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UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

REPORT OF THE PANEL

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Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
Canada – Continued Suspension	Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
Canada – Welded Pipe	Panel Report, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS482/R and Add.1, adopted 25 January 2017
China – Broiler Products (Article 21.5 – US)	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS427/RW and Add.1, adopted 28 February 2018
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC – Fasteners (China)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
EC – Fasteners (China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3

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EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EU – Biodiesel (Argentina)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016
EU – Biodiesel (Argentina)	Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
Indonesia – Import Licensing Regimes	Panel Report, *Indonesia – Importation of Horticultural Products, Animals and Animal Products*, WT/DS477/R, WT/DS478/R, Add.1 and Corr.1, adopted 22 November 2017, as modified by Appellate Body Report WT/DS477/AB/R, WT/DS478/AB/R
Korea – Certain Paper	Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
Russia – Commercial Vehicles	Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/AB/R and Add.1, adopted 9 April 2018
Russia – Commercial Vehicles	Panel Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/R and Add.1, adopted 9 April 2018, as modified by Appellate Body Report WT/DS479/AB/R
US – Anti-Dumping Methodologies (China)	Panel Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/R and Add.1, adopted 22 May 2017, as modified by Appellate Body Report WT/DS471/AB/R
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WT/DS244/AB/R, DSR 2004:I, p. 85
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027

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US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, p. 521
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – OCTG (Korea)	Panel Report, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WT/DS488/R and Add.1, adopted 12 January 2018
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Oil Country Tubular Goods Sunset Reviews	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R and Corr.1, adopted 17 December 2004, as modified by Appellate Body Report WT/DS268/AB/R, DSR 2004:VIII, p. 3421
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX, p. 3609
US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, p. 97
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
DDSR	Digital Dispute Settlement Registry
District Court	District Administrative Court of Ukraine
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EuroChem	JSC MCC EuroChem
GAAP	Generally accepted accounting principles
GATT 1994	General Agreement on Tariffs and Trade 1994
Gazprom	JSC Gazprom
ICIT	Intergovernmental Commission on International Trade
MEDT of Ukraine	Ministry of Economic Development and Trade of Ukraine
RIP	Review investigation period
SCM Agreement	Agreement on Subsidies and Countervailing Measures
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by the Russian Federation

1.1. On 7 May 2015, the Russian Federation (Russia) requested consultations with Ukraine pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 25 June 2015, but failed to resolve this dispute.

1.2 Panel establishment and composition

1.3. On 29 February 2016, Russia requested the establishment of a panel.[2] At its meeting on 22 April 2016, the Dispute Settlement Body (DSB) established a panel pursuant to Russia's request, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Russian Federation in document WT/DS493/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 23 January 2017, Russia requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 2 February 2017, the Director-General accordingly composed the Panel as follows:

Chairperson:	Ms Andrea Marie Dawes
Members:	Mr José Antonio Buencamino Ms Penelope Jane Ridings

1.6. Argentina, Australia, Brazil, Canada, China, Colombia, the European Union, Japan, Kazakhstan, Mexico, Norway, Qatar, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, we adopted our Working Procedures[5] and timetable on 3 April 2017. We amended the Working Procedures on 21 September 2017[6] and the timetable on 12 September 2017.[7] We updated the timetable on 27 November 2017.

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[1] Request for consultations by Russia, WT/DS493/1 (Russia's consultation request).
[2] Request for the establishment of a panel by Russia, WT/DS493/2 (Russia's panel request).
[3] DSB, Minutes of the meeting held on 22 April 2016, WT/DSB/M/377.
[4] Constitution note of the Panel, WT/DS493/3.
[5] See the Panel's Working Procedures in Annex A-1.
[6] Paragraph 26(a) of the Working Procedures provides that each party and third party shall submit all documents to the Panel by filing them via the Digital Dispute Settlement Registry (DDSR), and that the electronic version of the documents uploaded into the DDSR shall constitute the official version for the purpose of the record of the dispute. In our communication of 12 September 2017, and pursuant to Russia's communication on this matter, we invited the parties to comment on our proposal to modify paragraph 26(a) by adding a footnote that specifically addresses situations where a party uploads submissions or exhibits on the DDSR without facing any apparent technical difficulty, but other users, including the other party, do not have access to them due to, *inter alia*, technical issues relating to the DDSR. We amended the Working Procedures on 21 September 2017 after considering the parties' comments in this regard. Our communications in this regard are set out in Annexes D-4 and D-5 of this Report.

1.8. We held our first substantive meeting with the parties on 26 and 27 July 2017, and a session with the third parties on 27 July 2017. We held our second substantive meeting with the parties on 21 and 22 November 2017. We issued the descriptive part of our Report to the parties on 29 January 2017, the Interim Report on 24 April 2018, and the Final Report on 29 May 2018.

1.3.2 Additional Working Procedures on Business Confidential Information

1.9. After consultation with the parties, we adopted, on 3 April 2017, Additional Working Procedures on Business Confidential Information (BCI).

1.3.3 Request for a Preliminary Ruling

1.10. On 12 June 2017, Ukraine requested a preliminary ruling that certain claims and measures invoked by Russia fall outside our terms of reference.[8] Ukraine requested us to issue this ruling prior to 15 September 2017, but we declined to do so.[9] We address Ukraine's request for a preliminary ruling in our findings below.

1.3.4 Communications addressing procedural issues

1.11. We issued several communications to the parties addressing procedural issues arising in this dispute. These communications are set out in Annex D of this Report.[10]

2 FACTUAL ASPECTS

2.1. The Ukrainian authorities[11] originally imposed anti-dumping duties on imports of ammonium nitrate from Russia following an anti-dumping investigation on imports of this product into Ukraine. These duties were imposed by the Intergovernmental Commission on International Trade (ICIT) through its decision of 21 May 2008 (2008 original decision).[12] This 2008 original decision was successfully challenged by the Russian producer JSC MCC EuroChem (EuroChem) before the domestic courts in Ukraine. ICIT implemented these court judgments through an amendment decision on 25 October 2010, which amended the 2008 original decision (2010 amendment).[13]

2.2. The Ukrainian authorities subsequently initiated an interim and expiry review (underlying reviews) of these original measures. Pursuant to the underlying reviews, the Ministry of Economic Development and Trade of Ukraine (MEDT of Ukraine) issued its "[m]aterials" on interim and

[7] In our communication of 12 September 2017, we agreed to Russia's request to extend the deadline for the parties' second written submission as Ukraine's delay in filing its written response to Russia's questions following the first substantive meeting had deprived it of an adequate opportunity to prepare its rebuttal submission within the deadlines originally set in the timetable. Our communications of 23 August 2017 and 30 August 2017 set out the reasons for this delay on the part of Ukraine, and our decisions in this regard. These communications are set out in Annexes D-1, D-3, and D-4.

[8] Ukraine's first written submission, para. 72.

[9] Ukraine's opening statement at the first meeting of the Panel, para. 7.

[10] Russia objected to Ukraine's designation of UKR-53 (BCI), UKR-54 (BCI), and UKR-55 (BCI) as BCI in these proceedings. While we have cited these exhibits in footnote 263 below, we have not found it necessary to reproduce, or refer to any specific content from the exhibits in our report. Therefore, the question of redaction of references to such exhibits because they are BCI does not arise. We note that Russia has had access to these exhibits throughout the course of the proceedings, and Russia does not contend that its participation in these proceedings was affected by the designation of these documents as BCI. (Communication to the parties on 16 October 2017, (Annex D-6); Russia's response to Panel question No. 45, paras. 5-10). We do not consider it necessary to address this procedural objection in order to resolve this dispute.

[11] Under Ukrainian domestic law, the Intergovernmental Commission on International Trade (ICIT) has the power to initiate an anti-dumping investigation; to terminate or extend anti-dumping measures (as in the case of expiry reviews); or to terminate, extend, or change the extent of anti-dumping measures (as in the case of interim reviews). (Ukraine's response to Panel question No. 1, paras. 1-2). The Ministry of Economic Development and Trade of Ukraine (MEDT of Ukraine) is responsible for conducting the anti-dumping investigation or review, as well as drafting a final report containing its conclusions and recommendations. This report forms the basis for ICIT's final decision. (Ukraine's response to Panel question No. 1, para. 3). We use the term "Ukrainian authorities" to refer to both ICIT and MEDT of Ukraine.

[12] CIT, 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), (Exhibit RUS-2b).

[13] ICIT, Decision implementing court orders regarding EuroChem (25 October 2010) (2010 amendment), (Exhibit RUS-8b).

expiry review of the anti-dumping measures on imports of ammonium nitrate originating in Russia (Investigation Report[14]), which contained its findings and recommendations for the continued imposition of anti-dumping duties, but at modified rates.[15] ICIT issued its notice on the changes and extension of anti-dumping measures on imports of ammonium nitrate originating in Russia (2014 extension decision) on the basis of this report, thereby continuing the imposition of anti-dumping duties on imports of ammonium nitrate from Russia at modified rates.[16]

2.3. Russia challenges in these panel proceedings the Ukrainian authorities' determinations in the underlying reviews, as well as their conduct during these reviews.[17] Russia also challenges certain aspects of the original anti-dumping measures imposed by ICIT.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATION

3.1. Russia requests us to find that[18]:

a. With respect to the Ukrainian authorities' dumping determinations in the underlying reviews, Ukraine acted inconsistently with:

i. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because in determining the constructed normal value, the Ukrainian authorities failed to calculate costs on the basis of records kept by the Russian producers and exporters, even though the costs associated with the production and sale of ammonium nitrate were accurately and reasonably reflected in these exporters' and producers' records, and the records were in accordance with the generally accepted accounting principles (GAAP) of the country of origin and export;

ii. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because the Ukrainian authorities replaced the cost of gas actually borne by the Russian producers and exporters for production of ammonium nitrate with data on gas prices outside Russia that did not reflect the cost of production in the country of origin, and used such prices subsequently for constructing the normal value;

iii. Article 2.2.1 of the Anti-Dumping Agreement because the Ukrainian authorities improperly treated the domestic sales of ammonium nitrate of the Russian producers and exporters as not being in the ordinary course of trade and disregarded them in determining normal value;

iv. Article 2.4 of the Anti-Dumping Agreement because the Ukrainian authorities failed to make a fair comparison between the export price and the constructed normal value by improperly calculating constructed normal value for ammonium nitrate produced in Russia;

v. Article 2.1 of the Anti-Dumping Agreement because the Ukrainian authorities failed to determine the dumping margins of the Russian producers and exporters by comparing the export price of ammonium nitrate exported from Russia to Ukraine with the domestic sales price of the like product in Russia; and

vi. Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because the Ukrainian authorities calculated and relied on dumping margins for ammonium nitrate which

[14] Russia objects to the use of the term "Investigation Report", and asks us to use the term "disclosure" to refer to this document. (Russia's second written submission, para. 5). We do not share Russia's concern regarding the use of this term "Investigation Report", and note that the paragraph makes it quite clear that we use this term as a shorthand. We use the term "disclosure" to refer to this document when reviewing Russia's claims under Articles 6.9 and 6.2 of the Anti-Dumping Agreement.

[15] MEDT of Ukraine, Materials on interim and expiry review of the anti-dumping measures on imports of ammonium nitrate originating in Russia (25 June 2014) (Investigation Report), (Exhibit RUS-10b).

[16] ICIT, Notice on the changes and extension of anti-dumping measures on imports of ammonium nitrate originating in Russia (8 July 2014) (2014 extension decision), (Exhibit RUS-4b).

[17] The documents relied upon with respect to these claims are the Investigation Report of MEDT of Ukraine, and the 2014 extension decision issued by ICIT.

[18] Russia's first written submission, para. 347.

were not established consistently with Articles 2.1, 2.2, 2.2.1, 2.2.1.1, and 2.4 of the Anti-Dumping Agreement.

b. Ukraine acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because the Ukrainian authorities failed to terminate the original anti-dumping measures in respect of EuroChem, whose dumping margin was *de minimis*, and imposed a 0% anti-dumping duty on this exporter.[19]

c. Ukraine acted inconsistently with Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because the Ukrainian authorities included EuroChem, whose dumping margin was *de minimis*, in the scope of the underlying reviews and imposed anti-dumping duties on it following their determinations in these reviews.[20]

d. Ukraine acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because the Ukrainian authorities determined and relied on injury which was not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement, and in particular failed to establish facts and to conduct an unbiased and objective examination of these facts in its likelihood-of-injury determination.

e. With respect to the Ukrainian authorities' conduct in the underlying reviews, Ukraine acted inconsistently with:

   i. Article 6.8 and paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement because of the numerous procedural violations by the Ukrainian authorities.

   ii. Articles 6.2 and 6.9 of the Anti-Dumping Agreement because the Ukrainian authorities failed to adequately disclose the essential facts under consideration which formed the basis for the decision to apply anti-dumping measures, which included the essential facts underlying the:

      - determinations on the existence of dumping, the calculation of the dumping margins, including relevant data and formula applied;

      - determination of injury[21], including the price comparisons and the underlying data, information on import, and domestic prices used therein.

   iii. Article 6.9 of the Anti-Dumping Agreement because the Ukrainian authorities failed to give interested parties sufficient time to defend their interests by commenting on MEDT of Ukraine's disclosure.

f. Ukraine acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement because the Ukrainian authorities failed to provide in sufficient detail in the 2014 extension decision and the Investigation Report the findings and conclusions reached on all issues of fact and law that they considered in making their preliminary and final determinations and failed to provide all relevant information and reasons which led to the imposition of the measure.

g. Ukraine violated Articles 1 and 18.1 of the Anti-Dumping Agreement as well as Article VI of the GATT 1994 as a consequence of violations under the Anti-Dumping Agreement.

