2.2.1.1 of the Anti-Dumping Agreement does not contain an additional, third, condition that would permit an investigating authority to use this test; (ii) its applicability will be contrary to what Article 2.2.1.1 prescribes, i.e., comparison between the costs reported in the records kept by the investigated producers and the costs actually incurred by that investigated producer; (iii) the context of Article 2.2.1.1 (including the text of Article 2.3) does not support Ukraine's position either; (iv) its application contradicts the Appellate Body's ruling that the examination of the reasonableness of costs is not permitted under Article 2.2.1.1 of the Anti-Dumping Agreement; (v) it ignores that dumping arises

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<sup>1</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 156 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 129).

from the pricing behaviour of an exporter of the product under investigation, and not of a third party (producer of input).

19. Moreover, the suggested by Ukraine definition of an arm's length transaction shall not be accepted. The suggested analysis of government regulation of prices of inputs as well as of producers of inputs and their business structure and operation, the cost of production of inputs would result in a violation of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement. Also, Ukraine relies on definitions from the *auditing standards, international and those of the US*, while Article 2.2.1.1 of the Anti-Dumping Agreement concerns generally accepted *accounting principles of the exporting country*, i.e. the Russian Federation in this case.

20. In its argumentation on the relevance of Article 2.3 of the Anti-Dumping Agreement, Ukraine ignores the functional and textual differences between Articles 2.2.1.1 and 2.3 of the Anti-Dumping Agreement. While Article 2.3 governs the methodology for determining the export price, Article 2.2.1.1 concerns the calculation of the cost of production for determination of the normal value. Provisions of Article 2.2.1.1 and Article 2.3 contain different obligations and address different issues, and should not be mixed up. In particular, Article 2.2.1.1 does not include the terms "unreliable", "independent buyer". The absence of such wording in Article 2.2.1.1 and other provisions relevant to the determination of normal value also indicates that Article 2.3 should not be considered as the relevant context for interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.

21. Ukraine's arguments on "other practices" are not relevant either. Consistently with the well-established *ejusdem generis* canon of construction, the category of "other practices" should be understood as encompassing only such practices as are of the same kind as those preceding this phrase in footnote 400 of the panel report in *EU – Biodiesel*. Thus, the immediate context of the phrase suggests that the words "other practices" should be understood as reporting and business practices, i.e. the reporting practices of the investigated producers or exporters, but not as practices of governments. This is confirmed by the conclusion of the panel in *EU – Biodiesel*, in which it emphasized that records should adequately report the actual costs incurred by the particular producer or exporter for the product under consideration.<sup>2</sup>

**(D) Ukraine's arguments based on the interpretation of the word "normally" in Article 2.2.1.1 of the Anti-Dumping Agreement are irrelevant and legally flawed**

22. Ukraine cannot rely on the word "normally" in Article 2.2.1.1 of the Anti-Dumping Agreement as all such arguments constitute *ex post* rationalization. Furthermore, there is a limited number of explicit provisions that would allow investigating authorities in the course of normal value determination to disregard costs reflected in investigated producers' and exporters' records (when both conditions of the first sentence of Article 2.2.1.1 are satisfied) when determining the normal value. The exhaustive list of such provisions is: the third sentence of Article 2.2.1.1 of the Anti-Dumping Agreement and its footnote 6; Article 2.7 of the Anti-Dumping Agreement and the incorporated second Ad Note to Article VI:1 of the GATT 1994; special commitments on price comparability in the accession protocols of certain Members. None of them apply in the present case.

23. In this regard, the panel's interpretation of the term "normally" in *China – Broiler Products* is problematic, as not being balanced since it put more weight on the side of an investigating authority and should not be used. Also, there is no need to outreach to the *US – Clove Cigarettes* on the applicability of the TBT Agreement in order to examine the term "normally" in its ordinary meaning in Article 2.2.1.1 of the Anti-Dumping Agreement. The relevant context, namely Articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 support this understanding.

24. As to the interpretation of the term "appropriate proxy" in paragraph 6.24 of the Appellate Body Report in *EU – Biodiesel*, the Russian Federation submits that "the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country" means that an investigating authority is required to establish as accurately as possible the price of the like product in the domestic market.

25. In their examination of the records kept by the Russian investigated producers and exporters Ukrainian authorities were biased and not objective. There was no legal reason to reject prices of natural gas. Ukraine acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-

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<sup>2</sup> Panel Report, *EU – Biodiesel*, para. 7.232.

Dumping Agreement as Ukrainian authorities failed to calculate the cost of production of ammonium nitrate on the basis of the records kept by the investigated producers and exporters of ammonium nitrate.

**B. Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement by replacing (adjusting) gas prices actually paid by the Russian investigated producers and exporters with data outside the Russian Federation, and using such data subsequently for construction of the normal value**

**(A) Any ruling based on Article 14(d) of the SCM Agreement is not applicable to the present dispute**

26. Contrary to Ukraine's suggestion, neither Article 14(d) of the SCM Agreement, nor reasoning, interpretations and findings by the panel and the Appellate Body in *US – Softwood Lumber IV* apply to this dispute. There is no legal basis for the inclusion of obligations of Article 14(d) of the SCM Agreement into the framework of Article 2.2 and 2.2.1.1 of the Anti-Dumping Agreement. These provisions use entirely different terminology, different structure, and different wording. The primary focus of determining a subsidy under the SCM Agreement lies in the analysis of a government's actions, while the rules on determination of dumping stipulated by Article 2 of the Anti-Dumping Agreement are focused on "the foreign producer's or exporter's pricing behavior". Suggested applicability of Article 14(d) of the SCM Agreement is contrary to the intention of drafters to treat different problems differently with different instruments. Had the drafters intended so, they would have made an explicit reference or incorporated a similar wording in these articles of the Anti-Dumping Agreement.

27. Accordingly, the approach advocated by Ukraine, if adopted, would culminate in the extension of rights of importing Members at determining dumping and diminishment of rights of the exporting Members. As a result, Ukraine's approach towards the applicability of inferences made from Article 14(d) of the SCM Agreements is against Article 2 of the Anti-Dumping Agreement and Article 3.2 of the DSU.

**(B) Ukrainian authorities did not use the cost of production in the Russian Federation when constructing the normal value of ammonium nitrate**

28. Ukraine improperly interprets the claim of the Russian Federation under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement limiting it only to the "use of out-of-country evidence". This claim is, however, broader as Ukraine violated the said provisions because: 1) gas prices were taken not from the records of the investigated producers of ammonium nitrate, but from outside the country of origin, namely at German/Czech border (Waidhaus) as Ukraine explained; 2) Waidhaus gas price is not the "costs associated with the production and sale of the product under consideration"; and 3) Waidhaus gas price, with or without adjustment for transportation costs, does not reflect natural gas prices available for producers of ammonium nitrate in the Russian Federation. Thus, Ukraine's construction of normal value is not based on "the cost of production [of ammonium nitrate] in the country of origin", i.e. in the Russian Federation.

29. Ukrainian authorities violated Articles 2.2.1.1 and 2.2 when they substituted natural gas prices reflected in the investigated producers' records with the natural gas price at the German/Czech border and used this surrogate price in the calculation of the cost of production and then in the construction of the normal value of ammonium nitrate. There were no legal reasons for such substitution and the use of out-of-country price in these calculations.

30. Even if in a hypothetical case when records kept by Russian producers and exporters were not in compliance comply with the requirements of Article 2.2.1.1 of the Anti-Dumping Agreement or investigated producers had not cooperated and Ukrainian authorities had failed have *any* data about the prices paid by investigated producers of ammonium nitrate for natural gas, Ukrainian authorities should also have resorted first to the gas prices in the Russian Federation. The Appellate Body explained in *EU – Biodiesel* that "in-country evidence" is the preferred source of information after an examination of the records of the investigated producers and exporters. A resort to the information obtained outside the country of origin is limited to certain circumstances listed by the Appellate Body where there is *a need* to analyze or verify the information in the records kept by the exporter or producer under investigation using documents, information, or evidence from other sources, including from sources outside the 'country of origin'.<sup>3</sup> In any event, such information shall reflect the cost of production in the country of origin.

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<sup>3</sup> Appellate Body Report, *EU – Biodiesel*, paras. 6.70-6.71, fn 228.



31. Ukraine's resort to out-of-country evidence in the anti-dumping proceedings on imports of ammonium nitrate clearly constitutes a violation of Article 2.2 of the Anti-Dumping Agreement.

**(C) Ukraine failed to adapt price of Russian gas at the Germany/Czech border in order to arrive at the "cost of production in the country of origin"**

32. There were no legal reasons to reject in-country prices of Russian natural gas and resort to out-of-country price for natural gas. Without prejudice to this position, while resorting to out-of-country price, Ukraine failed to adapt the gas price at the German/Czech border to arrive at the cost of production of ammonium nitrate in the country of origin. The price at Waidhaus more than three times exceed the price actually paid by the Russian investigated producers and was several times higher than other gas prices in the domestic Russian market. In fact, Ukrainian authorities used the price at the Germany/Czech border *specifically* because it did not reflect the gas price within the domestic market of the Russian Federation, which mirrors the investigating authorities' decision that took place in *EU – Biodiesel*.<sup>4</sup> All these factors also show that Ukraine did not intend to adapt the information from outside the country in order to arrive at the "cost of production in the country of origin".

33. In their calculations of the cost of production of ammonium nitrate and the consequent construction of its normal value, Ukrainian authorities were biased and not objective. They replaced gas prices in the records of the investigated producers with prices outside of country of origin in a situation when the records of the investigated producers must have been used for the calculation of the cost of production of ammonium nitrate. The surrogate price for natural gas used by Ukrainian authorities in its calculations did not reflect actual prices of natural gas in the Russian Federation. The surrogate price for natural gas was neither "the cost[] associated with the production ... of the product under consideration" nor "the cost of production [of the product under consideration] in the country of origin" because it was not the price of natural gas in the Russian Federation. The Russian Federation reiterates that Ukraine acted inconsistently with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.

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

34. Ukrainian authorities violated Article 2.2.1 by improperly calculating the cost of production of ammonium nitrate and disregarding sales that are not below-costs. Prior to disregarding sales of the like products Ukraine failed to establish that they were: i) below cost in substantial quantities; ii) made at prices which do not provide for the recovery of all costs within a reasonable period of time; iii) made within an extended period of time. Contrary to Ukraine's objection to the scope of the claim, Ukrainian authorities understood the content of the arguments of the Russian Federation correctly.

35. The Russian Federation submitted that had Ukrainian authorities conducted such analysis by considering all three criteria prescribed by Article 2.2.1 of the Anti-Dumping Agreement, the result would have been legally flawed anyway since using the costs inflated due to the use of the surrogate gas price would inevitably distort the results of the ordinary course of trade test.

36. Ukrainian authorities' allegations that they complied with the "substantial quantities" requirement and the "extended period of time" requirement under Article 2.2.1 of the Anti-Dumping Agreement are misleading. Ukrainian authorities did not establish a "weighted average selling price" of ammonium nitrate. The Disclosure does not indicate that Ukrainian authorities carried out the respective analysis. Accordingly, any allegations made on the establishment of the "weighted average selling price", including fulfilment of "substantial quantities" and "extended period of time" requirements are incorrect. Compliance with these obligations cannot be implied.

37. Contrary to Ukraine's assertion, the Russian Federation does not need to "demonstrate that lower costs would have resulted in a finding that unit sales prices would have been above those lower costs" to prove a violation of Article 2.2.1 of the Anti-Dumping Agreement. Under Article 2.2.1, Ukrainian authorities should have conducted the ordinary course of trade test by reason of price based on costs of production reflected in the records kept by investigated producers and exporters. They failed to do so.

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<sup>4</sup> See Appellate Body Report, *EU – Biodiesel*, paras. 6.81-6.83 (quoting Panel Report, *EU – Biodiesel*, para. 7.258).

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

38. Being a logical progression of obligations under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, the first sentence of Article 2.4 mandates an investigating authority to apply these provisions in a way to ensure the fair comparison between the normal value and the export price. As a result, Russian Federation's claim under Article 2.4 should not be reduced to the issue of adjustments under the third sentence of Article 2.4 of the Anti-Dumping Agreement. The comparison of the actual export price with the inflated normal value constructed on the basis of WTO-inconsistent calculation of the costs of production resulted in the dumping margin at rate 82.2%. This margin is self-explanatory in contrast with the negative dumping margin in the absence of cost adjustments.

39. Ukraine violated the obligation in the first sentence of Article 2.4 of the Anti-Dumping Agreement because it failed to make a fair comparison between the export price and the constructed normal value by improperly calculating constructed normal value for ammonium nitrate produced in the Russian Federation.

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

40. There are compelling reasons for the Russian Federation to request the Panel to consider the claim under Article 2.1 of the Anti-Dumping Agreement and make a separate finding on the violation by Ukraine of its obligations under this Article. Nothing in the text of Article 2.1 represents an obstacle to this. Besides, such a fundamentally important provision, determinant for the entire Anti-Dumping Agreement, cannot be relegated to the level of "context" precluding the Panel from issuing a separate finding on it. This finding will positively affect the stage of implementation of the Panel's recommendations as the nature of the violation predetermines responding party's actions to eliminate it.

41. Ukrainian authorities should have determined the dumping margin by comparing the export price with the comparable price of the like product destined for consumption in the exporting country, i.e. the Russian Federation. Yet, they compared the export price with constructed normal value and, thus, determined the normal value in violation of Article 2.1 of the Anti-Dumping Agreement.

**IV. CLAIMS REGARDING INCLUSION OF A RUSSIAN PRODUCER WITH NEGATIVE DUMPING MARGIN INTO THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS – UKRAINE ACTED INCONSISTENTLY WITH ARTICLES 5.8, 11.1, 11.2 AND 11.3 OF THE ANTI-DUMPING AGREEMENT**

**A. The Panel Request properly identifies the contested measures**

42. Ukraine maintains its position that only the 2014 Decision was identified as a measure at issue in the Panel Request. However, the text of the Panel Request refers to the anti-dumping measures "in relation to" or "relating to" the interim and expiry reviews including, thus, the 2008 Decision, as amended by the 2010 Decision and later extended through the 2014 Decision.

43. Read in its entirety, the second sentence of the Panel Request further supports this understanding. Not only does this sentence cite "any and all annexes, notices, communications and reports of [MEDTU] and any amendments thereof," but it also mentions other decisions in footnote 2. Ukraine unconvincingly attempts to refute the relevance of footnote 2 by arguing that challenged measures are supposed to be mentioned in the main body of a panel request. This position is at odds with the Appellate Body's postulate requiring to "consider[] the panel request as a whole."<sup>5</sup> By the same token, the reference to the 2010 Decision in footnote 3 of the Panel Request disproves Ukraine's argument.

44. Contrary to its allegation, Ukraine has been able to identify the 2008 and 2010 Decisions and to comment on the claims made by the Russian Federation. Thus, Ukraine's ability to defend itself has not been impaired.

**B. Ukraine found that JSC MCC EuroChem was not dumping and correspondingly failed to exclude this exporter from the definitive anti-dumping measure**

45. The Russian Federation is challenging Ukraine's decision to impose a 0% anti-dumping duty on JSC MCC EuroChem through the 2010 Decision under Article 5.8. Whereas Ukraine committed an independent breach of Articles 11.1, 11.2 and 11.3 by including this exporter into the underlying reviews and by adopting the 2014 Decision in respect of JSC MCC EuroChem.

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<sup>5</sup> Appellate Body Report, *US – Carbon Steel*, para. 127.

46. As per Ukraine's submission, the 2010 Decision does not amount to a legal finding that JSC MCC EuroChem's dumping margin was negative, zero, or *de minimis*. Rather, its anti-dumping duty rate was set equal to 0%. But Ukraine overlooks the combined effect of Ukrainian courts' judgments modifying the dumping margin rate for JSC MCC EuroChem to be *de minimis*. As a result, Ukraine should have excluded this Russian producer from any subsequent review and from any extension of the measures as follows from *Mexico – Anti-Dumping Measures on Rice*.<sup>6</sup> Ukraine is precluded from invoking its national law to justify the allegedly improper decisions of its authorities, including those related to the acceptance of evidence.

47. For all these reasons, the Russian Federation maintains that Ukraine violated Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement by failing to terminate the anti-dumping measures in respect of JSC MCC EuroChem and unlawfully including it in the underlying reviews.

## **V. SUBSTANTIVE CLAIMS RELATING TO THE LIKELIHOOD OF INJURY DETERMINATION**

### **A. Ukraine has not substantiated its likelihood of injury determination in violation of Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement**

#### **(A) Applicable legal standard**

48. The Russian Federation contends that any injury analysis in anti-dumping proceedings is strictly governed by the Anti-Dumping Agreement. Ukraine's attempt to escape the obligations stemming from the Anti-Dumping Agreement is undermined by the proper interpretation of case law. If an investigating authority in its own judgement decides to make an examination falling under the scope of Article 3, "then it would be bound by the relevant provisions of Article 3 of the Agreement".<sup>7</sup> Even beyond this finding, Article 11.3 of the Anti-Dumping Agreement alone requires the investigating authority to act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination, to base its determinations on "positive evidence" and an "objective examination".

#### **(B) Ukraine made a determination on the likelihood of continuation of injury**

49. According to the Disclosure Ukrainian authorities made a determination regarding the likelihood of *continuation* of injury which was consisted of two steps. Ukraine, firstly, determined the present state of the domestic industry as to whether the injury was eliminated or not; and, secondly, conducted prospective analyses of what happens should the anti-dumping measures lapse. These logical steps taken by Ukrainian authorities culminate in the understanding that they had examined the present state of the domestic industry and made a conclusion that there was injury.

50. Ukraine's usage of a different terminology, i.e. *recurrence of injury* is deceiving. Ukraine tries to convince that Ukrainian authorities determined that Ukrainian producers did not completely recover from the injury established in the original investigation. However, this allegation does contrast with the actual determination that Ukrainian industry was suffering from the material injury caused by dumped imports. Additionally, Ukraine's reasoning that its authorities made a determination regarding the recurrence of injury are *ex post* rationalization and should be rejected in their totality.

#### **(C) Evaluation of economic factors and indices having a bearing on the state of the Ukrainian domestic industry was not based on an "objective examination" of "positive evidence"**

51. Ukraine made affirmative determination on the likelihood of continuation of injury predominantly on the basis of decreased profitability, ignoring the positive trends in other economic factors and indices. Despite Ukraine's emphasis on the dramatic drop in profitability of the domestic industry, Ukrainian authorities failed to conduct an objective and unbiased analysis of increase of gas costs and its influence on the state of the domestic industry. Ukraine failed to exclude imports of the Russian producer with negative dumping margin from the volume of "dumped" imports.

52. Ukraine's inclusion of imports attributable to the producer with negative dumping margin into the volumes of dumped imports in the likelihood-of-injury determination breaches Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement as not based on "positive evidence".

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<sup>6</sup> Appellate Body Report, *Mexico – Anti-Dumping Measure on Rice*, para. 305.

<sup>7</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7. 274.

As a corollary, conclusions made on the basis of this incorrectly established volume of "dumped" imports do not qualify as "objective assessments". The Russian Federation wishes to underline that the producer with negative dumping margin was the main exporter of the product under consideration to Ukraine. Thus, the inclusion of non-dumped imports into injury analysis has infected the *overall conclusions* on the likelihood of continuation of injury.

53. Ukraine made finding on the continuation of injury analysis, in such finding its evaluation of economic factors and indices having a bearing on the state of Ukrainian domestic industry was not based on an "objective examination" of "positive evidence". As a result, Ukraine made the likelihood of injury determination in violation of Articles 11.1, 11.2, 11.3 of the Anti-Dumping Agreement.

## **VI. PROCEDURAL ISSUES AND CLAIMS**

### **A. Ukraine committed several procedural violations of its obligations under Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement**

54. Contrary to Ukraine's argument that Article 6.8 of the Anti-Dumping Agreement and provisions of Annex II do not apply to the present case, MEDTU *de facto* referred to facts available when it rejected the "first-best" information from records of the investigated producers and used the surrogate price of natural gas. The analogies between Article 2.2.1.1 governing the calculation of costs and Article 2.3 governing the determination of export price<sup>8</sup> drawn by Ukraine are unfounded and do not affect the applicability of Article 6.8 of the Anti-Dumping Agreement.

### **B. Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement by not disclosing the essential facts**

55. Contrary to Ukraine's contention, the Russian Federation has established a *prima facie* case by explaining in its submissions why the data redacted in Tables 11.3.1-11.3.6 of the Disclosure and the formulas on the calculation of normal value and dumping margin are "facts on the record," which formed "the basis for the decision" to apply anti-dumping measures. By virtue of these properties, these are essential facts in the sense of Article 6.9 of the Anti-Dumping Agreement.

56. The Russian Federation's claim under Article 6.2 of the Anti-Dumping Agreement is not consequential to that of Article 6.9. Even if certain information is not regarded as essential facts to be disclosed under Article 6.9, its disclosure still can be a subject to the Article 6.2 broader obligation to provide interested parties with a full opportunity to defend their interests.

57. In its attempt to justify the violations of Articles 6.9 and 6.2 of the Anti-Dumping Agreement, Ukraine relies on the alleged confidentiality of the data concerned. By substantiating its response to Ukraine's arguments on the legal provisions invoked by the responding party, *i.e.* Article 6.5 and 6.5.1 of the Anti-Dumping Agreement, the Russian Federation enjoys its due process rights requiring equal opportunities to be provided for both parties during dispute settlement. In given circumstances, the departure from this rule is not warranted since a non-compliance with Article 6.5.1 may trigger a breach of obligations under Articles 6.2 and 6.9.

