

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

7 FINDINGS AND CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.3 Recommendation

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

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

Hong Zhao
Presiding Member

Ujal Singh Bhatia
Member

Shree Baboo Chekitan Servansing
Member