[19] Russia's response to Panel question No. 24, paras. 57-58. Ukraine in its comments on the descriptive part of the report stated that Russia had not made this claim in its first written submission. We note, however, that as part of its request for a preliminary ruling in its first written submission, Ukraine asked us to find that this "claim", along with the measures challenged as part of this claim, were outside our terms of reference. (Ukraine's first written submission, paras. 72(i), 224-225, and 230-231). Whether this claim falls outside our terms of reference is a separate issue that we discuss below.

[20] Russia's response to Panel question No. 24, paras. 59, 60, and 65-66.

[21] In its request for findings Russia also alleged that there was no disclosure of essential facts regarding the determination of "causation". But no claim regarding the disclosure of such facts is presented in the arguments section of the first written submission, or subsequent submissions.

3.2. Ukraine requests us to reject Russia's claims in this dispute in their entirety while, as noted above, also contending that several claims as well as certain measures invoked as part of some of these claims fall outside our terms of reference.[22]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries as provided to us in accordance with paragraph 19 of the Working Procedures (see Annexes B-1 to B-4).[23]

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Argentina, Australia, Brazil, China, Colombia, the European Union, Japan, Mexico, Norway, and the United States are reflected in their executive summaries, provided in accordance with paragraph 19 of the Working Procedures (see Annexes C-1 to C-10). Canada, Kazakhstan, and Qatar did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 24 April 2018, we issued our Interim Report to the parties. On 8 May 2018, Russia and Ukraine each submitted written requests for the Panel to review precise aspects of the Interim Report. Neither party requested for an interim review meeting. On 15 May 2018, both parties submitted comments on the other party's requests for review.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex E-1.

7 FINDINGS

7.1. In this section, we first set out the general principles regarding treaty interpretation, standard of review and burden of proof, as well as certain rules under Article 11 of the Anti-Dumping Agreement applicable to determinations made in interim and expiry reviews, which we apply in this dispute. We then set out our findings on issues raised by Ukraine regarding our terms of reference, and finally proceed to examine on substantive grounds the claims and measures that fall within our terms of reference. In making these findings, we first set out the relevant legal standard, and then apply that standard to resolve the jurisdictional and substantive issues before us.

7.1 General principles regarding treaty interpretation, the standard of review, and burden of proof

7.1.1 Treaty interpretation

7.2. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.[24] It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.

[22] Ukraine's first written submission, paras. 72 and 396.

[23] In our communication of 23 August 2017, we noted that Ukraine submitted two separate executive summaries as part of its first integrated executive summary, namely: (a) an executive summary of its first written submission; and (b) an executive summary of its oral statement. However, inconsistently with paragraph 20 of our Working Procedures, the combined length of these documents exceeded 15 pages. We informed Ukraine that we would thus only accept one of the two executive summaries, which were within the page limit set out in paragraph 20, and asked it to identify the document we should use in this regard. Ukraine asked us to treat the executive summary of its oral statement as the first integrated executive summary. Our communications in this regard are set out in Annexes D-2 and D-3.

[24] Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

7.1.2 Standard of review

7.3. Article 11 of the DSU provides, in relevant part, that:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute.

7.4. The Appellate Body has explained that where a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authority has provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported their factual findings; and (b) how those factual findings support the overall determination.[25] In reviewing an investigating authority's determination, a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the investigation[26] and must take into account all such evidence submitted by the parties to the dispute.[27] At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[28]

7.5. In the context of Article 17.6(i) of the Anti-Dumping Agreement, the Appellate Body has clarified that while the text of this provision is couched in terms of an obligation on a panel, in effect it defines when an investigating authority can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of its "establishment" and "evaluation" of the relevant facts.[29] Therefore, a panel must assess if the establishment of the facts by the investigating authority was proper and if the evaluation of those facts by that authority was unbiased and objective.[30] If these broad standards have not been met, a panel must hold the investigating authority's establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement.[31]

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[25] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Lamb*, para. 103.
[26] Article 17.5(ii) requires a panel to examine the matter based on the facts made available to the authorities.
[27] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[28] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[29] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[30] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.
[31] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.

7.1.3 Burden of proof

7.6. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[32] Therefore, as the complaining party in this proceeding, Russia bears the burden of demonstrating that the challenged aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement and the GATT 1994. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[33] Finally, it is generally for each party asserting a fact to provide proof thereof.[34]

7.2 Substantive and procedural rules under Article 11 of the Anti-Dumping Agreement applicable to interim and expiry reviews

7.7. Article 11.2 of the Anti-Dumping Agreement applies to interim reviews whereas Article 11.3 of this Agreement applies to expiry reviews. Several WTO panels have taken the view that these two Articles operationalize the general principle in Article 11.1 of the Anti-Dumping Agreement that an anti-dumping duty remain in force for as long as, and to the extent necessary to, counteract dumping which is causing injury.[35] Thus, according to these panels, Article 11.1 does not impose independent obligations on a Member.[36]

7.8. Article 11.2 provides for an examination of whether "continued imposition of the [anti-dumping] duty is necessary to offset dumping", "whether the injury would be likely to continue or recur if the duty were removed or varied", "or both". If as a result of a review under Article 11.2, the investigating authorities determine that the imposition of the anti-dumping duty is no longer warranted, the duty shall be terminated immediately. Article 11.3 requires termination of the anti-dumping duty no longer than five years from the date of its imposition unless the authorities determine, in a review, that expiry of this duty would be "likely to lead to continuation or recurrence of dumping and injury". The Appellate Body has concluded, based on its understanding of the words "review" and "determine" in Article 11.3, that in making a likelihood-of-dumping or likelihood-of-injury determination investigating authorities are obliged to act with an "appropriate degree of diligence" in order to arrive at a "reasoned conclusion".[37] Article 11.2 uses the same two words, and we consider that the same standard applies under this provision as well.[38]

7.9. With respect to procedural rules, Article 11.4 of the Anti-Dumping Agreement states that the provisions of Article 6 of this Agreement regarding evidence and procedure, which include Articles 6.2, 6.8, and 6.9 of this Agreement, would apply to Article 11 reviews.[39] Article 12.3 of the Anti-Dumping Agreement states that Article 12 of this Agreement, which sets out public notice obligations, shall apply *mutatis mutandis* to Article 11 reviews.

7.3 Findings on terms of reference

7.10. In its request for a preliminary ruling, Ukraine asked us to find that Russia's panel request was deficient and inconsistent with Article 6.2 of the DSU, insofar as it concerned the claims set out in the following item numbers of this request:

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[32] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:1, p. 337.
[33] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[34] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:1, p. 337.
[35] Panel Reports, *US – Shrimp II (Viet Nam)*, para. 7.364; *EC – Tube or Pipe Fittings*, para. 7.113; and *US – DRAMS*, para. 6.41.
[36] Panel Reports, *US – Shrimp II (Viet Nam)*, para. 7.363; *EC – Tube or Pipe Fittings*, para. 7.113.
[37] Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 111; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 283-284.
[38] See, e.g. Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.367.
[39] See, e.g. Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 152; Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, fn 78.

a. item number 1, concerning claims under Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement[40];

b. item number 4, concerning claims under Article 6.8 and paragraphs 3, 5, and 6 of Annex II to the Anti-Dumping Agreement[41]; and

c. item number 17, concerning claims under Articles 11.1, 11.2, 11.3, 3.1, and 3.4 of the Anti-Dumping Agreement.[42]

7.11. Ukraine also contended that the 2008 original decision *as amended* by the 2010 amendment of ICIT and the 2010 amendment were outside the scope of the panel request.[43] Ukraine asserted that the determinations made by the Ukrainian authorities in relation to the original investigation fall outside our terms of reference because in its panel request Russia only challenged the determinations made by these authorities in the interim and expiry reviews.

7.12. Further, Ukraine asked us to find that claims set out in the following item numbers of the panel request were not subject to consultations, and did not reasonably evolve from the legal basis set out in the consultation request:

a. item number 7, concerning claims under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement[44]; and

b. item number 17, insofar as it concerned the claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[45]

7.13. Ukraine asked us to find, on this basis, that the aforementioned claims and measures fall outside our terms of reference. We will first consider Ukraine's submissions regarding the consistency of Russia's panel request with Article 6.2 of the DSU, and then examine its submissions regarding claims that it alleges are outside our terms of reference because they were outside the scope of the consultation request.

7.3.1 Consistency of Russia's panel request with Article 6.2 of the DSU

7.3.1.1 Legal Standard

7.14. Pursuant to our terms of reference, set out in paragraph 1.4 above, we must examine the "matter" referred to the DSB by Russia in its panel request. We recall that the terms of reference, and the panel request on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response.[46] However, due process is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction, and therefore a deficient panel request cannot be cured by a complainant's subsequent written submissions.[47] Article 6.2 of the DSU requires that a panel request:

> [I]ndicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.15. Article 6.2 imposes two distinct requirements, which a panel request needs to comply with: (a) identify the specific measures at issue; and (b) provide a brief summary of the legal

[40] See also Russia's first written submission, para. 347(7).
[41] See also Russia's first written submission, para. 347(9).
[42] See also Russia's first written submission, para. 347(8).
[43] Ukraine's first written submission, paras. 30-32.
[44] See also Russia's first written submission, para. 347(12).
[45] Russia's first written submission, para. 347(8).
[46] Appellate Body Report, *US – Continued Zeroing*, para. 161.
[47] Appellate Body Report, *China – Raw Materials*, para. 233 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640).

basis of the complaint.[48] These two elements i.e. the measures and the claims together comprise the matter referred to the DSB, which we are required to examine.[49] Compliance with these Article 6.2 requirements must be demonstrated on the face of the panel request.[50] Further, compliance must be determined on the merits of each case, based on a consideration of the panel request as a whole, and in light of the attendant circumstances.[51]

7.3.1.1.1 Specific measures at issue

7.16. Article 6.2 of the DSU requires identification of the "specific" measures at issue. This specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request.[52] However, as long as each measure is discernible from the panel request, a complainant is not required to identify each challenged measure independently from other measures in order to comply with this specificity requirement.[53]

7.3.1.1.2 Brief summary of the legal basis of the complaint

7.17. To be consistent with Article 6.2 of the DSU, a panel request must: (a) set out the legal basis of the complaint; and (b) provide a brief summary of that legal basis sufficient to present the problem clearly. The "legal basis" of the complaint pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated.[54] A "brief summary" of the legal basis of the complaint aims to succinctly explain *how* or *why* the measure at issue is considered by the complainant to be violating the WTO obligation in question, and the narrative part of the panel request serves this function.[55] The brief summary must be sufficient to present the problem clearly.[56] Moreover, the panel request must also plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.[57]

7.3.1.2 Measures Ukraine alleges were outside the scope of Russia's panel request

7.18. Russia, as noted earlier, challenges certain aspects of the original anti-dumping measures imposed by the Ukrainian authorities on imports of ammonium nitrate from Russia. We recall in this regard that following the original investigation, ICIT imposed anti-dumping duties on ammonium nitrate exported to Ukraine by certain Russian producers, including EuroChem. ICIT imposed these duties through its decision of 21 May 2008, which we refer to as the 2008 original decision.[58] EuroChem challenged this decision, and specifically the dumping determinations made for EuroChem, before the domestic courts in Ukraine. The Ukrainian courts ruled in favour of EuroChem.[59]

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[48] See, e.g. Appellate Body Reports, *Argentina – Import Measures*, para. 5.39; and *US – Carbon Steel*, para. 125.

[49] See, e.g. Appellate Body Reports, *Guatemala – Cement I*, paras. 69-76; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; and *EC and certain member States – Large Civil Aircraft*, para. 639.

[50] Appellate Body Report, *US – Carbon Steel*, para. 127.

[51] Appellate Body Report, *US – Carbon Steel*, para. 127.

[52] Appellate Body Report, *US – Continued Zeroing*, para. 168. See also ibid. para. 169. The Appellate Body stated that the identification of a measure needs be framed only with sufficient particularity to indicate the nature of the measure and the gist of what is at issue.

[53] Appellate Body Report, *US – Continued Zeroing*, para. 170.

[54] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

[55] Appellate Body Reports, *EC – Selected Customs Matters*, para. 130; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.26.

[56] Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

[57] Appellate Body Report, *China – Raw Materials*, para. 220 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

[58] 2008 original decision, (Exhibit RUS-2b).

[59] See, e.g. Judgment of the Kiev District Administrative Court No. 5/411 (6 February 2009) (Judgment of the District Court 2009), (Exhibit RUS-6b). This judgment of the District Court was upheld by higher courts in Ukraine (Judgment of the Kiev Appellate Administrative Court No. 2-a-8850/08 (26 August 2009) (Judgment of the Appellate Court 2009), (Exhibit RUS-5b); Judgment of the Higher Administrative Court of Ukraine No. K-42562/09 (20 May 2010) (Judgment of the Higher Court), (Exhibit RUS-7b)).

7.19. In pursuance of these court judgments, ICIT issued the 2010 amendment, which amended the 2008 original decision[60] by reducing the anti-dumping duty rate for EuroChem from 10.78% to 0%.[61] Ukraine contends that the 2008 original decision as amended by the 2010 amendment of ICIT (2008 amended decision), and the 2010 amendment were not identified in Russia's panel request as the "specific measures at issue", and therefore, they fall outside our terms of reference.

7.20. Russia does not challenge the 2008 original decision in and of itself.[62] Instead, Russia challenges the 2008 amended decision as well as the 2010 amendment.[63] Thus, we must consider whether Russia's panel request covered the: (a) 2008 amended decision; and (b) the 2010 amendment.[64]

7.21. Article 6.2 of the DSU requires, *inter alia*, that the panel request "identif[ies] the specific measures at issue". Measures not properly identified in the panel request fall outside a panel's terms of reference[65], and cannot be the subject of panel findings or recommendations. The measures at issue must be identified with sufficient precision so that what is referred to adjudication may be discerned from the panel request.[66] A panel request will satisfy this requirement where it identifies the measure at issue with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue.[67] Therefore, the issue that we have to consider is whether the panel request, read as a whole, identified the 2008 amended decision and the 2010 amendment with sufficient precision, in a manner consistent with Article 6.2 of the DSU.

