

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

**(DS493)**

**THIRD PARTY EXECUTIVE SUMMARY  
OF THE UNITED STATES OF AMERICA**

**August 21, 2017**

## EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

### I. CLAIMS REGARDING ARTICLES 2.2 AND 2.2.1.1

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

1. 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. 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. Otherwise, investigating authorities would be bound to accept artificial, affiliated-party transfer prices – amounts which have no economic meaning.

2. Second, Article 2.2.1.1 references costs “*associated with* the production and sale of the product under consideration.” “Associate” or “associated” is typically defined as being “placed or found in conjunction with another.” 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.

3. 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.” Similarly, Article 2.2.2(ii) uses an express limitation to “the actual amounts incurred and realized by other exporters or producers.” 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.

4. Russia’s reliance on the Appellate Body report in *EU – Biodiesel* is also misplaced. First, 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,” “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.”

5. 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.*

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.

6. Finally, the United States recalls that the Panel’s role is to consider whether Russia has established that Ukraine’s authority failed to provide a reasoned and adequate explanation for its determination. Here, Ukraine explains that the recorded cost for natural gas is artificial because it is set by the Government of Russia. 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.

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

7. Ukraine is 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.” Rather, as the Appellate Body explained, when an authority rejects cost data under the second condition of the first sentence 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.

8. The Appellate Body in *EU – Biodiesel* 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.” 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.” Accordingly, 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 consideration and may use such information or evidence to determine an exporter’s or producer’s cost of production in the country of origin.

## **II. CLAIMS REGARDING THE RELATIONSHIP BETWEEN ARTICLES 3 AND 11.3**

9. 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.” 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.”

10. 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, and the authority’s evaluation of the evidence must be unbiased and objective. An authority may look to Article 3 for guidance in conducting its likelihood-of-injury analysis, but it is not required to do so.

11. Finally, 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 authority. Trade barriers in third country markets can be relevant to an authority’s likelihood-of-injury determination. Therefore, an 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.

### **III. CLAIMS REGARDING ARTICLE 6.8 AND ANNEX II**

12. 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. 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.

### **IV. CLAIMS REGARDING ARTICLES 6.2 AND 6.9**

13. Article 6.2 provides, in part, that all parties shall have a full opportunity to defend their interests throughout an anti-dumping investigation. 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.” 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.”

14. 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 adjustments for differences that affect price comparability; and (4) the formulas applied to the data. 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.

## **V. CLAIMS REGARDING ARTICLES 12.2 AND 12.2.2**

15. 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].” To this end, Article 12.2.2 provides that the 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.” 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,” because an interested party may not be able to discern from the reference whether the data in its possession was accurately used, or whether there were mathematical errors in the calculation using the data.

16. 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” within the meaning of Article 12.2.2. Such calculations are the mathematical basis for arriving at the dumping margins imposed by an 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.

### **EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT**

17. Contrary to Russia’s position, Articles 2.2.1.1 and 2.2 permit an investigating authority to reject or adjust recorded prices or costs where that authority’s decision to do so is based on a reasoned and adequate explanation. 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. In such a situation, where a producer charges its affiliate an artificially low price for a production input, an 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 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.

18. As Ukraine characterizes the facts, the situation created by the Russian Government’s intervention is analogous to a non-arm’s-length transaction because the recorded cost for natural gas in Russia is set by the Russian Government and is “not the result of market forces.” In these

circumstances, 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 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 the recordation of non-arm's-length transactions, which may affect the reliability of the reported costs. Accordingly, these circumstances could well constitute grounds to substitute or adjust that cost under Article 2.2.1.1, depending on the facts of the case and the conclusions the authority draws from those facts.

19. Finally, as the Appellate Body explained in *EU – Biodiesel*, when an 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. In certain circumstances, the proxy chosen may need to be adapted to reflect market conditions in the country of origin. That said, in doing so, the authority should not be required to adapt those costs in a way that reintroduces the distortions that led it to substitute the recorded cost.

#### EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

20. The Panel's question asks whether "an investigating authority [is] permitted to examine the reasonableness of the costs themselves." The premise of this question does not comport either with the text and structure of Article 2.2.1.1 of the Anti-Dumping Agreement, or with the U.S. understanding of the correct interpretation of this provision.

21. First, the phrase "costs themselves" used in the question 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."

22. 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." 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.

23. 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. First, Article 2.1 requires an investigating authority to include in the calculation of normal value only those sales "in the ordinary course of trade." As the

Appellate Body has noted, 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.

24. 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.” Under either alternative, the margin of dumping shall be determined by comparison with a “normal value” that reflects normal commercial practices or principles.

25. 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.” 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.”

26. 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. Definitions for the term “normally” include “in a regular manner,” “under . . . ordinary conditions,” or “as a rule, ordinarily.” 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.

27. Finally, the Appellate Body in *EU – Biodiesel* confirmed that an 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.”

28. In sum, Article 2.2.1.1 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 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.