58. Either way, Ukraine is barred from relying on the confidentiality explanation with regard to the aggregate data included in Tables 11.3.1-11.3.6 of the Disclosure, *i.e.* that four producers which filed a collective confidentiality request belong to one group, as it is merely *ex post* rationalization proffered by Ukraine first during these proceedings before the Panel and not known during the anti-dumping investigation at hand. Requests, if any, were sent by the Ukrainian producers in their own name, and yet they did not indicate reasons that would amount to good cause. The reasons presented in Exhibit UKR-51b, are nothing but a repetition of the general definition of confidential information under Article 6.5 of the Anti-Dumping Agreement that does not cover the aggregate data *per se*.

59. Ukraine did not provide an effective non-confidential summary as it is absolutely impossible to derive any conclusive findings from the relevant figures given in the Disclosure.

### **C. Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by not providing sufficient time to comment on the Disclosure and refusing to accept comments duly submitted by the Russian investigated producer**

60. All arguments and explanations provided by Ukraine do not justify the imposition of the 2-days period for comments on the Disclosure. The complexity of the issues involved in the

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<sup>8</sup> Ukraine second written submission, para. 170.

investigation rendered it impossible to derive any incorrectness or mistakes effectively within 2 days from the document in the foreign language for the Russian producers. The fact that the data used in the Disclosure was provided by the Russian producers in their replies to the questionnaires before circulation of the Disclosure is irrelevant as they could not be expected to know which information is essential for the investigation.

61. The Russian Federation upholds its claims regarding several procedural violations of WTO law committed by Ukraine in the course of the underlying reviews. Specifically, Ukraine breached Article 6.8 and paragraphs 3, 5 and 6 of Annex II to the Anti-Dumping Agreement because its decision to resort to facts available was unfounded. Ukraine's failure to disclose essential facts, harmful for interested persons' rights, is contrary to Articles 6.2 and 6.9 of the Anti-Dumping Agreement. Last but not least, Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement when it set the 2-days period for comments on the Disclosure.

## **VII. OTHER CLAIMS**

### **A. Ukraine breached Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement**

62. Claim under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement fall within the Panel's terms of references since they have naturally evolved from the claim under Article 6.9 as laid down in the Request for Consultations. Article 6.9 and Articles 12.2 and 12.2.2 do not categorically differ as far as the scope of the obligation, the time of disclosure (both obligations are triggered when an investigating authority takes or is about to take a final decision) and their purposes are concerned. As a result, this comparability amounts to "at the very least, some connection" that would suffice to establish that the claim in the Panel Request has evolved from the one set out in the request for consultations without changing the essence of the claim.

63. In addition to that, the claim is not strictly confined to "the lack of disclosure in respect of the dumping margin calculation" as Ukraine suggested, but to the full set of circumstances implied in the text of the claim in the Panel Request. The last sentence, singled out by Ukraine, is not a substitution but, rather, an exemplification of what the claims are. Finally, Ukraine may not rely on this objection to the scope of the claims at bar as it raised this argument at later stages of dispute settlement.

### **B. Ukraine violated Articles 1, 18.1 of the Anti-Dumping Agreement and Article VI of the GATT due to its WTO-inconsistent behaviour described above**

64. Ukraine falsely asserts that a dependent character of the claim under Articles 1 and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 renders it manifestly unfounded in law. Russian Federation's claim is substantiated as the measures imposed on imports of ammonium nitrate from Russia are not specific actions against dumping that are in accordance with the GATT 1994, as interpreted by the Anti-Dumping Agreement.

## ANNEX B-4

### SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

#### I. SUBSTANTIVE CLAIMS RELATING TO THE DUMPING DETERMINATION

**A. Claim 1 (Claim 10 of the Panel Request): Ukraine violated Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because, in determining the constructed normal value, it failed to calculate costs on the basis of records kept by the Russian producers and exporters, even though the costs associated with the production and sale of ammonium nitrate were accurately and reasonably reflected in the Russian exporters' and producers' records that were in accordance with the generally accepted accounting principles of the country of origin and exportation (RF SWS section 1)**

1. As Ukraine has explained in its First Written Submission and subsequent documents, the normal value calculation contained in the disclosure document and underlying documents provided a coherent explanation of the reasonable reflection of the costs associated with the production and sale of the product under consideration which justified the conclusion that the reliability of the reported costs had been affected.

2. Ukraine therefore submits that MEDT of Ukraine acted in accordance with the Anti-Dumping Agreement when it calculated the cost of gas in the Russian Federation and determined the reliability of the reported costs. The Appellate Body in *EU – Biodiesel* did not consider that the reliability of the records should necessarily be taken at face value when determining whether records reflect the costs.<sup>1</sup> On the contrary, an investigating authority has discretion within the factual context to examine non-arm's length transactions and other practices.<sup>2</sup> Ukraine also notes that the second sentence of Article 2.2.1.1 of the Anti-Dumping Agreement suggests that the investigating authority is in fact invited to examine all relevant evidence. Therefore, the assertion by the Russian Federation that an investigation into the reliability of the costs is somehow off-limits is contrary to the text of the provision and contrary to the text of the clarifications by the panel and the Appellate Body in *EU – Biodiesel*. Furthermore, in the context of the Anti-Dumping Agreement, "costs" means real economic costs involved in producing the product in the exporting country and not simply the amount reflected on an invoice.

3. Consequently, MEDT of Ukraine did properly examine the reliability of the reflection of the costs in the records, in accordance with the guidance of the Appellate Body, and found that these records did not completely reflect the costs of gas after a thorough investigation of all evidence before it. MEDT of Ukraine found that the domestic gas prices were regulated by the Government, were artificially lower than prices in genuine free markets, and were below cost. These are all consequences of the dual pricing system of gas in the Russian Federation. As for the suggestion that MEDT of Ukraine conducted a 'reasonableness' inquiry,<sup>3</sup> this does not comport with the disclosure document (Exhibit RUS-10). As witnessed on pages 21 through 23 of that document, MEDT of Ukraine did properly examine the *reliability* of the reflection of the costs in the records.

4. The Russian Federation is attempting to defy the clarifications by the panel and Appellate Body in *EU – Biodiesel* by either ignoring it, misinterpreting it or considering it an *obiter dictum*. The Russian Federation's qualification of footnote 400 of the panel report as *obiter dictum* is absurd and inconsistent. Footnote 400 does not deviate from the examination of the panel in paragraphs 7.220 to 7.247 and contributes to the panel's interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement. Hence, paragraphs 7.220 to 7.247, including the footnotes to these paragraphs, constitute, as a whole, the panel's legal analysis of the second condition of Article 2.2.1.1, which was essential to settle the dispute.

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<sup>1</sup> Appellate Body Report, *EU – Biodiesel*, para. 6.33.

<sup>2</sup> Appellate Body Report, *EU – Biodiesel*, para. 6.41.

<sup>3</sup> The Russian Federation's response to Panel question No. 7, para. 11, fourth sentence.

5. Ukraine thus maintains that the domestic gas prices in the Russian Federation were not at arm's length and could therefore be disregarded by MEDT of Ukraine. In similar vein, Ukraine submits that this governmental set of circumstances is a "practice" which is "other" than what happens in a marketplace driven by supply in demand, and that this centrally dictated fixed price affects the reliability and accuracy of the costs as reported in the records of a producer or exporter. Ukraine finds that it does not need to get to the discussion of 'normally' since the particular situation of the investigated Russian exporting producers already falls squarely in one of the two regular exceptions discussed earlier (non-arm's length or other practices). However, should the Panel deem it useful, Ukraine will be pleased to discuss this.

6. Contrary to what the Russian Federation holds, the fundamental differences between the *EU – Biodiesel* case and the case at hand make it impossible to merely transplant the factual findings of *EU – Biodiesel* to the case before us. The first difference between the two cases is the governmental regulation of gas prices in the Russian Federation, which was confirmed by the Working Party Report of the Russian Federation's accession. The Working Party Report illustrates the specific circumstances on the Russian gas market, that led MEDT of Ukraine to the finding that the gas prices in the Russian Federation's internal market are not at arm's length and are the result of 'other practices'. This report is used as a factual basis and therefore falls within the scope of this dispute. In addition to this, the second *Ad Note* to Article VI:1 GATT serves as relevant context to interpret Article 2.2.1.1 of the Anti-Dumping Agreement and stipulates that price comparability may be difficult when domestic prices are fixed by the State.<sup>4</sup> Both the Working Party Report and the Second *Ad Note* point to the WTO incompatibility of the Russian Federation's dual pricing system for gas, which is in stark contrast to the export duty imposed in Argentina.

7. MEDT of Ukraine did not need to investigate whether prices of other suppliers were also fixed pursuant to the national legislation since it found that Gazprom was the main and sole supplier of gas for all the Russian producers of ammonium nitrate. Additionally, out of all the relevant exporting producers from the Russian Federation: Uralchem did not export, EuroChem wanted all its answers to be disregarded and the financial statements mentioned that Dorogobuzh purchased all gas volumes from Gazprom.

8. The second difference lies in the fact that, contrary to the Argentine prices, the Russian prices for gas are below cost. The Russian Federation accuses Ukraine of misrepresenting and generalising the facts on the record. The facts however demonstrate that MEDT of Ukraine analyzed thousands of pages of evidence, including those contained in Exhibit UKR-1 and UKR-2. On the basis of a careful and balanced analysis, MEDT of Ukraine produced a concise disclosure document (Exhibit RUS-10) in excess of forty pages, with ten pages exclusively devoted to the normal value determination.

9. Initially, MEDT of Ukraine did not ask for detailed information on gas suppliers, because the sheer size and consequences of the distorted gas costs only surfaced after the submission by the Russian producers of the answers to the questionnaires on 26 November 2013. However, after analysis of the answers to the questionnaires of the Russian producers, as well as additional documents submitted by them, MEDT of Ukraine identified that in fact there were no Russian producers to which it *could* have *directly* sent further requests on gas suppliers. [[\*\*\*]]% of the exports from the Russian Federation came from EuroChem and this company had already formally requested that MEDT of Ukraine should disregard all its answers. Despite this position, MEDT of Ukraine still conducted a thorough examination and presented a well-reasoned explanation of its actions and findings in its disclosure.

10. Ukraine submits that the third difference with the *EU – Biodiesel* case is that in *EU – Biodiesel*, the domestic prices for *biodiesel* (the finished product) were regulated.<sup>5</sup> For that reason the European Union found that the domestic sales of biodiesel were not made in the ordinary course of trade, hence resorted to constructed normal value and only then started to doubt the raw material costs.<sup>6</sup> This sharply contrasts with the situation before us, where the price of the *main raw material* was fixed by the Russian State and which was the trigger to examine the raw material costs, *ab initio*. Furthermore, the price of the main raw material in *EU – Biodiesel* was not

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<sup>4</sup> Panel Report, *EU – Biodiesel*, para. 7.241.

<sup>5</sup> Russian Federation's Second Written Submission, paras. 139 and 140, quoting AB in *EU – Biodiesel*, para. 5.4.

<sup>6</sup> *Ibid.*

regulated. In contrast to the situation in Argentina, gas prices in the Russian Federation were the immediate consequence of governmental price setting.

11. Lastly, the fourth difference is that the impact of the fixed price of gas is measurable and significant, in contrast to the impact of an export duty. It is important to note that the percentages of export taxes are not the same as measuring the actual effect of those taxes on soybean prices. In light of the above, Ukraine submits that it is clear that the factual findings of the *EU – Biodiesel* case cannot be applied to the case at hand.

**B. Claim 2 (Claim 11 of the Panel Request): Ukraine acted in breach of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because it replaced (adjusted) the costs of gas actually borne by the Russian producers and exporters for production of ammonium nitrate with data on the gas prices outside the Russian Federation, in particular at the border with Germany, that did not reflect the costs of production in the country of origin, and used such prices subsequently for constructing the normal value (RF SWS Section 2)**

12. Ukraine submits that the Russian WTO-inconsistent dual pricing system of gas is at the root of the distortion. After having determined that under these circumstances, the accounting records of the companies did not reliably reflect the costs of gas, MEDT of Ukraine needed to properly rectify these records. By contrast, the approach suggested by the Russian Federation, namely accepting the records as they are, would lead to distorted results.

13. According to the Panel and the Appellate Body in *EU – Biodiesel*, "in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence"<sup>7</sup> as long as, "whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin'."<sup>8</sup> The fact that the real cost of the gas is significantly higher than the fixed domestic price within the Russian Federation does not mean that this disqualifies the evidence from outside the country. On the contrary, as Ukraine mentioned in its First Written Submission, the Appellate Body has proffered sound criteria and suggestions to make the required judgment calls in situations such as these. Ukraine acted in line with that guidance.

14. Ukraine submits that the reasoning of the Appellate Body in *US – Softwood Lumber IV* and further developed in the anti-dumping context in *EU – Biodiesel* is compelling. In very specific and unique circumstances, such as the one that MEDT of Ukraine was facing, interpretation must be given to a legal concept in light of economic facts that underpin it. In this case, no unaffected domestic market in the Russian Federation existed due to the demonstrated direct and pervasive intrusion of the State. Hence, Ukraine finds that this was imperative to search for an outside benchmark, duly adjusted, to supply objective evidence of the costs of gas in the Russian Federation.

15. Ukraine therefore intentionally used an undistorted price of Russian gas and then adapted that price to the local level. The average Russian gas price at Waidhaus was USD 426, which was properly 'adapted' back to the price level at the Russian border, i.e. USD 396 in line with the Appellate Body guidance concerning Article 2.2 of the Anti-Dumping Agreement.

**C. Claim 3 (Claim 9 of the Panel Request): Ukraine violated Article 2.2.1 of the Anti-Dumping Agreement because it improperly treated domestic sales of ammonium nitrate in the Russian Federation as not being in the ordinary course of trade and disregarded these sales in determining the normal value (RF SWS Section 3)**

16. Ukraine submits that MEDT's of Ukraine determination on the ordinary course of trade complied with Article 2.2.1 of the Anti-Dumping Agreement, footnote 5, and with the explanation accorded to Article 2.2.1 in *EC – Salmon*. In paragraph 7.238 of *EC – Salmon* the panel clarified that "the 'determination' that below-cost sales are made 'within an extended period of time' does not call for the investigating authority to 'determine' the 'extended period of time' itself, but only

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.



that the below-cost sales in question are made within a period of time that is normally one year but no less than six months." In the case before the Panel, the period of time that was used was the Review Investigation Period (RIP) (which was one year). Ukraine submits that this period fully qualifies as an extended period of time in the sense of footnote 4 of the Agreement.

17. In paragraph 7.239 of *EC – Salmon*, the panel confirmed that footnote 5 of the Anti-Dumping Agreement explains that below-cost sales may be considered to be "made in substantial quantities" when an investigating authority establishes that the "weighted average selling price" of the below-cost sales at issue is less than the "weighted average per unit costs". This is exactly what MEDT of Ukraine did.

18. In paragraph 7.275 of *EC – Salmon*, the panel clarified that all sales not found to be above weighted average cost for the period of investigation *do not* provide for the recovery of costs within a reasonable period of time. By finding that the weighted average selling price was below the weighted average unit cost, MEDT of Ukraine made exactly this determination on pages 25, 26 and 27 of the disclosure document.

19. It is abundantly clear therefore that by meeting all three relevant conditions of Article 2.2.1 of the Anti-Dumping Agreement, Ukraine has respected the requirements of the ordinary course of trade test.

20. Article 2.2.1 should in any event not be relegated to the realm of a consequential violation, should an inconsistency with Article 2.2.1.1 somehow be determined.<sup>9</sup> Assuming *arguendo* that an inconsistency with Article 2.2.1 could exist and lead a separate life as a consequential violation, the Russian Federation has never presented a *prima facie* case that, absent the rectification of the gas purchase costs, the *three-step* OCOT analysis (as properly conducted by Ukraine) would have led to a different result. The only allegation that was made was that the rectification of the gas costs "resulted in a much higher unit cost of production" that "made the conclusion that the domestic sales by the Russian exporting producers under investigation were made not in the ordinary course of trade *more likely*".<sup>10</sup> Such vague contention as 'more likely' is not sufficient to serve as a *prima facie* case since a violation of a provision of the Anti-Dumping Agreement cannot just be established on the mere basis of 'more likely'. There was in fact never a claim that Article 2.2.1 was violated as a result of higher unit costs.

**D. Claim 4 (Claim 12 of the Panel Request): Ukraine violated the obligation in the first sentence of Article 2.4 of the Anti-Dumping Agreement because it failed to make a fair comparison between the export price and the constructed normal value by improperly calculating constructed normal value for ammonium nitrate produced in the Russian Federation (RF SWS Section 4)**

21. Ukraine recalls that the Appellate Body held in *EU – Biodiesel* that Article 2.2.1.1 and Article 2.4 of the Anti-Dumping Agreement serve different functions in the context of determinations of dumping whereby the former assists an investigating authority in the calculation of costs for purposes of constructing the normal value; whereas the latter concerns the fair comparison between the normal value and the export price.

22. Similarly, the panel held in *EU – Footwear (China)* that "[n]othing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price."

23. For the foregoing reasons, the Russian Federation has not demonstrated that Ukraine failed to make a "fair comparison" between the normal value and the export price, inconsistently with Article 2.4 of the Anti-Dumping Agreement.

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<sup>9</sup> Ukraine's response to Panel question No. 15. paras. 68-70.

<sup>10</sup> Russian Federation's First Written Submission, para. 117. (emphasis added)

## **II. VIOLATION OF ARTICLES 5.8, 11.1, 11.2 AND 11.3 OF THE ANTI-DUMPING AGREEMENT BY INCLUDING A RUSSIAN PRODUCER WITH A NEGATIVE DUMPING MARGIN IN THE SCOPE OF THE INTERIM AND EXPIRY REVIEWS**

### **A. The Panel's Term of Reference**

24. Since the Russian Federation has clarified that it is no longer bringing a claim against the 2008 Decision, Ukraine does not need to reiterate its previous arguments regarding the fact that the 2008 Decision is not a measure brought properly before the Panel.

25. Notwithstanding this, Ukraine submits that the 2010 Decision was not brought properly before the Panel and therefore falls outside the Panel's terms of reference. This is clear by the wording of the Panel Request that limits the scope of the dispute to only those measures in relation to the expiry and interim reviews. Furthermore, contrary to what the Russian Federation holds, footnote 2 of the Panel Request is insufficient to properly identify the measures at issue since it appears to merely provide factual context to the expiry and interim review. Similarly, Ukraine holds that the Russian Federation's First Written Submission did not provide the required clarification since it emphasised a violation of Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement, which can only relate to the 2014 Decision.

26. As a consequence of the unclarity, Ukraine has to engage in speculation as to which measures were being challenged by the Russian Federation. However, the fact that Ukraine accidentally addressed the correct claim does not make the Panel Request compliant with Article 6.2 DSU. Evidently, these requirements needed to be met when the Panel Request was submitted and not after Ukraine wrote its First Written Submission. For these reasons, Ukraine submits that the 2010 Decision is not a measure before the Panel.

### **B. Violation of Article 5.8 Anti-Dumping Agreement in the 2014 Decision**

27. Ukraine submits that the obligation under Article 5.8 of the Anti-Dumping Agreement to immediately terminate an investigation when the dumping margin is zero or *de minimis*, did not arise with respect to the 2014 Decision. Pursuant to the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, an investigating authority only needs to terminate an investigation if it determines a negative, zero or *de minimis* dumping margin. MEDT of Ukraine found dumping margins of 40.5% and 82.2%, and therefore, it was not under the obligation to terminate the investigation. Furthermore, as held by the panel in *US – DRAMS* and the panel in *US – Corrosion-Resistant Steel Sunset Review*, the obligation to immediately terminate an investigation when the dumping margin is zero or *de minimis* is only applicable to original investigations initiated pursuant to Article 5 of the Anti-Dumping Agreement. Consequently, the *de minimis* test in Article 5.8 of the Anti-Dumping Agreement does not apply in expiry reviews.

### **C. Conditional Defense Regarding the Claim that the 2010 Decision Violated Article 5.8 Anti-Dumping Agreement**

28. Even if one assumes that a claim under Article 5.8 of the Anti-Dumping Agreement could have been brought against the 2010 Decision, Ukraine submits that such claim should be rejected since the investigating authority, MEDT of Ukraine and the Interdepartmental Commission on International Trade (ICIT), never determined a negative, zero or *de minimis* dumping margin. Upon request of EuroChem, the Ukrainian Courts simply ruled that the 2008 Decision was unlawful but did not find in the operative part that the dumping margin for EuroChem was negative, zero or *de minimis*. During the Court proceedings, the only calculation methods presented were the erroneous calculations carried out by EuroChem itself. The Courts, however, did neither instruct to reopen the investigation, nor to apply a particular methodology for the calculation of the dumping margin since this was not requested by EuroChem. Consequently, MEDT of Ukraine and ICIT had no choice but to bring the duty down to zero without recalculating the dumping margin.

29. Ukraine submits that as neither the investigating authorities in the 2010 Decision, nor the judgements of the Ukrainian Courts determined a negative, zero or *de minimis* dumping margin for EuroChem, the conditions set out by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* are not met. Therefore, the obligation under Article 5.8 of the Anti-Dumping Agreement to

immediately terminate an investigation and to not include producers with a negative or *de minimis* dumping margin in future reviews was not triggered by the 2010 Decision.