7.22. We note that the opening paragraph of the panel request refers to the measures subjected to WTO consultations between Ukraine and Russia. The opening paragraph states that Russia requested consultations with respect to:

> Ukraine's measures imposing anti-dumping duties on imports of ammonium nitrate originating in the Russian Federation in connection with expiry and interim reviews. These measures are set forth in the Decision of the Intergovernmental Commission on International Trade No. AD-315/2014/4421-06 of 1 July 2014 and Notice "On the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate, origin from the Russian Federation", published on 8 July 2014 in "Uryadoviy Courier", No 120, including any and all annexes, notices, communications and reports of the Ministry of Economic Development and Trade of Ukraine and any amendments thereof.[*][68]

> [*fn original][2] The definitive anti-dumping measures were imposed through 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**. The expiry review was initiated pursuant to the Decision of the Intergovernmental Commission on International Trade No. AD-294/2013/4423-06 of 24 May 2013. According to this Decision, the anti-dumping duties on import of ammonium nitrate originating in the Russian Federation were to remain in force pending the outcome of the review. The interim review was initiated pursuant to the Decision of the Intergovernmental Commission on International Trade No. AD-296/2013/4423-06 of 2 July 2013. As a result of the simultaneously conducted expiry and interim reviews, the definitive anti-dumping duty rates on imports of ammonium nitrate from the Russian Federation, that were initially imposed by the Decision No. AD-176/2008/143-47 of 21 May 2008, were increased and extended for the duration of five years by the Decision of the Intergovernmental Commission on International Trade No. AD-315/2014/4421-06 of 1 July 2014, which came into force on 8 July 2014.

[60] 2010 amendment, (Exhibit RUS-8b).
[61] 2010 amendment, (Exhibit RUS-8b).
[62] See, e.g. Russia's opening statement at the second meeting of the Panel, para. 153; response to Panel question No. 24, para. 57.
[63] Russia's opening statement at the second meeting of the Panel, para. 153; response to Panel question No. 24, para. 57.
[64] As Russia does not independently challenge the 2008 original decision, we do not find it necessary to rule on whether the 2008 original decision falls within our terms of reference.
[65] Appellate Body Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 120; *EC and certain member States – Large Civil Aircraft*, para. 790.
[66] Appellate Body Report, *US – Continued Zeroing*, para. 168.
[67] Appellate Body Report, *US – Continued Zeroing*, para. 169.
[68] Emphasis added; certain fns omitted.

7.23. Then, item number 1 of the panel request states:

> [Russia] considers that the measures at issue are inconsistent with Ukraine's obligations under the following provisions of the Anti-Dumping Agreement and the GATT:
>
> 1. Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement, because Ukraine failed to exclude a certain Russian exporter whose dumping margin was *de minimis* from the anti-dumping measures [*] and because Ukraine subjected this exporter to expiry and interim reviews [.][69]

> [*fn original][3] The following decisions of Ukrainian authorities determined that in the original investigation a dumping margin of JSC MHK EuroChem was *de minimis*: the Decision of the District Administrative Court of the City of Kiev of 6 February 2009 No 5/411, the Decision of the Kiev Appellate Administrative Court of 26 August 2009 No. 2-a-8850/08 and the Decision of the Higher Administrative Court of Ukraine of 20 May 2010 No. K-42562/09 and No. K-42568/09, 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**".

7.24. The part of footnote 2 marked in bold above refers to the 2008 amended decision. Item number 1 of the panel request states that Russia claims violations under Articles 5.8, 11.1, 11.2, and 11.3 because of the alleged failure of the Ukrainian authorities to exclude a certain Russian exporter from the "anti-dumping measures". The reference to the "anti-dumping measures" here is followed by footnote 3, which refers to the 2010 amendment, and notes that it amended the 2008 original decision. Thus, 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. Thus, in our view, Russia's panel request was sufficiently precise to identify the measures, i.e. 2008 amended decision, and the 2010 amendment, which were being referred for adjudication.

7.25. Ukraine argues that these references were not sufficient to identify these measures as the specific measures at issue because:

a. the phrase "in connection with the expiry and interim reviews" in the opening paragraph of the panel request restricted the scope of Russia's challenge to the underlying reviews[70]; and

b. measures could not have been identified in footnotes 2 and 3 of the panel request, because footnotes do not "ha[ve] the value, or the substance, to determine the terms of reference of the Panel".[71]

7.26. With respect to Ukraine's first argument, the opening paragraph of the panel request cannot be read in isolation from other parts of the panel request, including item number 1 of this request, as a panel request needs to be read as a whole. We already noted in paragraph 7.24 above that footnote 2 of the panel request and the reference to "anti-dumping measures" in item number 1 of the panel request covered both the 2008 amended decision, and the 2010 amendment. Therefore, we disagree with Ukraine that the phrase "in connection with the expiry and interim reviews" in the opening paragraph of the panel request restricted the scope of Russia's challenge to the underlying reviews.

7.27. With respect to the second argument, we note that nothing in Article 6.2 of the DSU specifically prohibits the identification of the specific measures in the footnotes of a panel request. Therefore, we are not persuaded by Ukraine's argument that the measures identified in a footnote of the panel request fall outside our terms of reference. We also note that the Appellate Body in *US – Countervailing and Anti-Dumping Measures (China)* found that "footnotes are part of the text

[69] Emphasis added.
[70] Ukraine's opening statement at the first meeting of the Panel, para. 12.
[71] Ukraine's opening statement at the first meeting of the Panel, para. 19.

of a panel request, and may be relevant to the identification of the measure at issue or the presentation of the legal basis of the complaint".[72]

7.28. Based on the foregoing, we find that the 2008 amended decision and the 2010 amendment were identified as specific measures at issue in the panel request, and thus do not fall outside our terms of reference.

7.3.1.3 Claims that Ukraine alleges were not presented in Russia's panel request in conformity with Article 6.2 of the DSU

7.29. Ukraine argues that item numbers 1, 4, and 17 of the panel request do not meet the requirement under Article 6.2 of the DSU as the claims in these item numbers were not set out in sufficient detail in this request. We understand Ukraine's arguments to be based on the view that Russia failed to provide in each of these item numbers a brief summary of the legal basis of the complaint that was sufficient to present the problem clearly. Hence, in Ukraine's view, the claims presented in these item numbers, and set out in paragraph 7.10 above, fall outside our terms of reference.

7.3.1.3.1 Claims presented in item number 1 of Russia's panel request

7.30. Ukraine argues that item number 1 of the panel request, which concerns Russia's claims under Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement, is inconsistent with Article 6.2 of the DSU as it does not clearly state which of the multiple obligations in these provisions the claims relate to.[73] The question before us therefore is whether Russia's panel request sets out these claims with adequate clarity, and specifically whether it provides a "brief summary" of these claims which is sufficient to present the problem clearly. We recall that the brief summary would be sufficient to present the problem clearly when, as stated in paragraph 7.17 above, it succinctly explains *how* or *why* the measure at issue is considered by the complainant to be violating the WTO obligation in question. Moreover, the panel request must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.

7.31. Item number 1 of the panel request states in this regard:

> [Russia] considers that the measures at issue are inconsistent with Ukraine's obligations under the following provisions of the Anti-Dumping Agreement and the GATT:
>
> 1. Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement, ***because*** Ukraine failed to exclude a certain Russian exporter whose dumping margin was *de minimis* from the anti-dumping measures[*] and ***because*** Ukraine subjected this exporter to expiry and interim reviews[.][74]

7.32. The word "because" is used twice in item number 1. This suggests that in this item number, Russia challenged two aspects of the measures at issue: first, that Ukraine failed to exclude a certain Russian exporter whose dumping margin was *de minimis* from the "anti-dumping measures"; second, that Ukraine subjected this exporter to expiry and interim reviews.

7.33. Regarding the first aspect, in the narrative part of the panel request, Russia claimed that Ukraine failed to exclude a certain Russian exporter whose dumping margin was *de minimis* from the "anti-dumping measures". The reference to anti-dumping measures, as stated in paragraph 7.24 above, is followed by footnote 3, which refers to the 2010 amendment and notes that it amended the 2008 original decision. These are the determinations made in the original investigation phase. Footnote 3 also identifies the court decisions as well as the 2010 amendment as the decisions of the Ukrainian authorities pursuant to which they allegedly determined a *de minimis* dumping margin for EuroChem in the original investigation. This suggests, as noted above, that the first aspect of item number 1 concerns Ukraine's failure to exclude a Russian

[72] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.39; see also Panel Report, *Indonesia – Import Licensing Regimes*, preliminary ruling of the panel, para. 3.15.

[73] Ukraine's first written submission, para. 43; second written submission, para. 13.

[74] Emphasis added; fn omitted.

exporter from the scope of the original anti-dumping investigation phase. The second sentence of Article 5.8 states that"[t]here shall be immediate termination [of an investigation] in cases where the authorities determine that the margin of dumping is *de minimis*". In claiming in item number 1 that Ukraine failed to exclude a certain Russia exporter from the anti-dumping measures *whose dumping margin was de minimis* Russia relies on this text of the second sentence of Article 5.8. The narrative part of the request does make it clear that this first aspect is concerned with Ukraine's failure to exclude an exporter with a *de minimis* dumping margin from the original investigation phase, which in Russia's view was contrary to the requirements under the second sentence of Article 5.8.

7.34. Regarding the second aspect, the narrative part in item number 1 identifies the issue as Ukraine's subjection of an exporter to an interim and expiry review, when it should have excluded this exporter from the "anti-dumping measures", i.e. determinations made in the original investigation phase. Russia invokes Articles 5.8, 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement in this regard. All these Articles could be potentially relevant to the issue identified by Russia. The second sentence of Article 5.8, as stated above, requires the "immediate termination" of the investigation in respect of an exporter with a *de minimis* margin of dumping. Article 11.2 sets out obligations concerning interim reviews, while Article 11.3 sets out obligations concerning expiry reviews. Specifically, Article 11.2 provides that the authorities shall review the "need for the continued imposition of the [anti-dumping] duty". Article 11.3 provides that an authority shall determine whether "the expiry of the duty" would be likely to lead to continuation or recurrence of dumping and injury. Articles 11.2 and 11.3 have been understood in past cases to operationalize the general principle set out in Article 11.1, which provides that an "anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury". Therefore, the narrative part of the panel request, coupled with the references to Articles 5.8, 11.1, 11.2, and 11.3, makes it sufficiently clear that Russia intended to challenge under these provisions Ukraine's decision to subject an exporter to the interim and expiry reviews when it should have terminated the investigation against it.

7.35. Based on the foregoing, we find that item number 1 of Russia's panel request was consistent with Article 6.2 of the DSU as it provided a brief summary of the legal basis which was sufficient to present the problem clearly. Thus, we find that the claims presented in this item number are within our terms of reference.

7.3.1.3.2 Claims presented in item number 4 of Russia's panel request

7.36. Ukraine argues that item number 4 of the panel request, in which Russia claims that Ukraine violated Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement, is inconsistent with Article 6.2 of the DSU as it does not indicate which aspects of the investigation were in violation of these provisions.[75] Ukraine contends that it was "completely blindsided" by Russia's arguments in its first written submission that took issue with MEDT of Ukraine's decision to reject the gas prices set out in the records of the investigated Russian producers, and replace it with the average price of gas exported from Russia at the German border.[76]

7.37. Russia's claims under Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement are presented in item number 4 of the panel request, which states:

> [Russia] considers that the measures at issue are inconsistent with Ukraine's obligations under the following provisions of the Anti-Dumping Agreement and the GATT:
>
> 4. Article 6.8 and Annex II, in particular paragraphs 3, 5 and 6, of the Anti-Dumping Agreement, because:
>
> (i) Ukraine failed to take into account *all information pertaining to the determination of the dumping margins* which was verifiable, supplied in a timely fashion and appropriately submitted so that it could be used in the investigation without undue difficulties;

[75] Ukraine's first written submission, para. 44; second written submission, para. 13.
[76] Ukraine's first written submission, para. 44.

> (ii) Ukraine failed to inform the Russian exporters and producers of the reasons why the supplied information and evidence were not accepted;
>
> (iii) Ukraine failed to give the Russian exporters and producers an opportunity to provide further explanations within a reasonable period of time[.][77]

7.38. We note that Russia's panel request identified the relevant legal provisions that it invoked, namely, Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement. Ukraine's argument that Russia simply referred to the legal provisions at issue in its panel request, and did not indicate in any detail what aspects of the investigation were conducted in violation of these provisions, takes issue with the degree of clarity with which Russia presented its claims. Thus, the issue before us is whether Russia's panel request, insofar as this item number is concerned, provided a brief summary of the legal basis that was sufficient to present the problem clearly.

7.39. We consider that the italicized part of the quoted extract in item number 4(i) of Russia's panel request, set out in paragraph 7.37 above, makes it clear that Russia took issue with the Ukrainian authorities' alleged failure to take into account *all information* pertaining to the determination of dumping. This includes information furnished by these producers with respect to their cost of production, including the gas prices that they paid, which was rejected by MEDT of Ukraine.[78] Thus, contrary to Ukraine's argument, the panel request, and specifically item number 4(i), does identify the aspect of the investigation that Russia took issue with, namely, the Ukrainian authorities' alleged failure to take into account all information pertaining to dumping determinations.

