



## UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

AB-2018-5

*Report of the Appellate Body*

*Addendum*

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

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

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**LIST OF ANNEXES****ANNEX A**

## NOTICE OF APPEAL

<b>Contents</b>		<b>Page</b>
Annex A-1	Ukraine's Notice of Appeal	4

**ANNEX B**

## ARGUMENTS OF THE PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex B-1	Executive summary of Ukraine's appellant's submission	6
Annex B-2	Executive summary of Russia's appellee's submission	9

**ANNEX C**

## ARGUMENTS OF THE THIRD PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of Argentina's third participant's submission	16
Annex C-2	Executive summary of Australia's third participant's submission	17
Annex C-3	Executive summary of Brazil's third participant's submission	18
Annex C-4	Executive summary of the European Union's third participant's submission	19
Annex C-5	Executive summary of Japan's third participant's submission	20
Annex C-6	Executive summary of the United States' third participant's submission	21

**ANNEX A**

NOTICE OF APPEAL

<b>Contents</b>		<b>Page</b>
Annex A-1	Ukraine's Notice of Appeal	4

**ANNEX A-1**UKRAINE'S NOTICE OF APPEAL<sup>1</sup>

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

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

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

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

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

**ANNEX B**

ARGUMENTS OF THE PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex B-1	Executive summary of Ukraine's appellant's submission	6
Annex B-2	Executive summary of Russia's appellee's submission	9

**ANNEX B-1****EXECUTIVE SUMMARY OF UKRAINE'S APPELLANT'S SUBMISSION****I. PROCEDURAL ISSUES****A. The Panel erred in finding that the 2008 and the 2010 Decisions were identified in the panel request**

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

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

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

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

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

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

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

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

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

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

### **III. THE PANEL ERRED WHEN FINDING THAT MEDT OF UKRAINE ACTED INCONSISTENTLY WITH ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT BECAUSE IT FAILED TO CALCULATE THE COST OF PRODUCTION OF THE INVESTIGATED RUSSIAN PRODUCERS "IN THE COUNTRY OF ORIGIN"**

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

### **IV. THE PANEL ERRED WHEN FINDING THAT UKRAINE ACTED INCONSISTENTLY WITH ARTICLE 2.2.1 OF THE ANTI-DUMPING AGREEMENT BECAUSE IN MAKING ITS DETERMINATIONS UNDER THIS PROVISION IT RELIED ON COSTS THAT WERE CALCULATED INCONSISTENTLY WITH ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT**

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

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

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

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

## **VI. CONCLUSION**

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

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

**ANNEX B-2**

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

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

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

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

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

**C. The Panel Correctly Found that the Ukrainian Authorities Acted Inconsistently With Article 2.2.1.1 of the Anti-Dumping Agreement in Rejecting the Reported Gas Cost of the Investigated Russian Producers Without Providing An Adequate Basis under the Second Condition of Article 2.2.1.1**

7. The Russian Federation supports the Panel's finding that the factual findings relied upon by MEDT of Ukraine, and set out in paragraph 7.73 of the Panel Report, did not provide a sufficient basis for MEDT of Ukraine to conclude that the records of the investigated Russian producers did not reasonably reflect the costs associated with the production and sale of ammonium nitrate. In particular, the Panel was correct in its factual finding that MEDT of Ukraine's enquiry was focused on whether the cost of gas incurred by the investigated Russian producers in the production and sale of ammonium nitrate was reasonable, or was the cost they would incur under what it considered to be normal circumstances, i.e. in the absence of the alleged distortions in the domestic Russian market for gas. The Panel's reliance on the legal findings and interpretation developed in *EU – Biodiesel (Argentina)* was also correct. The Russian Federation also supports the Panel's finding that for resolving this dispute it was *not* necessary to consider whether the conditions in the domestic Russian market and the conditions of sale of gas met the definitions of "non-arm's length transactions" proposed by Ukraine, or its interpretation of "other practices".
8. The Panel correctly found that the Ukrainian authorities acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement in rejecting the reported gas cost of the investigated Russian producers without providing an adequate basis under the second condition of Article 2.2.1.1.

**Ukraine's Arguments on the "Non-arm's-length" Test are Legally Flawed, Irrelevant and Should be Rejected**

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>3</sup> Emphasis added.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENTS OF THE THIRD PARTICIPANTS

<b>Contents</b>		<b>Page</b>
Annex C-1	Executive summary of Argentina's third participant's submission	16
Annex C-2	Executive summary of Australia's third participant's submission	17
Annex C-3	Executive summary of Brazil's third participant's submission	18
Annex C-4	Executive summary of the European Union's third participant's submission	19
Annex C-5	Executive summary of Japan's third participant's submission	20
Annex C-6	Executive summary of the United States' third participant's submission	21

## **ANNEX C-1**

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

#### **I. Existence of an "adequate basis" for rejecting the cost reported by the investigated producers pursuant to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement. Factual findings.**

- Argentina agrees with the Panel's findings - which are based on the Appellate Body's finding in *EU – Biodiesel* - to the effect that an "adequate basis" for concluding that the records of the investigated producers reasonably reflected the costs associated with the production and sale under the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement does not involve an examination of the reasonableness of the costs.
- There is no additional standard of reasonableness that applies to "costs" in the second condition under Article 2.2.1.1 of the Anti-Dumping Agreement. The condition is fulfilled when the costs are genuinely related to the production and sale of the product under consideration.
- The reference to "non-arm's length transactions or other practices" that may affect the reliability of the costs in the records should not be seen as an exception that permits the analysis of the reasonableness of costs instead of the reasonableness of the records.

#### **II. Calculation of the cost of production in the country of origin. Replacement of the cost in the country of origin by a surrogate price.**

- The Appellate Body's findings under Article 14(d) of the SCM Agreement are not relevant in helping us to interpret Article 2.2 of the Anti-Dumping Agreement.

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

## ANNEX C-2

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

#### I. EXECUTIVE SUMMARY

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

#### A. Interpretation of Article 2.2.1.1

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

#### B. Interpretation of Article 2.2

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

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

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

**ANNEX C-3**

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

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

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

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

## **ANNEX C-4**

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

#### **I. EXECUTIVE SUMMARY**

##### **A. Terms of reference issues**

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

##### **B. Substantive aspects**

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

## ANNEX C-5

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

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

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

**ANNEX C-6****EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION**

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

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