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WORLD TRADE ORGANIZATION
APPELLATE BODY

Ukraine ± Anti-Dumping Measures on Ammonium Nitrate	AB-2018-5
Ukraine, Russian Federation,	Appellate Body Division:
Argentina, Australia, Brazil, Canada, China, Colombia, European Union, Japan, Mexico, Norway, United States,	Zhao, Presiding Member Bhatia, Member Servansing, Member

1 INTRODUCTION

1.1. Ukraine appeals certain issues of law and legal interpretations developed in the Panel Report, [1] (Panel Report). The Panel was established on 22 April 2016[2] to consider a complaint by the Russian Federation[3] (Russia) with respect to certain measures taken by Ukraine regarding the imposition of anti-dumping duties on imports of ammonium nitrate from Russia.

1.2. Duties were originally imposed on ammonium nitrate from Russia by Ukraine's Intergovernmental Commission on International Trade (ICIT) through its decision of 21 May 2008 (2008 original decision).[4] Russian producer JSC MCC EuroChem (EuroChem) successfully challenged the 2008 original decision before domestic courts in Ukraine, following which ICIT issued an amendment (2010 amendment) to the 2008 original decision (as amended, 2008 amended decision).[5] Subsequently, following interim and expiry reviews conducted by the Ministry of Economic Development and Trade of Ukraine (MEDT), ICIT issued a decision (2014 extension decision), which imposed anti-dumping duties at modified rates, including with respect to EuroChem.[6] The factual aspects of this dispute are set forth in greater detail in the Panel Report and in section 5 of this Report.

[1] WT/DS493/R, 20 July 2018.
[2] Minutes of the Dispute Settlement Body (DSB) Meeting held on 22 April 2016, WT/DSB/M/377, para. 6.4.
[3] Request for the Establishment of a Panel by the Russian Federation, WT/DS493/2 (Russia's panel request).
[4] Panel Report, para. 2.1 (referring to ICIT, Decision on the application of definitive anti-dumping measures on imports of ammonium nitrate originating in Russia No. AD-176/2008/143-47 (21 May 2008) (2008 original decision) (Panel Exhibit RUS-2b)). In this Report, Panel exhibit numbers that are followed by the letter "b" refer to the English version of the relevant document.
[5] Panel Report, para. 2.1 (referring to ICIT, Decision implementing court orders regarding EuroChem (25 October 2010) (2010 amendment) (Panel Exhibit RUS-8b)); ICIT, Consolidated version of the Decision on the application of definitive anti-dumping measures on imports of ammonium nitrate originating in Russia No. AD-176/2008/143-47 (21 May 2008, as amended on 25 October 2010) (2008 amended decision) (Panel Exhibit RUS-12b). See also ibid., paras. 7.18-7.19.
[6] Panel Report, para. 2.2 (referring to ICIT, Notice on the changes and extension of anti-dumping measures on imports of ammonium nitrate originating in

1.3. Before the Panel, Russia challenged Ukraine's measures under various provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).[7] The Panel made the following findings in its Report.

1.4. With respect to the Panel's terms of reference, the Panel found that: (i) measures consisting of the 2008 amended decision and the 2010 amendment were within its terms of reference[8];

c. included EuroChem within the scope of the review determinations and imposed anti-dumping duties on it through the 2014 extension decision.[16]

1.7. The Panel further found that, with respect to Russia's claims challenging the investigating authorities' conduct in the interim and expiry reviews, Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because Ukrainian investigating authorities failed to disclose certain essential facts and to give interested parties sufficient time to comment on MEDT's disclosure.[17]

1.8. Pursuant to Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Panel recommended that Ukraine bring its measures into conformity with its obligations under the Anti-Dumping Agreement.[18]

1.9. On 23 August 2018, Ukraine notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal[19] and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review[20] (Working Procedures). On 10 September 2018, Russia filed an appellee's submission.[21] On 13 September 2018, Argentina, Australia, Brazil, the European Union, Japan, and the United States each filed a third participant's submission.[22] On the same day, Canada, China, Colombia, Mexico, and Norway each notified its intention to appear at the oral hearing as a third participant.[23]

1.10. By letter dated 28 September 2018, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate

including a duty of 36.03% on EuroChem.[42] For the purpose of its dumping margin calculations in the interim and expiry reviews, MEDT constructed the normal value of ammonium nitrate for two investigated Russian producers on the basis of their cost of production.[43] In doing so, MEDT rejected the reported gas cost[44], and replaced it with the price of gas exported from Russia at the German border, adjusted for transportation expenses (surrogate price of gas).[45] MEDT also used the surrogate price of gas in its ordinary-course-of-trade test, that is, when considering that the domestic sales of these investigated Russian producers were not in the ordinary course of trade by reason of price and thus could be disregarded in calculating normal value. In that regard, MEDT stated that the domestic selling prices of the investigated Russian producers were "lower than [the] reasonable per unit costs for its production (taking into account the natural gas value adjustment)".[46]