7.40. Item numbers 4(ii) and (iii) have to be understood in this context. The panel request could have been clearer if Russia were to additionally explain that it took issue with the rejection of certain information pertaining to constructed normal value, or that it took issue with the rejection of gas prices paid by the investigated Russian producers. However, we consider it to be sufficiently clear to meet the obligations under Article 6.2 of the DSU to provide a "brief summary" that was sufficient to clearly present the "problem", i.e. MEDT of Ukraine's alleged failure to take into account all information pertaining to its dumping determinations. Therefore, this request covers claims regarding the alleged use of facts available in constructing the normal value by rejecting the gas prices reported by the investigated Russian producers in their records.

7.41. Based on the foregoing, we find that item number 4 of Russia's panel request sets out a brief summary of the legal basis that is sufficient to present the problem clearly. Thus, we find the claims presented in this item number to be within our terms of reference.

7.3.1.3.3 Claims presented in item number 17 of Russia's panel request

7.42. Ukraine argues that item number 17 of the panel request does not clearly state which of the multiple obligations in Articles 11.1, 11.2, 11.3, 3.1, and 3.4 of the Anti-Dumping Agreement its claims relate to.[79] The issue before us is whether Russia's panel request, insofar as the claims presented in item number 17 of the panel request are concerned, provides a brief summary of the legal basis sufficient to present the problem clearly. We must address this question based on a review of the panel request as a whole.

7.43. In terms of the structure of the panel request, item numbers 14, 15, and 16 precede item number 17, and state:

> [Russia] considers the measures at issue are inconsistent with Ukraine's obligations under the following provisions of the Anti-Dumping Agreement and the GATT:
>
> …

[77] Emphasis added.

[78] Ukraine notes that these gas prices were the only information pertaining to the dumping determinations that were rejected by MEDT of Ukraine. (Ukraine's response to Panel question No. 29, para. 97).

[79] Ukraine's first written submission, para. 43.

> 14. Articles 3.1 and 3.2 of the Anti-Dumping Agreement because Ukraine's determination on injury was not based on positive evidence and did not involve an objective examination of the volume of the allegedly dumped imports and the effect of those imports on prices in the domestic market for like products.
>
> 15. Articles 3.1 and 3.4 of the Anti-Dumping Agreement because Ukraine failed to base findings on injury on positive evidence and to conduct an objective examination of all relevant factors and indices having a bearing on the state of the domestic industry.
>
> 16. Articles 3.1 and 3.5 of the Anti-Dumping Agreement because Ukraine failed to conduct an objective examination of factors other than the allegedly dumped imports and attributed the alleged injury to the allegedly dumped imports.

7.44. Each of these item numbers set out the relevant provisions of Article 3 that Russia alleges the Ukrainian authorities infringed through the actions or omissions identified therein. In our view, item number 17 needs to be read in conjunction with item numbers 14, 15, and 16. Item number 14, which refers to Articles 3.1 and 3.2, and item number 15, which refers to Articles 3.1 and 3.4, set out the aspects of the alleged injury analysis made by MEDT of Ukraine, that Russia took issue with, namely: (a) the considerations regarding the volume of allegedly dumped imports and the effect of those imports on domestic like product prices; and (b) the examination of the state of the domestic industry. Paragraph 16 refers to causation-related issues under Article 3.5. These are the aspects of the relevant measures that Russia took issue with in its panel request.[80]

7.45. Item number 17 immediately follows item numbers 14, 15, and 16, and states that the measures were inconsistent with Ukraine's obligations under:

> 17. Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement because Ukraine determined and relied on injury which was not established in accordance with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

7.46. Item number 17 refers to the provisions at issue, namely Articles 11.1, 11.2, and 11.3. It does not specifically identify the textual obligations under these provisions that Russia invokes in its claims. However, considering item number 17 immediately follows item numbers 14, 15, and 16, cross-refers to the Article 3 injury provisions discussed in these item numbers, and states that the violations under Articles 11.1, 11.2, and 11.3 occurred because Ukraine "determined and relied on *injury*"[81] not established in accordance with these Article 3 injury provisions, it is clear that Russia was invoking the injury related provisions of Articles 11.2 and 11.3. In particular, Articles 11.2 and 11.3, while worded differently, both refer to the likelihood of continuation or recurrence of injury, and these cross references, along with the reference to "injury" in item number 17 make it clear that it is this aspect of Articles 11.2 and 11.3 that Russia sought to challenge. Articles 11.2 and 11.3 operationalize the general principle under Article 11.1, and thus a failure to follow these provisions could lead to a failure to ensure that anti-dumping duty remains in force only as long as and to the extent necessary to counteract dumping which is causing injury. Thus, when read as a whole, the panel request plainly connects the relevant aspects of the measures with the legal basis of its complaint, and succinctly explains *how* or *why* Russia considers Ukraine to have acted inconsistently with these provisions.

7.47. Based on the foregoing, we find that item number 17 of Russia's panel request sets out a brief summary of the legal basis that is sufficient to present the problem clearly. Thus, to the extent Russia's claims in item number 17 of the panel request are based on the premise that the Ukrainian authorities acted inconsistently with Articles 11.1, 11.2, and 11.3 because they determined and relied on injury not established in accordance with Articles 3.1, 3.2, 3.4, and 3.5, this request is not inconsistent with Article 6.2 of the DSU.

[80] However, Russia does not pursue any causation-related claims in its first written submission.
[81] Emphasis added.

7.3.1.4 Overall conclusion

7.48. Based on the foregoing, we find that the claims presented in the following item numbers fall within our terms of reference:

a. item number 1 of the panel request with respect to the claims specified under Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement;

b. item number 4 of the panel request with respect to claims under Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement; and

c. item number 17 of the panel request with respect to claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement insofar as they are based on the view that the Ukrainian authorities determined and relied on injury which was not established in accordance with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement.

7.3.2 Claims that Ukraine alleges were outside the scope of the consultation request

7.3.2.1 Legal standard

7.49. Article 4.4 of the DSU provides that a consultation request shall be "submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint". The issue before us concerns the indication of the legal basis of the complaint in Russia's consultation request. The language of Article 4.4 in this regard has been understood to impose a less stringent standard than Article 6.2 of the DSU, where a mere "indication" of the legal basis would not suffice.[82]

7.50. The Appellate Body has clarified in this regard that a claim specified in the panel request will not necessarily fall outside a panel's terms of reference because they are not specified in the consultation request.[83] In particular, there is no need for a precise and exact identity between a consultation request and a panel request.[84] The rationale is that consultations may lead to reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant.[85] The panel request may thus refer to additional provisions that are not invoked in the consultation request.

7.51. However, the legal basis or claims set out in the panel request still need to reasonably evolve from the legal basis that formed the subject of consultations.[86] The panel request must thus not change the essence of the measures and the legal basis set out in the consultation request.[87] In examining the sufficiency of the request for consultations, a panel should examine the consultation request, and not consider what happened in the consultations.[88]

7.3.2.2 Whether Russia's "public notice" claims under Articles 12.2 and 12.2.2 fall outside our terms of reference in light of its consultation request

7.52. In item number 7 of its panel request, Russia stated:

> [Russia] considers that the measures at issue are inconsistent with Ukraine's obligations under the following provisions of the Anti-Dumping Agreement and the GATT:
>
> …

[82] Panel Report, *EC – Fasteners (China)*, para. 7.206.
[83] See, e.g. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[84] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 137 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 132).
[85] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[86] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 138.
[87] Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, paras. 137-138; *Brazil – Aircraft*, para. 132.
[88] Appellate Body Report, *US – Upland Cotton*, para. 287.

> 7. Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement, because Ukraine failed to provide in sufficient detail in the Decision of the Intergovernmental Commission on International Trade No. AD-315/2014/4421-06 of 1 July 2014, as referred to in Notice "On the changes and extension of anti-dumping measures in respect of import to Ukraine of ammonium nitrate, origin from the Russian Federation", and in the Communication of the Ministry of Economic Development and Trade of Ukraine No. 4421-10/21367-07 of 25 June 2014 the findings and conclusions reached on all issues of fact and law it considered in making its preliminary and final determinations and failed to provide all relevant information and reasons, which have led to the imposition of the measure. Ukraine did not provide the calculations used to determine the dumping margins in the final determination and the data it relied upon in order to make the calculations.

7.53. Russia's consultation request does not refer either to Articles 12.2 and 12.2.2 or the subject matter governed under Article 12, such as the adequacy of the public notice issued by an investigating authority. However, Russia contends that its claims under Articles 12.2/12.2.2 in the panel request naturally evolved from the legal basis set out in item number 10 of the consultation request, which deals with its claims under Article 6.9 of the Anti-Dumping Agreement. In item number 10, Russia stated:

> The measures at issue appear to be inconsistent with Ukraine's WTO obligations, in particular, under the following provisions of the Anti-Dumping Agreement and the GATT 1994:
>
> …
>
> 10. Article 6.9 of the Anti-Dumping Agreement because Ukraine failed to adequately disclose the essential facts under consideration which form the basis for the decision to impose antidumping measures, including the essential facts underlying the determinations of the existence of dumping and the calculation of the margins of dumping, the determination of injury, and the casual link. Ukraine failed to provide sufficient time for all interested parties to review and response to the essential facts under consideration in order to defend their interests.

7.54. Russia asserts that both Article 6.9 and Articles 12.2/12.2.2 conceptually relate to the obligation to disclose information underlying an investigating authority's decision.[89] Further, Russia notes that the issuance of a public notice within the meaning of Articles 12.2/12.2.2 is an event that follows the disclosure of essential facts, and asserts that a failure to "provide sufficient details" in the public notice, as required under Articles 12.2/12.2.2 is a logical consequence of, and closely connected to, the failure to disclose essential facts.[90] The question before us is whether Russia's claims in the panel request under Articles 12.2 and 12.2.2 reasonably evolved from the legal basis of the consultation request, including its claims under Article 6.9 of the Anti-Dumping Agreement set out in item number 10 of that request, or whether it changed its essence.

7.55. We recall that the Appellate Body in *China – GOES* as well as *Russia – Commercial Vehicles* distinguished between the obligations under Article 12.2.2 and Article 6.9 of the Anti-Dumping Agreement, by noting that Article 12.2.2 governs the disclosure of matters of fact and law and reasons at the conclusion of the anti-dumping investigations, while Article 6.9 requires the disclosure of "facts" in the course of the investigation itself.[91] We consider that these provisions are distinct in the following important ways[92]:

a. they govern different aspects of the investigation process as Article 6.9 applies before a final determination is made, while Articles 12.2 and 12.2.2 apply once that determination is made;

[89] Russia's comments on Ukraine's preliminary ruling request, para. 125.
[90] Russia's comments on Ukraine's preliminary ruling request, paras. 123 and 125.
[91] Appellate Body Reports, *China – GOES*, para. 240; *Russia – Commercial Vehicles*, para. 5.177.
[92] Thus, while both Article 6.9 and Articles 12.2/12.2.2 could be characterized as transparency obligations, such characterization is not dispositive of the issues before us.

b. Article 6.9 requires disclosure to interested parties, whereas Articles 12.2 and 12.2.2 require notice to the "public", which is broader than interested parties[93]; and

c. the scope and legal standard under these provisions are different, with Article 6.9 in certain cases requiring disclosure of facts that need not be disclosed in a public notice pursuant to Articles 12.2 and 12.2.2.[94]

7.56. Taking into account these differences between Article 6.9 and Articles 12.2/12.2.2, we do not consider that Russia's public notice claims under Articles 12.2 and 12.2.2 could be said to have reasonably evolved from its claims under Article 6.9 in item number 10 of the consultation request. Moreover, the factual basis of Russia's claims under Article 6.9 and Articles 12.2/12.2.2 is not identical. In particular, Russia challenges ICIT's 2014 extension decision as part of its Articles 12.2/12.2.2 claims, but this document is not a disclosure document, and hence not relevant to its Article 6.9 claims.[95] Further, as Russia contends, item number 7 of the panel request covers claims under Articles 12.2/12.2.2 challenging the Ukrainian authorities' alleged failure to disclose in sufficient detail the data underlying its injury margin calculations.[96] However, Russia does not make any claim under Article 6.9 regarding the disclosure of the data underlying the injury margins. In these circumstances, we do not consider that Russia's claims under Articles 12.2/12.2.2 reasonably evolved from its claims under Article 6.9.

7.57. We note that Russia also contends that in describing the measures in the consultation request, it challenged "all annexes, notices and reports" of MEDT of Ukraine.[97] Russia states that the reference to "notices" in the plural in its consultation request covers the "public notice" of the final determination.[98] It is not entirely clear to us whether Russia refers to this description of the measures in the consultation request in support of a view that its public notice claims under Articles 12.2/12.2.2 evolved from its consultation request. If so, we do not consider that such a vague reference to "notices" in the description of the measures at issue could have indicated that Russia intended to raise public notice claims under Articles 12.2 and 12.2.2.

7.58. Based on the foregoing, we find that Russia's claims in the panel request under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement fall outside our terms of reference because they did not reasonably evolve from the legal basis set out in its consultation request.[99]

7.3.2.3 Whether Russia's "claims" under Articles 3.1 and 3.4 fall outside our terms of reference in light of its consultation request

7.59. In its request for a preliminary ruling, Ukraine contended that Russia's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement were outside our terms of reference because they were not mentioned in the consultation request, and their addition in the panel request

[93] The panels in *China – HP-SSST (Japan) / China – HP-SSST (EU)* stated that the object of Article 6.9 is to provide interested parties with sufficient factual information to defend their interests during the investigation. By contrast, the object of Article 12.2.2 is to ensure that the investigating authorities' reasons for concluding as it did can be discerned and understood by the public. (Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.275)

[94] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.274-7.275.

[95] Russia's first written submission, para. 328.

[96] Russia's second written submission, paras. 724-727 and 730.

[97] Russia's comments on Ukraine's preliminary ruling request, para. 126.

[98] Russia's comments on Ukraine's preliminary ruling request, para. 127.