**D. Violation of Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement in the 2014 Decision**

30. Ukraine considers that the Russian Federation's claim concerning Article 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement is purely consequential to the Russian Federation's claim under Article 5.8 of the Anti-Dumping Agreement. Ukraine therefore submits that since the mere imposition of a zero dumping duty on a company – without a determination of a negative, zero or *de minimis* dumping margin – does not trigger the obligation to immediately terminate the investigation, there is also no obligation upon the investigating authority to exclude the same company in later reviews. In other words, if the obligation under Article 5.8 of the Anti-Dumping Agreement does not apply in the original investigation, Ukraine holds that the same obligation cannot exist in later reviews.

31. If the Panel were to consider that this claim is not consequential, Ukraine submits that this claim must still be dismissed as unfounded as the Russian Federation failed to provide a *prima facie* violation of these provisions. Indeed, the Russian Federation did not specify which actions – or inactions – by MEDT of Ukraine or ICIT constitute an alleged violation of these legal provisions. Ukraine cannot be expected to defend itself against claims that merely refer to articles of the Anti-Dumping Agreement without any further specifications or clarifications as to the exact claimed violations.

**III. SUBSTANTIVE CLAIMS RELATING TO THE LIKELIHOOD OF INJURY DETERMINATION**

**A. Claim 8: Ukraine Acted Inconsistently with Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement**

**1. MEDT's of Ukraine Determination of the Likelihood of Recurrence of Injury**

32. Pursuant to the panel in *EU – Footwear (China)*, in order to discharge the burden of proof, the Russian Federation must demonstrate that while making its conclusion on the likelihood of injury, MEDT of Ukraine did not make a reasoned conclusion based on sufficient evidence. The heart of the Russian Federation's argument is that MEDT of Ukraine made a determination that material injury existed in the RIP and that MEDT of Ukraine relied on this determination to conclude that there was likelihood of continuation of injury.

33. As is clear from section 13 and 11.4 of the Disclosure, Ukraine holds that MEDT of Ukraine determined that there was a likelihood of recurrence of injury and not of continuation of injury. The analysis performed by MEDT of Ukraine underscored the negative effects on the Ukrainian domestic industry which would occur should the measures be terminated. Moreover, Ukraine notes that the Russian Federation does not point out a single passage in the Disclosure or 2014 Decision stating that MEDT of Ukraine determined that the injury was likely to continue should the anti-dumping measures be repealed.

34. Ukraine submits that the Russian Federation's argument saying that MEDT's of Ukraine determination that the Ukrainian domestic industry did not completely recover from material injury established during the original investigation is equal to a determination that the Ukrainian industry is suffering from material injury is incorrect since it ignores the economic reality. When carrying out an interim or expiry review, the condition of the domestic industry may range anywhere between a completely healthy state and suffering from serious injury. Essentially, all possible degrees of deterioration of domestic industry, that fall short of "injury" within the meaning of Article 3, should therefore be classified, in terms of the Anti-Dumping Agreement, as *absence of injury*. A finding that the domestic industry did not *completely* recover from previous material injury would suggest that the domestic industry is somewhere in *between* having recovered (a healthy state) and suffering from material injury. Therefore, in terms of two legal categories provided for in the Anti-Dumping Agreement, such finding should be classified as a finding that the domestic industry is not suffering from a material injury.

2. Russian Federation's Claims in respect to the Determinations relied on by MEDT of Ukraine in its likelihood analysis

35. Ukraine submits that in the course of expiry and interim reviews, an investigating authority is obliged to base its findings on an objective examination of positive evidence. However, as held by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, the source of this obligation is Articles 11.2 and 11.3 of the Anti-Dumping Agreement and not Article 3 since the obligations set out in Article 3 do not apply to likelihood-of-injury determinations in sunset reviews.<sup>11</sup>

36. The Russian Federation submits a new argument in its second written submission stating that MEDT of Ukraine should have taken into account the fact that natural gas was supplied to the Ukrainian domestic industry by Ostchem at prices, allegedly higher than Ostchem's own purchase costs.<sup>12</sup> This allegation never appeared in the Russian Federation's First Written Submission, First Oral Statement nor in the responses to the questions from the Panel. Ukraine therefore submits that this cannot be addressed in the Panel Report.

37. In any event, the Russian Federation's allegation has no merit. MEDT of Ukraine was indeed aware that the Ukrainian domestic producers were purchasing gas from its parent company, Ostchem Holding. This is clearly indicated in the questionnaire responses of the Ukrainian producers. At the same time, gas purchase prices of the Ukrainian domestic industry, as reflected in their records, were in line with the market prices for the industrial users in Ukraine (that is, Naftogaz market price to industrial users). Therefore, the price of gas sale transactions between Ostchem and Ukrainian domestic industry adequately reflected market forces and the arm's length principle.<sup>13</sup> Moreover, the assessment of the state of the industry is limited to the domestic companies producing the like product and does not include the assessment of the profitability of the parent company.

38. The Russian Federation criticizes MEDT's of Ukraine comparison between the prices of the imported product and like domestic product on the grounds that it does not discuss "reasons underlying the difference in prices"<sup>14</sup> and attributes to "a legitimate decision of the Ukrainian courts" negative effect on the prices of the domestic industry.<sup>15</sup> First, similar to the issue of transfer pricing, the criticism of MEDT's of Ukraine price comparison was raised for the first time in Russian Federation's Second Written Submission. It would, therefore, be inappropriate to address this new allegation in the Panel's report. Secondly, there is no connection between this argument and the two "claims" under Articles 11.1, 11.2 and 11.3 advanced by the Russian Federation in the Panel Request. Further, Russian Federation's criticism, has, in any event, no merit. There is no obligation to explore the "reasons" for differences in price levels and/or the difference between the price of the Russian exporters and the cost of production of domestic industry. The fact is that Russian producer's export price (Ukraine border) was lower than the cost of production of Ukrainian domestic producers and the sales prices of the Ukrainian domestic producers.

39. With regard to the Russian Federation's argument that MEDT's of Ukraine determination "on likelihood of injury was unsubstantiated and legally flawed since the analysis had been carried out on the basis of imports including"<sup>16</sup> imports from EuroChem in respect of which a zero anti-dumping duty was established in the 2010 Decision, Ukraine would like to reiterate its position. As previously explained, MEDT of Ukraine was under no obligation to exclude EuroChem from the review since this obligation does not exist during reviews and since EuroChem was found to be dumping. In any event, Ukraine submits that considering import volume trends of a producer in respect of whom anti-dumping duty was decreased to zero is the most reasonable methodology to assess the import trends once the anti-dumping measures are terminated.

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<sup>11</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 285.

<sup>12</sup> Russian Federation's Second Written Submission, paras. 604-610.

<sup>13</sup> In particular, in 2012 the domestic industry gas purchase price (net of VAT, inclusive transportation costs) was in the range between [[\*\*\*]] and [[\*\*\*]] USD/1000 m<sup>3</sup> and in RIP, between [[\*\*\*]] and [[\*\*\*]] USD/1000 m<sup>3</sup>. Naftogaz price to industrial consumers (net of VAT, inclusive transportation costs) was 476.8 USD/1000 m<sup>3</sup> both in 2012 and RIP.

<sup>14</sup> Russian Federation's Second Written Submission, para. 615.

<sup>15</sup> Ibid.

<sup>16</sup> Russian Federation's First Written Submission, para. 209.

#### IV. PROCEDURAL CLAIMS

**A. Claim 9 (Claim 4 of the Panel Request): Relating to the Alleged Recourse to Facts Available**

40. Ukraine explains that the information about costs of gas in the producers' records was not rejected on evidentiary grounds under Article 6.8 of the Anti-Dumping Agreement.<sup>17</sup> Instead, the information regarding the costs of gas in the records of the investigated producers was accepted into evidence, analyzed by MEDT of Ukraine and thereafter rectified based on the substantive rules regarding the determination of costs under Article 2.2.1.1 of the Anti-Dumping Agreement. The respective explanations were duly provided in the Disclosure. Furthermore, the Russian Federation did not bring forward any arguments substantiating its claim.

**B. Claim 10 (Claim 5 of the Panel Request): Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement because Ukraine failed to adequately disclose the essential facts under consideration which formed the basis for the decision to apply anti-dumping measures, including the essential facts underlying the determinations of the existence of dumping; the calculation of the dumping margins, including relevant data and formula applied; the determination of injury and causation, including the price comparisons and the underlying data; information on import and domestic prices used therein**

41. With respect to the Russian Federation's claims under Articles 6.2 and 6.9 of the Anti-Dumping Agreement, Ukraine reiterates that the Russian Federation failed to demonstrate that any of the facts, which were allegedly not disclosed, constitute essential facts. Moreover, Ukraine notes that the information in Tables 11.3.1, 11.3.2, 11.3.3, 11.3.4, 11.3.5 and 11.3.6 was properly disclosed to the interested parties taking into account MEDT's of Ukraine confidentiality obligations under Article 6.5 of the Anti-Dumping Agreement.

42. Contrary to the Russian Federation's allegations, the Ukrainian producers did request confidential treatment both for their individual data and for the combined data. The request for confidentiality was in fact substantiated since the Ukrainian producers qualified the data as commercially sensitive for the companies individually and together. This qualification was reasonable, as for example, the disclosure of the average price level in respect to the four affiliated companies would have given Russian producers a good basis for formulating their own pricing strategy in Ukraine. Ukraine emphasizes that none of the interested Russian Producers objected to the designation of this data as commercially sensitive.

43. Furthermore, with regard to the sufficiency of the non-confidential summaries, Ukraine argues that since MEDT of Ukraine made its determinations on the basis of trends of various economic and financial indicators, as opposed to absolute figures, the disclosure of trends data was the most appropriate means of providing a summary of the confidential information.

44. Finally, Ukraine notes that the Federation's grievances regarding the confidentiality treatment and insufficient confidential summaries are, in any event, outside of the Panel's Terms of Reference. The Panel's Terms of Reference are limited pursuant to Article 7 DSU to the claims put forward in the Russian Federation's Panel Request. In its Panel Request, the Russian Federation advanced only a claim under Article 6.5.1 of the Anti-Dumping Agreement and not under Article 6.5 in general. Consequently, the Panel has no jurisdiction to rule on Ukraine's alleged violation of Article 6.5 of the Anti-Dumping Agreement.

**C. Claim 11 (Claim 6 of the Panel Request): Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because the disclosure of the documents with results of expiry and interim reviews issued on 25 June 2014 was not made by Ukraine in sufficient time for the interested parties to defend their interests**

45. Ukraine notes that the Ukrainian Anti-Dumping Law clearly indicates that the time-limits established by the investigating authority "expire at the end of the working hours in ministries,

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<sup>17</sup> See Ukraine's First Written Submission, Section VII.A.1.

central executive body in the tax or customs sphere or in the Commission".<sup>18</sup> Ukraine submits that it is not unreasonable to expect that one interested party, namely EuroChem, participating in an anti-dumping investigation in Ukraine would familiarize itself with the legislation – Ukrainian Anti-Dumping Law – applicable to the conduct of the investigation.

46. The Russian Federation also claims that the 2-days period was unreasonable because the disclosure was issued in Ukrainian language. The anti-dumping investigation was conducted in Ukraine by Ukrainian Authorities with Ukrainian being the official language of Ukraine. The fact that an interested party may not have command of the Ukrainian language, therefore, does not warrant a provision of any additional time for submitting comments.

## V. OTHER CLAIMS

- A. Claim 14 (Claim 7 of the Panel Request): Ukraine acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because Ukraine failed to provide in sufficient detail in the Decision of the Intergovernmental Commission on International Trade No.AD-315/2014/4421-06 of 1 July 2014, as referred to in Notice "On the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate originating in the Russian Federation", and in the Communication of the Ministry of Economic Development and Trade of Ukraine No. 4421-10/21367-07 of 25 June 2014 the findings and conclusions reached on all issues of fact and law it considered in making its preliminary and final determinations and failed to provide all relevant information and reasons, which have led to the imposition of the measure. In particular, Ukraine did not provide the calculations used to determine the dumping margins in the final determination and the data it relied upon in order to make the calculations**

47. Ukraine explained that a claim under Article 12.2 does not evolve from a claim under Article 6.9 and does in fact expand the scope of the dispute. In respect of the scope of obligations under Articles 6.9 and 12.2, Russian Federation's arguments are limited to a mere statement that both Articles contain an obligation to disclose information and, therefore, do not categorically differ.<sup>19</sup> Ukraine notes that the scope of disclosure (*i.e.*, which information has to be disclosed) was considered a relevant factor by the panel in *EC – Fasteners (China)* in its decision to rule that a claim under Article 6.9 (an obligation to disclose information) not mentioned in the Request for Consultations was outside the Panel's Terms of Reference, even though a claim under Article 6.2 (also a disclosure obligation) was mentioned in the Request for Consultations.<sup>20</sup> The same panel found that the timing as to when the disclosure has to be fulfilled is another relevant factor.

48. Furthermore, the difference in purpose is that Article 6.9 of the Anti-Dumping Agreement obliges an investigating authority to provide parties "with sufficient factual information to defend their interests during the investigation", whereas Article 12.2.2 – "to ensure that the investigating authority's reasons for concluding as it did can be discerned and understood".

49. Finally, Ukraine notes that including the phrase "notices [...] of the Ministry of Economic Development and Trade of Ukraine" is insufficient to indicate to Ukraine that by challenging the measures under Article 6.9 of the Anti-Dumping Agreement, the Russian Federation also intends to challenge the measures under Article 12.2 of the same Agreement. Ukraine recalls that the complaining party must indicate both the measure being challenged and the specific legal provisions alleged to be violated.<sup>21</sup> The mere indication of a measure being challenged does not put the respondent on a sufficient notice as to what claims the claimant intends to pursue and what "matter" is being referred to the DSB. Based on the foregoing, Ukraine submits that the Russian Federation's claim under Article 12.2 of the Anti-Dumping Agreement falls outside of the scope of the Panel's terms of reference.

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<sup>18</sup> Paragraph 4, Article 6 of the Ukrainian Anti-Dumping Law, Exhibit UKR-9.

<sup>19</sup> Russian Federation's Second Written Submission, para. 714.

<sup>20</sup> Panel Report, *EC – Fasteners (China)*, paras. 7.507 and 7.508.

<sup>21</sup> Appellate Body Report, *Guatemala – Cement I*, paras. 70 and 72.

## **VI. CONCLUSIONS**

50. Ukraine has shown that all the claims pursued and developed in the Russian Federation's First Written Submission, First Oral Statement, Second Written Submission and Second Oral Statement are unfounded and based on erroneous interpretations of the covered agreements. Ukraine respectfully asks the Panel to reject all of the Russian Federation's claims.

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## **ANNEX C**

### **ARGUMENTS OF THE THIRD PARTIES**

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## ANNEX C-1

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA

#### *Third party oral statement*

#### **Introduction**

1. Argentina thanks the Panel for the opportunity to participate in this case and to present its views, given its systemic and trade interest in the correct interpretation of certain obligations contained in the legal provisions of the Anti-Dumping Agreement and the GATT 1994 invoked in this dispute.

2. In particular, Argentina emphasizes the importance of maintaining a proper interpretation of the rules contained in those agreements and the findings made by the Appellate Body in *EU – Biodiesel* (DS473).

3. In the light of the foregoing, Argentina respectfully submits the following considerations to the Panel.

#### ***The Russian Federation's claim under Article 2.2.1.1 of the Anti-Dumping Agreement***

4. In connection with the claim under Article 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, Argentina considers it appropriate to recall certain specific principles developed by the Appellate Body in the *EU – Biodiesel* case.

5. First of all, the Appellate Body upheld the Panel's finding that Article 2.2.1.1 "does not involve an examination of the 'reasonableness' of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful".<sup>1</sup>

6. Upon verification of the conditions of the first sentence of Article 2.2.1.1, that is, the existence of records that are kept in accordance with generally accepted accounting principles and reasonably reflect the costs associated with the production and sale of the product under consideration, the value must be constructed on the basis of those records insofar as they reflect the actual costs incurred.<sup>2</sup>

7. Argentina has argued that the correct inquiry into whether the records reasonably reflect the cost of production involves an assessment of the reasonableness of the records, as opposed to the reasonableness of the costs, and that, although government intervention may distort costs, such intervention does not necessarily constitute a sufficient basis for disregarding the records.<sup>3</sup>

8. Secondly, Argentina does not agree with the interpretation given by some third parties to the effect that certain governmental actions may be the source or origin of dumping.<sup>4</sup>

9. The Panel in the *EU – Biodiesel* case found that there were no legal arguments to extrapolate from the second Ad Note to Articles VI:2 and VI:3 that the concept of "dumping" is intended to cover any distortion arising out of government action.<sup>5</sup>

10. The Appellate Body reaffirmed that the object and purpose of the Anti-Dumping Agreement is to recognize the right of Members to take anti-dumping measures to counteract injurious

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<sup>1</sup> *EU – Biodiesel* (WT/DS473/AB/R, para. 6.41).

<sup>2</sup> *EU – Biodiesel* (WT/DS473/AB/R, para. 6.41).

<sup>3</sup> *EU – Biodiesel* (WT/DS473/R, para. 7.188).

<sup>4</sup> Third Party Written Submission of the European Union, p. 7; Third Party Written Submission of Brazil, pp. 8-9.

<sup>5</sup> *EU – Biodiesel* (WT/DS473/R, para. 7.240).

dumping<sup>6</sup> and that the normal value of the product under consideration must be constructed in accordance with costs actually incurred by the investigated companies.<sup>7</sup>

11. In other words, the construction of value must not be based on hypothetical costs that might have been incurred under a different set of conditions or circumstances, such as the alleged absence of any distortion of costs caused by government intervention.<sup>8</sup>

12. In this connection, in the *EU – Biodiesel* case, both the Panel and the Appellate Body found that the difference between the domestic market prices and the international prices of the raw material caused as a result of certain government interventions does not, in itself, constitute a sufficient basis, under Article 2.2.1.1, for concluding that the producers' records do not reasonably reflect the costs of the raw material, or for disregarding those costs when constructing the normal value of the product under consideration.<sup>9</sup>

### ***The Russian Federation's claims under Article 2.2 of the Anti-Dumping Agreement***

13. The Russian Federation argues that Ukraine acted in a manner inconsistent with Article 2.2 of the Anti-Dumping Agreement by not using production costs in the country of origin to construct normal value and by replacing the raw material costs reported in producers' records (internal cost and cost actually incurred) with the average price of gas destined for export at the border with Germany.<sup>10</sup>

14. Argentina recalls that, as was noted by the Appellate Body in the *EU – Biodiesel* case, the investigating authority is not prevented from having recourse to information on costs other than that contained in the records of exporters or producers, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin".<sup>11</sup>

15. The Appellate Body held that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination provided for in that rule refers to the "cost of production [...] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin".<sup>12</sup>

16. It may be concluded from the foregoing that the investigating authority may not have recourse to information from a place other than the country of origin for the sole purpose of correcting an alleged cost distortion caused by government intervention, by substituting an alleged out-of-country cost for the domestic cost actually incurred.

### ***The Russian Federation's claim under Article 6.9 of the Anti-Dumping Agreement***

17. The Russian Federation argues that Ukraine acted in a manner inconsistent with Article 6.9 of the Anti-Dumping Agreement by not having informed all interested parties of the essential facts in sufficient time for them to defend their interests. Russia maintains that Ukraine granted only two working days for the interested parties to make comments on the essential facts which formed the basis for the decision taken as a result of the interim review and the final review upon expiry of the time-limit.

18. Without seeking to take a position on factual questions in this specific case, Argentina shares the view expressed by the Russian Federation and by some third parties<sup>13</sup> to the effect that the two working days allowed for comments on the essential facts do not appear *prima facie* to be sufficient or reasonable under the terms of Article 6.9 of the Anti-Dumping Agreement.

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<sup>6</sup> *EU – Biodiesel* (WT/DS473/AB/R, para. 6.25).

<sup>7</sup> *EU – Biodiesel* (WT/DS473/AB/R, para. 6.19).

<sup>8</sup> *EU – Biodiesel* (WT/DS473/AB/R, para. 6.41).

<sup>9</sup> *EU – Biodiesel* (WT/DS473/AB/R, paras. 6.54-6.56).

<sup>10</sup> First Written Submission by the Russian Federation, p. 95.

<sup>11</sup> *EU – Biodiesel* (WT/DS473/AB/R, para. 6.73).

<sup>12</sup> *EU – Biodiesel* (WT/DS473/AB/R, para. 6.73).

<sup>13</sup> Third Party Submission of Brazil, pp. 22-24.

**Conclusion**

19. Madam President and distinguished Panel members, Argentina thanks you for your attention.

## ANNEX C-2

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

1. Australia's submissions in this dispute have focused on how normal value should be determined in anti-dumping investigations where government price setting is evident.

#### **I. INTERPRETATION OF "REASONABLY REFLECT THE COSTS" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT**

2. In Australia's view, the proper application of Article 2.2.1.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the "Anti-Dumping Agreement") is informed by the purpose of Article 2.2, which the Appellate Body has described as follows:

Article 2.2 of the Anti-Dumping Agreement concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. The costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy. This supports the view that the "costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 are those costs that have a genuine relationship with the production and sale of the product under consideration.<sup>1</sup>

3. Australia considers that an investigating authority must therefore examine whether costs calculated pursuant to Article 2.2.1.1 are capable of generating an appropriate proxy; and have a genuine relationship with the production and sale of the product under consideration. Where reliance on the costs reflected in a producer or exporter's records would not result in an appropriate proxy, an investigating authority should disregard those costs.