5.7. In the Investigation Report, MEDT stated that it was rejecting the reported gas cost because the records did "not completely reflect the costs associated with production and sale of the [product under consideration], in particular, the gas expenses".[47] This conclusion was based on the following grounds: (i) the gas price in Russia was not a market price, as the State controlled this price

6.7. The Panel then addressed two arguments made by Ukraine.[66] First, the Panel disagreed with Ukraine that the phrase "in connection with the expiry and interim reviews" in the opening paragraph of the panel request restricted Russia's challenge to the interim and expiry reviews.[67] The Panel reasoned that the opening paragraph of a panel request cannot be read in isolation from the remainder of that panel request and recalled that both footnote 2 and item number 1 covered the 2008 amended decision and the 2010 amendment.[68] Next, the Panel rejected Ukraine's argument that footnotes cannot determine a panel's terms of reference. It considered that nothing in Article 6.2 of the DSU prohibits identifying measures in footnotes in panel requests, and that the Appellate Body has found that footnotes are part of the text of a panel request and therefore may be relevant to identifying measures at issue.[69]

6.8. The Panel therefore concluded that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in the panel request and fell within its terms of reference.[70]

6.9. Subsequently, the Panel considered whether item number 1 of Russia's panel request satisfied the second requirement of Article 6.2 to provide a brief summary of the claim sufficient to present the problem clearly.[71] The Panel articulated that this requirement is met where the panel request explains how or why a measure at issue is considered to violate the World Trade Organization (WTO)

settlement proceedings.[93] On that basis, the Panel found that Ukraine's arguments did not show that no

6.22. At the outset, we note that the participants do not take issue with the Panel's articulation of the legal standard under Article 6.2 of the DSU.[121] For its part, although Ukraine accepts that the elements of a panel request cannot be read in isolation, and that a panel request including its footnotes must be read as a whole[122], Ukraine considers that the Panel erred by failing to demand sufficient precision in applying that standard to Russia's panel request.[123]

6.23. In evaluating whether the 2008 amended decision and the 2010 amendment were within the Panel's terms of reference, the Panel relied on language in two portions of Russia's panel request.[124] First, the Panel pointed to the opening paragraph of the panel request.[125] That paragraph indicates that Russia had requested consultations regarding the interim and expiry reviews, and then notes in footnote 2 that these "anti-dumping measures" were imposed through a number of instruments, including the 2008 original decision, as it was amended by the 2010 amendment, resulting in the 2008 amended decision. The Panel marked in bold the language in footnote 2, which refers to the:

> Decision of the Intergovernmental Commission on International Trade No. AD-176/2008/143-47 of 21 May 2008 "On the Application of the Definitive Anti-Dumping Measures on Import into Ukraine of Ammonium Nitrate Originating in the Russian Federation", as amended by the Decision No. AD-245/2010/4403-47 of 25 October 2010.[126]

6.24. Second, the Panel observed that item number 1 of the panel request states that Russia claims violations under Articles 5.8 and 11.1-11.3 of the Anti-Dumping Agreement because of the alleged failure by Ukrainian authorities to exclude a certain Russian exporter from the "anti-dumping measures".[127] The Panel marked in bold the language in footnote 3 to that item, which refers to the:

> Decision of the Intergovernmental Commission on International Trade No. AD-245/2010/4403-47 of 25 October 2010 "On reversal of Decision of the Intergovernmental Commission on International Trade No. AD-176/2008/143-47 of 21 May 2008 'On the Application of the Definitive Anti-Dumping Measures on Import into Ukraine of Ammonium Nitrate Originating in the Russian Federation' in respect of JSC MHK EuroChem".[128]

6.25. According to the Panel, the reference to the "anti-dumping measures" in the text of item number 1 is followed by footnote 3, "which refers to the 2010 amendment, and notes that it amended the 2008 original decision".[129] The Panel thus considered that the references to the 2008 amended decision and the 2010 amendment in footnotes 2 and 3 "show that Russia took issue, in its panel request, with the alleged failure to exclude the Russian exporter from the 2008 amended decision".[130] Accordingly, the Panel considered that Russia's panel request "was sufficiently precise to identify the measures, i.e. [the] 2008 amended decision[] and the 2010 amendment, which were being referred for adjudication".[131]

6.26. This matter relates to Russia's claim under Article 5.8 of the Anti-Dumping Agreement as to whether Ukrainian investigating authorities – following successful court challenges by EuroChem – were required to have excluded EuroChem from the anti-dumping proceedings instead of imposing a 0% anti-dumping duty. The process by which the dumping margin assigned to EuroChem in the