[99] We note that a similar decision was made by the panel in *EC – Fasteners (China)*. In that case, the panel examined whether a claim under Article 6.9 regarding the disclosure of the EU authorities' dumping determinations in an anti-dumping investigation on fasteners was within its terms of reference. The claim was made in the panel request, but there was no reference to Article 6.9 in the consultation request, or a narrative description indicating that China might intend to raise a claim under Article 6.9 in this context. (Panel Report, *EC – Fasteners (China)*, para. 7.506). China, while acknowledging that it did not invoke Article 6.9 in the consultation request, noted that in the context of presenting its claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement it had referred to the EU authorities' failure to provide opportunity to the interested parties to see all relevant information, including information relating to dumping margin calculations. (Panel Report, *EC – Fasteners (China)*, para. 7.503; China's consultation request in *EC – Fasteners (China)*, para. 2(xiv)). Noting the differences in the nature of obligations set forth in Articles 6.2 and 6.4, and that set out in Article 6.9, the panel concluded that China's claims under Article 6.9 could not have reasonably evolved from these claims under Articles 6.2 and 6.4. (Panel Report, *EC – Fasteners (China)*, para. 7.508).

broadened the scope of this dispute.[100] In response to Russia's clarification that it is not making independent claims under Articles 3.1 and 3.4, and not requesting independent findings in this regard, Ukraine acknowledged that its request had become moot.[101]

7.60. Based on the foregoing, we find Ukraine's request for a ruling that Russia's "claims" under Articles 3.1 and 3.4 in item number 17 of Russia's panel request fall outside our terms of reference to be moot, and do not make any findings in this regard.

7.3.2.4 Overall conclusion

7.61. Based on the foregoing, we find that the claims presented under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement in item number 7 of the panel request fall outside our terms of reference because they did not reasonably evolve from the legal basis set out in its consultation request. We do not make any findings on whether Russia's "claims" presented under Articles 3.1 and 3.4 of the Anti-Dumping Agreement in item number 17 of the panel request fall outside our terms of reference.

7.4 Dumping and likelihood-of-dumping determinations

7.62. Russia contends that MEDT of Ukraine's dumping determinations in the underlying reviews were inconsistent with Articles 2.1, 2.2, 2.2.1, 2.2.1.1, and 2.4 of the Anti-Dumping Agreement.[102] Russia submits that in addition to violating these provisions of Article 2, MEDT of Ukraine acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because it relied on these Article 2-inconsistent dumping determinations to make its likelihood-of-dumping determination.[103] Russia asserts that MEDT of Ukraine also acted inconsistently with Article 11.1 of the Anti-Dumping Agreement because in its view this provision does not permit the continued imposition of anti-dumping duty if no dumping exists.[104] Russia argues that if MEDT of Ukraine had properly calculated the dumping margin in the underlying reviews, no dumping would have been found to exist, and no anti-dumping duties could have been imposed.[105] Ukraine asks us to dismiss all of Russia's claims.

7.63. In making our findings, we first examine Russia's claims under Articles 2.2.1.1 and 2.2 (cost adjustment claims), then its claims under Articles 2.2.1, 2.1, and 2.4, and finally those under Articles 11.1, 11.2, and 11.3.

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[100] Ukraine's first written submission, paras. 66 and 70.

[101] Ukraine's response to Panel question No. 51(a), para. 21.

[102] There is no dispute between the parties that Article 2 of the Anti-Dumping Agreement applies in the context of the underlying reviews, and that we can make findings under the relevant provisions of Article 2. We recall in this regard that in *US – Corrosion-Resistant Steel Sunset Review* the Appellate Body stated that should investigating authorities choose to rely upon dumping margin calculations in making their likelihood-of-dumping determination in an expiry review, these margins must be calculated consistently with Article 2.4 of the Anti-Dumping Agreement. If they are not consistent with Article 2.4, this "could give rise to an inconsistency *not only with Article 2.4*, but also with Article 11.3" of the Anti-Dumping Agreement. (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127 (emphasis added)). We understand this statement of the Appellate Body to suggest that if dumping margins are calculated inconsistently with Article 2 obligations in the context of a review, there could be independent violations under the relevant provisions of Article 2 of the Anti-Dumping Agreement, in addition to any violation under Article 11.2 or Article 11.3. We note that in *EU – Footwear (China)* the panel adopted a different approach. The EU authorities in that case had calculated dumping margins in an expiry review, and relied on those margins to make their likelihood-of-dumping determination. The panel took the view that Article 2 is not directly applicable to a determination under Article 11.3, and thus it would review the likelihood-of-dumping determination in order to consider whether the complainant had shown a violation under Article 11.3 of the Anti-Dumping Agreement, and not in order to make findings as to whether those determinations were inconsistent with Article 2. (Panel Report, *EU – Footwear (China)*, para. 7.157). In this case, however, we see no reason why we should not make findings under Article 2. We find it relevant to note that the dumping margins that MEDT of Ukraine calculated in the underlying reviews formed the basis of revisions in the anti-dumping duty rate imposed on the investigated Russian producers, and these margins were not used purely for the purposes of making a likelihood-of-dumping determination under Articles 11.2 and 11.3.

[103] Russia's first written submission, paras. 147 and 151; second written submission, para. 408.

[104] Russia's second written submission, para. 409.

[105] Russia's second written submission, paras. 409-410.

7.4.1 Cost adjustment claims under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement

7.64. Russia claims that:

a. MEDT of Ukraine acted inconsistently with Articles 2.2.1.1 and 2.2 because in calculating the cost of production of the investigated Russian producers, as part of its dumping determinations, it *rejected* the price of gas that they paid, and reported in their records (reported gas cost).[106]

b. MEDT of Ukraine acted inconsistently with Articles 2.2 and 2.2.1.1 because it *replaced* the reported gas cost with gas prices outside Russia, specifically the price of gas exported from Russia to the German border, adjusted for transportation expenses (surrogate price of gas).[107]

7.4.1.1 Legal standard

7.65. Article 2.2.1.1 of the Anti-Dumping Agreement, in relevant part, provides:

> 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 are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.

7.66. "[P]aragraph 2" in Article 2.2.1.1 refers to Article 2.2 of the Anti-Dumping Agreement, which states that:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production *in the country of origin* plus a reasonable amount for administrative, selling and general costs and for profits.[108]

7.67. The first sentence of Article 2.2.1.1 states that costs shall "normally" be calculated on the basis of the records kept by the exporter or producer under investigation, provided that such records are: (a) in accordance with the GAAP of the exporting country (first condition); and (b) reasonably reflect the costs associated with the production and sale of the product under consideration (second condition).

7.68. Even though the question whether the use of the word "normally" in the opening sentence permits investigating authorities to reject the record costs even when these two conditions are met has been alluded to in previous disputes, neither a panel nor the Appellate Body has made findings on this issue. In *EU – Biodiesel (Argentina)*, for instance, noting that the investigating authority relied explicitly on the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement in rejecting the record costs, the panel and the Appellate Body did not consider if the use of the word "normally" suggested there could be some basis other than these two conditions to reject the record costs.[109]

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[106] Russia's first written submission, paras. 76-77.

[107] Russia's first written submission, paras. 104-105. Ukraine submits that this price represented the price at the German border (Waidhaus), adjusted back to represent costs in Russia. (Ukraine's first written submission, para. 186; opening statement at the first meeting of the Panel, paras. 105 and 109; and opening statement at the second meeting of the Panel, para. 147).

[108] Emphasis added; fns omitted.

[109] Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 120; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.227.

7.69. With respect to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement, the Appellate Body in *EU – Biodiesel (Argentina)* understood the focus of this condition to be on whether the records of the exporter or producer reasonably reflect their costs, rather than whether the costs incurred by them are reasonable.[110] Thus, the second condition does not permit investigating authorities to reject the record costs because the costs do not pertain to the production and sale of the product under consideration in what the authorities consider to be "normal circumstances".[111] Instead, the Appellate Body found that the records of an exporter or producer could be said to reasonably reflect the costs associated with the production and sale of the product under consideration, when the records suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration.[112]

7.70. Both the panel and the Appellate Body in *EU – Biodiesel (Argentina)* recognized that there may be circumstances where records that meet the first condition of Article 2.2.1.1, and are thus GAAP compliant, may not reasonably reflect the costs associated with the production and sale of the product under consideration. This may be the case, for instance, when transactions involving inputs purchased by the exporter or producer are not at arm's length.[113]

7.71. Regarding Article 2.2, the issue in this dispute is whether the cost of production determined for the investigated Russian producers in the underlying reviews was the cost "in the country of origin". The Appellate Body has noted that Article 2.2 does not specify the type of evidence or information that must be used to determine the cost of production in the country of origin, and does not preclude the possibility that the authority may have to use out-of-country evidence for this purpose.[114] However, the reference to "in the country of origin" indicated to the Appellate Body that the information or evidence used by the authorities to determine the cost of production, must be apt to or capable of yielding the cost of production in the country of origin.[115] This suggested to the Appellate Body that information or evidence from outside the country of origin may need to be *adapted* in order to ensure that it is suitable to determine the cost of production in the country of origin.[116]

7.4.1.2 MEDT of Ukraine's cost assessments in the underlying reviews

7.72. MEDT of Ukraine calculated the dumping margins for two of the investigated Russian producers.[117] In calculating these dumping margins, MEDT of Ukraine constructed the normal value of the investigated Russian producers on the basis of their cost of production. However, in doing so, MEDT of Ukraine rejected their reported gas cost, and replaced it with the surrogate price of gas.

7.73. MEDT of Ukraine stated in this regard that "the price for gas indicated in the accounting records of [the] Russian producers [could not] be used to analyse the production expenses incurred" by them.[118] This is because their "records" did "not completely reflect the costs associated with production and sale of the [product under consideration], in particular, the gas expenses".[119] The parties do not dispute that the reported gas cost was the price actually paid by the investigated Russian producers for gas. MEDT of Ukraine concluded, however, that their records did not completely reflect the costs associated with the production and sale of ammonium

[110] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.20 and 6.37.
[111] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.30. In that case, the European Union had argued that the EU authorities were permitted to consider whether costs in the records pertained to the product and sale of biodiesel in normal circumstances, i.e. in the absence of the alleged distortion caused by Argentina's export tax system.
[112] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.26.
[113] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.232 and fn 400.
[114] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70 and 6.73.
[115] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.70.
[116] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70 and 6.73.
[117] Ukraine's first written submission, para. 342; Investigation Report, (Exhibit RUS-10b), pp. 27-28.
[118] Investigation Report, (Exhibit RUS-10b), p. 23.
[119] Investigation Report, (Exhibit RUS-10b), p. 23.

nitrate because the gas price in those records was distorted.[120] It reached this conclusion on the following grounds:

a. the gas price in the domestic Russian market was not a market price, as the state controlled the price for gas[121];

b. due to the existence of state control, the price of gas for the investigated Russian producers was much lower than the selling price of gas exported from Russia and the prices for producers in other countries, as well as the market price in certain countries such as the United States, Canada, Japan, or the European Union[122];

c. calculations that showed that JSC Gazprom (Gazprom), a Russian supplier of gas, was selling below its cost of production and that the profitability of this supplier was due to export sales.[123]

7.74. With respect to allegations of government regulation of the price of gas in Russia, Ukraine acknowledges that it is the price of Gazprom, and not that of other independent domestic suppliers, that was subject to price control in Russia.[124] However, Ukraine submits that the prices set by other independent gas suppliers in Russia were aligned with the regulated price of Gazprom due to the dominant position of this supplier in the domestic Russian market.[125] In addition, though Ukraine confirms that MEDT of Ukraine did not ask the investigated Russian producers to provide information regarding their suppliers of gas[126], it asserts that MEDT of Ukraine "logically inferred" that Gazprom was virtually the sole supplier of gas.[127] However, Ukraine acknowledges that there was no relationship between Gazprom and the investigated Russian producers[128], and we note that MEDT of Ukraine did not make any finding that the reported gas cost was affected by any relationship between the investigated Russian producers and their gas suppliers.

7.75. Even though Russia questions Ukraine's assertion that MEDT of Ukraine found Gazprom to be virtually the sole supplier of gas, the substance of its claims is that the findings made by MEDT of Ukraine, as set out in the Investigation Report, did not constitute an adequate basis to conclude that the records of the investigated Russian producers, insofar as the reported gas cost was concerned, did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.[129] To address Russia's claims under Articles 2.2.1.1 and 2.2, therefore, we examine whether MEDT of Ukraine's findings in the Investigation Report constituted an adequate basis to meet the requirements under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement.

7.4.1.3 Rejection of the reported gas cost

7.76. Russia makes claims under Article 2.2.1.1 as well as Article 2.2 challenging MEDT of Ukraine's rejection of the reported gas cost, but its arguments focus on alleged violations of Article 2.2.1.1. In presenting its claim under Article 2.2, for example, Russia contends that MEDT of Ukraine constructed the normal value of the investigated Russian producers inconsistently with this provision because it used costs that were calculated inconsistently with Article 2.2.1.1.[130]

[120] Investigation Report, (Exhibit RUS-10b), p. 23.
[121] Investigation Report, (Exhibit RUS-10b), pp. 21-22.
[122] Investigation Report, (Exhibit RUS-10b), p. 22.
[123] Investigation Report, (Exhibit RUS-10b), pp. 22-23. Ukraine does not contend that Gazprom was an interested party in the underlying reviews, or participated in the review in any manner.
[124] See, e.g. Ukraine's response to Panel question No. 10(a), para. 34.
[125] Ukraine's response to Panel question No. 10(a), para. 35.
[126] Ukraine's response to Panel question No. 9, para. 31.
[127] Ukraine's response to Panel question No. 9, para. 31.
[128] Ukraine's response to Panel question No. 8, para. 30. Ukraine asserts that MEDT of Ukraine "logically inferred" that Gazprom was virtually the sole supplier of gas to the investigated Russian producers, but states that though the relations between Gazprom and these producers were examined no demonstrable link could be established between them. (Ukraine's responses to Panel question No. 8, para. 17, and No. 8.2, para. 30).
[129] See, e.g. Russia's first written submission, paras. 59-78. While questioning Ukraine's argument that Gazprom was virtually the sole supplier of gas, Russia submits that even if MEDT of Ukraine had properly established the identity of the Russian gas suppliers it would still have violated Articles 2.2.1.1 and 2.2. (Russia's second written submission, para. 102).
[130] Russia's first written submission, para. 77.

