

***UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE FROM RUSSIA***

**(DS493)**

**THIRD PARTY SUBMISSION  
OF THE UNITED STATES OF AMERICA**

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<i>China – GOES (AB)</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012
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<i>China – X-Ray Equipment</i>	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , WT/DS425/R and Add.1, adopted 24 April 2013
<i>EC – Fasteners (China) (AB)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
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<i>EU – Biodiesel (AB)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/AB/R, adopted 26 October 2016
<i>EU – Biodiesel (Panel)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/R and Add. 1, adopted 29 March 2016

<i>US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R, adopted 28 November 2005
<i>US – Clove Cigarettes (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Oil Country Tubular Goods Sunset Reviews (AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004

## I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel.
2. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“Anti-Dumping Agreement”) as relevant to certain issues in this dispute.

## II. CLAIMS REGARDING ARTICLES 2.2 AND 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT

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

3. 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. To recall, Russia takes the position that “the parameters of costs themselves . . . are beyond the scope of Investigating Authority’s examination.”<sup>1</sup> This position is not supportable under the text of Article 2.2.1.1, nor – as Russia asserts – was this the finding of the Appellate Body in *EU – Biodiesel*. To the contrary, under the plain meaning of the article, an investigating authority may examine whether recorded costs “reasonably reflect the costs associated with the production and sale of the product under consideration.”<sup>2</sup>

4. This analysis is not limited to comparing, for example, invoiced amounts with the amounts set out in books and records. Rather, the investigating authority may consider whether recorded costs reflect the actual economic costs in the exporting country. This principle is well recognized – for example, the United States understands that no Member disagrees that a cost based on an affiliated party transfer price should not be used under Article 2.2.1.1, even if that cost is the actual invoiced amount and reflected in the producer’s records.<sup>3</sup>

5. Turning first to the text of the Anti-Dumping Agreement, the second condition of the first sentence of Article 2.2.1.1 reads as follows:

For the purpose of paragraph 2, 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 associated with the production and sale of the product under consideration.<sup>4</sup>

6. Russia, apparently, would read this second condition as meaning that the “records . . . reflect the amounts actually paid by the producer for a particular input.” This interpretation, however, does not reflect the text.

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<sup>1</sup> Russia First Written Submission, para. 68.

<sup>2</sup> Anti-Dumping Agreement, art. 2.2.1.1.

<sup>3</sup> Both the panel and the Appellate Body confirmed this principle in *EU – Biodiesel*. See *EU – Biodiesel (AB)*, para. 6.41; *EU – Biodiesel (Panel)*, paras. 7.232 and 7.242 n.400.

<sup>4</sup> Anti-Dumping Agreement, art. 2.2.1.1.

7. 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.<sup>5</sup> Otherwise, investigating authorities would be bound to accept artificial, affiliated-party transfer prices – amounts which have no economic meaning. No WTO Member could seriously advocate this interpretation. Indeed, the Anti-Dumping Agreement in other circumstances similarly indicates that an investigating authority should be concerned with real, economically meaningful data. For example, export prices may be disregarded where the authority is concerned the price is “unreliable,”<sup>6</sup> and the domestic industry may refer to “the rest of the producers” where certain producers are related to exporters or importers.<sup>7</sup>

8. Second, Article 2.2.1.1 references costs “*associated with* the production and sale of the product under consideration.”<sup>8</sup> “Associate” or “associated” is typically defined as being “placed or found in conjunction with another.”<sup>9</sup> 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 (as opposed to amounts actually paid by a specific respondent).

9. 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.”<sup>10</sup> Similarly, Article 2.2.2(ii) uses an express limitation to “the actual amounts incurred and realized by other exporters or producers.”<sup>11</sup> 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.

10. Russia’s reliance on the Appellate Body report in *EU – Biodiesel* is also misplaced. Contrary to Russia’s depiction, the Appellate Body in fact confirmed that an authority is not

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<sup>5</sup> See *EU – Biodiesel (Panel)*, paras. 7.229-7.232.

<sup>6</sup> Anti-Dumping Agreement, art. 2.3 (“In cases where there is no export price or 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 export price may be constructed”).

<sup>7</sup> Anti-Dumping Agreement, art. 4.1(i) (“when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term “domestic industry” may be interpreted as referring to the rest of the producers”).

<sup>8</sup> Anti-Dumping Agreement, art. 2.2.1.1 (emphasis added).