[121] At the oral hearing, Ukraine maintained that what is contained in a consultations request may be relevant under Article 6.2 of the DSU and that the 2008 amended decision and the 2010 amendment were not sufficiently identified in Russia's consultations request. (Ukraine's response to questioning at the oral hearing) Ukraine presented no claim regarding Russia's cons-3(en)5(t)6(i)3(f)-5(i)3(ed)10( )- MHconsul3g Russia's cons-3(en)5(t)6(i)3(f)

clarifies what measures and claims are being brought, and on what conditions.[141] Although Ukraine accepts that footnote 2 mentions the 2008 amended decision and the 2010 amendment, it argues that they are not identified as measures at issue.[142]

6.31. Russia responds that Ukraine's analysis relies on particular portions of the panel request and is therefore incompatible with reading the panel request as a whole.[143] For instance, Russia remarks that Ukraine relies on specific passages as limiting the scope of the panel request, such as "in connection with expiry and interim reviews", and ignores the context and clarification provided by the opening paragraph, footnote 2, item number 1, and footnote 3.[144] Russia notes that, in any event, the 2014 extension decision itself refers to the 2008 amended decision.[145] Further, Russia argues that Article 6.2 of the DSU does not require Russia to list the 2008 amended decision, the 2010 amendment, and the 2014 extension decision together as measures at issue or refer to them expressly as measures at issue.[146]

6.32. We recall that Article 6.2 of the DSU requires that measures at issue must be identified with sufficient precision such that they are discernible from a panel request, reading the panel request as a whole.[147] While the location of certain information in a panel request – and, in particular, whether such information is in the body text or in a footnote – may have some relevance for understanding whether the measures at issue are discernible, it is unlikely to be dispositive given the need to read the panel request as a whole.

6.33. Ukraine relies on language in footnotes of a panel request in
as an example of the degree of specificity required of a footnote, which Ukraine claims is not exhibited by footnote 2 of Russia's panel request.[148] In particular, Ukraine maintains that the footnotes in that panel request contained "explicit language clarifying what measures and claims were being brought and on what condition".[149] Russia responds that the footnotes in that panel request are similar to footnotes 2 and 3 in Russia's panel request in this case.[150] Given the inherent case-by-case approach to scrutinizing panel requests, we do not consider that a textual comparison of footnotes in different panel requests in different disputes is of much assistance in assessing whether the 2008 amended decision and the 2010 amendment are discernible measures at issue in Russia's panel request. We emphasize that whether the 2008 amended decision and the 2010

that the 2008 amended decision and the 2010 amendment formed part of the Panel's terms of reference, there would be no basis to entertain Ukraine's claims under Articles 7.1 and 11.[171] Accordingly, we find that Ukraine has not established that the Panel erred under Articles 7.1 and 11 of the DSU by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment.

6.1.5 Whether the Panel erred under Article 11 of the DSU by failing to examine properly the arguments and evidence presented by Ukraine regarding the authority of Ukrainian courts and investigating authorities to calculate dumping margins under Ukrainian law

6.40. Ukraine claims that the Panel acted inconsistently with Article 11 of the DSU by failing to examine properly the arguments and evidence presented by Ukraine regarding the authority of Ukrainian courts and investigating authorities to calculate dumping margins under Ukrainian law.[172] Ukraine's claim under Article 11 of the DSU concerns the Panel's analysis regarding the second sentence of Article 5.8 of the Anti-Dumping Agreement, which requires immediate termination of an anti-dumping investigation, and therefore exclusion of a producer or exporter from the scope of that investigation, where a dumping margin has been determined for that producer or exporter.[173] Ukraine principally maintains that the Panel failed to consider that neither Ukrainian investigating authorities nor Ukrainian courts recalculated – or, in these circumstances, had the competence to recalculate – the dumping margin for EuroChem.[174] Ukraine therefore requests that we reverse the Panel's findings in paragraphs 7.147, 7.149-7.152, 7.154, 7.157, and 8.3.a of the Panel Report.[175] Russia requests that we uphold the Panel's findings at issue.[176]

6.41. Article 11 of the DSU imposes on panels a comprehensive obligation to make an "objective assessment of the matter", which embraces "all aspects of a panel's examination of the 'matter', both factual and legal".[177] Thus, panels are required to make an "objective assessment of the facts", of the "applicability" of the covered agreements, and of the "conformity" of the measures at issue with the covered agreements.[178] Moreover, the Appellate Body has stated that, in conducting an objective assessment of the matter, a panel must provide reasoned and adequate explanations and coherent reasoning.[179] A claim that a panel has failed to conduct an objective assessment of the matter before it is "a very serious allegation".[180] Participants must therefore identify specific errors regarding the objectivity of a panel's assessment[181] and explain why the alleged error has a bearing on the objectivity of a panel's assessment.[182] Not every error amounts to a failure by the panel to comply with its duties under Article 11, only those which, taken together or singly, undermine the objectivity of the panel's assessment of the matter before it.[183]