Therefore, we find it useful to first examine Russia's claim under Article 2.2.1.1, and then turn to its claim under Article 2.2.

7.77. With respect to Article 2.2.1.1, Russia asserts that MEDT of Ukraine relied on the second condition of Article 2.2.1.1 to reject the reported gas cost, but it did not properly meet this condition.[131] Further, Russia submits that because MEDT of Ukraine relied on this second condition in the underlying reviews, arguments that it advances in the panel proceedings on other legal bases, such as the use of the word "normally" in the first sentence of Article 2.2.1.1, constitute *ex post facto* rationalizations which we must reject.[132]

7.78. Ukraine relies on two alternative bases under Article 2.2.1.1 of the Anti-Dumping Agreement to justify MEDT of Ukraine's rejection of the reported gas cost.[133] First, Ukraine contends that the second condition of Article 2.2.1.1 permits rejection of costs reported in an exporter's or producer's records when the records do not reasonably reflect the costs associated with the production and sale of the product under consideration, here, ammonium nitrate.[134] Ukraine submits that the records of the investigated Russian producers, insofar as the reported gas cost was concerned, did not meet this second condition, and hence MEDT of Ukraine was justified in rejecting it.[135] Second, relying on the use of the word "normally" in the first sentence of Article 2.2.1.1, Ukraine asserts that MEDT of Ukraine was permitted to depart from the obligation to "normally" calculate the cost of production of the product under consideration on the basis of the exporter's or producer's records because the gas price in the domestic Russian market was fixed by the state, not of a commercial nature, and below the cost of production of gas.[136] In particular, Ukraine notes that "normally" means "under normal or ordinary conditions; as a rule", and submits that the use of this word in the first sentence of Article 2.2.1.1 suggests that the use of an exporter's or producer's records to calculate its cost of production is not mandatory in every case where the two conditions of Article 2.2.1.1 are met.[137]

7.4.1.3.1 Ukraine's arguments based on the use of the word "normally"

7.79. We note that though Ukraine relies on the use of the word "normally" in Article 2.2.1.1, MEDT of Ukraine rejected the reported gas cost based on the italicized part of the following provision of Ukrainian law (Article 7(9) of Ukraine's anti-dumping law):

> For the purpose of this Article, costs shall be generally calculated on the basis of accounting reports of the party, a subject to an anti-dumping investigation, under condition such accounting report is made according to the principles and norms of bookkeeping, generally accepted in the country which is a subject of consideration *and completely reflects the costs, related to the production and sale of products subject to consideration*.[138]

7.80. While this italicized part is not identical, in terms of its wording, to the second condition of Article 2.2.1.1, Ukraine does not argue that the scope and purpose of this part of Ukrainian law is different from the second condition of Article 2.2.1.1. Instead, Ukraine itself relies on the second condition of Article 2.2.1.1 to justify MEDT of Ukraine's rejection of the reported gas cost. Further, MEDT of Ukraine's finding, as set out in paragraph 7.73 above, that the *records* of the investigated Russian producers "[did] not completely reflect the costs associated with production and sale of the Products, in particular, the gas expenses" shows that MEDT of Ukraine's decision was based on perceived problems with the records of these producers insofar as they did not completely reflect

[131] Russia's first written submission, para. 63; opening statement at the first meeting of the Panel, para. 59.
[132] Russia's opening statement at the first meeting of the Panel, paras. 59-60.
[133] Ukraine does not dispute that the records of the investigated Russian producers were GAAP-compliant, and thus complied with the first condition under Article 2.2.1.1.
[134] Ukraine's first written submission, paras. 166-167.
[135] Ukraine's first written submission, paras. 144-145.
[136] Ukraine's first written submission, para. 162.
[137] Ukraine's first written submission, para. 91.
[138] Law "On Protection of the National Producer from the Dumped Import", N 330-XIV (with changes and amendments) (22 December 1998), (Exhibit UKR-9) (emphasis added); Ukraine's responses to Panel question No. 6(a), para. 12, and No. 6(b), para. 14; and Confidential version of the Investigation Report, (Exhibit UKR-52b (BCI)), p. 26.

the gas expenses.[139] MEDT of Ukraine did not conclude in the Investigation Report, for example, that though the records were maintained consistently with the first and the second conditions of Article 2.2.1.1 or analogous provisions of domestic law, it would nevertheless reject this cost because of the perceived distortions in the domestic Russian market for gas. Therefore, we find that Ukraine's arguments based on the use of the word "normally" in Article 2.2.1.1 constitute *ex post facto* rationalizations, which we cannot consider.[140] Instead, we will limit our review to the parties' arguments on the second condition of Article 2.2.1.1.[141]

7.4.1.3.2 Rejection of the reported gas cost pursuant to the second condition of Article 2.2.1.1

7.81. The specific question before us is whether MEDT of Ukraine provided an adequate basis to reject the reported gas cost of the investigated Russian producers because their records did not meet the second condition of Article 2.2.1.1, i.e. they did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.

7.82. Russia argues that while the second condition of Article 2.2.1.1 permits investigating authorities to examine whether the records of the exporter or producer *reasonably* reflect their costs, it does not permit them to examine whether the reported costs are *reasonable*.[142] However, in Russia's view, in rejecting the reported gas cost of the investigated Russian producers based on a finding that the price of gas in Russia was regulated by the government, and lower than the export price of Russian gas, and prices in third countries, MEDT of Ukraine essentially examined the reasonableness of the reported gas cost.[143] Thus, it acted inconsistently with the second condition of Article 2.2.1.1, as interpreted by the Appellate Body in *EU – Biodiesel (Argentina)*. Further, noting that Ukraine relies on the panel's and the Appellate Body's statement in *EU – Biodiesel (Argentina)* that the second condition permits investigating authorities to examine *non-arm's length transactions* or *other practices* which may affect the reliability of the record costs, Russia submits that MEDT of Ukraine did not reject the reported gas cost because of any alleged effect of "non-arm's length" transactions and "other practices" on the records of the investigated Russian producers.[144] Therefore, in Russia's view, Ukraine's arguments based on the terms "non-arm's length" and "other practices" are *ex post facto* rationalizations as MEDT of Ukraine did not itself make its determination by relying on these terms.

7.83. In Ukraine's view, "non-arm's length transactions" and "other practices" are "legal exceptions" carved out by the Appellate Body in *EU – Biodiesel (Argentina)* under Article 2.2.1.1. Ukraine argues that MEDT of Ukraine was justified in rejecting the reported gas cost because such non-arm's length transactions and other practices affected the reliability of the reported gas cost. In support of its argument, Ukraine proposes definitions of the term "arm's length", and presents its interpretation of the term "other practices".[145] Based on these definitions and interpretation,

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[139] Investigation Report, (Exhibit RUS-10b), p. 23.

[140] Pursuant to Article 17.5(ii) of the Anti-Dumping Agreement, a WTO panel should examine the matter based on "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". This precludes us from considering *ex post facto* rationalizations that have no basis in the determinations made by the investigating authority. Moreover, the manner in which Ukraine presents its argument on this issue further confirms that its submissions based on the use of the word "normally" constitute *ex post facto* rationalizations. In particular, instead of providing any proper basis in the underlying determination that could suggest that MEDT of Ukraine relied on the word "normally" in Article 2.2.1.1 to reject the reported gas cost, it states that there is "no[] need to get to the discussion of 'normally'", but should "the Panel deem it useful" it would "be pleased to discuss" why MEDT of Ukraine was justified, in light of the use of the word "normally" in Article 2.2.1.1, in rejecting the reported gas cost. (Ukraine's opening statement at the first meeting of the Panel, para. 103; second written submission, para. 49).

[141] We find our view to be consistent with that taken by the panel and the Appellate Body in *EU – Biodiesel (Argentina)*, where, having noted that the investigating authority relied on a provision analogous to the second condition of Article 2.2.1.1 under domestic law to reject the record costs, the panel and the Appellate Body did not examine whether the authority's decision to reject such costs could be justified based on the word "normally" in the first sentence of Article 2.2.1.1. (Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 120; Panel Report, *EU – Biodiesel (Argentina)*, para. 7.227).

[142] Russia's first written submission, paras. 51 and 66 (referring to Panel Report, *EU – Biodiesel (Argentina)*, fn 400; and Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41).

[143] Russia's first written submission, para. 67.

[144] Russia's opening statement at the first meeting of the Panel, paras. 51-52; response to Panel question No. 7, paras. 12-13.

[145] Ukraine's opening statement at the first meeting of the Panel, paras. 94-100.

Ukraine submits that the reported gas cost was affected by non-arm's length transactions and other practices because the gas price in the domestic Russian market was distorted due to governmental regulation. Specifically, Ukraine contends that the reported gas cost was purchased at non-arm's length prices because the domestic prices were set pursuant to governmental decree, rather than profit maximization motivations of the gas suppliers, and were below cost.[146] Ukraine asserts that alternatively, if the transactions between the investigated Russian producers and their suppliers cannot be categorized as non-arm's length transactions, they qualify as "other practices" affecting the reliability of the records.[147] In response to Russia's statement that Ukraine's arguments based on these terms constitute *ex post facto rationalizations*, Ukraine submits that while MEDT of Ukraine may not have specifically mentioned in the Investigation Report that it was rejecting the reported gas cost because of the effect of "non-arm's length" or "other practices" on the records of the investigated Russian producers, it did meet the substance of these two "exceptions".[148] On this basis, Ukraine justifies MEDT of Ukraine's rejection of the reported gas cost.

7.84. Considering how heavily the parties, and especially Ukraine relies on the observations of the panel in *EU – Biodiesel (Argentina)* that investigating authorities are free pursuant to the second condition of Article 2.2.1.1 to "examine non-arms-length transactions or other practices which may affect the reliability of the reported costs", we find it useful to commence our analysis by setting out the panel's observations in their proper context. We recall that in making these observations in footnote 400 of its report, the panel in *EU – Biodiesel (Argentina)* stated[149]:

> [W]e do not understand the phrase "reasonably reflect" to mean that whatever is recorded in the records of the producer or exporter must be automatically accepted. Nor does it mean, as argued by Argentina, that the words "reasonably reflect" are limited only to the "allocation" of costs. The investigating authorities are certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters, and thus, whether those records "reasonably reflect" such costs. In particular, the investigating authorities are free to examine whether all costs incurred are captured and none has been left out; they can examine whether the actual costs incurred have been over or understated; and they can examine if the allocations made, for example for depreciation or amortization, are appropriate and in accordance with proper accounting standards. *They are also free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs*. But, in our view, the examination of the records that flows from the term "reasonably reflect" in Article 2.2.1.1 does not involve an examination of the "reasonableness" of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful.[150]

7.85. We consider these observations to reflect that panel's view that in certain cases the records of an exporter or producer under investigation, while otherwise consistent with the first condition of Article 2.2.1.1, and thus GAAP-compliant, may not reasonably reflect the costs associated with the production and sale of the product under consideration.[151] We recognize that investigating authorities are free to examine the reliability and accuracy of the costs in the records of the investigated exporter or producer. However, we do not find it necessary to consider, in the abstract, whether the conditions in the domestic Russian market and the conditions of sale of gas

[146] Ukraine's opening statement at the first meeting of the Panel, para. 98.
[147] Ukraine's opening statement at the first meeting of the Panel, para. 100.
[148] Ukraine's second written submission, para. 36.
[149] The Appellate Body reproduced these observations in questioning the European Union's reading of the panel report. (Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.41).
[150] Emphasis added.
[151] The Appellate Body in *EU – Biodiesel (Argentina)* also discussed other situations where GAAP-compliant records may not reasonably reflect the costs associated with production and sale of the product under consideration. For instance, it noted that although the product under consideration in a particular anti-dumping investigation may be limited to a single model, size, type, or specification of a product, the exporter or producer under investigation may export or produce a number of different products. However, the records of such exporter or producer may include costs that concern multiple products without allocating them on a product-by-product or model-by-model basis. Thus, the manner in which an exporter or producer registers its costs may not reasonably reflect the costs associated with the production and sale of the product under consideration in a specific anti-dumping investigation. (Appellate Body Report, *EU – Biodiesel (Argentina)*, fn 127).

met the definitions of "non-arm's length transactions" proposed by Ukraine, or its interpretation of what it refers to as an "other-practices" "exception".[152] Instead, the question is whether the records of the exporters or producers reasonably reflect the costs associated with production and sale of the product under consideration. This is a question which needs to be assessed on a case-by-case basis, taking into account the evidence before the investigating authority, and the determination that it makes.

7.86. In light of this, we must examine whether MEDT of Ukraine provided an adequate basis in the Investigation Report to find that the records of the investigated Russian producers, insofar as the reported gas cost was concerned, did not reasonably reflect the costs associated with the production and sale of ammonium nitrate, as is provided for under the second condition of Article 2.2.1.1. In making this examination, we will consider Ukraine's argument that the reliability of the reported gas cost was affected due to the conditions that MEDT of Ukraine found to exist in the domestic Russian market for gas.