<sup>9</sup> “Associate” means “[j]oined in companionship, function, or dignity; allied; concomitant,” “[s]haring in responsibility, function, membership, but with a secondary or subordinate status,” “[a] thing placed or found in conjunctions with another,” or “[j]oin, combine, (things together; one thing with, to another or others).” *THE NEW SHORTER OXFORD ENGLISH DICTIONARY*, vol. 1 (1993 ed.).

<sup>10</sup> Anti-Dumping Agreement, art. 2.2.2(i).

<sup>11</sup> Anti-Dumping Agreement, art. 2.2.2(ii).

limited to examining the costs actually paid by a specific producer for a particular input in every circumstance.

11. First, the Appellate Body explained what it viewed as the goal of constructing normal value. In particular, 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,”<sup>12</sup> “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.”<sup>13</sup>

12. 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.*<sup>14</sup>

13. The highlighted language – *whether non-arms-length transactions or other practices affect the reliability of the reported costs* – is directly at odds with Russia’s proposed interpretation. 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.<sup>15</sup>

14. The United States recalls that the Panel’s role is not to conduct a *de novo* investigation of the constructed cost of ammonium nitrate from Russia. Rather, it is to consider whether Russia has established through argument and citations to record evidence that Ukraine’s authority failed

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<sup>12</sup> *EU – Biodiesel (AB)*, para. 6.24.

<sup>13</sup> *EU – Biodiesel (AB)*, para. 6.22.

<sup>14</sup> *EU – Biodiesel (AB)*, para. 6.41 (quoting *EU – Biodiesel (Panel)*, para. 7.242 n.400) (emphasis added).

<sup>15</sup> The Appellate Body in *EU – Biodiesel* did not elaborate on what types of “other practices” might affect “the reliability of the reported costs,” which further undercuts Russia’s reading of *EU - Biodiesel*. The Appellate Body also rejected the position that “no matter how unreasonable the production (or sale) costs in the records kept by the investigated firm would be when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do.” *EU – Biodiesel*, paras. 6.40, 6.41.

to provide a reasoned and adequate explanation for its determination (i.e., could those findings and conclusions have been reached by an unbiased and objective investigating authority).<sup>16</sup>

15. Here, Ukraine’s authority does appear to have provided a reasoned and adequate explanation for rejecting the recorded costs for natural gas and replacing them with a constructed cost of natural gas in Russia. Ukraine explains that the recorded costs for natural gas is artificial because it is set by the Government of Russia.<sup>17</sup> In fact, Ukraine found that the natural gas price set by the Government did not even cover the costs of extraction and transportation of the natural gas.<sup>18</sup> Indeed, Russia does not even dispute the finding of Ukraine’s authority that natural gas prices in Russia are subject to “state control,”<sup>19</sup> nor that the price for natural gas in Russia is “not a market price.”<sup>20</sup>

16. 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.

17. The United States further notes that the Working Party Report on Russia’s accession to the WTO supports the approach adopted by Ukraine’s authority. In the Report, Members expressed concerns that pricing practices of Russia’s natural gas industry “could not be regarded as being based on commercial considerations . . . [and that] [a]rtificially low domestic energy prices could . . . lead to . . . exports of value-added intermediate and finished goods at prices below their normal value.”<sup>21</sup> Members specifically “noted that the cost of producing natural gas for Gazprom [i.e., the majority State-owned company] was significantly higher than the regulated domestic price.”<sup>22</sup> Members further noted that “exports of ‘downstream’ intermediate or finished goods of the Russian Federation, particularly, of products that were energy-intensive, such as fertilizers or metals, could take place at prices below their normal value or at subsidized prices, leading to the possibility of facing anti-dumping or countervailing actions in export markets.”<sup>23</sup>

18. Finally, contrary to Russia’s implications, the facts in this dispute are different from those involved in *EU – Biodiesel*. In *EU – Biodiesel*, the investigating authority considered the

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<sup>16</sup> Anti-Dumping Agreement, art. 17.6(i).

<sup>17</sup> Disclosure, sec. 10.2, pp. 21-22 (Exhibit RUS-10b); *see* Ukraine First Written Submission, paras. 146-148.

<sup>18</sup> Disclosure, sec. 10.2, pp. 22-23 (Exhibit RUS-10b); *see* Ukraine First Written Submission, paras. 149-155.

<sup>19</sup> Disclosure, sec. 10.2, p. 23 (Exhibit RUS-10b).

<sup>20</sup> Disclosure, sec. 10.2, p. 21 (Exhibit RUS-10b).

<sup>21</sup> Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70, WT/MIN(11)/2, para. 90 (17 Nov. 2011).