6.42. Article 11 of the DSU requires a panel to consider all of the arguments and evidence presented before it, in order to treat the parties' arguments and evidence in an even-handed manner, and to

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[171] Ukraine's response to questioning at the oral hearing.
[172] Ukraine's appellant's submission, paras. 100-152.
[173] Appellate Body Report, , paras. 217, 219, and 305. We note that the parties did not dispute the interpretation of the second sentence of Article 5.8 of the Anti-Dumping Agreement before the Panel. (Panel Report, paras. 7.140 and 7.146)
[174] Ukraine's appellant's submission, paras. 116-152.
[175] Ukraine's appellant's submission, para. 152; Notice of Appeal, para. f.
[176] Russia's appellee's submission, paras. 313 and 371.
[177] Appellate Body Report, , para. 54.
[178] Appellate Body Reports, , para. 54; , para. 5.31.
[179] Appellate Body Reports, , para. 5.18;

concluded that these arguments did not support Ukraine's position.[229] However, we do not regard the Panel as having sought to determine whether Ukrainian courts have the competence to, or in fact did, calculate dumping margins, and we do not see that the Panel made any such findings. Rather, the Panel understood that, by rejecting MEDT's application of discounts in calculating dumping margins for EuroChem in the 2008 original decision, the Ukrainian court rulings invalidated

law as a means of avoiding its WTO obligations.[234] Ukraine maintains that it is not relying on domestic law to avoid its WTO obligations, but as evidence of the "fact" that Ukrainian courts did not recalculate a dumping margin with respect to EuroChem.[235] Russia considers that a number of Ukraine's arguments derive from "restraints" on the competence of Ukrainian courts and investigating authorities under Ukrainian law.[236] Russia submits that a Member's domestic law arrangements are not determinative of issues in WTO dispute settlement proceedings, and cannot be used to justify Ukraine's conduct in the present case with respect to Article 5.8 of the Anti-Dumping Agreement.[237]

6.57. We consider that the Panel's reasoning is consistent with its understanding that the "combined effect" of the court judgments and the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was . We recall that, as an example, the Panel stated that the fact that, in implementing the court judgments, ICIT did not, or could not, recalculate the dumping margin itself is a matter of domestic law, and did not, in the Panel's view, diminish the probative value of these court judgments or ICIT's order implementing them.[238] Accordingly, we understand that Ukraine's arguments concerning ICIT's authority to recalculate a dumping margin for EuroChem following the court judgments were not germane to the Panel's reasoning that the "combined effect" of the Ukrainian court judgments and the 2010 amendment was that there was no basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem. In light of the arguments and evidence of the parties, and the manner in which the Panel reasoned its conclusion, we consider that the Panel was objective in rejecting Ukraine's contentions that the obligation under Article 5.8 of the Anti-Dumping Agreement had not been triggered, because its domestic law prevented the recalculation of EuroChem's dumping margin once it had been invalidated by Ukrainian courts.

6.58. On the basis of our examination of the Panel's explanations and reasoning, we do not consider that the Panel acted inconsistently with Article 11 of the DSU. Having considered that the Ukrainian court rulings invalidated the basis at that point for a dumping margin or an anti-dumping duty with respect to EuroChem, the Panel provided a reasoned and coherent explanation in reaching the conclusion that "the combined effect of the Ukrainian court judgments, and their implementation by ICIT's 2010 amendment[,] was that the dumping margin for EuroChem in the original investigation phase was ."[239] Although Ukraine cites certain arguments and evidence that it claims the Panel overlooked, we consider that the Panel, consistent with its duty under Article 11 of the DSU, conducted an objective assessment of the arguments and evidence necessary to resolve the claim under Article 5.8 of the Anti-Dumping Agreement as it relates to the 2008 amended decision and the 2010 amendment. For these reasons, we also see no reason to consider that the Panel did not conduct an objective assessment to resolve Russia's claim under Article 5.8 as it relates to the 2014 extension decision. Accordingly, we find that Ukraine has not established that the Panel acted inconsistently with Article 11 of the DSU in examining the arguments and evidence presented by Ukraine regarding the authority of Ukrainian courts and investigating authorities to calculate dumping margins under Ukrainian law.