4. In Australia's view, such circumstances may arise in instances where government price setting is evident. This is because government price setting may not apportion costs between relevant entities on the basis of commercial considerations and market forces of supply and demand. Rather, where the input prices paid and recorded by a producer or exporter are set by government, they may not accurately reflect how the actual costs have been apportioned between the relevant transacting entities. In such circumstances, using the producer's or exporter's cost records could fail to reasonably reflect the costs associated with the production and sale of the product under consideration, such that they would yield an inappropriate proxy that fulfils the basic purpose of Article 2.2.

5. The Appellate Body has consistently recognised that costs may be disregarded in remedies investigations where they are not based on forces of supply and demand but instead reflect some anomalous distortion – including: where prices in a subsidies investigation are suppressed because of a government's predominant role in the market;<sup>2</sup> where prices are suppressed because sales of relevance to an anti-dumping investigation take place between affiliates;<sup>3</sup> and where sales take place in the context of a liquidation sale.<sup>4</sup> This is further supported by the context of Article 2.2, including Article 2.7 – which makes clear that the price comparison methodology may need to be adjusted in circumstances of government price setting.

6. Australia therefore considers that the setting of input prices by government may be a sufficient basis for disregarding the costs reflected in the records of producers and exporters because, where those costs would not yield an appropriate proxy for the price of the like product in the ordinary course of trade, they would not fulfil the basic purpose of Article 2.2.

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<sup>1</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

<sup>2</sup> Appellate Body Reports, *US – Softwood Lumber IV*, para. 106; *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.

<sup>3</sup> Appellate Body, *US – Hot-Rolled Steel*, paras. 140 - 147.

<sup>4</sup> Appellate Body, *US – Hot-Rolled Steel*, para. 143.

## **II. INTERPRETATION OF "NORMALLY" IN ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT**

7. Australia supports Ukraine's argument in this dispute that the "normally" condition in Article 2.2.1.1 of the Anti-Dumping Agreement provides a separate legal ground for derogating from producers' records.

8. As was found by the panel in *China – Broiler Products*, the "normally" condition provides a standalone legal basis to derogate from the rule applied in Article 2.2.1.1, and "requires an investigating authority to explain why it departed from the norm and declined to use a respondent's books and records."<sup>5</sup>

9. Australia therefore considers that the "normally" condition: supports the view that an investigating authority should consider whether it would be appropriate in the circumstances of a particular investigation to depart from the usual rule in Article 2.2.1.1; and justifies disregarding the records of producers and exporters where these would not yield an appropriate proxy.

## **III. DISTINGUISHING THIS DISPUTE FROM *EU – BIODIESEL (ARGENTINA)***

10. Australia considers that it is important to take account of the factual and legal distinctions between this dispute and *EU – Biodiesel (Argentina)*, and cautions against any reflexive application of the reasoning and findings in *EU – Biodiesel (Argentina)* to the current dispute.

11. Nuances in the panel and Appellate Body reports in *EU – Biodiesel (Argentina)* have not been reflected in Russia's first written submission or oral statement. In particular, Russia contends that Article 2.2.1.1, as clarified by the Appellate Body in that dispute, makes the parameters of the costs themselves beyond the scope of the investigating authority's examination.<sup>6</sup> However, while the panel and the Appellate Body determined that the Argentine export tax system did not provide "a sufficient basis" for disregarding the costs in producer and exporter records, both the panel and the Appellate Body explicitly recognised a number of circumstances in which the costs reflected in producers' records might be examined and disregarded.<sup>7</sup>

12. Importantly, the panel in *EU – Biodiesel (Argentina)* also explicitly noted that the circumstances at issue in that dispute were distinct from those where input prices are set by the government, as is the case in the current dispute.<sup>8</sup> For the reasons Australia has provided throughout its submissions in this dispute, in Australia's view, government price setting provides a sufficient basis for disregarding the costs in records of producers and exporters under investigation.

13. Further, in *EU – Biodiesel (Argentina)*, the EU made clear that it did not seek to rely upon the "normally" condition.<sup>9</sup> In contrast, Ukraine does seek to rely upon it in this dispute. This provides a second legal ground to support Ukraine's approach which was not examined in the dispute upon which Russia seeks to rely.

## **IV. FINDING THE COSTS ASSOCIATED WITH PRODUCTION IN THE COUNTRY OF ORIGIN CONSISTENTLY WITH ARTICLE 2.2**

14. The text of Article 2.2 permits the margin of dumping to be determined by comparison with a comparable price of the like product when exported to an appropriate third country in certain circumstances. In considering how this should be applied, Australia observes that the Appellate Body in *EU – Biodiesel (Argentina)* found that the use of "information from sources outside the country" was permitted on the condition that:

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<sup>5</sup> Panel Report, *China – Broiler Products*, para. 7.161, citing Appellate Body Report, *US – Clove Cigarettes*, para. 273.

<sup>6</sup> Russia's first written submission, para. 68.

<sup>7</sup> Panel Report, *EU – Biodiesel (Argentina)*, fn 400; Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41.

<sup>8</sup> Panel Report *EU – Biodiesel (Argentina)*, fn 421 to para. 7.249. Note the Appellate Body upheld these findings in para. 6.57 of its Report.

<sup>9</sup> Panel Report, *EU – Biodiesel (Argentina)*, fn 380; Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 120.

... whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin".<sup>10</sup>

15. This makes clear that use of data from outside of the country of production is permitted where that data is adapted to ensure it is suitable to determine the cost of production in the country of origin. In Australia's view, this will depend on the specific circumstances of a given case, the quality and quantity of the evidence on the investigation record, and the quality of an investigating authority's explanation. However, Australia cautions that the process of adjustment should not reintroduce distortions, such as those arising from government price setting, in the construction of normal value.

## **V. CONCLUSION**

16. Australia concludes that Article 2.2 requires an investigating authority to examine whether costs calculated pursuant to Article 2.2.1.1 are capable of generating an appropriate proxy, and whether government price setting has suppressed costs to the extent that costs apportioned to the seller are not reasonably reflected in the records. In such circumstances there may be grounds for the investigating authority to depart from the producer or exporter records where doing so would yield a more appropriate proxy. Where such derogation takes place, Article 2.2 clearly permits the use of data from a third country where it is appropriately adjusted to reflect the costs of production in the country of origin, without reintroducing the very distortions that undermine the appropriateness of the proxy.

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<sup>10</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.

### ANNEX C-3

#### EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil made the following points in relation to topics of systemic relevance in this dispute.

**I. The legal standard under Article 2.2.1.1 of the Anti-dumping Agreement (ADA)**

2. The Russian Federation relied heavily on the Appellate Body jurisprudence in *EU – Biodiesel (Argentina)* to argue its case. Brazil would like to recall, however, that the referred Appellate Body's ruling is circumscribed to the factual circumstances of that case. Therefore, Brazil would caution the Panel against overstressing the boundaries of the Appellate Body's ruling in *EU – Biodiesel (Argentina)*.

3. It is clear from the report in *EU – Biodiesel (Argentina)* that the Appellate Body's reading of the legal standard under Article 2.2.1.1 of the ADA is more nuanced than Russia has argued in these proceedings.

4. Firstly, the Appellate Body referred to several instances in which investigating authorities are authorized to depart from the records kept by producers when calculating the normal value. It explained that:

"[R]ecords that are GAAP-consistent may nonetheless be found not to reasonably reflect the costs associated with the production and sale of the product under consideration. This may occur, for example, if certain costs relate to the production both of the product under consideration and of other products, or where the exporter or producer under investigation is part of a group of companies in which the costs of certain inputs associated with the production and sale of the product under consideration are spread across different companies' records, or where transactions involving such inputs are not at arm's length."<sup>1</sup>

5. The Appellate Body also clarified that there may be circumstances where the obligation to calculate the cost on the basis of the records kept by the exporter or producer does not apply. The Appellate Body did not limit those circumstances, nor did it establish an exhaustive list, they merely mentioned transfer pricing as *one* example of such instances<sup>2</sup>.

6. Moreover, the Appellate Body considered that the phrase "the cost of production in the country of origin" does not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin.<sup>3</sup> This means that there may be circumstances when it would be appropriate for the investigating authority to rely on an external benchmark when calculating the normal value under Article 2.2.1.1 of the ADA.

7. Secondly, in *EU – Biodiesel (Argentina)*, the EU based its determination that the producer's records do not reasonably reflect the cost of soybeans on the fact that the export tariff applied to soybean was around 20% higher than that applied to the exportation of biodiesel. For the Appellate Body, however,

"the Argentine export tax system was not, in itself, a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel."<sup>4</sup>

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<sup>1</sup> *EU – Biodiesel (Argentina)*, para. 6.33.

<sup>2</sup> *Ib.*, para. 6.73.

<sup>3</sup> *Ib.*, para. 6.74.

<sup>4</sup> *Ib.*, para. 6.55.

8. Brazil understands that the determination of which circumstances would in fact authorize investigating authorities to depart from the records kept by producers needs to be made on a case-by-case basis, according to the actual effect of this restriction in the product at issue. In this regard, Brazil agrees with Australia's Third Party Submission that the basic purpose of constructing the normal value under Article 2.2 of the ADA is to identify an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when that price cannot be used. It is thus for investigating authorities to assess in each case whether constructing the normal value on the basis of the records kept by producers will generate this proxy.

9. Brazil considers that, depending on the nature and on the magnitude of the intervention, State interference in the market to set or regulate the prices of inputs or raw materials at artificially low levels could be considered "sufficient basis" for investigating authorities disregarding producers' records under Article 2.2.1.1 of the ADA. It is important to note that, in *EU – Biodiesel (Argentina)*, the Appellate Body did not make any findings regarding how Article 2.2.1.1 should apply to situations where the prices of inputs are subject to price controls.

10. Thirdly, the Appellate Body's decision in *EU – Biodiesel (Argentina)* was specifically circumscribed to the second condition of the *first sentence of Article 2.2.1.1*. This means that there was *no guidance* about the interpretation of the term "normally", in the beginning of the first sentence. More specifically, on which circumstances the obligation in the first sentence of Article 2.2.1.1 to "normally" base the calculation of costs on the records kept by the exporter or producer under investigation would not apply:

"As the Panel noted, the EU authorities relied explicitly on the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement to discard the records kept by the Argentine producers under investigation insofar as they pertained to the cost of soybeans. (See Panel Report, paras. 7.221 and 7.227; and Definitive Regulation (Panel Exhibit ARG-22), Recital 38) Thus, for purposes of resolving this dispute, it is the meaning of this condition that must be ascertained, and not whether there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 'normally' to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply".<sup>5</sup>

11. Brazil understands that the term "normally" in the first sentence of the Article 2.2.1.1 suggests that there may be specific situations where the records kept by the exporter or producer could be put aside, justifying the departure of the obligation to calculate the costs of production on the basis of the records kept by the producers.

12. In sum, Brazil considers that the jurisprudence in *EU – Biodiesel (Argentina)* offers only limited guidance when assessing whether investigating authorities can resort to an external benchmark when calculating the normal value under Article 2.2.1.1 of the ADA. In deciding the present dispute, the Panel should be conscious of these limitations.

## **II. Article 5.8 of the ADA is applicable in the context of reviews initiated under Articles 11.2 or 11.3 of the ADA**

13. In Brazil's view Article 5.8 of the ADA is applicable in the context of reviews initiated under Articles 11.2 or 11.3 of the Anti-Dumping Agreement. Therefore, an investigating authority cannot impose duties in the context of reviews if the producer/exporter's dumping margin was found to be *de minimis*. This understanding is confirmed by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*:

"[a]n investigating authority does not, of course, impose duties – including duties at zero per cent – on exporters excluded from the definitive anti-dumping measure, therefore such exporters cannot be subject to administrative and changed circumstances reviews, because such reviews examine, respectively, the 'duty paid' and 'the need for the continued imposition of the duty'"<sup>6</sup>.

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<sup>5</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.18, footnote 120.

<sup>6</sup> Appellate Body Report, *Mexico – Anti-dumping measures on rice*, para. 305.



**III. Procedural claim: Deadline for producer and exporter to comment on the essential facts**

14. Brazil understands that there is no definition in the ADA as to what constitutes "sufficient time" for the purpose of Article 6.9 of the ADA.

15. Brazil considers however, that, in any case, the parties should have full opportunity to defend their interests.

## ANNEX C-4

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

#### *Third party oral statement*

Ms Chairperson, distinguished Members of the Panel:

1. The People's Republic of China appreciates the opportunity to express its views before the Panel at the third party session. In this oral statement, China will focus on the legal interpretation of Articles 2.2.1.1 and 2.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement").

#### **I. INTRODUCTION**

2. This dispute raises important interpretive issues regarding the relevant provisions under Article 2 of the Anti-Dumping Agreement. As Article 2 disciplines a Member's determination of the existence and magnitude of "dumping", this dispute relates to the foundational concept of "dumping" that applies throughout the Anti-Dumping Agreement and in Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The Appellate Body has explained that "dumping is the result of the *pricing behavior of individual exporters or foreign producers*",<sup>1</sup> and that "[d]umping arises from the *pricing practices of exporters* as both normal values and export prices reflect *their pricing strategies* in home and foreign markets".<sup>2</sup> This understanding of "dumping" as international price discrimination is fundamental for the balance of rights and obligations in the Anti-Dumping Agreement. The factors exogenous to the producer are simply not relevant for determining the existence of "dumping". Anti-dumping measures are not a tool for importing countries to counteract the *regulatory policies of exporting countries*. The interpretation of the relevant provisions under Article 2 of the Anti-Dumping Agreement should be consistent with the foundational concept of "dumping".

#### **II. ARTICLE 2.2.1.1 STIPULATES TO CALCULATE THE COST OF PRODUCTION ON THE BASIS OF THE RECORDS KEPT BY THE PRODUCERS**

3. Article 2.2.1.1 addresses how to determine costs of production in the country of origin, either where an investigating authority assesses whether prices are below costs under Article 2.2.1 or where it chooses to *construct* normal value under Article 2.2. Article 2.2.1.1 states that an authority must use the costs set forth in the GAAP compliant "records kept by the exporter or producer under investigation", unless the records do not "reasonably reflect the costs associated with the production and sale of the *product*".<sup>3</sup> The Appellate Body in *EU – Biodiesel* stressed that the term "reasonably reflect the costs associated with the production and sale of the product" in Article 2.2.1.1 refers to whether "the records kept by the exporter or producer suitably and sufficiently correspond or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the *specific product under consideration*".<sup>4</sup>

4. The mere recording of the *price paid* for inputs does not inevitably mean that the producer's records reasonably reflect the costs associated with the product's production. For instance, Article 2.2.1.1 itself embodies rules dealing with the "proper allocation" of certain costs, and the Appellate Body in *EU – Biodiesel* pointed out some exceptional situation too. However, none of these situations involve imposition of hypothetical out-of-country costs in a bid to counter the economic effects of regulation by an exporting government. The Appellate Body has excluded "an examination of the 'reasonableness' of the reported costs themselves, when the actual costs

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<sup>1</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 111 (emphasis added).

<sup>2</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 95 (emphasis added), referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 156 and *US – Zeroing (Japan)*, para. 156 "[t]he concept of dumping relates to the pricing behaviour of exporters or foreign producers". See also Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 86.

<sup>3</sup> Emphasis added.

<sup>4</sup> Appellate Body Report, *EU – Biodiesel*, para. 6.26.

recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful".<sup>5</sup> The Appellate Body found the costs "calculated on the basis of records kept by the exporter or producer" under Article 2.2.1.1 must lead to a cost "in the country of origin".<sup>6</sup>

5. Article 2.2.1.1 states that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation". The panel in *US – Softwood Lumber V* explained that this imposes a positive obligation on an investigating authority to normally use the books and records of the respondent, provided that two conditions are met.<sup>7</sup> The fact that the sentence uses the word "normally" does not render the rule optional. It simply indicates that the obligation included in that sentence is not absolute and that there are exceptions as expressed by the two conditions referred to in the same sentence. This understanding has also been highlighted by the Appellate Body in *US – Clove Cigarettes*:

*We observe that the ordinary meaning of the term "normally" is defined as "under normal or ordinary conditions, as a rule". In our view, the qualification of an obligation with the adverb "normally" does not, necessarily, alter the characterization of that obligation as constituting a "rule". Rather, we consider that the use of the term 'normally' ... indicates that the rule ... admits of derogation under certain circumstances." [...]*<sup>8</sup>

6. There is no reason that the interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement in this dispute could depart from the WTO jurisprudence in *EU – Biodiesel*. The use of the word "normally" can't be interpreted to allow an investigating authority to ignore its obligation under Article 2.2.1.1 unless under the exceptions provided under the Anti-Dumping Agreement.

### **III. ARTICLE 2.2 STIPULATES TO CONSTRUCT THE NORMAL VALUE ON THE BASIS OF THE COST OF PRODUCTION IN THE COUNTRY OF ORIGIN**

7. Article 2.2 of the Anti-Dumping Agreement deals with the establishment of the producer/exporter's normal value. It requires that domestic prices normally be used for the purpose of establishing normal value. In some circumstances, however, Article 2.2 recognizes that domestic prices may be unsuitable. These situations are clearly provided in Article 2.2. In such a situation, an investigating authority has two options: it may base normal value on "a comparable price of the like product when exported to an appropriate third country", or, it may construct normal value on the basis of the "cost of production in the country of origin" plus administrative, selling and general costs and profit. Each of these methods aims to achieve a proxy normal value as close as possible to the would-be domestic selling price:<sup>9</sup> sales must be to an "appropriate" third country at a "comparable" price and the costs of production must be the producer's costs in the "country of origin". The "cost of production" described in Article 2.2 is the *producer's* cost and not a *hypothetical* cost that does not reflect the true cost incurred by the producer to produce the product under consideration.

8. China recognizes that situations arise where a producer's true costs to produce the product are not reflected in its records, meaning that the "cost of production in the country of origin" must be determined through evidence other than the producer's own accounts. This may be the case, for example, where the producer's records cannot be used because the transaction is influenced by a non-arm's length pricing transfer with a related party, in which case the recorded cost may appear to be unreliable. To be clear, in such a case, the investigating authority may reject the producer's *records*, but may not deny the *true costs* of the producer of the product under consideration. The authority may look for evidence other than the producer's records, but, at the end of the day, it must determine or calculate the *true costs* of the producer of the product under consideration and not a *hypothetical* cost. To determine costs in such a case, the authority must clearly look for evidence *in the country of origin* because this evidence is the best evidence of the true cost to the producer "in the country of origin".

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<sup>5</sup> Ibid. para. 6.41 (quoting Panel Report, *EU – Biodiesel*, fn 400 to para. 7.242).

<sup>6</sup> Ibid. para. 6.23.

<sup>7</sup> Panel Report, *US – Softwood Lumber V*, para. 7.237.

<sup>8</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 273. See also Panel Report, *China – Broiler Products*, para. 7.161.

<sup>9</sup> Panel Report, *Thailand – H-Beams*, para. 7.112.

9. The Appellate Body in *EU – Biodiesel* also stressed that an investigating authority may not, when using out-of-country evidence, "simply substitute costs from outside the country of origin for the 'cost of production in the country of origin'"; rather "the investigating authority [is required] to adapt the information that it collects" [to the conditions of the country of origin].<sup>10</sup>

10. Thus, if no in-country evidence were available and out-of-country evidence had to be used, the out-of-country costs would have to be adjusted to ensure that the "cost of production" ascertained by the authority is a reflection of the producer's true costs to produce the product *in the country of origin*. Such necessary adjustments would include accounting for any differences in regulatory policies and any other factors exogenous to the producer that affect the cost of production. Ignoring such factors would mean that the external costs taken into consideration reflect conditions *outside* the country of origin and therefore could not be reflective of the producer's cost of production "in the country of origin".

#### **IV. OTHER ISSUE**

11. China takes note that some Parties use Article 2.7 of the Anti-Dumping Agreement and the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994 ("*Ad Note*") as context to support their conclusion that a state regulation of prices would allow an investigating authority to reject home market prices.

12. The *Ad Note* is the only provision of the Anti-Dumping Agreement and GATT 1994 that provides conditional authority for an investigating authority to use of a methodology not based on a strict comparison with domestic prices and costs. However, the *Ad Note* lays down two strict conditions that must be met before an authority is permitted to depart from a strict comparison with home market prices and costs. Specifically, the *Ad Note* permits recourse to the exceptional methodology under the *Ad Note* only if: (i) there is a complete or substantially complete monopoly of trade by the State in the exporting country; and (ii) *all* prices in the exporting country are fixed by the State.

13. The *Ad Note* is an exception to the rules provided under articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI of GATT 1994. It could not justify an investigating authority's practice to reject home market price or costs based on the regulation of price in the exporting country. On the contrary, if it does not meet the two strict conditions provided under the *Ad Note*, an investigating authority must strictly follow the rules provided under articles 2.1 and 2.2 of the Anti-Dumping Agreement and Article VI of GATT 1994.

Thank you. The delegation of China looks forward to your questions.

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<sup>10</sup> Appellate Body Report, *EU – Biodiesel*, para. 6.73.

## ANNEX C-5

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

The government of Colombia (hereinafter "Colombia") intervenes in this case given its systemic interest in the application of several provisions of the WTO Covered Agreements discussed before this Panel.