<sup>22</sup> Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, WT/ACC/RUS/70, WT/MIN(11)/2, para. 90 (17 Nov. 2011).

<sup>23</sup> Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, (WT/ACC/RUS/70, WT/MIN(11)/2, para. 120 (17 Nov. 2011).

indirect distortive effect of an exporting Member’s tax system on domestic input prices – and, by implication, costs of production – for purposes of Article 2.2.1.1.<sup>24</sup> In contrast, in this dispute, the authority was faced with direct government control of the price of a major input, at a level below the cost of extracting and transporting the input to the producer of the goods under investigation. As Ukraine has explained, in these circumstances, the cost recorded on the producers’ books were divorced from any real economic costs.

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

19. Russia argues that Ukraine breached its obligations under Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because it adjusted the costs of natural gas reported in the records of the respondents based on cost data for natural gas not sold in the country of origin.<sup>25</sup> Russia’s argument cannot be supported by the text of the Agreement. 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, Russia identifies no language in Article 2.2.1.1 that restricts the investigating authority from considering evidence beyond the country of origin.

20. Ukraine is otherwise 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.”<sup>26</sup> Rather, as the Appellate Body explained, when an investigating 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, albeit the benchmark chosen may need to be adapted to reflect the market conditions in the origin country.<sup>27</sup>

21. The Appellate Body 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.”<sup>28</sup> 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.”<sup>29</sup>

22. Accordingly, contrary to the argument put forward by Russia, 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

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<sup>24</sup> See *EU – Biodiesel (Panel)*, para. 7.248.

<sup>25</sup> Russia First Written Submission, paras. 79, 83, 91, 99.

<sup>26</sup> Ukraine First Written Submission, para. 181.

<sup>27</sup> *EU – Biodiesel (AB)*, para. 6.70.

<sup>28</sup> *EU – Biodiesel (AB)*, para. 6.70.

<sup>29</sup> *EU – Biodiesel (AB)*, para. 6.70.

consideration and may use such information or evidence to determine an exporter's or producer's cost of production in the country of origin.

### III. CLAIMS REGARDING THE RELATIONSHIP BETWEEN ARTICLES 3 AND 11.3 OF THE ANTI-DUMPING AGREEMENT

#### A. Relationship Between Article 3 and Article 11.3

23. Russia argues, in part, that the obligations established under Article 3 of the Anti-Dumping Agreement apply equally to expiry reviews under Article 11.3.<sup>30</sup> Ukraine maintains that Russia's interpretation of the relationship between Articles 3 and 11.3 is wrong<sup>31</sup> and that "Article 3 does not apply to the determination of the likelihood of the continuation/recurrence of injury analysis as such."<sup>32</sup>

24. Article 3, entitled *Determination of Injury*, governs an investigating authority's consideration of whether a domestic industry is materially injured or threatened with material injury by reason of subject imports in original investigations.<sup>33</sup> Article 11.3, governing expiry or sunset reviews, provides for the termination of a definitive anti-dumping duty after five years, "unless the authorities determine . . . that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."<sup>34</sup>

25. As indicated by the text of these provisions, 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."<sup>35</sup> 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."<sup>36</sup>

26. Further, the Appellate Body reports cited by Russia<sup>37</sup> do not support its view that Article 3 applies directly to sunset reviews. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body found only that prior determinations relied on by an investigating authority

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<sup>30</sup> Russia First Written Submission, paras. 198-202.

<sup>31</sup> Ukraine First Written Submission, paras. 282-288.

<sup>32</sup> Ukraine First Written Submission, para. 286.

<sup>33</sup> Anti-Dumping Agreement, art. 3.

<sup>34</sup> Anti-Dumping Agreement, art. 11.3.

<sup>35</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 278; see *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, para. 123.

<sup>36</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 280.

<sup>37</sup> See Russia First Written Submission, paras. 198-199, 202.

in a sunset review (in that instance dumping margins calculated in prior reviews) should have been conducted in accordance with the Anti-Dumping Agreement.<sup>38</sup> The Appellate Body did not find that Article 3 applied to an investigating authority's determination of likelihood of dumping or injury under Article 11.3. Similarly, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body found that investigating authorities may consider other factors contained in Article 3 when conducting expiry reviews but were not required to do so.<sup>39</sup>

27. 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. Indeed, the Anti-Dumping Agreement in Article 17.6(i) instructs panels to determine whether an investigating authority's "establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective."<sup>40</sup> As the Appellate Body has explained,

The requirement to make a "determination" concerning likelihood . . . precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that *the investigating authority has to determine, on the basis of positive evidence*, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. *An investigating authority must have a sufficient factual basis* to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.<sup>41</sup>

28. In sum, likelihood-of-injury determinations under Article 11.3 must be based on "positive evidence," and the authority's evaluation of the evidence must be unbiased and objective. An investigating authority may look to Article 3 for guidance in conducting its likelihood-of-injury analysis, but it is not required to do so.

