UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE FROM RUSSIA

(DS493)

RESPONSES OF THE UNITED STATES OF AMERICA
TO THE PANEL'S QUESTIONS TO THIRD PARTIES

August 14, 2017

TABLE OF REPORTS

Short Title	Full Case Title and Citation
EU – Biodiesel (AB)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, adopted 26 October 2016
EU – Biodiesel (Panel)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add. 1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R
Thailand – H-Beams (Panel)	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Clove Cigarettes (AB)	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US Softwood Lumber V (Panel)	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R
US – Zeroing (EC) (Panel)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R

WRITTEN QUESTIONS FROM THE PANEL TO ALL THIRD PARTIES AFTER THE THIRD PARTY SESSION

DISREGARDING COSTS OF GAS USED IN PRODUCTION OF AMMONIUM NITRATE

Question 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.

1. The above question asks whether "an investigating authority [is] permitted to examine the reasonableness of the costs themselves." The premise of this question, however, does not comport either with the text and structure of Article 2.2.1.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), or with the U.S. understanding of the correct interpretation of this provision. First, the phrase "costs themselves" 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."

2. 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."[1] 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.

3. 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. The second condition of the first sentence of 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, provided that such records . . . reasonably reflect the costs

[1] Emphasis added.

associated with the production and sale of the product under consideration."[2] As discussed below and in the U.S. Third-Party Submission,[3] the term "costs" in Article 2.2.1.1 means, in context, real economic costs involved in producing the product under consideration in the exporting country, not simply the amount reported in the records kept by the exporter or producer under investigation.

4. First, Article 2.1 of the Anti-Dumping Agreement requires an investigating authority to include in the calculation of normal value only those sales "in the ordinary course of trade."[4] As the Appellate Body has noted,

> Article 2.1 requires investigating authorities to exclude sales not made "in the ordinary course of trade", 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. Where a sales transaction is concluded on terms and conditions that are incompatible with *"normal" commercial practice* for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.[5]

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.[6]

5. 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": (1) "a comparable price" for the like product when exported to an "appropriate" third country (provided it is representative); or (2) the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits.[7] Under either

[2] Anti-Dumping Agreement, art. 2.2.1.1.

[3] U.S. Third-Party Submission, paras. 7-9. *See also* Australia Third-Party Submission, paras. 7-11.

[4] Article 2.1 establishes that "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product being exported . . . is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Anti-Dumping Agreement, art. 2.1.

[5] *US – Hot-Rolled Steel (AB)*, para. 140 (emphasis added).

[6] For example, the Appellate Body has recognized that an investigating authority should not be bound to accept artificial sales transactions, including affiliated-party or liquidation sales. *US – Hot-Rolled Steel (AB)*, para. 143 (finding that "[i]t suffices to recognize that, *as between affiliates*, a sales transaction *might* not be 'in the ordinary course of trade', either because the sales price is higher than the 'ordinary course' price, or because it is lower than that price" (emphasis original)); *US – Hot-Rolled Steel (AB)*, para. 143 n.106 (finding that a liquidation sale may not reflect 'normal' commercial principles).

[7] Anti-Dumping Agreement, art. 2.2.

alternative, the margin of dumping shall be determined by comparison with a "normal value" that reflects normal commercial practices or principles.[8]

6. 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."[9] "Associate" or "associated" is defined, in part, as something being "placed or found in conjunction with another."[10] 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."[11]

7. Indeed, where the Anti-Dumping Agreement requires costs to be amounts actually incurred, it states so explicitly.[12] 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."[13] Similarly, Article 2.2.2(ii) uses an express limitation to "the actual amounts incurred and realized by other exporters or producers."[14] Therefore, given the express language utilized in Articles 2.2.2(i) and 2.2.2(ii), Article 2.2.1.1 should not be read to limit "costs" to those actually incurred.

8. 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.[15] Definitions for the term "normally" include "in a regular manner," "under . . . ordinary conditions," or "as a rule,

[8] Anti-Dumping Agreement, arts. 2.1 and 2.2; *see* Anti-Dumping Agreement, art. 2.4 ("comparison shall be made between the export price and the normal value"); *EU – Biodiesel (AB)*, para. 6.24 (finding that Article 2.2 concerns the establishment of an appropriate proxy for the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country (citing *Thailand – H-Beams (Panel)*, para 7.112, and *U.S. Softwood Lumber V (Panel)*, para. 7.278)); *US – Hot-Rolled Steel (AB)*, para. 143 n.106 (finding that a sale between independent parties might not be in the ordinary course of trade where it does not reflect normal commercial principles).