While not taking a final position on the specific merits of this case, Colombia provides its views on some of the legal claims advanced by the Parties to the dispute. In particular, Colombia has made submissions on the following issues presented by the Parties:

#### A. ARTICLES 2.2 AND 2.2.1.1 - SOURCES INSIDE THE COUNTRY OF ORIGIN

1. In Colombia's opinion, the Anti-Dumping Agreement acknowledges that in certain circumstances consideration of the domestic price in the exporting country does not produce an appropriate 'normal value' for the purposes of comparison with the export price in order to determine the margin of dumping. Thus, ADA Article 2.2 envisages circumstances in which such a straightforward price-to-price comparison may not be possible or appropriate and therefore provides for alternative methodologies for the calculation of the normal value. Such possibilities do not exclude information collected outside the exporting country when determining the "cost of production in the country of origin".

2. This issue was clarified by the Appellate Body in *EU – Biodiesel* when interpreting Article 2.2 of the ADA and VI of the GATT 1994; the AB stated that: "*these provisions do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin...*".<sup>1</sup>

3. Furthermore, the AB stressed the "reference" role of ADA Article 2.2 and stated that "...On the basis of the text of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, the phrase "cost of production [...] in the country of origin" may be understood as a reference to the price paid or to be paid to produce something within the country of origin".<sup>2</sup>

#### B. THE TERMS "SHALL NORMALLY" UNDER ADA ARTICLE 2.2.1.1

4. Colombia recognizes that the use of the term "shall" before the term "normally" implies an obligation of mandatory nature. However, as the AB has stated, there should be certain circumstances where the preference rule over records kept by the exporter or the producer admits derogation. This seems to be the case where despite the evidence submitted or obtained during the investigation proceedings, the IA concludes that domestic sales of any product are not "in the ordinary course of trade". This has critical relevance in cases where distorting administrative practices or rules could affect the "normal value" of the investigated product. Nonetheless, the IA must comply with the fundamental obligations set out in ADA Article 5.3 when performing the proper examination of the evidence provided by the interested parties. This means to examine whether the evidence before the authority at the time it made its determination was such that an unbiased and objective that evidence could properly have made the determination.<sup>3</sup>

#### C. THE OBLIGATION TO ESTABLISH A PRIMA FACIE CASE

5. Colombia considers that the *prima facie* case, refers to several elements: a) there must be an express statement on the claim; b) the reasons for which the complaining Member considers there is a violation of a specific article of a Covered Agreement; c) identification of the specific measures at issue and provision of a brief summary of the legal basis of the complaint sufficient to

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<sup>1</sup> ABR, *EU – Biodiesel*, para. 6.74 (WT/DS473/AB/R).

<sup>2</sup> Ibid, para. 6.69.

<sup>3</sup> PR, *US – Hot-Rolled Steel*, para. 7.153 (WT/DS184/R).

present the problem clearly<sup>4</sup>. Evidence must be presented to enable the complainant to rule on the alleged facts.

6. For this reason, it is important to consider that, according to Article 13 of the DSU, the panels have a significant investigative authority, but this authority cannot replace the burden for the complaining party to establish a *prima facie* case of inconsistency based on a specific legal claims.<sup>5</sup> A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU, but not to make the case for a complaining party.

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<sup>4</sup> Appellate Body Report, *Guatemala – Cement I*, paras. 70 and 72.

<sup>5</sup> ABR, *India – Agricultural Products*, para. 5.85.

## ANNEX C-6

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

#### 1 INTRODUCTION

1. The EU exercises its right to participate as a third party in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the rights and obligations contained therein, in particular the Anti-Dumping Agreement. Whilst not taking a position on the facts of this case, the EU provides its views on certain legal claims and arguments advanced so far by the Parties to the dispute.

#### 2 SUBSTANTIVE CLAIMS RELATING TO DUMPING DETERMINATIONS

##### **2.1 Russia's claim that Ukraine violated Articles 2.2 and 2.2.1.1 of Anti-Dumping Agreement because, in determining the constructed normal value, it failed to calculate costs on the basis of records kept by the Russian producers and exporters**

2. The EU notes that the Appellate Body in *EU — Biodiesel*, referring to the panel report in the same case, mentioned "non-arms-length transactions" or "other practices" which may affect the reliability of the costs reported in the records. Several third parties (Australia, Brazil, the US) highlighted this aspect in their written submissions.

3. *First*, the EU agrees that certain government actions can be at the source of dumping and material injury. Ukraine distinguishes the present case from *EU — Biodiesel* and explains in detail that the kind of state intervention in the present case is much more significant than in *EU — Biodiesel*, as the domestic price of gas in Russia is established by law and not subject to market forces.

4. Indeed, Article VI:5 of GATT 1994 provides that no product can be subject to both anti-dumping and countervailing duties, in order to "compensate for the same situation". It is uncontroversial that countervailing duties can be used to address situations caused by the action of the government of the exporting country, such as prohibited subsidies. This means that, by acknowledging that there can be a single situation which could be the subject to either a countervailing duty or an anti-dumping duty, Article VI of GATT 1994 acknowledges that government actions may be at the source of dumping and material injury.

5. This conclusion was confirmed by the Appellate Body in *United States — Anti-dumping and Countervailing duties (China)* that clearly establishes that "exogenous factors", such as the actions of the government of the exporting country, may very well be the source of dumping.

6. *Second*, the EU agrees with Ukraine that the establishment of the domestic gas prices in Russia may fall under the "other practices" which may affect the reliability of the reported costs. Indeed, the domestic gas price in Russia is regulated by the State and not subject to market forces. It appears that the price at which the main provider, Gazprom, sells gas on Russia's domestic market does not even cover the costs for extraction and transportation to the Russian producers, let alone the other expenses incurred.

7. The EU agrees that this practice by the Russian State of establishing the domestic gas prices may be considered as falling under the category of "other practices" which affect the reliability and accuracy of the costs in the producers' records.

8. *Third*, the EU agrees that at the time of its accession to the WTO Russia undertook specific commitments with regard to pricing policies and in particular with regard to the fact that "producers/distributors of natural gas in the Russian Federation would operate [...] on the basis normal commercial considerations, based on recovery of costs and profit". In addition, the EU recalls the concerns expressed by Members with regard to Russia's gas pricing policies and the role of Gazprom.

9. Thus, Russia's commitment that producers and distributors of gas in Russia would operate on the basis of normal commercial considerations, based on recovery of cost and profit, is part of

its WTO obligations. However, the fixing of domestic gas prices by the State cannot be equated to "normal commercial considerations".

10. *Finally*, with regard to the meaning of "normally" in Article 2.2.1.1, the EU considers that a threshold question is whether Ukraine has explained sufficiently well to the Panel how that particular provision was relied upon by the IA in the investigation at issue. Otherwise the invocation by this particular provision may only constitute an attempt at *ex-post* rationalisation. This would mean that the Panel almost certainly does not need to decide this question in this case, and in our submission should not do so.

11. Following the definition of dumping, and the introduction of the notions of normal value and price comparability in Article 2.1 of the Anti-Dumping Agreement, Article 2.2 elaborates the rules for determining normal value. Article 2.2 contains two sub-paragraphs. Article 2.2.1 focuses in on the question of when domestic sales or sales to a third country may be treated as not in the ordinary course of trade by reason of price (when they are below the costs of production plus administrative, selling and general costs).

12. Article 2.2.1 itself contains one further sub-paragraph: Article 2.2.1.1. By its own terms, Article 2.2.1.1 is framed as a provision to be applied "for the purpose of paragraph 2". The term "purpose" appears in the singular. To understand the provision properly, we must therefore look back to the single purpose of paragraph 2. We must neither improperly expand nor narrow that single purpose. The single purpose of paragraph 2 is, as we have already observed, to set out rules governing the establishment of a value that is normal or, for short, a normal value. Thus, we must correctly understand the first sentence of Article 2.2.1.1 as requiring that, for the purpose of establishing a normal value, provided that certain conditions are met, costs shall normally be based on the records of the investigated firm.

13. The first sentence of Article 2.2.1.1 contains two conditions, introduced by the term "provided that". The first condition relates to GAAP, whilst the second condition refers to "records ... reasonably reflect the costs ...". If the relevant conditions are fulfilled, then, according to the terms of Article 2.2.1.1, a particular consequence follows. That consequence is framed as an obligation (through the use of the term "shall"). Specifically, the consequence is that normally the costs are to be calculated on the basis of the records of the investigated firm. Thus, by its own terms, the first sentence of Article 2.2.1.1 does not establish the consequence as an absolute rule, but frames the consequential obligation by using the term "normally". Also by its own terms, the first sentence of Article 2.2.1.1 does not explicitly set out what circumstances may be considered "normal" and what circumstances may be considered "not normal".

14. It is important to recognise and acknowledge, in the design and architecture of the first sentence of Article 2.2.1.1, that there are two conditions that, if satisfied, result in a specific consequence. Such a condition – consequence structure is not the same, as a matter of law, to a general rule – exception structure, and it would be legally erroneous to interpret and apply the provision as if it were framed as a general rule – exception, when that is not the case.

15. By its own terms, Article 2.2.1.1 does indicate some of the circumstances in which it may be justified to reject/replace/adjust specific cost items in the records of the investigated firm. For example, the second sentence of Article 2.2.1.1 refers to cost allocations have been "historically utilized" by the investigated firm, in particular as regards amortization, depreciation, allowances for capital expenditures and other development costs. Thus, a specific cost allocation might be in accordance with GAAP and otherwise "reasonably reflect the costs ...", but it might not have been "historically utilized" by the investigated firm, as opposed to being specifically engineered for the purposes of completing the questionnaire response. Thus, in such a situation, instead of calculating costs exclusively on the basis of the records kept by the investigated firm, an investigating authority may be entitled to reject/replace/adjust such costs (by definition, by having recourse to information or data exogenous to the records kept by the investigated firm). The same comment applies with respect to the existence of an "association or compensatory arrangement" as referenced in Article 2.3. The Appellate Body has recognised that rejecting transactions between affiliates in favour of transactions that are in the ordinary course of trade is consistent with Article 2.1, and thus consistent with the purpose (establishing a normal value) that Article 2.2.1.1 is expressly directed towards achieving. If such adjustments would not be made pursuant to Article 2.2.1.1 (the terms adjusted and adjustment appear in the third sentence and in footnote 6), then they would only have to be made instead pursuant to Article 2.4.

16. These observations are confirmed by the repeated use of the term "normal" throughout the relevant provisions, including in Article VI of the GATT 1994; in the basic definition in Article 2.1;



in Article 2.2, footnote 2, Article 2.2.1, and footnote 5; in Articles 2.2.1.1 and 2.2.2 (by cross-reference) and Article 2.4. The overarching requirement that the export price must be compared with a value that is normal, that is, a normal value, provides compelling support for the preceding analysis.

17. Thus, the EU has offered some initial views with regard to the correct interpretation of Article 2.2.1.1, including the meaning and place of "normally" in its overall architecture. The EU considers that there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 "normally" to base the calculation of costs on the records kept by the exporter or producer under investigation would not preclude the rejection or adjustment of data found to relate to an abnormal situation, an issue which was not decided in *EU — Biodiesel*. This understanding is shared by other third parties.

**2.2 Russia's claim that Ukraine acted in breach of Articles 2.2 and 2.2.1.1 of Anti-Dumping Agreement because it replaced (adjusted) the costs of gas actually borne by the Russian producers and exporters for production of ammonium nitrate with data on the gas prices outside of Russia**

18. Ukraine maintains that, differently from *EU — Biodiesel*, in the present case the gas price was regulated by the State and the State was the main supplier of the respective product.

19. The EU recalls that the Appellate Body has made it clear that evidence from outside the country of origin may be taken into account in the determination of the cost of production in the country of origin.

20. Furthermore, the EU notes that in the context of the SCM Agreement the Appellate Body went even further, stating in *US — Softwood Lumber IV* that an IA may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted.

21. That position was later confirmed by the Appellate Body in *US — Anti-Dumping and Countervailing Duties (China)*, also in the context of the SCM Agreement. According to the Appellate Body an IA may reject in-country private prices if it reaches the conclusion that these are too distorted due to the predominant participation of the government as a supplier in the market.

22. Similarly, in the present case Ukraine has brought evidence that in-country gas prices in Russia are distorted such that they cannot meaningfully be used for the construction of the normal value, as the Russian government establishes itself the domestic gas prices. It follows that in the case of a market distorted to such an extent by state intervention an IA may not rely on the domestic prices of gas.

**2.3 Russia's claim that Ukraine violated Article 2.2.1 of the Anti-Dumping Agreement because it improperly treated domestic sales of Ammonium nitrate in Russia as not being in the ordinary course of trade**

23. Russia claims that the use of the price adjustment with respect to the gas prices in Russia's domestic market resulted in a much higher per unit costs of production and lead to the conclusion that the domestic sales of the ammonium nitrate producers were not in the ordinary course of trade. Thus, the use of a several times higher gas price tainted the entire analysis under Article 2.2.1 of the Anti-Dumping Agreement.

24. Ukraine maintains that Russia's third claim is consequential to its first claim according to which Ukraine violated Article 2.2.1.1 of the Anti-Dumping Agreement, explaining then that the IA has found that sales were made at a loss, in substantial quantities and during an extended period of time, the prices not having provided for recovery of all costs within a reasonable period of time.

25. The EU recalls that Appellate Body has offered in *US — Hot-Rolled Steel* several examples of situations which may fall under the category of transactions "not in the ordinary course of trade".

#### **2.4 Russia's claim that Ukraine violated Article 2.4 of the Anti-Dumping Agreement because it failed to make a fair comparison between the export price and the constructed normal value**

26. Russia claims that Ukraine violated Article 2.4 of the Anti-Dumping Agreement as a consequence of the fact that in the construction of the normal value the IA rejected the prices of gas paid by the ammonium nitrate producers and replaced them with gas prices charged to customers outside the country of origin.

27. Ukraine maintains that Russia's claim is merely a repetition of its previous claim regarding the construction of the normal value and that the "artificial inflation" of the total cost of production is not a difference which affects price comparability. It re-explains that the IA reached the conclusion that gas prices on Russia's domestic market were clearly not of a commercial nature, being significantly lower than the export prices, and that those prices were fixed by the State and were below the cost, contrary to Russia's commitment undertaken upon its WTO accession. Accordingly, the IA took into account the average of the gas prices at the German border. Thus, the solution used by the IA does not relate to a difference in the characteristics of the domestic and export transactions which are compared, or for that matter a difference affecting price comparability.

28. The text of Article 2.4 provides that a "fair comparison" be made between the export price and the normal value when determining whether dumping exists. The second sentence of Article 2.4 sets up the requirements to be met by this comparison, stating that it shall be "at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time". The third sentence of Article 2.4 elaborates on the means to be employed in order that the "comparison" between the normal value and the export price is "fair".

29. The EU recalls that the panel in *EU – Biodiesel* has found that Article 2.4 refers to only those differences which affect price comparability and not to differences arising exclusively from the methodology used to construct the normal value.

30. The EU agrees with Ukraine. As the way that Argentina and Russia structured their claims is similar in the two cases, the EU considers that the Panel should dismiss Russia's claim, as it is a merely consequential claim to its claims regarding the construction of the normal value and it does not address specific aspects of the fair comparison contemplated by Article 2.4 of the Anti-Dumping Agreement.

31. Russia's claim under Article 2.4 pertains to the calculation of the normal value, as opposed to the comparison between the normal value and the export price. In light of the panel reports in *Egypt – Steel Rebar* and *EC – Tube or Pipe Fittings*, Article 2.4 does not deal with the basis for and basic establishment of the export price and normal value (which are addressed in other provisions), but rather addresses the nature of the comparison of export price and normal value. Thus, Russia's claim that the Ukrainian authorities should have calculated the normal value in a different way falls outside the scope of Article 2.4, because Article 2.4 does not apply to the establishment of the normal value. If Ukraine is right about the adjustments made pursuant to Article 2.2.1.1, which the EU considers to be the case, it would of course not be required to "un-adjust" pursuant to Article 2.4. The case turns on a proper construction and application of Article 2.2.1.1, not Article 2.4.

#### **2.5 Termination of investigation against an exporter with alleged negative dumping in the original investigation**

32. The EU starts by recalling that the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* found that by requiring the investigating authority to conduct a review for exporters with zero and *de minimis* margins, Article 68 of Mexico's Foreign Trade Act was inconsistent with Article 5.8 of Anti-Dumping Agreement and Article 11.9 of SCM Agreement.

33. If the Panel finds that in the present case there were no such *de minimis* determinations with respect to EuroChem in the original investigation, then the question may be if Article 5.8 of Anti-Dumping Agreement applies in the context of reviews initiated under Articles 11.2 or 11.3 of Anti-Dumping Agreement.

34. In this respect, the panel in *US – Corrosion-Resistant Steel Sunset Review* did not find textual or contextual support in the language of either Article 11.3 or Article 5.8 to suggest that the *de minimis* standard also applies in the context of sunset reviews.

35. However, the EU notes that in interpreting the provisions with respect to sunset reviews a panel needs to take into account their rationale and not confine itself to the sole analysis of text and context. For instance, in the context of the cumulative assessment of injury the Appellate Body found in *US — Oil Country Tubular Goods Sunset Reviews* that notwithstanding the differences between original investigations and sunset reviews, cumulation remains a useful tool for investigating authorities in both inquiries.

36. Finally, the EU recalls that in the context of the SCM Agreement the Appellate Body has found in *US — Carbon Steel* that the *de minimis* standard set forth in Article 11.9 of the SCM Agreement is not implied in Article 21.3 of the Agreement.

### **3 CONCLUSIONS**

37. The EU hopes that its contribution in the present case will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the Anti-Dumping Agreement.

## ANNEX C-7

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

#### I. INTRODUCTION

1. In this dispute, the Russian Federation ("Russia") challenges the anti-dumping measures imposed by Ukraine on ammonium nitrate originating in Russia, raising a number of claims pertaining to the interpretation of the WTO covered agreements, notably the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement"). Japan considers that this dispute raises issues of systemic importance, and focuses on several issues regarding the interpretation of Articles 2.2.1.1, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement. Notwithstanding the above, Japan does not take any specific views on the factual aspects of the dispute.

#### II. INTERPRETATION OF ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

##### A. The Condition that the Exporter's Records Reasonably Reflect Costs

2. Japan's comments regarding the condition that the exporter's records reasonably reflect the costs focus on the methodology used by an investigating authority to calculate the cost of production. Russia correctly notes that, in *EU – Biodiesel (Argentina)*, the Appellate Body clarified that there is no "additional or abstract standard of 'reasonableness' that governs the meaning of costs associated with the production and sales of the product under consideration".<sup>1</sup> This, however, does not mean that an investigating authority must in all circumstances accept the costs registered in an exporter's or producer's records.<sup>2</sup>

3. For example, the panel in *EU – Biodiesel (Argentina)* made it clear that an investigating authority are "free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs [ ]".<sup>3</sup> The Appellate Body also recognized in *EU – Biodiesel (Argentina)* that there may be circumstances in which the exporter's or producer's records may be found "not to reasonably reflect the costs associated with the production and sale of the product under consideration".<sup>4</sup> In sum, both the panel and the Appellate Body left open the possibility that the investigating authority could permissibly decline to use the exporter's or producer's records after considering the specific circumstances of the costs reported to be incurred by those exporters or producers on their records. In Japan's view, transactions affected by government price control may fall under "non-arms-length transactions or other practices which may affect the reliability of the reported costs" and which the investigating authorities are "free to examine".

4. Further, Japan notes that Article 2.2.1.1 must be understood in the light of the concept of "normal value" and Articles 2.1 and 2.2. "Normal value" is defined in Article 2.1 as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The "normal value" is meant to reflect "the 'normal' price of the like product, in the home market of the exporter".<sup>5</sup> Sales not made in the ordinary course of trade are to be excluded from the calculation of normal value "precisely to ensure that normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter".<sup>6</sup>

5. The Appellate Body also stated that Article 2.2.1.1 pertains to a methodology for obtaining an "appropriate proxy" for the sales price of the product under investigation "if it were sold in the ordinary course of trade in the domestic market".<sup>7</sup> In this regard, "the costs associated with the production and sale of the product" under Article 2.2.1.1 are intended to serve as an appropriate

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<sup>1</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37.

<sup>2</sup> See for example, Panel Report, *EU – Biodiesel (Argentina)*, footnote 400 to para. 7.242.

<sup>3</sup> Ibid.

<sup>4</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33.

<sup>5</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 140.

<sup>6</sup> Ibid.

<sup>7</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.24.

basis for estimating the would-be market price of the products concerned, or, in other words, the price that would have resulted from sales transactions concluded on terms and conditions that are compatible with normal commercial practice. Japan considers that whether or not a commercial practice is "normal" must be determined objectively by the investigating authority of the importing country and take into account the actual commercial practices in the relevant market.

6. The above interpretation does not constitute a new test under Article 2.2.1.1. To the contrary, the above interpretation faithfully reflects the text of Article 2.2.1.1, as previously interpreted by panels and the Appellate Body. Article 2.2.1.1 permits an investigating authority to disregard the exporter's or producer's records when it determines that such records do not "reasonably reflect the costs associated with the production and sale of the product under consideration" because the recorded costs of inputs do not reflect transactions concluded on terms and conditions that are compatible with normal commercial practice.

#### **B. The Term "Normally" Under Article 2.2.1.1**

7. Japan notes that the first sentence of Article 2.2.1.1 contemplates that an investigating authority shall "normally" calculate costs on the basis of records kept by the exporter or producer, provided that such records satisfy the two prescribed conditions.