## **B. Trade Barriers in Third Country Markets**

29. Russia argues that Ukraine impermissibly based its likelihood-of-injury determination on "new types of dumping" when it found that barriers to Russian exports of ammonium nitrate in third country markets made it more likely that Russian respondents would direct exports to Ukraine after expiry of the duty.<sup>42</sup>

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<sup>38</sup> *US – Corrosion-Resistant Steel Sunset Review (AB)*, paras. 123-127.

<sup>39</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 284 (finding that "[a]n investigating authority may also, in its own judgement, consider other factors contained in Article 3 when making a likelihood-of-injury determination. But the necessity of conducting such an analysis in a given case results from the requirement imposed by Article 11.3—not Article 3—that a likelihood-of-injury determination rest on a "sufficient factual basis" that allows the agency to draw "reasoned and adequate conclusions").

<sup>40</sup> Anti-Dumping Agreement, art. 17.6(i).

<sup>41</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 321 (quoting and adding emphasis to *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 114 (quoting *US – Corrosion-Resistant Steel Sunset Review (Panel)*, para. 7.271)).

<sup>42</sup> Russia First Written Submission, paras. 238-242.

30. 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 investigating authority.<sup>43</sup> Trade barriers in third country markets, such as anti-dumping measures covering the same exports at issue in the expiry review, can be relevant to an investigating authority's likelihood-of-injury determination. Therefore, an investigating 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.<sup>44</sup>

#### IV. CLAIMS REGARDING ARTICLE 6.8 AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

31. Russia contends that Ukraine breached its obligations under Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement when it failed to accept certain cost data pursuant to the second condition of Article 2.2.1.1 given that the respondents had fully cooperated with the investigation and provided necessary information within a reasonable period of time.<sup>45</sup>

32. Ukraine argues that it is clear from the record of its investigation that the cost data provided by the respondents “was not rejected on evidentiary grounds under Article 6.8 of the Anti-Dumping Agreement,”<sup>46</sup> and thus Russia's claim has no factual basis.<sup>47</sup> Ukraine also argues that Russia's claim is extraordinary because such an interpretation would only allow an investigating authority to reject provided data based on the evidentiary grounds of Article 6.8, thereby rendering substantive provisions, like Article 2.2.1.1, “meaningless and non-operative.”<sup>48</sup>

33. 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.<sup>49</sup> 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.

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<sup>43</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 283-284.

<sup>44</sup> For example, the “availability of other export markets to absorb additional exports” is a factor that investigating authorities “should consider” in making threat determinations under Article 3.7, which also requires a forward-looking analysis.

<sup>45</sup> Russia First Written Submission, paras. 243, 258, 269-270.

<sup>46</sup> Ukraine First Written Submission, para. 310.

<sup>47</sup> Ukraine First Written Submission, paras. 311-312.

<sup>48</sup> Ukraine First Written Submission, paras. 315-316.

<sup>49</sup> See Anti-Dumping Agreement, art. 6.8 and Annex II.

## V. CLAIMS REGARDING ARTICLES 6.2 AND 6.9 OF THE ANTI-DUMPING AGREEMENT

34. Russia alleges that Ukraine breached its obligations under Articles 6.2 and 6.9 by failing to disclose the essential facts on which Ukraine based its final determination in the Ukraine Disclosure and, in doing so, failing to provide interested parties with a full opportunity to defend their interests.<sup>50</sup> Specifically, Russia claims that Ukraine’s Disclosure did not disclose the essential facts with respect to the existence and margin of dumping,<sup>51</sup> including the calculation methodology.<sup>52</sup> Russia argues that due to Ukraine’s failure to observe the requirements of Article 6.9, the Russian respondents, as interested parties to the investigation, were unable to defend their respective interests in the investigation, including, inter alia, challenging the use of incorrect facts.<sup>53</sup>

35. Ukraine acknowledges that it did not provide “actual figures” for export prices<sup>54</sup> or “absolute figures” for normal value,<sup>55</sup> but argues that it disclosed sufficient details about these calculations, as well as the comparison between export price and normal value, such that Russian respondents could identify what data were used and how.<sup>56</sup>

36. Article 6.2 provides, in part, that all parties shall have a full opportunity to defend their interests throughout an anti-dumping investigation.<sup>57</sup> 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.”<sup>58</sup> 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.”<sup>59</sup>

37. 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

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<sup>50</sup> Russia First Written Submission, paras. 287-314.