7.87. We note in this regard that Article 2.2.1.1 forms part of the disciplines set out in Article 2 of the Anti-Dumping Agreement. Article 2 provides the relevant rules governing the "determination of dumping". Dumping arises from the pricing behavior of individual exporters or foreign producers.[153] The first sentence of Article 2.2.1.1 is concerned with establishing the costs for these individual exporters or producers under investigation.[154] The Appellate Body has stated that the phrase "costs associated with the production and sale of the product under consideration" in the second condition of Article 2.2.1.1 means the costs *incurred* by the producer or exporter that are genuinely related to the production and sale of the product under consideration.[155] The phrase "reasonably reflect" in Article 2.2.1.1 refers to the "records" of the individual exporter or producer under investigation, while the term "reasonably" qualifies the reproduction or correspondence of the costs in those records.[156] To the extent the costs are genuinely related to the production and sale of the product under consideration in a particular anti-dumping investigation, there is no additional standard of reasonableness that applies to "costs" in the second condition under Article 2.2.1.1.[157]

7.88. We set out in paragraph 7.73 above the factual basis on which MEDT of Ukraine found that the records of the investigated Russian producers did not meet the second condition of Article 2.2.1.1. We recall that MEDT of Ukraine found that the gas price in the domestic Russian market was not a market price as the state controlled this price, that this price was artificially lower than the export price of gas from Russia as well as the price of gas in other countries, and that it was below the cost of production.[158] MEDT of Ukraine concluded on this factual basis that the records of the investigated Russian producers did not completely reflect the costs associated with the production and sale of ammonium nitrate, insofar as the reported gas cost was concerned. Thus, MEDT of Ukraine found that these records did not meet the second condition of Article 2.2.1.1.

7.89. We do not consider this factual basis to have been adequate for MEDT of Ukraine to conclude that the records of the investigated Russian producers did not reasonably reflect the costs associated with the production and sale of ammonium nitrate. MEDT of Ukraine examined whether due to government regulation of gas price in Russia, the costs incurred by these producers were lower compared to prices in other countries, or export prices of gas from Russia. This shows that MEDT of Ukraine's enquiry was focused on whether the cost of gas incurred by these producers in the production and sale of ammonium nitrate was reasonable, or was the cost they would incur under what it considered to be normal circumstances, i.e. in the absence of the alleged distortions in the domestic Russian market for gas. However, that is not the purpose of the enquiry under the second condition of Article 2.2.1.1. This second condition permits investigating authorities to examine whether the records reasonably reflect the costs associated with the production and sale of the product under consideration. This is different from an examination on

[152] We do not consider that either the panel or the Appellate Body in *EU – Biodiesel (Argentina)* "carved out" an open-ended "exception" for "non-arm's -length transactions or other practices" as Ukraine appears to suggest. (Ukraine's opening statement at the first meeting of the Panel, para. 91).
[153] Appellate Body Reports, *US – Zeroing (Japan)*, para. 111; *US – Stainless Steel (Mexico)*, para. 98.
[154] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.17.
[155] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.30.
[156] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.20.
[157] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.37.
[158] Investigation Report, (Exhibit RUS-10b), pp. 21-23; Ukraine's second written submission, para. 31.

whether the costs contained in the records are not reasonable because, for instance, they are lower than those in other countries, which is what MEDT of Ukraine examined in the underlying reviews.

7.90. In addition, MEDT of Ukraine took the view in its Investigation Report that Gazprom sells gas in the domestic Russian market below cost. However, there is nothing in this report that shows that this affected the reliability of the records of the investigated Russian producers, such that the records did not reasonably reflect the costs associated with production and sale of ammonium nitrate. In particular, we note that MEDT of Ukraine did not find that Gazprom was affiliated with these producers, and Ukraine has not pointed to anything in the Investigation Report that suggests that MEDT of Ukraine even considered who these producers' suppliers were.[159] Further, we note that Article 2.2.1.1 forms part of Article 2, which sets out the relevant rules regarding the determination of dumping. Article 2 is concerned with the pricing behaviour of individual exporters and producers. The exporters and producers may source inputs used to produce the product under consideration from multiple unrelated suppliers. 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. We do 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 unrelated suppliers' prices are government regulated, lower than the prices prevailing in other countries, or allegedly priced below their cost of production. In these circumstances, we do not consider that the factual findings relied upon by MEDT of Ukraine, and set out in paragraph 7.73 above, provided a sufficient basis for MEDT of Ukraine to conclude that the records of the investigated Russian producers did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.

7.91. Our conclusions in this regard are consistent with the legal findings and interpretation developed by the panel and the Appellate Body in *EU – Biodiesel (Argentina)*. We recall that in that case, the EU authorities had found that the domestic prices of the main input (soybeans and soybean oil) used by the biodiesel producers in Argentina were artificially lower than international prices due to distortions created by Argentina's export tax system, and consequently the costs of these inputs were not reasonably reflected in the records of the investigated Argentinian producers.[160] First, the panel, and then the Appellate Body, found that this was not a sufficient factual basis under the second condition of Article 2.2.1.1 to reject the reported cost of these inputs. We note Ukraine's argument in this regard that the factual circumstances in *EU – Biodiesel (Argentina)* and those before us are different, because in that case the investigating authority did not find any evidence of direct state intervention in regulating the costs of input and the distortion was not appreciable, even though the Argentinian export tax system had a price depressing effect on input prices.[161] However, nothing in the panel or the Appellate Body report in *EU – Biodiesel*

[159] We note Russia's argument that MEDT of Ukraine presumed that Gazprom was the only company that produced and supplied gas in Russia. (Russia's second written submission, para. 111). Ukraine acknowledges that MEDT of Ukraine did not ask the investigated Russian producers the names of their gas suppliers. (See, e.g. Ukraine's response to Panel question No. 9, para. 31). Instead, Ukraine contends that MEDT of Ukraine "logically inferred" that Gazprom was the main and virtually sole supplier of gas. However, it does not point to anything in MEDT of Ukraine's own findings to support that view, and its argument is undermined by its own acknowledgment that EuroChem had other suppliers. (Ukraine's response to Panel question No. 8, fn 10). There is no reference to such suppliers of EuroChem in the Investigation Report, or any finding that the records of the investigated Russian producers, insofar as they reflected the prices paid to these suppliers, were unreliable. Further, while Ukraine contends that EuroChem did not cooperate with MEDT of Ukraine in this regard, we note that it does not argue, and the Investigation Report does not show, that MEDT of Ukraine found EuroChem to be a non-cooperating exporter pursuant to the criteria in Article 6.8 and Annex II of the Anti-Dumping Agreement. (See, e.g. Ukraine's opening statement at the second meeting of the Panel, paras. 63-64). In addition, while it contends that prices of suppliers other than Gazprom were affected by prices of Gazprom, which allegedly accounted for 56% of Russian gas sales, there is, again, nothing in MEDT of Ukraine's finding to support this view. (Ukraine's response to Panel question No. 10(a), para. 35). Such arguments are therefore, *ex post facto* rationalizations, and there is no correlation in MEDT of Ukraine's findings between alleged below-cost sales by Gazprom and the reliability of the records of the investigated Russian producers.

[160] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.221. The EU authorities found that the export taxes on soybeans and soybean oil depressed the domestic price of soybeans and soybean oil to an artificially-low level which, as a consequence, affected the costs of the biodiesel producers. Specifically, the EU authorities found that the difference between the international and domestic prices of soybeans and soybean oil was equivalent to export taxes on the product and the expenses involved in exporting them. (Panel Report, *EU – Biodiesel (Argentina)*, para. 7.181).

[161] Ukraine's first written submission, paras. 116-118 and 138.

(Argentina) suggests that the economic level, and the direct or indirect nature of the regulation in question, were relevant to the panel's or Appellate Body's analysis of the second condition under Article 2.2.1.1. Instead the legal findings and interpretation developed in that dispute are relevant to the facts before us.[162] Therefore, we do not consider that MEDT of Ukraine had a proper basis under the second condition of Article 2.2.1.1 to reject the reported gas cost of the investigated Russian producers.[163]

7.92. Based on the foregoing, we find that MEDT of Ukraine acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because it did not provide an adequate basis under the second condition of Article 2.2.1.1 to reject the reported gas cost of the investigated Russian producers.[164] In light of this finding under Article 2.2.1.1, we do not find it necessary to resolve Russia's claim under Article 2.2 of the Anti-Dumping Agreement. We therefore exercise judicial economy with respect to this claim.

7.4.1.4 Replacement of reported gas cost with surrogate price of gas

7.93. Russia makes claims under Articles 2.2 and 2.2.1.1 challenging MEDT of Ukraine's calculation of the cost of production of the investigated Russian producers on the basis of the surrogate price of gas. Russia contends that MEDT of Ukraine acted inconsistently with Articles 2.2 and 2.2.1.1 because in using a surrogate price of gas that did not represent the cost in Russia it failed to calculate the cost of production in the "country of origin".[165] Article 2.2 specifically requires investigating authorities to calculate the cost of production in the country of origin. Russia's claim raises the question as to whether the surrogate price of gas used by MEDT of Ukraine reflected costs in the "country of origin", i.e. Russia. We thus find it useful to first examine Russia's claim under Article 2.2 of the Anti-Dumping Agreement, and then turn to its claim under Article 2.2.1.1 of the Anti-Dumping Agreement.

7.94. We recall that the surrogate price of gas was the export price of Russian gas at the German border, adjusted for transportation expenses. Russia asserts that MEDT of Ukraine could not have used this surrogate price of gas to calculate the cost in the country of origin as it was a price charged outside Russia and was determined under market conditions different from those in

[162] Ukraine also distinguishes the panel and the Appellate Body Report in *EU – Biodiesel (Argentina)* by contending that "governmental price-fixing" of the domestic Russian gas prices was WTO-inconsistent, specifically invoking Article XVII:1(b) and the second Ad Note to Article VI:1 of the GATT 1994 in this regard. (Ukraine's opening statement at the first meeting of the Panel, paras. 76-79). We do not find these arguments to be relevant to our analysis, considering that our terms of reference require us to review MEDT of Ukraine's determinations, and not Russia's compliance with its own WTO obligations. Similarly, Ukraine argues that MEDT of Ukraine found that the gas prices were set inconsistently with Russia's WTO commitments, as set out in its Working Party Report. (Ukraine's opening statement at the second meeting of the Panel, paras. 36-37 and 41). We note that while there is a discussion in the Investigation Report on statements and concerns raised by WTO Members about the domestic gas prices in Russia, the report does not as such identify any WTO-commitment that was violated by Russia. In any case, Ukraine does not contend that Russia's Working Party Report or its Accession Protocol provides legal justification for MEDT of Ukraine's decision to reject the reported gas cost. To the extent Ukraine alleges that Russia failed to comply with its own WTO commitments, we note that such issues have to be resolved through the DSU. (Appellate Body Report, *Canada – Continued Suspension*, para. 371).

[163] Ukraine also relies, as context, on Articles 2.3 and 2.2.1 of the Anti-Dumping Agreement and the second Ad Note to Article VI:1 of the GATT 1994 to advance the view that prices that are not of a "commercial nature" are unreliable. (Ukraine's first written submission, paras. 151-152). We note that the provisions cited by Ukraine permit rejection of prices only in the specific circumstances set out therein. Those circumstances are not applicable here. Article 2.3, for example, permits construction of export prices where, *inter alia*, 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. Article 2.2.1 permits investigating authorities to reject domestic sales as a basis for calculating normal value, only when the specific circumstances set out therein are met. The second Ad Note of Article VI:1 applies only to certain types of non-market economies, specifically those economies in which the country has a complete or substantially complete monopoly on its trade and the State fixes all prices. (Appellate Body Report, *EC – Fasteners (China)*, fn 460). It is not alleged that Russia meets these criteria.

[164] Our findings in this dispute are limited to the second condition of Article 2.2.1.1 of the Anti-Dumping Agreement, which we found was invoked by MEDT of Ukraine to reject the gas prices of the investigated Russian producers.

[165] Russia's first written submission, para. 96; second written submission, para. 326; and opening statement at the second meeting with the Panel, para. 99.

Russia.[166] In addition, Russia asserts that MEDT of Ukraine did not adapt the surrogate price of gas to reflect the price of gas in Russia.[167] Ukraine does not argue that the price of gas exported from Russia to the German border was in and of itself a price in the "country of origin", but contends that this price was *adapted* to ensure that the resulting surrogate price of gas reflected the price in Russia.[168] In particular, Ukraine argues that it *adapted* the price of gas exported from Russia to the German border by making an adjustment for transport expenses.[169]

7.95. The question before us is whether the surrogate price of gas used by MEDT of Ukraine in calculating the cost of production of the investigated Russian producers was the cost in the "country of origin", i.e. Russia. We note that the panel and the Appellate Body in *EU – Biodiesel (Argentina)* addressed a similar claim under Article 2.2.

7.96. In that case, having found that the domestic price of soybean used in the production of biodiesel was artificially lower than international soybean prices due to distortions created by Argentina's export tax system, the EU authorities replaced this domestic price with the price that it considered Argentinian producers would have paid in the absence of the distortions created by this tax system.[170] In particular, they replaced this price with the average reference price of soybeans published by Argentina's Ministry of Agriculture for export during the investigated period, free-on-board, minus fobbing cost.[171] The question before that panel was whether this average reference price represented the cost of Argentinian producers in the "country of origin". The panel found that it did not.

7.97. The panel noted that the EU authorities specifically selected this average reference price to remove the perceived distortions in the domestic price of soybeans, and thus they selected this price precisely because it was not the cost of soybeans in Argentina.[172] Moreover, the panel found it irrelevant that the average reference price was published by Argentina's Ministry of Agriculture as this cost did not represent the cost of soybeans for domestic purchasers of soybean in Argentina.[173] Accordingly, the panel concluded that the EU authorities acted inconsistently with Article 2.2 because this average reference price did not constitute the cost in the "country of origin".