8. The ordinary meaning of "normally" is "[u]nder normal or usual conditions; as a rule".<sup>8</sup> The Appellate Body has observed that the qualification of an obligation with the adverb "normally" connotes that there are circumstances "in which the obligation in the first sentence of Article 2.2.1.1 'normally' to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply".<sup>9</sup> In accordance with the principle of effectiveness,<sup>10</sup> this Panel must give "meaning and effect" <sup>11</sup> to the term "normally" in Article 2.2.1.1. Limiting the circumstances in which an investigating authority may depart from the exporter's records to the two prescribed conditions reads out the term "normally" from Article 2.2.1.1 and the text would have exactly the same meaning as if it had read: "costs shall be calculated on the basis of records kept by the exporter or producer under investigation, provided that [ ]".

9. Furthermore, the rationale for relying on the recorded costs of the producer or exporter is that such costs potentially reflect market prices of inputs and, consequently, the use of such prices can yield a proxy that approximates the would-be price of the product under consideration if it had been sold in the ordinary course of trade. Such rationale is premised on the existence of a well-functioning market in which participants are acting independently (as in arm's length transactions) for their own commercial interest. When prices of inputs are determined arbitrarily by government regulations, then an investigating authority should be allowed to exclude the relevant transactions from the calculation of constructed normal value. Japan recalls, in this regard, that the Appellate Body has recognized "that the Anti-Dumping Agreement affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not 'in the ordinary course of trade'" provided that discretion is exercised in an even-handed way.<sup>12</sup> Japan respectfully requests the Panel to give "meaning and effect" to the inclusion of the term "normally" and to preserve the flexibility that the inclusion of this term in Article 2.2.1.1 is intended to provide to investigating authorities.

### **III. INTERPRETATION OF ARTICLE 11 OF THE ANTI-DUMPING AGREEMENT**

10. Article 11 of the Anti-Dumping Agreement provides that anti-dumping duties may continue or be extended if the investigating authority finds that the removal or expiry of the anti-dumping duties would likely lead to continuation or recurrence of injury. With respect to Article 11, Russia argues that the provisions of Article 3 of the Anti-Dumping Agreement apply to reviews conducted pursuant to Article 11.<sup>13</sup>

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<sup>8</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 273.

<sup>9</sup> Appellate Body Report, *EU – Biodiesel (Argentina)*, footnote 120 to para. 6.18.

<sup>10</sup> The principle of effectiveness is "[o]ne of the corollaries of the 'general rule of interpretation' in the Vienna Convention [on the Law of Treaties]" (Appellate Body Report, *US – Gasoline*, p. 23).

<sup>11</sup> Appellate Body Report, *Canada – Dairy*, para. 133.

<sup>12</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 148.

<sup>13</sup> Russia's First Written Submission, para. 199.

11. As stated by the Appellate Body, there are certain differences in the "nature and purpose" of original investigations and sunset reviews.<sup>14</sup> The Appellate Body further noted that there are no cross-references between Article 3 and Article 11.3, and that Article 11.3 does not expressly identify any particular factors that authorities must take into account in making such a determination.<sup>15</sup> However, investigating authorities' discretion is not unfettered with respect to the determination of likelihood of the continuation or recurrence of injury under Article 11. The investigating authorities must abide by the following considerations.

12. First, the Appellate Body has confirmed that "the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3."<sup>16</sup> Second, pursuant to Article 11.3, the investigating authority's likelihood-of-injury determination must rest on "a sufficient factual basis to allow it to draw reasoned and adequate conclusions".<sup>17</sup> To comply with this requirement, "[c]ertain of the analyses mandated by Article 3 [ ] may prove to be probative, or even required".<sup>18</sup> As the Appellate Body explained:

[i]t seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgment, consider other factors contained in Article 3 when making a likelihood-of-injury determination.<sup>19</sup>

13. In sum, Japan considers that, contrary to Russia's assertion, there is no rigid requirement to examine *all* of the injury factors listed in Article 3.4 of the Anti-Dumping Agreement in every Article 11 review. Nonetheless, by the nature of likelihood of "injury" determinations, Japan understands that certain factors examined under Article 3 may need to be examined in an Article 11 review depending on the specific circumstances of the case.

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<sup>14</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 124.

<sup>15</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 113.

<sup>16</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

<sup>17</sup> Appellate Body, *US – Corrosion-Resistant Steel Sunset Review*, para 114 (quoting Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para 7.271).

<sup>18</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

<sup>19</sup> *Ibid.*

## ANNEX C-8

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO

#### *Third party oral statement*

1. Mexico is grateful for the opportunity to put forward its views on this dispute.
2. In this statement, my delegation will first address substantive aspects and then go on to some procedural aspects.
3. In general terms, Mexico does not agree with various arguments put forward by Russia concerning the interpretation of the second condition in the first sentence of Article 2.2.1.1 and its relationship with Article 2.2 of the Anti-Dumping Agreement.
4. Russia argues that the reference to "costs of production" contained in Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement concerns the producer-specific costs associated with the production and sale of the product under consideration, since only these costs can be those incurred by the producer investigated in the country of origin.
5. Mexico disagrees with Russia's interpretation. In our view, a proper interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement leads to the conclusion that the production costs referred to in Article 2.2 of the Anti-Dumping Agreement are not necessarily the costs associated with the production and sale of the product under consideration that are actually incurred by the specific producer/exporter.
6. In this connection, in the first place Russia's interpretation would necessarily lead to the conclusion that it is implicit in Article 2.2 that the reference to the "cost of production" pertains to the specific product of the producer or exporter investigated. However, that would make it superfluous for the article to go on to say "in the country of origin", since this would already be covered by the expression "of the product" (under consideration) which is considered implicit.
7. Secondly, if an investigating authority validly determines that it cannot use the records of the exporter or producer because they are not in conformity with the generally accepted accounting principles of the exporting country, or because they do not reasonably reflect the costs associated with the production and sale of the product under investigation, then the authority would have to use a different basis for the costs associated with the production and sale of the product under consideration. If, in using this alternative basis, it determines that there are no domestic sales in the ordinary course of trade, it would then be able to construct the normal value. Obviously, in constructing the normal value in accordance with Article 2.2, it could not use the accounting records of the exporter, since, as was said earlier, they are not reliable. However, according to Russia's interpretation, Article 2.2 of the Anti-Dumping Agreement would oblige the authority precisely to use those records, despite the fact that it has already been determined that they are not reliable. That is the reason why Article 2.2 cannot refer implicitly to the specific product, because such an interpretation would mean that, despite the existence of a valid reason for not using the accounting records, the authority would necessarily have to use the costs of the product under consideration, now by virtue of Article 2.2.
8. Thus, apart from the fact that there is nothing in Article 2.2 to support the interpretation that the article in question implicitly refers to the specific product, such an interpretation would mean that there is no difference between the costs referred to in that article and Article 2.2.1.1, even though the Appellate Body itself, in its *EU – Biodiesel* report (DS43), stated that the scope of Article 2.2 is much broader than that of Article 2.2.1.1. On the other hand, as mentioned before, if it were implicit in Article 2.2 that the production cost must be that of the specific product, referring to the product under investigation produced by a particular producer/exporter, it would be superfluous to go on to say "in the country of origin", since this would already be covered by the fact that there is an implicit reference to the specific product.

9. Mexico therefore considers that the reference contained in Article 2.2 to the "cost of production in the country of origin" indicates that the information sought is not the specific information of a company, but information making it possible to determine what is the cost of production in the country of origin. This reading is compatible with what was stated by the Appellate Body in the *EU – Biodiesel* case (DS473), where it found:

"[...] the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence".<sup>1</sup>

10. Mexico also considers that the Anti-Dumping Agreement's preference for actual information does not justify limiting the methodological options for its substitution. This is evidenced by the fact that Article 2.2.2, which also refers to the construction of normal value, provides the flexibility of replacing the actual data with "any other reasonable method". Moreover, according to Article 2.2.1.1, the option of calculating costs using records of the producer/exporter is only the preferred basis, since, as was indicated by the Appellate Body in *US – Clove Cigarettes* (DS406), if a provision is qualified by the term "normally", it admits of exceptions. Thus, in accordance with that article, it is possible to resort to other options in order to calculate costs.

11. Mexico considers that the interpretations given by Russia, taken to the extreme, would imply that the "facts available" provisions may not be used either, although these are set out in the Anti-Dumping Agreement itself, because they imply an option other than that of costs.

12. Lastly, with regard to the procedural issues, Mexico wishes to express its concern about the time-limit imposed on third parties by the Panel for the reading of oral statements during this session, irrespective of the language in which it is wished to make them. Mexico points out that this limitation is not a decision of the Members reflected in the Dispute Settlement Understanding; in addition, in establishing the limitation indiscriminately for all languages, consideration is not given to the fact that more time is required to make a statement in Spanish than in English, as is shown by the versions of the Panel and Appellate Body reports in Spanish, which require roughly 16% more pages than the English versions. Thus, the imposition of a single limit for official languages has a detrimental impact on Spanish and French.

13. Moreover, my delegation wishes to point out that the Panel decided to use the Digital Dispute Settlement Registry mandatorily, without consulting the third parties. The progress towards a digital platform is important and may facilitate the handling of the case file; however, as that platform is still in a test phase, permission should have been given for the use of both the traditional system and the new platform.

14. Having made these points, the Mexican Government again expresses gratitude for being given the opportunity to participate in this proceeding and to present its points of view, and is more than willing to reply to any question the Panel may put to it.

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<sup>1</sup> Appellate Body Report, *EU – Biodiesel* (DS473), para. 6.73.



*The Response by Mexico to the Question of the Panel*

**1. DISREGARDING COSTS OF GAS USED IN PRODUCTION OF AMMONIUM NITRATE**

1. In paragraph 6 of its third-party statement, Norway states that under Article 2.2.1.1 of the Anti-Dumping Agreement it is the records of the investigated producer that stand the test of reasonableness and not the costs reflected in those records. In the third parties' view, in ascertaining whether the records reasonably reflect the costs, is an investigating authority permitted to examine the reasonableness of the costs themselves? Please explain what in the text of Article 2.2.1.1 would support your view.

**Reply:**

1. In Mexico's view, yes, this is permitted. Article 2.2.1.1 of the ADA lays down the requirements that must be met in choosing the basis to be used in calculating the costs for determining normal value. In particular, we note that the text of this article establishes two basic premises:

- (a) first, that costs are normally calculated on the basis of records kept by the exporter or producer;
- (b) second, that the first premise (i.e. that costs are normally calculated on the basis of records kept by the exporter or producer) will be applied provided that two conditions are satisfied:
  - (i) that the records of the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and
  - (ii) that they reasonably reflect the costs associated with the production and sale of the product under consideration.

2. In other words, if the records kept by the exporter or producer are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under investigation, then the authority will normally use the accounting records kept by the exporter or producer.

3. Now, in *US – Clove Cigarettes*, the WTO Appellate Body (AB) interpreted the ordinary meaning of the term "normally" as "under normal or ordinary conditions; as a rule".<sup>2</sup> In the same dispute, the AB observed that if an obligation is qualified by the adverb "normally", then that obligation admits of derogation.<sup>3</sup> In paragraph 7.161 of its final report, the Panel in *China – Boiler Products* adopted the same approach.

4. Thus, if the accounting records are in accordance with the GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration, then the authority will normally use those accounting records for calculating the costs. Obviously, if the records reflect the costs of production and sale of the product under consideration, then in using those records the authority would be basing itself on the costs of production and sale of the product under consideration. On the other hand, however, if the authority were to decide not to base itself on the accounting records (for example, because the records did not comply with the GAAP or reasonably reflect the costs associated with the production and sale of the product under consideration), then, by definition, the authority would not be able to base itself on the costs of production and sale of the product under consideration, but would have to carry out its calculations on some other basis. It is precisely for this reason that Article 2.2 of the ADA cannot implicitly contain the expression "of the product", since that interpretation would mean that, despite not being able to use the accounting records, the authority would necessarily have to fall back, this time under Article 2.2, on the costs of the product under consideration.

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<sup>2</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 273.

<sup>3</sup> *Idem*.

5. Clearly, this interpretation leads to absurd results and, moreover, deprives the word "normally" in Article 2.2.1.1 of its meaning, since, for practical purposes, the authority would always have to base itself on the accounting records to be able to obtain the costs of the product under consideration incurred by the exporter, regardless of the fact that Article 2.2.1.1 would allow it to seek another option.

6. If recourse to an option other than the accounting records of the exporter is permitted, we see no reason why that other option could not be used when the accounting records of the exporter reflect unreasonable costs.

## ANNEX C-9

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

#### *Third party oral statement*

Madam Chairperson, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel. Without taking any position on the facts of this dispute, Norway will in this oral statement take the opportunity to offer some views on the interpretation of the Second condition of Article 2.2.1.1 of the Anti-Dumping Agreement, and the application of the Panel and Appellate Body reports in EU – Biodiesel.<sup>1</sup>

2. The obligations on the investigating authorities according to Article 2.2.1.1, is subjected to two cumulative conditions:

- i. that the records kept by the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and
- ii. that such records reasonably reflect the costs associated with the production and sale of the product under consideration.

3. If these two conditions are fulfilled, the investigating authorities "*shall normally*" calculate the costs on the basis of the records kept by the exporter or producer under investigation.

4. With regards to the second condition, the parties disagree on whether Article 2.2.1.1 "*allows an investigating authority to disregard input prices reasonably reflected in records kept by the investigated producers and ex-porters on the grounds that due to governmental regulation domestic input prices are lower than prices charged for exporter of the input concerned and/or in the markets of third countries*".<sup>2</sup>

5. Ukraine contends, among other, that following the guidance of the Appellate Body and Panel in EU – Biodiesel, the second condition of Article 2.2.1.1 allows the investigating authority to "*examine the reliability and accuracy of the costs recorded in the records of the producers/exporters*", and disregard such records when they do not reasonably reflect the costs associated with the production and sale of the product under consideration, because the recorded costs of inputs do not reflect transactions concluded on terms and conditions that are compatible with normal commercial practices.

6. Regarding the content of the second condition, Norway notes that the Appellate Body in EU – Biodiesel clearly established that the wording "*reasonably reflect*" of Article 2.2.1.1 relates to the "*records*", and not the "*costs associated with the production and sale of the product under consideration*". It is the "*records*" that stand the test of reasonableness, and not the "*costs*".

7. Furthermore, regarding the "*costs*", both the Panel and the Appellate Body in EU – Biodiesel established that "*costs associated with the production and sale of the product under consideration*" relates to the "*actual*" costs incurred that are genuinely related to the production and sale of the specific product under consideration.<sup>3</sup>

8. In connection to this, the Panel in EU – Biodiesel underlined that the condition at issue relates to whether the costs set out in a producer's or exporter's records "*correspond – within acceptable limits – in an accurate and reliable manner[] to all the actual costs incurred by the*

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<sup>1</sup> DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina.

<sup>2</sup> Russia's First Written Submission para. 64.

<sup>3</sup> Appellate Body Report in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 6.30.

*particular producer or exporter under consideration".<sup>4</sup> In addition the Panel further underlined that "the object of comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under different set of conditions or circumstances and which the investigating authority consider more "reasonable" than the costs actually incurred".<sup>5</sup>*

9. Norway does not intend to delve into the facts of the case, but it seems from the written submissions of the parties that the Ukraine does not dispute that the costs recorded by the producers accurately and reliably capture all the relevant production activities that have actually incurred related to the production of the specific product. The real issue in dispute would seem to be whether the input price of gas in Russia can be disregarded due to it being subsidized or distorted through government regulations so that the producer receives gas for less than market value.

10. In this respect, Norway notes that "dumping" is defined as price discrimination by the investigated producer between domestic and export markets.<sup>6</sup> Anti-dumping measures are available to counter such discriminatory behavior by exporters. Government regulation or intervention in the home market, that affect the producers' cost of production, for instance price caps or the provision by a Government of an input for less than market value, is more appropriately considered under the Subsidies Agreement<sup>7</sup>, and is not as such a reason to reject the actual cost of production in a dumping investigation.

11. In conclusion, Article 2.2.1.1 of the Anti-dumping Agreement does not allow the investigating authorities to reject records by the producer or exporter, on the grounds that the records do not reasonably reflect the costs associated with the production and sale of the product under investigation, because the price of an input is considered not to reflect market value due to governmental regulation.

12. This concludes Norway's statement here today. Thank you.

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<sup>4</sup> Panel Report in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 7.247.

<sup>5</sup> Panel Report, in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 7.242.

<sup>6</sup> GATT Article VI:1(b)(ii) and *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* Article 2.1.

<sup>7</sup> Cf. *Agreement on Subsidies and Countervailing Measures* Article 1.1(a)(1)(iii) and Article 14(d).

## ANNEX C-10

### EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

#### I. CLAIMS REGARDING ARTICLES 2.2 AND 2.2.1.1

##### A. Costs Associated With the Production of the Product under Investigation

1. The United States has serious concerns with the positions espoused by Russia with regard to the interpretation and application of Article 2.2.1.1 of the Anti-Dumping Agreement. First, the Anti-Dumping Agreement uses the general term "costs," and not a term such as "amounts actually incurred." In context, the term "cost" means real economic costs involved in producing the product in the exporting country and not simply the amount reflected, for example, in an invoice price. Otherwise, investigating authorities would be bound to accept artificial, affiliated-party transfer prices – amounts which have no economic meaning.

2. Second, Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration." "Associate" or "associated" is typically defined as being "placed or found in conjunction with another." This language does not support an interpretation that the only inquiry involves what the producer paid for a particular input. Rather, the term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product and supports an economic conception of costs.

3. The context provided by other provisions in Article 2.2 also undermines Russia's suggested interpretation. Where the Anti-Dumping Agreement refers to costs "actually incurred by producers," it does so explicitly. For instance, for administrative, selling, and general costs, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question." Similarly, Article 2.2.2(ii) uses an express limitation to "the actual amounts incurred and realized by other exporters or producers." Given the express language utilized in Articles 2.2.2(i) and 2.2.2(ii), Article 2.2.1.1 cannot be read to limit "costs" to those actually incurred in the way envisioned by Russia.

4. Russia's reliance on the Appellate Body report in *EU – Biodiesel* is also misplaced. First, the Appellate Body understood that the costs calculated pursuant to Article 2.2.1.1 must generate an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales. Given that Article 2.2.1.1 (in conjunction with Article 2.2) pertains to a methodology for obtaining an "appropriate proxy" for the price of the product under investigation "if it were sold in the ordinary course of trade in the domestic market," "the costs associated with the production and sale of the product" under Article 2.2.1.1 must be of the kind that is capable of serving as an appropriate basis for estimating the normal value of the final product. Similarly, the Appellate Body stated the general proposition that the second condition (starting with "reasonably reflect") means that the records of the exporter or producer must "suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration."

5. Second, the Appellate Body in *EU – Biodiesel* made an explicit finding on what kind of analysis an authority may employ in applying the second condition of the first sentence of Article 2.2.1.1:

an investigating authority is "certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters" to determine, in particular, whether all costs incurred are captured, whether the costs incurred have been over- or understated *and whether non-arms-length transactions or other practices affect the reliability of the reported costs.*

If, as Russia suggests, the only inquiry related to whether the books and records reflected amounts actually incurred, then the existence of "non-arms-length transactions" or "other practices" would be irrelevant.

6. Finally, the United States recalls that the Panel's role is to consider whether Russia has established that Ukraine's authority failed to provide a reasoned and adequate explanation for its determination. Here, Ukraine explains that the recorded cost for natural gas is artificial because it is set by the Government of Russia. In these circumstances, an unbiased and objective investigating authority could have found that a State-determined natural gas price was not a real, economic cost. Just as a price between affiliated parties may be artificial because it does not reflect an arm's-length price, so too a State-determined price may be artificial because the seller is similarly not free to sell at the price it determines, and therefore price does not reflect the interaction between independent buyers and sellers.

#### **B. Use of Out-of-Country Sources to Derive the Cost of Production**

7. Ukraine is correct that the panel and Appellate Body in *EU – Biodiesel* "did not exclude the possibility that an investigating authority may use information and evidence outside the country of origin to determine the prices in the country of origin." Rather, as the Appellate Body explained, when an authority rejects cost data under the second condition of the first sentence of Article 2.2.1.1, information from out-of-country sources could be used to arrive at the cost of production in the country of origin, albeit the benchmark chosen may need to be adapted to reflect the market conditions in the origin country.

8. The Appellate Body in *EU – Biodiesel* correctly differentiated "costs" from "information or evidence" used to establish "costs" by observing "that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin." As the Appellate Body recognized, "these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country." Accordingly, Articles 2.2 and 2.2.1.1 do not preclude an investigating authority from looking to sources outside the country of origin for information or evidence about costs associated with the production of the product under consideration and may use such information or evidence to determine an exporter's or producer's cost of production in the country of origin.

#### **II. CLAIMS REGARDING THE RELATIONSHIP BETWEEN ARTICLES 3 AND 11.3**

9. The obligations set forth in Article 3 do not apply directly to likelihood-of-injury determinations in sunset reviews conducted under Article 11.3. As the Appellate Body observed in *US – Oil Country Tubular Goods Sunset Reviews*, the Anti-Dumping Agreement distinguishes between "'determination[s] of injury' addressed in Article 3, and determinations of likelihood of 'continuation or recurrence . . . of injury', addressed in Article 11.3." Article 11.3 contains no cross-reference to Article 3 that would make Article 3 provisions applicable to sunset reviews. As further explained by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, "for the 'review' of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3."