<sup>51</sup> Russia First Written Submission, paras. 287-314.

<sup>52</sup> Russia First Written Submission, paras. 287-314.

<sup>53</sup> Russia First Written Submission, paras. 298, 303, 312.

<sup>54</sup> Ukraine First Written Submission, para. 345.

<sup>55</sup> Ukraine First Written Submission, para. 355.

<sup>56</sup> Ukraine First Written Submission, paras. 355, 357-358.

<sup>57</sup> Anti-Dumping Agreement, art. 6.2.

<sup>58</sup> Anti-Dumping Agreement, art. 6.9.

<sup>59</sup> See *China – GOES (AB)*, para. 240 (finding that “essential facts . . . refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures”). See also *China – Broiler Products*, para. 7.86; *China – X-Ray Equipment*, paras. 7.399-7.400.

adjustments for differences that affect price comparability; and (4) the formulas applied to the data.<sup>60</sup> 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.<sup>61</sup>

38. Accordingly, the Panel should assess whether Ukraine properly disclosed the essential facts under consideration which form the basis for the decision whether to apply definitive measures, so as: (1) to permit interested parties to understand clearly the data being used by the investigating authority and how that data was used to determine the existence and margin of dumping; and (2) to provide interested parties with a full opportunity for the defense of their interests.<sup>62</sup>

## VI. CLAIMS REGARDING ARTICLES 12.2 AND 12.2.2 OF THE ANTI-DUMPING AGREEMENT

39. Russia argues, in part, that Ukraine acted inconsistently with Articles 12.2 and 12.2.2 by failing to provide sufficient detail of the findings and conclusions reached on all issues of fact and law material to Ukraine’s preliminary and final determinations, specifically arguing that Ukraine failed to provide the calculations used to determine the dumping margins in the final determination<sup>63</sup> and the data on which it relied to make those determinations.<sup>64</sup> Ukraine responds that Articles 12.2 and 12.2.2 do not obligate it to disclose the actual calculation of a dumping margin.<sup>65</sup>

40. 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].”<sup>66</sup> To this end, Article 12.2.2 provides that the investigating 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.”<sup>67</sup> 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,”<sup>68</sup> because an interested party may not be able to discern from the reference whether

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<sup>60</sup> *China – Broiler Products*, para. 7.93.

<sup>61</sup> *China – GOES (AB)*, para. 240 (“In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 . . . is paramount for ensuring the ability of the parties concerned to defend their interests”).

<sup>62</sup> *China – HP-SSST (AB)*, para. 5.131.

<sup>63</sup> Russia First Written Submission, para. 329.

<sup>64</sup> Russia First Written Submission, para. 329.

<sup>65</sup> Ukraine’s First Written Submission, paras. 376-377.

<sup>66</sup> Anti-Dumping Agreement, art. 12.2.

<sup>67</sup> Anti-Dumping Agreement, art. 12.2.2.

<sup>68</sup> Anti-Dumping Agreement, art. 12.2.2.

the data in its possession was accurately used, or whether there were mathematical errors in the calculation using the data.

41. 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”<sup>69</sup> within the meaning of Article 12.2.2. Such calculations are the mathematical basis for arriving at the dumping margins imposed by an investigating 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.

42. The Appellate Body in *China – HP-SSST* came to a similar conclusion:

The mere fact that the investigating authority refers in its disclosure to data that are in the possession of an interested party does not mean that the investigating authority has disclosed the factual basis for its determination in a manner that enables interested parties to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, and to comment on or make arguments as to the proper interpretation of those facts.<sup>70</sup>

43. The Panel should thus assess whether Ukraine disclosed, or otherwise made available through a separate report, the calculations used to determine the dumping margins for the Russian respondents and the data underlying those calculations, in order to evaluate whether Ukraine acted inconsistent with its obligations under Articles 12.2 and 12.2.2.

## VII. CONCLUSION

44. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the Anti-Dumping Agreement.

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<sup>69</sup> Anti-Dumping Agreement, art. 12.2.2.

<sup>70</sup> *China – HP-SSST (AB)*, para. 5.131.