[234] Ukraine's appellant's submission, paras. 140-141. See also Panel Report, paras. 7.148-7.150 and fn 265 to para. 7.147. On appeal, in response to the Panel's reasoning in footnote 265 to paragraph 7.147 of the Panel Report, Ukraine argues that EuroChem could have petitioned Ukrainian courts for an order requiring Ukrainian investigating authorities to recalculate its dumping margin. Ukraine considers the fact that no dumping margin was determined was therefore a result of EuroChem's own conduct. (Ukraine's appellant's submission, paras. 142-147 (referring to Panel Report, fn 265 to para. 7.147)) We do not consider that the possibility of making such a petition was relevant to the Panel's reasoning or affects the Panel's conclusion that the "combined effect" of the court judgments and the 2010 amendment was that the dumping margin for EuroChem in the original investigation phase was . Given that there was no basis at that

6.1.6 Conclusion

ordinary-course-of-trade test, MEDT relied on costs calculated inconsistently with Article 2.2.1.1.[241] Third, Ukraine claims that the Panel erred in its interpretation and application of Article 2.2 in finding

6.72. In these circumstances, the Panel concluded that the findings relied on by MEDT in the Investigation Report

consider the adjustment for transportation expenses to have been sufficient to adapt the export price to reflect the cost of gas in Russia.[278]

6.76. The Panel also addressed Ukraine's argument that MEDT could not use the gas price in the domestic market in Russia to calculate the cost of production of the investigated Russian producers because there was no undistorted domestic market for gas in Russia.[279] In this context, Ukraine had relied on the Appellate Body's finding under Article 14(d) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) in that investigating authorities may use out-of-country benchmarks when private prices in a country are distorted due to the government's predominant role in the market.[280] Disagreeing with Ukraine's argument, the Panel recalled its earlier finding that MEDT did not provide a proper basis to reject the reported gas cost.[281] The Panel also considered the Appellate Body's finding in not to be relevant to its interpretation of Article 2.2.[282] In the Panel's view, the Appellate Body in that dispute recognized that, where the entire domestic market is distorted because of a government's role, comparing prices at which the government provides goods with prices of private suppliers in the domestic market could indicate an artificially low benefit, meaning that the full extent of the subsidy would not be captured.[283] The Panel took the view that the purpose of cost calculation under Article 2.2 of the Anti-Dumping Agreement and that of the calculation of benefit under Article 14(d) of the SCM Agreement are different and should not be conflated.[284] The Panel added that the interim and expiry reviews concern a determination in an anti-dumping proceeding and that the question of ascertaining the benefit granted to a producer through the governmental provision of goods and services does not arise.[285]

6.77. Based on the foregoing, the Panel found that Ukraine acted inconsistently with Article 2.2 of the Anti-Dumping Agreement because, when constructing normal value, MEDT failed to calculate the cost of production "in the country of origin".[286]

6.2.2.3 The Panel's findings under Article 2.2.1 of the Anti-Dumping Agreement

6.78. With respect to Article 2.2.1 of the Anti-Dumping Agreement, the Panel stated that this provision describes a methodology for determining whether below-cost sales may be treated as not being made in the ordinary course of trade.[287] The Panel added that the first sentence of Article 2.2.1 requires investigating authorities to: (i) identify sales that are made at prices below "per unit (fixed and variable) costs of production plus administrative, selling and general costs"; and (ii) determine whether such below-cost sales are made within an extended period of time, in substantial quantities, and at prices which do not provide for the recovery of all costs within a reasonable period of time.[288]

6.79. The Panel noted that, in the interim and expiry reviews, MEDT had used the surrogate price of gas, rather than the reported gas cost, to identify below-cost sales and assess whether they could be treated as not being made in the ordinary course of trade within the meaning of Article 2.2.1.[289] Recalling its finding that MEDT's rejection of the reported gas cost was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement, the Panel took the view that "the use of costs that

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[278] Panel Report, para. 7.99. The Panel noted that the panel and the Appellate Body in had reached a similar conclusion under Article 2.2 of the Anti-Dumping Agreement. (Ibid., para. 7.99)

[279] Panel Report, para. 7.100 (referring to Ukraine's opening statement at the first Panel meeting, para. 105).

[280] Panel Report, para. 7.100 (referring to Ukraine's first written submission to the Panel, para. 179).

[281] Panel Report, para. 7.101.

