

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

**(AB-2018-5 / DS493)**

**THIRD PARTICIPANT ORAL STATEMENT  
OF THE UNITED STATES OF AMERICA**

**May 20, 2019**

1. Good afternoon Presiding Member, members of the Division.
2. The United States will address in its opening statement the correct interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement.
3. The WTO agreements are premised on the operation of market principles under which enterprises make decisions based on commercial considerations. Where a WTO Member's economy, or a sector of that economy, operates pursuant to government directives, however, basic rules on non-discrimination, market access, and fair trading set out in the covered agreements can be broken or evaded.
4. WTO rules relating to anti-dumping reflect this real-world understanding. Understood correctly, Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement establish that domestic price, third-country export price, and cost of production may *not* be considered "the comparable price, in the ordinary course of trade," when the evidence of record indicates that they are not based on market principles.<sup>1</sup> For example, a domestic price between related parties may not be based on normal commercial practices that reflect market principles because such a price may not be consistent with an arm's-length transaction between unrelated parties.<sup>2</sup>
5. Like domestic and third-country export prices, costs of production calculated pursuant to Article 2.2 of the Anti-Dumping Agreement must be capable of generating an appropriate proxy for "the comparable price, in the ordinary course of trade."<sup>3</sup> For this reason, costs calculated

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<sup>1</sup> See U.S. Third Participant Submission, paras. 8-10.

<sup>2</sup> See *US – Hot-Rolled Steel (AB)*, paras. 141, 143. See also *US – OCTG (Korea)*, paras. 7.192-7.198.

<sup>3</sup> Anti-Dumping Agreement, Art. 2.1.

under Article 2.2.1.1 must be based on normal commercial practices that reflect market principles, which, depending on the circumstances, may or may not be the “costs” reported in an invoice price.<sup>4</sup>

6. For example, in *US – OCTG (Korea)*, the panel first examined the investigating authority’s conclusion that the relevant costs reflected a price from a related supplier.<sup>5</sup> After determining that the investigating authority had based this conclusion on sufficient evidence, the panel next examined the authority’s conclusion that the relevant costs did not reflect arm’s-length prices because of the relationship between the producer and the supplier.<sup>6</sup> The panel concluded that if this latter examination revealed that the prices for the costs differed significantly from the prices at which the supplier sold inputs to unrelated entities, it was not unreasonable for the investigating authority to conclude that the costs reported in the producer’s records did not reflect arm’s-length prices (*i.e.*, normal commercial practices). In such a situation, the related producer’s “records did not reasonably reflect the costs associated with the production and sale of [the like product] within the meaning of Article 2.2.1.1.”<sup>7</sup>

7. The concept that underlies the well-established concern regarding related entity transactions underlies other types of transactions that may not be based on normal commercial practices that reflect market principles.

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<sup>4</sup> See U.S. Third Participant Submission, paras. 11-16.

<sup>5</sup> See *US – OCTG (Korea)*, paras. 7.192-7.193

<sup>6</sup> See *US – OCTG (Korea)*, paras. 7.195-7.198

<sup>7</sup> *US – OCTG (Korea)*, para. 7.198.

8. Just like transactions between related entities, government interference in the marketplace may portend that the costs reported in a producer’s records are not capable of generating an appropriate proxy for “the comparable price, in the ordinary course of trade.”<sup>8</sup> Specifically, where a government intervenes in the marketplace to interfere with the ability of buyers and sellers to enter into transactions according to their own commercial interests, the sales price of a product might be established according to criteria not fully based on market principles.<sup>9</sup>

9. Contrary to the Panel’s findings in this dispute, Article 2.2.1.1 of the Anti-Dumping Agreement does not foreclose an investigating authority from examining a producer’s cost records because of possible government interference in the marketplace.<sup>10</sup> It is entirely reasonable and appropriate for an investigating authority to seek to examine government interference in the marketplace under Article 2.2.1.1 as a means of ensuring that all costs are captured; that costs are not overstated or understated; or that non-arm’s-length transactions or other practices do not prevent the investigating authority’s efforts to generate an appropriate proxy for “the comparable price.”<sup>11</sup> The Panel therefore erred as a matter of law when it prejudged Ukraine’s inquiry into a producer’s cost records based on government interference in the marketplace and narrowed the situations in which an investigating authority may examine such records under Article 2.2.1.1.

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<sup>8</sup> Anti-Dumping Agreement, Art. 2.1. *See also EU – Biodiesel (Argentina) (AB)*, para. 6.24.

<sup>9</sup> *See* U.S. Third Participant Submission, paras. 21-23.

<sup>10</sup> *See EU – Biodiesel (Argentina) (AB)*, para. 6.41.

<sup>11</sup> *See, e.g., EU – Biodiesel (Argentina) (AB)*, paras. 6.24, 6.41; *US – Hot-Rolled Steel (AB)*, para. 143. *See also* U.S. Third Participant Submission, paras. 24-30.

10. Presiding Member, members of the Division: The United States appreciates the opportunity to provide its views in this appeal and looks forward to participating in the discussion.