

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

**(DS493)**

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA  
AT THE THIRD-PARTY SESSION OF  
THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

**July 27, 2017**

Ms. Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute. Our statement today will emphasize and reinforce the comments in our written submission with respect to the interpretation and application of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement.<sup>1</sup>

**I. Costs Associated with the Production of the Product under Consideration**

2. As the United States understands the facts of this dispute, Ukraine rejected the respondents' recorded cost for natural gas because this cost did not reflect the genuine costs associated with the production of ammonium nitrate in Russia.<sup>2</sup> For example, the United States understands from the Disclosure that “[d]ue to the existence of state control the price for gas for Russian producers is much lower than the selling price for gas which is exported from the Russian Federation, and the price for producers in other countries.”<sup>3</sup>

3. Russia's response is essentially that the determination of Ukraine's authority is somehow precluded under the findings in *EU – Biodiesel*.<sup>4</sup> Russia's reliance on *EU – Biodiesel* is misplaced. In fact, the Appellate Body explicitly 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

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<sup>1</sup> *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“Anti-Dumping Agreement”).

<sup>2</sup> See Ukraine First Written Submission, paras. 126-134.

<sup>3</sup> Disclosure, sec. 10.2, p. 22 (Exhibit RUS-10b).

<sup>4</sup> Russia First Written Submission, paras. 51, 63-68.

nothing an investigating authority can do.”<sup>5</sup> Thus, contrary to Russia’s position, as explained in our written submission, 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.

4. 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.<sup>6</sup> 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.

5. As Ukraine characterizes the facts, the situation created by the Russian Government’s intervention is analogous to a non-arm’s-length transaction<sup>7</sup> because, according to Ukraine’s analysis, the recorded cost for natural gas in Russia is set by the Russian Government and is “not the result of market forces.”<sup>8</sup> Indeed, the investigating authority found that the price for natural

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<sup>5</sup> See *EU – Biodiesel (AB)*, paras. 6.40-6.41 (internal quotations omitted).

<sup>6</sup> See *EU – Biodiesel (AB)*, para. 6.41 (quoting *EU – Biodiesel (Panel)*, para. 7.242 n.400).

<sup>7</sup> See U.S. Third Party Submission, para. 16.

<sup>8</sup> Ukraine First Written Submission, para. 134; see also Disclosure, sec. 10.2, p. 21 (Exhibit RUS-10b) (“not a market price”).

gas as recorded in the respondents' records does not cover the costs of extraction and transportation of the natural gas.<sup>9</sup>

6. 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 investigating authority draws from those facts.<sup>10</sup>

7. In the context of Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement, the term "cost" must be understood to refer to real economic costs involved in producing the product in the exporting country, an amount genuinely "associated with the production and sale of the product under consideration," where input costs reflect the operation of free market forces.

8. The Appellate Body confirmed this understanding in *EU – Biodiesel*. In particular, the Appellate Body found 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."<sup>11</sup> According to the Appellate Body, "the costs associated with the

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<sup>9</sup> Disclosure, sec. 10.2, pp. 22-23 (Exhibit RUS-10b); see Ukraine First Written Submission, paras. 149-155.

<sup>10</sup> See *EU – Biodiesel (AB)*, para. 6.41 (quoting *EU – Biodiesel (Panel)*, para. 7.242 n.400).

<sup>11</sup> *EU – Biodiesel (AB)*, para. 6.24.

production and sale of the product” under Article 2.2.1.1 must be capable of serving as an appropriate basis for estimating the normal value of the final product.<sup>12</sup> As such, 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>

9. The Appellate Body in *EU – Biodiesel* thus concluded that 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 non-arms-length transactions *or other practices* affect the reliability of the reported costs.”<sup>14</sup>

10. In sum, the Ukraine authority was faced with what it considered to be 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.<sup>15</sup> In such a circumstance, an unbiased and objective investigating authority could have found such a price was not a real, economic cost, and the authority would have a basis under the Anti-Dumping Agreement to reject or adjust this artificial price, so long as its determination was based on a reasoned and adequate explanation.

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<sup>12</sup> *EU – Biodiesel (AB)*, para. 6.22.

<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> See Ukraine First Written Submission, paras. 146-155.

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

11. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement also 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, or from using such information or evidence to determine a respondent's cost of production in the country of origin.

12. As the Appellate Body explained in *EU – Biodiesel*, 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. In certain circumstances, the proxy chosen may need to be adapted to reflect market conditions in the country of origin.<sup>16</sup> That said, in doing so, the authority should not be required to adapt those costs in a way that reintroduces the same distortions that led it to substitute the recorded cost in the first place.

13. Therefore, once an investigating authority determines that a respondent's records do not reasonably reflect the costs associated with the production and sale of a manufacturing input, it can be entirely appropriate and permissible under Articles 2.2 and 2.2.1.1 for the authority to resort to external data that is reflective of real, market-based costs "in the country of origin." The issue to be addressed in this dispute then is whether the investigating authority's decision to

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<sup>16</sup> See *EU – Biodiesel (AB)*, para. 6.70.

use information and evidence outside the country of origin to determine the real cost for a manufacturing input in the country of origin was based on a reasoned and adequate explanation.

### **III. Conclusion**

14. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of the views of the United States.