[282] Panel Report, para. 7.102.

were calculated inconsistently with Article 2.2.1.1 tainted MEDT of Ukraine's ordinary-course-of-trade test."[290]

6.80. Before the Panel, Ukraine contended that a finding that MEDT calculated costs inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement cannot lead to a violation of Article 2.2.1 of that Agreement.[291] The Panel noted that Ukraine had put forward two arguments in this respect, namely, that: (i) cost calculations under Article 2.2.1.1 and the ordinary-course-of-trade test under Article 2.2.1 are separate and sequential obligations; and (ii) Russia had not made a case that if costs had not been calculated on the basis of the methodology adopted by MEDT, the results of the ordinary-course-of-trade test under Article 2.2.1 would have been different.[292] With respect to Ukraine's first argument, the Panel observed that Article 2.2.1.1 applies to "[p]aragraph 2", which covers Article 2.2.1.[293] The Panel thus took the view that costs used in the ordinary-course-of-trade test under Article 2.2.1 must be consistent with Article 2.2.1.1.[294] With respect to Ukraine's second argument, the Panel considered that it was not permitted to examine whether the results of MEDT's ordinary-course-of-trade test would have been different had it calculated the costs consistently with Article 2.2.1.1, as such an examination would have required a review of the evidence on the record.[295] Furthermore, while Ukraine argued that the outcome of the ordinary-course-of-trade test would not have changed had MEDT calculated the costs of the investigated producers consistently with Article 2.2.1.1, the Panel did not consider "such an argument [to] show that [the] less error to be relevant to [its] analysis".[296]

6.81. Based on the foregoing, the Panel found that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in conducting its ordinary-course-of-trade test, MEDT relied on costs that had been calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.[297]

6.2.3 Overview of relevant aspects of the legal standard in Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement

6.82. Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement form part of the disciplines concerning the determination of dumping in Article 2 of that Agreement. Article 2.1 provides that a product is being dumped when it is "introduced into the commerce of another country" at an export price that is "less than its normal value". Pursuant to Article 2.1, the normal value of the product refers to "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The other provisions of Article 2 set out the rules regarding the determination of normal value and export price, and the comparison to be made between the two for the purpose of determining the margin of dumping.

6.83. While normal value will typically be based on domestic sales prices pursuant to Article 2.1[298], Article 2.2 of the Anti-Dumping Agreement identifies circumstances in which an investigating authority need not determine normal value on the basis of such domestic sales.[299] One such circumstance is "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country". The other circumstance outlined in Article 2.2 is when domestic sales do not permit a proper comparison, either because of "the particular market situation or the low volume of the sales in the domestic market of the exporting country".[300] When one of these circumstances exists, the margin of dumping shall be determined by comparing the export

[290] Panel Report, para. 7.114.
[291] Panel Report, para. 7.115.
[292] Panel Report, para. 7.115 (referring to Ukraine's response to Panel question No. 15, paras. 67-72).
[293] Panel Report, para. 7.116.
[294] Panel Report, para. 7.116. The Panel considered that there is nothing in the text of Article 2.2.1 or Article 2.2.1.1 of the Anti-Dumping Agreement to support the view that an investigating authority is free to disregard the specific rules under Article 2.2.1.1 when calculating the cost of production used for the purpose of the ordinary

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price with: (i) "

condition relates to whether the records of a specific exporter or producer conform to the accounting principles, standards, and procedures that are generally accepted and apply to such records in the relevant jurisdiction – i.e. the exporting country. This condition concerns the general accounting and reporting practices of the exporter or producer.[304] The second condition in the first sentence of Article 2.2.1.1 in turn concerns whether the records reasonably reflect the costs associated with the production and sale of the product under consideration in a specific anti-dumping proceeding.[305] The second and third sentences of Article 2.2.1.1 then provide rules concerning the allocation of costs.

6.87. We observe that the first sentence of Article 2.2.1.1 requires that costs "normally" be

6.96. The panel in also stated that "while the costs in the records might be consistent with GAAP, they may still not accord with how they would need to be considered in the context of an anti-dumping investigation, such as in respect of the proper allocation of costs for depreciation or amortization or the relevant time periods."[332] As "another example" of records that may not reasonably reflect the costs associated with the production and sale of the product under consideration, that panel referred to an investigated exporter or producer that is "part of a vertically-integrated group of companies in which the actual cost of production of particular inputs is spread across different companies' records, or in which transactions between such companies are not at arms-length or indicative of the actual costs involved in the production of the product under consideration".[333] The Appellate Body agreed with the panel that records that are GAAP-consistent may nonetheless be found not to reasonably reflect the costs associated with the production and sale of the product under consideration.[334] To the Appellate Body, "[t]his may occur, for example, if certain costs relate to the production both of the product under consideration and of other products, o

6.98. Ukraine further contends that the Panel erred because "the Panel seem[s] to suggest that the records can only be deemed unreliable when the parties [to input transactions] are affiliated."[341] In other words, according to Ukraine, the Panel appears to have drawn a distinction between affiliated and non-affiliated parties to input transactions for the purposes of the second condition in the first sentence of Article 2.2.1.1. To Ukraine, however, the rationale for determining whether records are "unreliable" under that condition is the dependent and uncommercial character of the relevant input transactions, and any legal affiliation between transacting parties is only an "indication that these practices may more easily occur".[342] In support of its understanding of the second condition in the first sentence of Article 2.2.1.1, Ukraine refers to several WTO disputes in which a panel or the Appellate Body allegedly assessed whether transactions were at arm's length by considering " ", instead of focusing on whether the parties to such transactions were affiliated.[343] Ukraine also refers to the second Note to Article VI of the GATT 1994 and Article 2.2 of the Anti-Dumping Agreement as relevant context, which in its view confirms that the Anti-Dumping Agreement does not preclude the possibility that certain government practices may render prices "unreliable".[344]