10. Although Article 3.1 does not apply to sunset reviews, the United States nonetheless agrees with Russia that investigating authorities must base likelihood-of-injury determinations on an objective examination of positive evidence under Article 11.3, and the authority's evaluation of the evidence must be unbiased and objective. An authority may look to Article 3 for guidance in conducting its likelihood-of-injury analysis, but it is not required to do so.

11. Finally, an investigating authority's likelihood-of-injury determination under Article 11.3 must be made in an objective manner based on positive facts, but Article 11.3 does not prescribe the particular factors that must be considered or the methodology used by an authority. Trade barriers in third country markets can be relevant to an authority's likelihood-of-injury determination. Therefore, an authority could reasonably find that trade barriers in third country markets make an increase in subject import volume after expiry of a duty more likely by limiting the availability of other export markets to absorb any additional exports from the subject producers and exporters.

### **III. CLAIMS REGARDING ARTICLE 6.8 AND ANNEX II**

12. Article 6.8 and Annex II set forth the conditions under which an investigating authority may make a determination on the basis of facts available. They do not govern how an investigating authority is to calculate dumping margins. Those conditions are provided for in Article 2. Therefore, the United States agrees with Ukraine that the cooperation of Russian respondents is not pertinent to the question of whether Ukraine's decision not to rely on the cost data reported by those parties with respect to its determination of dumping is consistent with its obligations under Article 2.2.1.1 of the Anti-Dumping Agreement.

### **IV. CLAIMS REGARDING ARTICLES 6.2 AND 6.9**

13. Article 6.2 provides, in part, that all parties shall have a full opportunity to defend their interests throughout an anti-dumping investigation. Article 6.9 further requires that an investigating authority, "before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." The disclosure obligation of Article 6.9, while it does not extend to all facts, does extend to those facts which are "salient for a decision to apply definitive measures."

14. Absent a full disclosure of the "essential facts" forming the basis for consideration of an underlying dumping determination, it might not be possible for an interested party to identify whether the determination contains clerical or mathematical errors or even whether the investigating authority properly considered the factual information before it. In this regard, the United States agrees with the panel in *China – Broiler Products* that an investigating authority, with respect to a determination of the existence and margin of dumping, should disclose: (1) the data used in the determinations of normal value (including constructed value) and export price; (2) sales that were used in comparison between normal value and export price; (3) any adjustments for differences that affect price comparability; and (4) the formulas applied to the data. Failure to provide this information could result in an interested party being unable to defend its interests within the meaning of Articles 6.2 and 6.9 because it would not be able to sufficiently identify which issues, if any, are adverse to its interests.

### **V. CLAIMS REGARDING ARTICLES 12.2 AND 12.2.2**

15. Article 12.2 obligates investigating authorities to set forth "the findings and conclusions on all issues of fact and law considered material by the investigating authorit[y]." To this end, Article 12.2.2 provides that the authority's public notice or separate report on a final affirmative determination shall contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . as well as the reasons for the acceptance or rejection of relevant arguments or claims made by exporters or importers." Therefore, disclosure by the investigating authority, including a mere reference to data in possession of an interested party, may not necessarily constitute disclosure of "relevant information on matters of fact and law and reasons which have led to the imposition of final measures," because an interested party may not be able to discern from the reference whether the data in its possession was accurately used, or whether there were mathematical errors in the calculation using the data.

16. At a minimum, the calculations employed by an investigating authority to determine dumping margins, and the data underlying the calculations, constitute "relevant information on matters of fact and law and reasons which have led to the imposition of final measures" within the meaning of Article 12.2.2. Such calculations are the mathematical basis for arriving at the dumping margins imposed by an authority. They thus are highly "relevant" to the decision to apply final measures, and because they consist of sales and cost data and mathematical uses of these data, they are "matters of fact" within the meaning of Articles 12.2 and 12.2.2.

### **EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT**

17. Contrary to Russia's position, Articles 2.2.1.1 and 2.2 permit an investigating authority to reject or adjust recorded prices or costs where that authority's decision to do so is based on a reasoned and adequate explanation. None of the parties or third parties appear to dispute that recorded costs may be rejected or adjusted where they are artificial transfer prices between affiliated entities. In such a situation, where a producer charges its affiliate an artificially low price for a production input, an authority may reject or adjust the transfer price of that input to reflect

its real cost in the domestic market. A non-arm's-length transaction for an input subsequently used in producing merchandise subject to an anti-dumping proceeding therefore provides a clear example where an authority may look beyond the four corners of a respondent's records to determine whether they "reasonably reflect the costs associated with the production and sale of the product under consideration" within the meaning of Article 2.2.1.1.

18. As Ukraine characterizes the facts, the situation created by the Russian Government's intervention is analogous to a non-arm's-length transaction because the recorded cost for natural gas in Russia is set by the Russian Government and is "not the result of market forces." In these circumstances, an unbiased and objective investigating authority could have found that the price for natural gas in Russia is an artificial price in that it does not reasonably reflect the price that would otherwise be determined by independent interactions between a seller and a buyer in a free market. This then could be another practice, similar to the recordation of non-arm's-length transactions, which may affect the reliability of the reported costs. Accordingly, these circumstances could well constitute grounds to substitute or adjust that cost under Article 2.2.1.1, depending on the facts of the case and the conclusions the authority draws from those facts.

19. Finally, as the Appellate Body explained in *EU – Biodiesel*, when an authority rejects cost data under the second condition of Article 2.2.1.1, information from out-of-country sources could be used to arrive at the cost of production in the country of origin. In certain circumstances, the proxy chosen may need to be adapted to reflect market conditions in the country of origin. That said, in doing so, the authority should not be required to adapt those costs in a way that reintroduces the distortions that led it to substitute the recorded cost.

#### **EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS**

20. The Panel's question asks whether "an investigating authority [is] permitted to examine the reasonableness of the costs themselves." The premise of this question does not comport either with the text and structure of Article 2.2.1.1 of the Anti-Dumping Agreement, or with the U.S. understanding of the correct interpretation of this provision.

21. First, the phrase "costs themselves" used in the question seems to imply that an authority must otherwise limit its examination to the figures recorded in the books and records of the producers. This proposition is inconsistent with, and even contrary to, what is provided for in Article 2.2.1.1. Indeed, Article 2.2.1.1 affirmatively provides that an authority may consider whether the producer's "records . . . reasonably reflect the costs associated with the production and sale of the product under consideration." That is, two items should be compared: (1) the recorded costs should be compared with (2) those costs (whether or not contained somewhere in the producer's books and records) associated with the production and sale of the product under consideration. The authority thus is clearly not limited to examining the recorded "costs themselves."

22. Second, the phrase "reasonableness of the costs" is vague and misleading – this phrase is not contained in Article 2.2.1.1, and is not an element of what the United States understands to be the proper interpretation of Article 2.2.1.1. Rather, the inquiry under this second condition in the first sentence of Article 2.2.1.1 is whether the producer's "records . . . *reasonably reflect* the costs associated with the production and sale of the product under consideration." Thus, the application of Article 2.2.1.1 – contrary to what is arguably implied by the question – does not turn on some vague inquiry into the "reasonableness of costs." Rather, the inquiry is aimed at the extent to which the figures recorded in the books and records correspond to those costs associated with the production and sale of the product at issue.

23. Turning to Norway's reading of Article 2.2.1.1, Norway's interpretation does not accurately reflect the text of this article, especially when read in context with Articles 2.1 and 2.2 of the Anti-Dumping Agreement. First, Article 2.1 requires an investigating authority to include in the calculation of normal value only those sales "in the ordinary course of trade." As the Appellate Body has noted, there could be many reasons why sales of the like product, destined for consumption in the exporting country, may be incompatible with market-determined, "'normal' commercial practices" or principles, and thus not an appropriate basis for the calculation of normal value.



24. Second, when no sales of the like product in the ordinary course of trade exist in the domestic market of the exporting country, or such sales do not permit a proper comparison because of "the particular market situation" or the low volume of sales in the domestic market, Article 2.2 prescribes two alternative data sources that may provide for a "proper comparison." Under either alternative, the margin of dumping shall be determined by comparison with a "normal value" that reflects normal commercial practices or principles.

25. If the investigating authority decides to calculate normal value based on cost data, Article 2.2.1.1, together with Article 2.2.2, provides the framework for this determination. Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration." The term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product under consideration and supports an economic conception of costs. Pursuant to Article 2.2.1.1, and as the Appellate Body has concluded, the "costs associated with the production and sale of the product under consideration" must be considered as referring to "those costs that have a genuine relationship with the production and sale of the product under consideration. This is because these are the costs that, together with other elements, would otherwise form the basis for the [comparable] price of the like product if it were sold in the ordinary course of trade in the domestic market."

26. The term "normally" as it appears in Article 2.2.1.1 further suggests that this provision should not be read to limit "costs" to those actually incurred. Definitions for the term "normally" include "in a regular manner," "under . . . ordinary conditions," or "as a rule, ordinarily." The term "normally" thus indicates that there may be conditions in which costs should not be calculated based on the records kept by the exporter or producer under investigation.

27. Finally, the Appellate Body in *EU – Biodiesel* confirmed that an authority, in ascertaining whether the records kept by the exporter or producer under investigation reasonably reflect the costs of production, could "examine the reliability and accuracy of the costs recorded in the records of the producers/exporters' to determine, in particular, whether all costs incurred are captured, whether the costs incurred have been over- or understated and whether non-arms-length transactions or other practices affect the reliability of the reported costs."

28. In sum, Article 2.2.1.1 cannot be interpreted such that the costs reported in the records kept by the exporter or producer under investigation must be accepted without any consideration. To the contrary, an authority may examine such records. That examination may include, *inter alia*, a consideration of whether the costs kept by the exporter or producer under investigation do not "reasonably reflect" the real economic costs associated with the production and sale of the product under consideration. In such a situation, an unbiased and objective investigating authority would have a basis under the Anti-Dumping Agreement to reject or adjust a cost that does not reflect a normal commercial practice or principle, so long as its determination was based on a reasoned and adequate explanation.

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## **ANNEX D**

### **PANEL COMMUNICATIONS**

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## ANNEX D-1

### COMMUNICATION DATED 23 AUGUST 2017 REGARDING DEADLINES SET OUT IN THE TIMETABLE FOR THIS DISPUTE

In this communication, we address issues arising out of Ukraine's refusal to submit a written response to the questions posed to it by the Russian Federation (Russia) following the first substantive meeting, on the ground that it did not receive these questions from Russia by 5 p.m. on the due date set out in the timetable. In addressing these issues, we have considered the comments made by Ukraine and Russia on this matter, including those presented on 18 August 2017.

We recall that the deadline set out in the timetable for each party to pose questions to the other party following the first substantive meeting, to which it wished to receive a response in writing was 5 p.m. on 28 July 2017. The deadline for the other party to submit its written response to these questions was 5 p.m. on 14 August 2017. The Working Procedures adopted in this dispute require parties to file all submissions, including the written questions to the other party through the Digital Dispute Settlement Registry (DDSR), which is the electronic platform maintained by the WTO Secretariat for official filings in this dispute.<sup>1</sup>

Russia informed us through email, at 6.47 p.m. on 28 July 2017, that while it uploaded its questions to Ukraine at 4.57 p.m. on 28 July 2017, due to a technical error in the DDSR, these questions were not released to the other users, including Ukraine at that time.<sup>2</sup> Russia further explained that after it became aware of this technical error, it re-uploaded these questions on the DDSR at 5.57 p.m. on 28 July 2017. The DDSR time log shows that the questions became available to other users, including Ukraine at 5.57 p.m. Ukraine does not suggest otherwise. Thus, Ukraine had access to these questions on 28 July, albeit 57 minutes after the deadline of 5 p.m. Further, Ukraine was copied on this email from Russia, and thus aware as of 28 July 2017 about Russia's explanations for this delay.

Ukraine did not object to this 57 minutes delay at any time prior to the expiry of the deadline on 14 August 2017 for receipt of its written response to questions posed by Russia, or inform us that it would not file its response on account of this delay. We became aware of Ukraine's decision to not file this response only on 15 August 2017, when, in response to a query by the Secretariat, Ukraine stated that it would not be filing this response as it did not receive Russia's questions within the deadline.

In these circumstances, we deeply regret that Ukraine unilaterally decided to not file its response on account of this delay, and then failed to communicate its decision on this matter to the Panel and Russia in a timely manner. We also regret that despite having sufficient time to do so, Ukraine failed to raise its objections regarding the delay faced in accessing Russia's questions in a timely fashion.

Nonetheless, having considered the parties' comments on this matter, and taking into account the minimal delay faced by Ukraine in accessing these questions, the Panel asks Ukraine to provide its written response to the questions posed by Russia to Ukraine on 28 July 2017, **by 5 p.m. on 25 August 2017**. The Panel will not grant any request for an extension of this deadline.

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<sup>1</sup> Working Procedures, para. 26. This paragraph also sets out circumstances wherein official filings may be made through a system other than the DDSR.

<sup>2</sup> We have no reason to question Russia's explanations regarding the technical error on the DDSR, and it does appear that the DDSR did not release these written questions at 5 p.m. on 28 July 2017 to other users because of a technical issue in the system. The issue was that instead of releasing the questions initially uploaded by Russia to other users, including Ukraine at 5 p.m. on 28 July 2017, the DDSR system incorrectly applied a different release deadline of 5 p.m. on 24 November 2017.

## **ANNEX D-2**

### **COMMUNICATION DATED 23 AUGUST 2017 REGARDING UKRAINE'S FIRST INTEGRATED EXECUTIVE SUMMARY**

The Panel notes Ukraine's clarification on 21 August 2017 that as part of its first integrated executive summary, it has submitted an (i) executive summary of the first written submission of Ukraine and (ii) executive summary of the oral statement of Ukraine. The combined length of these two documents, excluding the cover pages, exceeds 15 pages.

Paragraph 20 of the Working Procedures states that each "integrated executive summary shall be limited to no more than 15 pages". Thus, Ukraine's submission in this regard exceeds the page limit set out in the Working Procedures.

Considering Ukraine has submitted two separate executive summaries as part of its integrated executive summary, and bearing in mind the two documents combined exceed the page limit specified in the Working Procedures, the Panel will accept only one of the two executive summaries filed by Ukraine as the integrated executive summary for the purposes of paragraph 20 of the Working Procedures. Please let the Panel know by **5 p.m. on 28 August 2017** which of the two executive summaries filed by Ukraine should be treated by the Panel as the first integrated executive summary for the purpose of paragraph 20 of the Working Procedures.

No new submissions may be made at this stage as part of the first integrated executive summary.

### ANNEX D-3

#### COMMUNICATION DATED 30 AUGUST 2017

The Panel takes note of Ukraine's message of 29 August 2017 that it did not have access to the DDSR system from 24-28 August 2017, on account of public holidays in Ukraine between 24-27 August, and technical difficulties in accessing the DDSR on 28 August. Thus, Ukraine was unable to access the communications sent by the Panel at around 8.14 p.m. (Geneva time) on 23 August 2017, including the communication asking Ukraine to respond to the written questions posed to it by Russia following the first substantive meeting by **5 p.m. on 28 August 2017**.

The Panel recalls that in its communication it had stated that it would not grant any request for an extension of the deadline of 5 p.m. on 28 August for Ukraine to respond to the written questions posed by Russia. However, the Panel acknowledges the particular difficulties faced by Ukraine due to which it could not file its response within the set deadline. The Panel asks Ukraine to provide its written response to the questions posed by Russia on 28 July 2017, by **5 p.m. on Friday, 1 September**, in accordance with paragraph 26 of the Working Procedures.

In setting this new deadline, the Panel has taken into consideration the fact that the original deadline to respond to these questions was 14 August 2017, Ukraine chose not to submit its response on this date on account of a 57 minutes delay faced in accessing these questions, and failed to inform the Panel of its decision to not file a response for this reason till 15 August 2017.

The Panel also acknowledges Ukraine's submission that the integrated executive summary of its oral statements should be treated as the first integrated executive summary for the purposes of this dispute.

## **ANNEX D-4**

### **COMMUNICATION DATED 12 SEPTEMBER 2017**

Having considered Russia's communication of 6 September 2017, and the communications cross-referred therein, the Panel has decided as follows:

#### **2 EXTENSION OF DEADLINE FOR REBUTTAL SUBMISSION (SECOND WRITTEN SUBMISSION)**

The Panel acknowledges Russia's concern that while Ukraine's written response to questions posed to it by Russia following the first substantive meeting was due on 14 August 2017, the responses were ultimately filed on 1 September 2017. The reasons for this delay and the Panel's decisions in this regard, are discussed in the Panel's communications of 23 August 2017 and 30 August 2017.

Russia submits that this delay deprived it of an adequate opportunity to prepare its rebuttal submission, which, per the timetable is due on 15 September 2017. Russia requests the Panel to extend the deadline for the rebuttal submission to 25 September 2017.

Upon consideration of the reasons put forth by Russia for its request for extension, the Panel agrees to extend the deadline for the rebuttal submissions by Russia and Ukraine to **5 p.m. on 25 September 2017**.

#### **3 RUSSIA'S CONCERNS REGARDING PANEL'S COMMUNICATION OF 23 AUGUST 2017**

The Panel refers to Russia's statement in its communication of 6 September 2017, about its deep concerns regarding the wording used in the Panel's communication of 23 August 2017 characterizing the situation that occurred in relation to Ukraine's response to Russia's questions. Russia does not identify the specific wording in this communication that it has concerns about, but asks the Panel to note, for the record of this dispute, that Russia met the deadline for submitting its questions to the other party. Russia welcomes, *inter alia*, in the Panel Report a correction highlighting that Russia met the deadline for filing its questions to the other party following the first substantive meeting.

In the Panel's view, its communication of 23 August 2017 does not suggest that Russia did not file its questions to Ukraine following the first substantive meeting within the deadline of 5 p.m. on 28 July 2017. On the contrary, the communication acknowledges Russia's statement in its email of 28 July 2017 that it uploaded these questions at 4.57 p.m. on 28 July 2017, which is before the deadline of 5 p.m., and that due to a technical error in the DDSR, these questions were not released to other users, including Ukraine at that time. In footnote 2 of the communication, the Panel states that it has no reason to question Russia's explanations regarding the technical error in the DDSR, and further clarifies that it does appear that the "DDSR did not release these written questions at 5 p.m. on 28 July 2017" to other users because of a "technical issue in the system". Thus, we consider the communication is clear that due to a technical issue in the DDSR, rather than due to an error on part of Russia, Ukraine had access to the questions at 5.57 p.m., instead of 5 p.m. The communication also notes a delay of 57 minutes in Ukraine having "access" to the questions, not in Russia filing them.

Thus, to the extent Russia's concern is that the Panel's communication of 23 August 2017 suggests that Russia did not file the questions to Ukraine following the first substantive meeting by the deadline of 5 p.m. on 28 July 2017, the Panel does not share Russia's concern, and does not consider any revision to this communication to be necessary.

Procedural issues arising in this dispute, including this one, will be appropriately reflected in the descriptive part of the Panel Report.

#### 4 PROPOSED MODIFICATION TO WORKING PROCEDURES

The Panel proposes a modification to the working procedures for this dispute to more specifically address situations where a party uploads submissions or exhibits on the DDSR without facing any apparent technical difficulty, but other users, including the other party, do not have access to them due to, *inter alia*, technical issues relating to the DDSR.

In particular, the Panel proposes the addition of the following footnote (underlined) to paragraph 26(a) of the Working Procedures:

Each party and third party shall submit all documents to the Panel by filing them via the Digital Dispute Settlement Registry (DDSR) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded into the DDSR shall constitute the official version for the purposes of the record of the dispute. Upload into the DDSR shall also constitute electronic service on the Panel, the other party, and the third parties.<sup>1</sup> In case any party or third party is unable to meet the 5.00 p.m. deadline because of technical difficulties in uploading these documents into the DDSR, the party or third party concerned shall contact the DS Registry without delay and provide an electronic version of all documents to be submitted to the Panel by e-mail, except for any exhibits. The e-mail shall be addressed to DSRegistry@wto.org and the other party and, where appropriate, the third parties. The documents sent by email shall be filed no later than 5.30 p.m. on the date due. The exhibits shall also be filed with the DS Registry (office No. 2047) and provided to the other party and, where appropriate, the third parties by no later than 5:30 p.m., but shall be submitted on a CD-ROM, DVD, or USB stick, together with the DDSR E-docket template.

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<sup>1</sup> When a party uploads a document on the DDSR, in accordance with this paragraph, it shall also send a message on the DDSR to the Panel, through the Secretariat, and the other party, identifying the document, including exhibits uploaded. The other party shall inform, through the DDSR, the DS Registry and the party which uploaded the document, promptly and in any case, no later than 5 p.m. the next working day, if it does not have access to any document identified in that message.

The parties are requested to provide their comments on the proposed modification to the working procedures by **5 p.m. on 15 September 2017**.

## **ANNEX D-5**

### **COMMUNICATION DATED 21 SEPTEMBER 2017**

Pursuant to Russia's communication of 6 September 2017, the Panel proposed a modification to the working procedures for this dispute to more specifically address situations where a party uploads submissions and/or exhibits into the DDSR without facing any apparent technical difficulty, but other users, including the other party, do not have access to them due to, *inter alia*, technical issues relating to the DDSR. The Panel invited comments from the parties on this proposed modification on 12 September 2017.

Having considered the parties' responses on 15 September 2017, the Panel has amended the working procedures by adding a footnote to Paragraph 26(a). No other change has been made to the working procedures. The revised working procedures have been uploaded into the DDSR.