[9] Anti-Dumping Agreement, art. 2.2.1.1 (emphasis added).

[10] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 132 (defining "associate" to mean "Joined in companionship, function, or dignity; allied; concomitant," "Sharing in responsibility, function, membership, etc., but with a secondary or subordinate status," "A thing placed or found in conjunctions with another"); *see* U.S. Third-Party Submission, para. 8.

[11] *EU – Biodiesel (AB)*, para. 6.24.

[12] U.S. Third-Party Submission, para. 9.

[13] Anti-Dumping Agreement, art. 2.2.2(i).

[14] Anti-Dumping Agreement, art. 2.2.2(ii).

[15] The United States agrees with the European Union that the Panel does not need to consider the meaning of "normally" for purposes of resolving this issue. *See* EU Third-Party Submission, para 18.

ordinarily."[16] 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.

9. Finally, the Appellate Body in *EU – Biodiesel* specifically found that Article 2.2.1.1 does not limit an investigating authority to examining just the costs reflected in the records of the exporter or producer under investigation. In *EU – Biodiesel*, 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 based on domestic sales.[17] Given that Article 2.2.1.1 (together 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" derived under Article 2.2.1.1 must be capable of serving as an appropriate basis for estimating the normal value of that product.[18] Further, according to the Appellate Body, the second condition of the first sentence of Article 2.2.1.1 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."[19] For these reasons, the Appellate Body in *EU – Biodiesel* confirmed that an investigating 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."[20]

10. 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.[21] In such a situation, where a producer charges its affiliate an artificially low price for a production input, an investigating 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 investigating 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. And in the context of this dispute, 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

[16] *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 1940; *see US – Clove Cigarettes (AB)*, para. 273 ("We observe that the ordinary meaning of the term 'normally' is defined as 'under normal or ordinary conditions; as a rule'").

[17] *EU – Biodiesel (AB)*, para. 6.24.

[18] *EU – Biodiesel (AB)*, para. 6.24.

[19] *EU – Biodiesel (AB)*, para. 6.22.

[20] *EU – Biodiesel (AB)*, para. 6.41 (quoting *EU – Biodiesel (Panel)*, para. 7.242 n.400).

[21] *See EU – Biodiesel (AB)*, para. 6.41 (quoting *EU – Biodiesel (Panel)*, para. 7.242 n.400).

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 a non-arm's-length transaction, which may affect the reliability of the reported costs.[22]

11. In sum, Article 2.2.1.1 of the Anti-Dumping Agreement 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 investigating 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.

TERMINATION OF INVESTIGATION AGAINST EXPORTER WITH ALLEGED NEGATIVE DUMPING MARGIN IN ORIGINAL INVESTIGATION PHASE

Question 2. Do the third parties agree with Ukraine's view that Article 5.8 of the Anti-Dumping Agreement does not apply in the context of reviews initiated under Articles 11.2 or 11.3 of the Anti-Dumping Agreement?[23]

12. The title of Article 5 of the Anti-Dumping Agreement, "Initiation and Subsequent Investigation," indicates that the provisions of this article apply only to investigations. The plain language of Article 5.8 – "an investigation shall be terminated" – also indicates the applicability of this provision to investigations only.[24] Findings of panels and the Appellate Body have confirmed that requirements found in provisions applicable to an anti-dumping or countervailing duty investigation will not automatically be read into those provisions expressly applying to proceedings that take place after the conclusion of an original investigation, including reviews.[25] Accordingly, the investigation requirements of Article 5.8 of the Anti-Dumping Agreement are not applicable to reviews conducted pursuant to Articles 11.2 and 11.3 of the Anti-Dumping Agreement.

[22] *See* U.S. Oral Statement at the Third Party Session, para. 6.

[23] *See*, *e.g.*, Ukraine First Written Submission, para. 259.

[24] Anti-Dumping Agreement, art. 5.8.

[25] *E.g.*, *US - Carbon Steel (India) (AB)*, paras. 4.527-4.530; *US – Zeroing (EC) (Panel)*, para. 7.180-7.186; *US – Carbon Steel (AB)*, paras. 72, 87.