6.99.

that the Panel's analysis is tailored to the specific circumstances of this case, where no determination was made by MEDT that Gazprom was the gas supplier of the investigated Russian producers or that Gazprom's prices affected other gas suppliers' prices.

6.104. The Panel went on to state that Article 2 of the Anti-Dumping Agreement is concerned with the pricing behaviour of individual exporters and producers.[362] The Panel added that a producer may source inputs used to produce the product under consideration from multiple
and that the prices paid by the producer to these unrelated suppliers would form part of the costs that it incurs to produce the product under consideration.[363] The Panel did not consider that "the investigated Russian producers' own records could be said to be unreliable, or not reasonably reflect the costs associated with the production and sale of the product under investigation, because its
' prices are government regulated, lower than the prices prevailing in other countries, or allegedly priced below their cost of production."[364]

6.105. These references by the Panel to "unrelated suppliers", read in isolation, could arguably be read to suggest that, in the Panel's view, records may not be disregarded under the first sentence of Article 2.2.1.1 on the sole basis that input prices are set by the government below cost of production when the producers or exporters of the product under investigation and the input suppliers are unrelated (but might be when these entities are related). To the extent the Panel Report suggests as much, we have reservations regarding the relevance of drawing a distinction between related parties to input transactions, on the one hand, and unrelated parties to such transactions, on the other hand, for the inquiry under the first sentence of Article 2.2.1.1 as to whether cost calculations should be based on records kept by the exporter or producer under investigation.[365] Simply because parties to input transactions are considered to be unrelated does not mean that cost calculations should necessarily be based on records kept by the exporter or producer under the first sentence of Article 2.2.1.1. In particular, as explained above, given the reference to "normally" in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances, other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply. However, to the extent the Panel's statements regarding unrelated

6.107. In light of the above, we do not consider that Ukraine has established that the Panel erred in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in finding that MEDT did not provide an adequate basis under that second condition to reject the reported gas cost.[368]

6.108. We recall that Ukraine also challenges the Panel's finding that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because, in conducting its ordinary-course-of-trade test, MEDT relied on costs calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.[369] In that regard, Ukraine argues that the Panel's finding of inconsistency with Article 2.2.1 is vitiated by the Panel's errors of interpretation and application with respect to the second condition in the first sentence of Article 2.2.1.1.[370] Noting that Ukraine's challenge under Article 2.2.1 is consequential to its challenge under the second condition in the first sentence of Article 2.2.1.1, Russia responds that the Panel did not err in its analysis under Article 2.2.1.1.[371] As summarized above, Article 2.2.1 sets out when sales of the like product in the domestic market or to a third country may be treated as not being in the ordinary course of trade and disregarded in determining normal value. In reaching its finding of inconsistency with Article 2.2.1 of the Anti-Dumping Agreement, the Panel relied on its earlier finding that MEDT's rejection of the reported gas cost was inconsistent with Article 2.2.1.1 of that Agreement.[372] Ukraine's arguments on appeal are limited to alleging that the Panel's errors with respect to the interpretation and application of the second condition in the first sentence of Article 2.2.1.1 also vitiate the Panel's finding under Article 2.2.1.[373] At the oral hearing, Ukraine confirmed that its claim of error under Article 2.2.1 is dependent on us reversing the Panel's findings under Article 2.2.1.1.[374] Therefore, given our conclusion that the Panel did not err in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement, we see no reason to disturb the Panel's finding that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement.

that condition, MEDT failed to construct normal value on the basis of the cost of production in the country of origin within the meaning of Article 2.2 by using the surrogate price of gas.[379] The Panel considered that Article 2.2 does not preclude the possibility that an investigating authority may have to use out-of-country evidence to construct normal value, provided that such evidence is "reliable or capable of yielding the cost of production in the country of origin.[380] The Panel did not see "any explanations in the Investigation Report as to why adjustments for … transportation expenses were adequate to adapt the … export price from Russia at the German border[] to reflect the cost of the investigated Russian producers in the country of origin".[381] Rather, the Panel considered MEDT's explanation in the Investigation Report to suggest that it had selected this export price because "[it] was an out-of-country benchmark, and that it did not adapt this price to reflect costs in Russia."[382] In these circumstances, the Panel did not consider that the adjustment for transportation expenses was sufficient to adapt the export price of gas from Russia at the German border to reflect the cost in Russia.[383] The Panel then dismissed Ukraine's argument that MEDT could not use domestic gas prices in Russia because there was no undistorted domestic market for gas in Russia, relying on its earlier finding that MEDT had not provided a proper basis to reject the reported gas cost.[384]