## **ANNEX D-6**

### **COMMUNICATION DATED 16 OCTOBER 2017**

Having considered the requests made by the Russian Federation (Russia) in its letter of 29 September 2017, and Ukraine's comments on 10 October 2017 on these requests, the Panel has decided as follows:

- a. The Panel declines Russia's request to ask Ukraine, pursuant to Article 13 of the DSU, to provide full confidential version of the questionnaire responses filed by the domestic industry, including all exhibits thereto, or at least the information contained in sections 4.2, 7 and 8 of these questionnaire responses, as the Panel does not find it necessary to seek this information at this stage.
- b. The Panel notes Russia's objections to Ukraine's designation of Exhibits UKR-42, UKR-53, UKR-54 and UKR-55 as BCI.

Regarding Exhibit UKR-42, Ukraine acknowledges that this exhibit was inadvertently designated as BCI. In light of this acknowledgment, the Panel will not treat Exhibit UKR-42 as BCI, pursuant to the BCI procedures.

With respect to Exhibits UKR-53, UKR-54 and UKR-55, the Panel notes that pursuant to paragraph 3 of its BCI procedures, in deciding "whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, [the Panel] will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information." Ukraine invokes Article 32 of its domestic anti-dumping law to justify the BCI designation of these exhibits.

The Panel intends to pose questions to the parties at the second substantive meeting to gain more clarity on this justification put forth by Ukraine, and then take a decision as to whether Exhibits UKR-53, UKR-54 and UKR-55 should continue to be treated as BCI for the purpose of these proceedings. Pending the Panel's decision in this regard, the parties should continue to treat these exhibits as BCI.

- c. The Panel notes Russia's request that the Panel oblige Ukraine to submit an English translation in full of Exhibits UKR-46A, UKR-47A, UKR-48-A and UKR-49A, which are in the Ukrainian language. The Panel recalls that these exhibits were submitted by Ukraine in its written responses to Russia's questions following the first substantive meeting. Ukraine filed certain parts of these exhibits in English because it considers that only certain parts of these exhibits were relevant to answer the questions posed by Russia. The limited English translation is in Exhibits UKR-46B, UKR-47B, UKR-48-B and UKR-49B.

In its responses, Ukraine also filed Exhibit UKR-50, and stated that this exhibit provides an overview of the parts of Exhibits UKR-46 – UKR-49 where confidentiality has been claimed by the relevant domestic producers. The Panel notes that the cross references in Exhibit UKR-50 appear to be to the Ukrainian version of the exhibits, and not the English version.

In the Panel's view, while it is for each party to decide how to respond to questions posed by the other party, those responses must be filed in accordance with the Working Procedures. In this regard, paragraph 9 of the Working Procedures stipulates that "[w]here the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time".

Considering Exhibits UKR-46A, UKR-47A, UKR-48A and UKR-49A are not in an official WTO language, the Panel will limit its review to those parts of the exhibits that are filed in English, namely, Exhibits UKR-46B, UKR-47B, UKR-48B and UKR-49B. If Ukraine wishes that the Panel take into account any other part of these exhibits, in part, or in full, it should file these exhibits in a WTO working language, consistent with paragraph 9 of the Working Procedures.

## **ANNEX E**

### INTERIM REVIEW

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## **ANNEX E-1**

### **INTERIM REVIEW**

#### **1 INTRODUCTION**

1. In accordance with Article 15.3 of the DSU, this Annex sets out our discussion of the arguments made at the interim review stage. We have revised certain aspects of the Interim Report in light of the parties' comments. In addition, we have made certain editorial changes to improve the clarity and accuracy of the Final Report, or to correct typographical and non-substantive errors, including those suggested by the parties. The footnote numbers in the Final Report have changed due to these revisions. The footnote numbers indicated in this Annex pertain to those in the Final Report, but we have also indicated the footnote numbers in the Interim Report where they differ from those in the Final Report. The paragraph numbers in the Final Report remain unchanged.

#### **2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES**

##### **2.1 Paragraph 7.62**

2. Russia requests us to modify this paragraph to accurately reflect its arguments under Article 11.1 of the Anti-Dumping Agreement.<sup>1</sup> Ukraine asks us to reject Russia's request because it sees no merit in it.<sup>2</sup>

3. We have made some minor changes to more closely reflect the actual language used by Russia in its submissions. However, we do not find it necessary to modify this paragraph in the manner proposed by Russia as we consider the changes that we made to be sufficient to accurately reflect Russia's arguments.

##### **2.2 Paragraph 7.64, footnote 107**

4. Russia requests us to add two additional sentences in footnote 107 to paragraph 7.64 in order to reflect two additional arguments.<sup>3</sup> First, Russia asserts that in footnote 294 of its second written submission it questioned the accuracy of the transportation costs used by MEDT of Ukraine to calculate the surrogate price of gas and asks us to reflect this argument in the Final Report. Second, Russia asks us to reflect its argument that the surrogate price of gas could not be considered to be the price of gas in Russia. Ukraine asks us to reject Russia's request as the original footnote in the Interim Report was clear and correct.<sup>4</sup> Ukraine also asserts that the arguments referred by Russia were submitted at a late stage in panel proceedings, and should therefore not be accepted.<sup>5</sup>

5. We consider the additions requested by Russia to be unnecessary. We note that parties are free to reflect their arguments in their executive summaries, annexed to the Final Report, as they deem fit, and we see no reason to reproduce these specific arguments in the Final Report. We also note that the second argument is adequately reflected in paragraph 7.94 of this Report. Therefore, we decline Russia's request.

##### **2.3 Paragraphs 7.71, 7.95, and 7.99**

6. Russia requests us to make certain changes to accurately reflect the text of Article 2.2 of the Anti-Dumping Agreement.<sup>6</sup> Ukraine asks us to reject Russia's request because it does not see any problem in these paragraphs.<sup>7</sup>

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<sup>1</sup> Russia's request for interim review, para. 2.

<sup>2</sup> Ukraine's comments on Russia's request for interim review, para. 3.

<sup>3</sup> Russia's request for interim review, para. 3.

<sup>4</sup> Ukraine's comments on Russia's request for interim review, para. 5.

<sup>5</sup> Ukraine's comments on Russia's request for interim review, para. 5.

<sup>6</sup> Russia's request for interim review, para. 5.

7. We have made the changes suggested by Russia to accurately reflect the text of Article 2.2 of the Anti-Dumping Agreement.

#### 2.4 Paragraph 7.74

8. Ukraine requests us to reflect in the Final Report the additional reasons that it presented in its submissions, apart from the dominant position of Gazprom in domestic Russian market, for why the gas prices set by other independent suppliers in Russia were aligned with the gas price of Gazprom.<sup>8</sup> Russia asks us to decline Ukraine's request because the Interim Report accurately and fully reflects Ukraine's position on the matter.<sup>9</sup> Russia also asserts that contrary to what Ukraine alleges in its request, Gazprom's dominant position in the domestic Russian market was the only reason that Ukraine provided in its submissions for the alleged pricing behaviour of independent gas suppliers.<sup>10</sup>

9. We reject Ukraine's request as we do not find it necessary to reflect these additional reasons presented by Ukraine as they do not add to the clarity or accuracy of the Final Report, which already reflects the main arguments of Ukraine on this matter.<sup>11</sup>

#### 2.5 Paragraph 7.75

10. Russia requests us to make three specific modifications to more accurately reflect its arguments. First, Russia asks us to replace the word "provide" with the word "constitute" to more accurately reflect the language that it used in its submissions.<sup>12</sup> Second, Russia asks us to add a footnote to this paragraph to reflect certain arguments that it made in its submissions.<sup>13</sup> Third, Russia asks us to modify footnote 129 to paragraph 7.75 to reflect the "focal point" of Russia's position that "all [of] Ukraine's arguments, reasons and evidence related to the cost of production of an input used for manufacturing of the product under consideration are irrelevant to this dispute".<sup>14</sup> Ukraine states that the Interim Report already reflects Russia's arguments on this point, submits that no further modification or addition in this paragraph is necessary, and asks us to not add a footnote to this paragraph, as requested by Russia.<sup>15</sup>

11. We have made the first modification proposed by Russia to more closely reflect the language that it used in its submissions. We decline to make the second and third modifications proposed by Russia as we do not find it necessary to reflect these arguments in the Final Report. Parties, as noted above, are free to reflect their arguments in their executive summaries as they deem fit.

#### 2.6 Paragraph 7.80

12. Russia requests us to delete a part of the fourth sentence of this paragraph to avoid any assumptions based on hypothetical situations that are not necessary for the effective resolution of this dispute, and which in its view may have far reaching and misleading effects well beyond the scope of this dispute.<sup>16</sup> Ukraine asks us to reject Russia's request.<sup>17</sup>

13. We note that we made the observation alluded by Russia in rejecting, as *ex post facto* rationalization, Ukraine's argument based on the use of the word "normally" in Article 2.2.1.1. We limited our review to the parties' arguments on the second condition of Article 2.2.1.1 and offered no views on whether an investigating authority's rejection of certain costs incurred by an exporter or producer could be justified based on the use of the word "normally" in Article 2.2.1.1.

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<sup>7</sup> Ukraine's comments on Russia's request for interim review, para. 7.

<sup>8</sup> Ukraine's request for interim review, para. 5.

<sup>9</sup> Russia's comments on Ukraine's request for interim review, para. 4.

<sup>10</sup> Russia's comments on Ukraine's request for interim review, para. 7.

<sup>11</sup> As noted in footnote 159 of the Report, MEDT of Ukraine did not find that the gas prices of independent suppliers were aligned with the gas price of Gazprom. Ukraine has not suggested in its comments on the interim report that MEDT of Ukraine actually made such a finding. Thus, the additional reasons provided by Ukraine are not integral to our evaluation and findings.

<sup>12</sup> Russia's request for interim review, para. 7.

<sup>13</sup> Russia's request for interim review, para. 8.

<sup>14</sup> Russia's request for interim review, para. 9.

<sup>15</sup> Ukraine's comments on Russia's request for interim review, para. 9.

<sup>16</sup> Russia's request for interim review, para. 10.

<sup>17</sup> Ukraine's comments on Russia's request for interim review, para. 11.

Therefore, we do not consider, and Russia does not explain why, our observations will have the "far reaching and misleading effects" contemplated by Russia. In addition, we note that deleting part of the fourth sentence in the manner proposed by Russia will make the sentence less clear. Therefore, we decline Russia's request.

## **2.7 Paragraph 7.82**

14. Russia requests us to make certain additions in this paragraph to properly reflect its arguments.<sup>18</sup> Ukraine asks us to reject Russia's request.<sup>19</sup>

15. We decline Russia's request as the additions proposed by Russia are unnecessary, and will also affect the clarity of the Final Report.

## **2.8 Paragraph 7.83**

16. Russia requests us to add a footnote to this paragraph to reflect its arguments in full.<sup>20</sup> Ukraine asks us to reject Russia's request.<sup>21</sup>

17. We decline Russia's request as the additions proposed by Russia are unnecessary, and will also affect the clarity of the Final Report.

## **2.9 Paragraph 7.88**

18. Russia requests us to make certain changes in paragraph 7.88 to accurately reflect the facts of this dispute.<sup>22</sup> In particular, Russia objects to the part of this paragraph, where, while recalling the factual basis of MEDT of Ukraine's findings set out in paragraph 7.73 of the Interim Report, we stated that MEDT of Ukraine had found that the gas prices in the domestic Russian market were not based "on commercial considerations" due to governmental regulation of the domestic gas prices in Russia.<sup>23</sup> Russia submits that MEDT of Ukraine only referred to the absence of "commercial considerations" in gas prices set in Russia when alluding to the discussions of WTO Members during the accession process of Russia to the WTO.<sup>24</sup> Thus, in Russia's view, MEDT of Ukraine did not make any finding as such that gas prices in Russia were not set based on commercial considerations. Ukraine asks us to reject Russia's request.<sup>25</sup>

19. We recall that while setting out the factual basis of MEDT of Ukraine's findings in paragraph 7.73 of the Interim Report with respect to cost adjustments, we noted MEDT of Ukraine's finding that the gas price in the domestic Russian market was not a "market price", as the state controlled the price of gas. However, while cross-referring in paragraph 7.88 to the factual basis of MEDT of Ukraine's findings set out in paragraph 7.73 we stated that it had found that the price in Russia was not based on "commercial considerations". For consistency in our use of terminologies across the Final Report, and specifically paragraphs 7.73 and 7.88, we have deleted the reference to a price not based on commercial considerations in paragraph 7.88. Instead, we note in paragraph 7.88, like we did in paragraph 7.73, that MEDT of Ukraine found that the gas price in Russia was not a market price. This change does not affect our analysis with respect to Russia's claim under Article 2.2.1.1 of the Anti-Dumping Agreement.

## **2.10 Paragraph 7.89**

20. Russia requests us to insert quotation marks around the terms "normal" or "normal circumstances" in the third sentence of paragraph 7.89 so as to clarify that these terms refer to

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<sup>18</sup> Russia's request for interim review, para. 11.

<sup>19</sup> Ukraine's comments on Russia's request for interim review, para. 13.

<sup>20</sup> Russia's request for interim review, para. 12.

<sup>21</sup> Ukraine's comments on Russia's request for interim review, para. 15.

<sup>22</sup> Russia's request for interim review, para. 13.

<sup>23</sup> Russia's request for interim review, para. 13.

<sup>24</sup> Russia's request for interim review, para. 13.

<sup>25</sup> Ukraine's comments on Russia's request for interim review, para. 17.

Ukraine's own views on the matter. Russia also requests us to add a citation to Ukraine's first written submission at the end of this paragraph.<sup>26</sup> Ukraine does not comment on this request.

21. The third sentence of paragraph 7.89 reflects our own assessment, and not Ukraine's arguments. Thus, we do not find it necessary to cite Ukraine's first written submission at the end of this sentence, or add the quotation marks suggested by Russia. Nonetheless, we have slightly modified this sentence to enhance the clarity of our analysis.

#### **2.11 Paragraph 7.90**

22. Russia requests us to insert a footnote after the first sentence of paragraph 7.90 to reflect an additional argument that it made.<sup>27</sup> Ukraine asks us to dismiss Russia's request.<sup>28</sup>

23. The additions proposed by Russia are not integral to our evaluation and findings, and do not add to the clarity of the Final Report. Therefore, we deny Russia's request.

#### **2.12 Paragraph 7.93**

24. Russia requests us to add certain citations in footnote 165 to paragraph 7.93 to make references to Russia's arguments complete and accurate.<sup>29</sup> Ukraine does not comment on this request.

25. We have added the citations suggested by Russia.

#### **2.13 Paragraph 7.94**

26. Russia requests us to make certain additions in this paragraph to more completely reflect its arguments.<sup>30</sup> Ukraine asks us to dismiss this request.<sup>31</sup>

27. We reject Russia's request as the proposed arguments are adequately reflected in other parts of this Report.<sup>32</sup>

#### **2.14 Paragraph 7.104**

28. Russia requests us to make certain additions in this paragraph to more completely reflect its arguments with respect to its claim under Article 2.2.1 of the Anti-Dumping Agreement.<sup>33</sup> Ukraine asks us to reject this request.<sup>34</sup>

29. The additions proposed by Russia are not integral to our evaluation and findings. Therefore, we reject Russia's request.

#### **2.15 Paragraph 7.105**

30. Russia requests us to add certain citations in footnote 188 to paragraph 7.105 to make references to Russia's arguments more complete and accurate.<sup>35</sup> Ukraine does not comment on this request.

31. We have added the citations suggested by Russia.

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<sup>26</sup> Russia's request for interim review, para. 14.

<sup>27</sup> Russia's request for interim review, para. 15.

<sup>28</sup> Ukraine's comments on Russia's request for interim review, para. 19.

<sup>29</sup> Russia's request for interim review, para. 16.

<sup>30</sup> Russia's request for interim review, para. 17.

<sup>31</sup> Ukraine's comments on Russia's request for interim review, para. 21.

<sup>32</sup> See, e.g. Panel Report, para. 7.93.

<sup>33</sup> Russia's request for interim review, para. 19.

<sup>34</sup> Ukraine's comments on Russia's request for interim review, para. 23.

<sup>35</sup> Russia's request for interim review, para. 18.

## 2.16 Paragraph 7.125

32. Russia requests us to include a reference to Article 2.2 of the Anti-Dumping Agreement in paragraph 7.125.<sup>36</sup> Ukraine does not comment on this request.

33. We have added a reference to Article 2.2 of the Anti-Dumping Agreement to this paragraph pursuant to Russia's request.

## 2.17 Paragraph 7.128

34. Russia requests us to insert a footnote in this paragraph reflecting additional citations to Russia's submissions to make references to its arguments complete and accurate.<sup>37</sup> Ukraine does not comment on this request.

35. We have inserted a new footnote (footnote 225) reflecting the additional citations suggested by Russia.

## 2.18 Section 7.5

36. Ukraine observes that Section 7.5 does not contain: (a) a detailed description regarding the competence of the Ukrainian courts in the Ukrainian legal order; and (b) reference to the fact that the Ukrainian courts confirmed that MEDT of Ukraine had correctly included EuroChem in the underlying reviews.<sup>38</sup> Ukraine requests us to add these descriptions in the Final Report. Russia asks us to reject Ukraine's requests. In particular, Russia finds Ukraine's requests to be unclear, vague, and imprecise, and considers them to go beyond the requirement under Article 15.2 of the DSU that a request for review be limited to "precise aspects" of the Interim Report.<sup>39</sup>

37. With respect to Ukraine's request that we add a detailed description regarding the competence of the Ukrainian courts in the Ukrainian legal order, we note that we have already set out the facts necessary to resolve Russia's claim, and support our reasoning. While Ukraine requests us to add a description regarding the Ukrainian legal order, it does not propose any particular edits or specify the precise additions that it wishes us to make in this regard. We do not consider that such additional descriptions would add to the clarity of the Final Report. We accordingly reject this aspect of Ukraine's request.

38. Regarding Ukraine's request to add a reference to the fact that the Ukrainian courts confirmed that MEDT of Ukraine had correctly included EuroChem in the underlying reviews, we do not consider that such additions would add to the clarity of the Report, or be necessary to resolve the claim. Therefore, we also reject this aspect of Ukraine's request.<sup>40</sup>

## 2.19 Paragraph 7.150, footnote 272 (footnote 271 of Interim Report)

39. Ukraine requests us to modify this footnote to correctly reflect the title of the Constitution of Ukraine.<sup>41</sup> Russia does not comment on this request.

40. We have made the change suggested by Ukraine.

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<sup>36</sup> Russia's request for interim review, para. 20.

<sup>37</sup> Russia's request for interim review, para. 21.

<sup>38</sup> Ukraine's request for interim review, paras. 8.

<sup>39</sup> Russia's comments on Ukraine's request for interim review, paras. 11-12.

<sup>40</sup> We recall that in the Interim Report we found that the combined effect of Ukrainian court judgments, which found that EuroChem had a negative rate of dumping, and the implementation of these judgments through ICIT's 2010 amendment was that dumping margin for this producer in the original investigation phase was *de minimis*. We thus found that the obligation under the second sentence of Article 5.8 that authorities terminate the investigation against an exporter or producer found to have a *de minimis* dumping margin in the original investigation was applicable in this case, and thus the Ukrainian authorities should have terminated the investigation against EuroChem. We do not consider that the references to court judgments that upheld the Ukrainian authorities' decision to initiate the underlying reviews against Eurochem affect the probative value of the evidence we relied upon to find that in the original investigation phase EuroChem was found to have a negative rate of dumping.

<sup>41</sup> Ukraine's request for interim review, para. 7.

## **2.20 Paragraph 7.193**

41. Russia requests us to reflect its argument that in the underlying reviews MEDT of Ukraine *de facto* resorted to facts available in rejecting the reported gas cost, and using the surrogate price of gas to calculate the cost of production of the investigated Russian producers.<sup>42</sup> Ukraine does not comment on this request.

42. We have made the change suggested by Russia.

## **2.21 Paragraph 7.233**

43. Russia requests us to make two sets of changes in this paragraph. First, Russia requests us to add a sentence in footnote 424 (footnote 422 of Interim Report) to paragraph 7.233 to more completely reflect its arguments.<sup>43</sup> Second, Russia requests us to insert a new footnote in this paragraph noting that at the second substantive meeting of the Panel, Russia replied to the "defence" raised by Ukraine under Article 6.5 of the Anti-Dumping Agreement in response to Russia's claim under Article 6.9 of the Anti-Dumping Agreement.<sup>44</sup> Ukraine asks us to reject Russia's request. In particular, Ukraine considers the additions proposed by Russia to be confusing, notes that Russia's arguments under Article 6.5 were adequately reflected in paragraph 7.230 of the Interim Report, and disagrees with Russia's characterization of Ukraine's arguments under Article 6.5 as a "defence".

44. We do not consider that the additional references to Russia's arguments to be necessary as they do not add to the clarity of the Final Report. Therefore, we reject Russia's requests.

## **2.22 Paragraph 7.250**

45. Russia requests us to add certain citations in footnote 452 (footnote 450 of Interim Report) to paragraph 7.250.<sup>45</sup> Ukraine does not comment on this request.

46. We have added certain citations in footnote 452, including those proposed by Russia.

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<sup>42</sup> Russia's request for interim review, para. 22.

<sup>43</sup> Russia's request for interim review, para. 23.

<sup>44</sup> Russia's request for interim review, para. 24.

<sup>45</sup> Russia's request for interim review, para. 25.