6.111. In challenging these Panel findings on appeal, Ukraine first argues that the Panel's interpretation and application of Article 2.2 of the Anti-Dumping Agreement rely on the Panel's erroneous finding that Ukraine acted inconsistently with Article 2.2.1.1.[385] Ukraine submits that, for this reason alone, we should reverse the Panel's finding under Article 2.2.[386] Ukraine makes a series of additional arguments challenging the Panel's interpretation and application of Article 2.2 that are premised on finding error with the Panel's interpretation or application of the second condition in the first sentence of Article 2.2.1.1. In particular, Ukraine submits that it would be circular and void of economic logic to calculate the cost of production under Article 2.2 on the basis of costs rejected under Article 2.2.1.1 of the Anti-Dumping Agreement.[387] In that regard, Ukraine relies on the Appellate Body reports in China) and
as standing for the proposition that "once a particular cost item is found to be unreliable or distorted, an investigating authority cannot be forced to make an adjustment to re-introduce the very same cond

Appellate Body's findings under Article 14(d) of the SCM Agreement in to be relevant to its interpretation of Article 2.2 of the Anti-Dumping Agreement.[400]

6.117. We begin by recalling that Article 14(d) of the SCM Agreement contains guidelines for the calculation of the amount of a subsidy in terms of the benefit to the recipient. Article 14(d) provides,

expenses was not sufficient to adapt this price to reflect prices in Russia.[406] In that regard, Ukraine states that "other than apparently requesting domestic state-fixed prices to be used for the purpose of the calculation of the cost of production, none of the interested parties in the investigation pointed to any differences in the market conditions in Russia (other than prices being fixed by the state) and market conditions relating to the export prices, which would necessitate further adjustments to the export gas prices."[407] According to Ukraine, in these circumstances, "MEDT of Ukraine cannot be faulted for limiting the adaptation to the gas export price to an adjustment on account of transportation expenses."[408]

6.120. Russia responds that the Panel correctly found that the export price of gas from Russia at the German border was not properly adapted to reflect the cost of gas in the country of origin as required under Article 2.2.[409] In that regard, Russia argues that the Panel correctly made the following factual findings: (i) "the export price from Russia to Germany was not the cost of gas for the investigated Russian producers in Russia"; (ii) "the record does not show how MEDT of Ukraine adapted this export price to reflect the prices in Russia"; and (iii) MEDT "selected this price because the export price was an out-of-country benchmark, and that it did adapt this price to reflect costs in Russia".[410] Russia further argues that the analysis under Article 2.2 does not relate to the market conditions for inputs in different countries, but to whether the surrogate price of gas reflects the domestic price of gas in Russia.[411] According to Russia, the Panel correctly considered that it did not.[412] Moreover, Russia argues that the obligation under Article 2.2 lies with the investigating authority regardless of whether interested parties request adjustments to ensure that a price relied on to construct normal value reflects the cost in the country of origin.[413]

6.121. As set out above, the phrase "cost of production in the country of origin" indicates that whatever information or evidence is used to determine the "cost of production", it must be apt to yield or capable of yielding a cost of production "in the country of origin".[414] Therefore, an investigating authority has to ensure that the information it collects is used to arrive at the "cost of production in the country of origin" and compliance with this obligation may require the investigating authority to adapt that information.[415]

6.122.

condition in the first sentence of Article 2.2.1.1[417], a finding with which we agreed above.[418] Other than pointing to the deduction of transportation expenses, Ukraine has not asserted, either before the Panel or before us, that MEDT otherwise adapted the export price of gas used in its calculations

7.2 Claims under Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement relating to MEDT's determinations of dumping in the interim and expiry reviews

7.5. We consider that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs

7.8. Ukraine raises certain arguments under Article 2.2 of the Anti-Dumping Agreement that are dependent on us finding error with the Panel's findings under Article 2.2.1.1. Given our finding that the Panel did not err in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1, we reject these arguments by Ukraine. In light of the differences in text and function between Article 2.2 of the Anti-Dumping Agreement and Article 14(d) of the SCM Agreement, we also consider that the Panel did not err in its interpretation of Article 2.2 in considering t

Signed in the original in Geneva this 30th day of July 2019 by:

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Hong Zhao
Presiding Member

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Ujal Singh Bhatia
Member

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Shree Baboo Chekitan Servansing
Member

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