7.98. On appeal, the European Union argued, *inter alia*, that the subtraction of the fobbing costs from the average reference price published by Argentina's Ministry of Agriculture rendered the surrogate price for soybeans used by the EU authorities a reasonable proxy for the undistorted price of soybeans in Argentina.[174] The Appellate Body noted that other than pointing to the deduction of fobbing costs, the European Union had not asserted that the EU authorities adapted, or even considered adapting, the information used in their calculation in order to ensure that it represented the cost of production in Argentina.[175] Instead, like the panel, the Appellate Body found that the EU authorities specifically selected the surrogate price for soybeans to remove the perceived distortion in the cost of soybeans in Argentina.[176]

7.99. In the underlying reviews, MEDT of Ukraine concluded that the export price from Russia at the German border was representative, and could be used to calculate the cost of production because Germany was the biggest consumer of Russian natural gas, and this price was revised according to market conditions in 2012.[177] Ukraine does not argue in these proceedings that this export price was in and of itself the cost in the country of origin.[178] Indeed, the export price from Russia to Germany was not the cost of gas for the investigated Russian producers in Russia. Instead, Ukraine's argument is that MEDT of Ukraine adapted this export price to ensure that this

[166] Russia's first written submission, para. 99.
[167] Russia's second written submission, para. 343.
[168] Ukraine's response to Panel question No. 12(c), para. 57.
[169] Ukraine's response to Panel question No. 12(c), para. 57.
[170] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.257.
[171] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.257.
[172] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.258.
[173] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.259.
[174] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.79.
[175] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.81.
[176] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.81.
[177] Investigation Report, (Exhibit RUS-10b), p. 23.
[178] Ukraine's response to Panel question No. 12(c), para. 57.

price reflected the cost of gas in Russia.[179] We recognize that investigating authorities may use out-of-country evidence to calculate the cost of production in the country of origin provided they adapt this evidence to reflect the cost in the country of origin. However, except for an adjustment for transportation expenses, the record does not show how MEDT of Ukraine adapted this export price to reflect the prices in Russia. We do not see any explanations in the Investigation Report as to why adjustments for such transportation expenses were adequate to adapt the out-of-country evidence, i.e. export price from Russia at the German border, to reflect the cost of the investigated Russian producers in the country of origin. Instead, MEDT of Ukraine's explanation suggests that it selected this price because the export price was an out-of-country benchmark, and that it did not adapt this price to reflect costs in Russia. In these circumstances, we do not consider that the adjustment for transportation expenses made by MEDT of Ukraine was sufficient to adapt the export price from Russia to reflect the cost of gas in the country of origin, i.e. Russia. We note that the panel and the Appellate Body in *EU – Biodiesel (Argentina)* reached a similar conclusion under Article 2.2. In particular, as stated above, the panel and the Appellate Body found that adjustments for fobbing costs were not sufficient to adapt the average reference price of soybeans published by Argentina's Ministry of Agriculture for export to prices in the "country of origin" under Article 2.2.

7.100. We note in this regard Ukraine's argument that it could not use 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.[180] Ukraine relies on the Appellate Body report in *US – Softwood Lumber IV* in support of its arguments.[181] Specifically, Ukraine relies on the Appellate Body's finding under Article 14(d) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) 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.[182] Ukraine submits that the Appellate Body's findings support the view that the obligations of investigating authorities should not be interpreted in a manner that undermines the right of Members to countervail subsidies, or, as is allegedly the case here, counteract injurious dumping.[183]

7.101. We disagree with Ukraine's argument that MEDT of Ukraine could not use the gas price in the domestic Russian market to calculate the cost of production of these producers in the underlying reviews. As noted above, we have found that MEDT of Ukraine did not provide a proper basis to reject the reported gas cost of the investigated Russian producers. We also consider Ukraine's reliance on the Appellate Body's finding under Article 14(d) of the SCM Agreement in *US – Softwood Lumber IV* to be inapposite. We note that Article 14 of the SCM Agreement is titled "[c]alculation of the amount of a subsidy in terms of the benefit to the recipient". Article 14(d) is concerned with the assessment of the "benefit" granted to an exporter or producer due to governmental provision of goods and services. In interpreting the text of Article 14(d), the Appellate Body stated that a government's role in providing a financial contribution, in terms of provision of goods and services, may be so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, thereby making the entire domestic market distorted.[184] The Appellate Body considered that in these circumstances, the comparison of the price at which the government provides goods with the price at which private suppliers sell these goods in the domestic market could indicate a benefit that was artificially low, or even zero, such that the full extent of the subsidy would not be captured, thereby undermining the rights of Members under the SCM Agreement to countervail subsidies.[185]

7.102. Article 2.2 of the Anti-Dumping Agreement concerns the calculation of the cost of production of an investigated producer in its country of origin to construct normal value, for the purpose of ultimately ascertaining whether this producer is dumping, and the dumping margin. Unlike Article 14(d), the purpose of Article 2.2 is not to ascertain the benefit conferred on such a producer by the governmental provision of goods and services, and the extent of such benefit. Thus, the purpose of cost calculation under Article 2.2 of the Anti-Dumping Agreement, and benefit calculation under Article 14(d) of the SCM Agreement is different, and should not be

[179] Ukraine's response to Panel question No. 12(c), para. 57.
[180] Ukraine's opening statement at the first meeting of the Panel, para. 105.
[181] Ukraine's first written submission, paras. 176-179.
[182] Ukraine's first written submission, para. 179.
[183] Ukraine's first written submission, para. 183.
[184] Appellate Body Report, *US – Softwood Lumber IV*, paras. 93 and 101.
[185] Appellate Body Report, *US – Softwood Lumber IV*, para. 100.

conflated. Considering the underlying reviews concern a determination in an anti-dumping proceeding, rather than an anti-subsidy proceeding, the question of ascertaining the benefit granted to a producer through the governmental provision of goods and services does not arise. Therefore, we disagree with Ukraine that the Appellate Body's findings under Article 14(d) are relevant to our interpretation of Article 2.2 of the Anti-Dumping Agreement. We also do not consider that our findings undermine the rights of a Member to countervail subsidies in a manner consistent with the relevant provisions of the SCM Agreement or the GATT 1994, as neither the SCM Agreement nor the subsidy-related aspects of the GATT 1994 are before us.

7.103. Based on the foregoing, we conclude that MEDT of Ukraine acted inconsistently with Article 2.2 of the Anti-Dumping Agreement because it failed to calculate the cost of production of the investigated Russian producers "in the country of origin". Having found that MEDT of Ukraine acted inconsistently with Article 2.2 of the Anti-Dumping Agreement, we do not find it necessary to resolve Russia's claim under Article 2.2.1.1 of the Anti-Dumping Agreement in this regard. Therefore, we exercise judicial economy with respect to this claim.

7.4.2 Claims under Articles 2.2.1 and 2.1 of the Anti-Dumping Agreement regarding MEDT of Ukraine's ordinary-course-of-trade test

7.104. Russia claims that MEDT of Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement in finding that the investigated Russian producers' domestic sales of ammonium nitrate were outside the ordinary course of trade by reason of price because[186]:

a. in conducting its ordinary-course-of-trade test under Article 2.2.1, MEDT of Ukraine used a cost of production that was calculated inconsistently with Article 2.2.1.1;

b. it failed to analyse whether alleged below-cost domestic sales were made "within an extended period of time", "in substantial quantities", or "at prices which [did] not provide for the recovery of all costs within a reasonable period of time", as is required under Article 2.2.1; and

c. even if it conducted this analysis, the use of costs that were calculated inconsistently with Article 2.2.1.1 infected the results of its ordinary-course-of-trade test.

7.105. Russia also claims that MEDT of Ukraine acted inconsistently with Article 2.1 of the Anti-Dumping Agreement, because it should have determined the dumping margin of the investigated Russian producers by comparing their export price with their domestic sales price of ammonium nitrate.[187] According to Russia, MEDT of Ukraine failed to do so because it conducted an ordinary-course-of-trade test inconsistently with its obligations under Articles 2.2.1 and 2.2.1.1.[188]

7.106. Ukraine asks us to dismiss Russia's Article 2.2.1 claim, asserting that:

a. even if we find that the costs of the investigated Russian producers were calculated inconsistently with Article 2.2.1.1, we cannot on that basis find consequential violations under Article 2.2.1, as these two provisions contain different obligations and Russia has not demonstrated that the domestic sales of these producers would have been found to be in the ordinary course of trade if the reported gas cost was used to calculate the cost of production[189]; and

b. contrary to Russia's arguments, MEDT of Ukraine analysed whether alleged below-cost domestic sales were made "within an extended period of time", "in substantial quantities", or "at prices which do not provide for the recovery of all costs within a reasonable period of time".[190]

[186] Russia's first written submission, paras. 118-120; second written submission, para. 353.
[187] Russia's first written submission, paras. 140-141.
[188] Russia's first written submission, paras. 139-141; second written submission, para. 405.
[189] Ukraine's first written submission, para. 197; second written submission, paras. 65-66; and opening statement at the second meeting of the Panel, para. 168.
[190] Ukraine's response to Panel question No. 14, para. 59; second written submission, paras. 62-63.

7.107. Ukraine also asks us to dismiss Russia's Article 2.1 claim, contending that this is a definitional provision that does not impose independent obligations.

7.4.2.1 Legal standard

7.108. Article 2.2.1 of the Anti-Dumping Agreement states:

> Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[*] *determine that such sales are made within an extended period of time[**] in substantial quantities[***] and are at prices which do not provide for the recovery of all costs within a reasonable period of time.* If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.[191]
>
> [*fn original][3] When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.
> [**fn original][4] The extended period of time should normally be one year but shall in no case be less than six months.
> [***fn original][5] Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

7.109. Article 2.2.1 describes a methodology for determining whether below-cost sales may be treated as not being made in the ordinary course of trade.[192] The first sentence of Article 2.2.1 refers to the "[s]ales of the like product in the domestic market of the exporting country or sales to a third country at prices *below per unit (fixed and variable) costs of production* plus administrative, selling and general costs".[193] It states that "such sales", i.e. below-cost sales, may be treated as not being in the ordinary course of trade by reason of price, and disregarded in determining normal value, only if the requirements set out in Article 2.2.1 are met. The methodology under the first sentence of Article 2.2.1 involves two steps.[194]

7.110. First, the below-cost sales that may potentially be treated as not being in the ordinary course of trade by reason of price must be ascertained.[195] This requires investigating authorities to identify sales that are made at prices below "per unit (fixed and variable) costs of production plus administrative, selling and general costs". Second, the investigating authorities must determine whether such below-cost sales display the following three specific characteristics, i.e. they are made: (a) within an extended period of time; (b) in substantial quantities; and (c) at prices which do not provide for the recovery of all costs within a reasonable period of time.[196] Only when the below-cost sales are found to exhibit all three of these characteristics, they can be treated as not being made in the ordinary course of trade by reason of price.[197] Though these three specific characteristics show that investigating authorities may act inconsistently with Article 2.2.1 in different ways, Article 2.2.1 does not contain multiple and distinct obligations in this regard.[198] Instead, Article 2.2.1 sets out a single obligation whereby investigating authorities may disregard below-cost sales of the like product only if it determines the below-cost sales display these three characteristics.[199]

[191] Emphasis added.
[192] Panel Report, *EC – Salmon (Norway)*, para. 7.231.
[193] Emphasis added.
[194] Panel Report, *EC – Salmon (Norway)*, para. 7.232.
[195] Panel Report, *EC – Salmon (Norway)*, para. 7.232.
[196] Panel Report, *EC – Salmon (Norway)*, para. 7.233.
[197] Panel Report, *EC – Salmon (Norway)*, para. 7.233.
[198] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.22.
[199] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.22.

7.111. Article 2.1 of the Anti-Dumping Agreement states:

> For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

7.112. The Appellate Body in *US – Zeroing (Japan)* found Article 2.1 to be a definitional provision that does not impose independent obligations, stating that:

> Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 are definitional provisions. They set out a definition of "dumping" for the purposes of the Anti-Dumping Agreement and the GATT 1994. The definitions in Article 2.1 and Article VI:1 are no doubt central to the interpretation of other provisions of the *Anti-Dumping Agreement*, such as the obligations relating to, *inter alia*, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping. But, Article 2.1 and Article VI:1, read in isolation, do not impose independent obligations.[200]

7.4.2.2 Evaluation

7.4.2.2.1 Claim under Article 2.2.1

7.113. We noted in paragraphs 7.109-7.110 above that the methodology under the first sentence of Article 2.2.1 involves two steps. We understand Ukraine to argue that MEDT of Ukraine conducted its ordinary-course-of-trade test in the underlying reviews on the basis of these two steps. First, MEDT of Ukraine found 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)*".[201] As the italicized part of MEDT of Ukraine's finding shows, and Ukraine confirms, MEDT of Ukraine did not use the reported gas cost of the investigated Russian producers when ascertaining whether their domestic sales were below cost.[202] Second, Ukraine submits that MEDT of Ukraine assessed whether these below-cost sales met the three characteristics set out in the first sentence of Article 2.2.1, and found that:

a. Considering this determination was made for the period of review, which was 12 months, below-cost sales were made over an extended period of time (i.e. the first characteristic).

b. Below-cost sales were made in substantial quantities (i.e. the second characteristic) because the weighted average selling price of the transactions under consideration for the determination of the normal value was "*below weighted average per unit costs*".[203]

c. Below-cost sales were at prices which did not provide for the recovery of all costs within a reasonable period of time (i.e. the third characteristic), because the weighted average selling price was below the *weighted average costs* during the period of review.[204]

7.114. Ukraine confirms that the weighted average costs used as part of this assessment were calculated on the basis of the surrogate price of gas, and not the reported gas cost of the investigated Russian producers.[205] Thus, MEDT of Ukraine used the surrogate price of gas, rather than the reported gas cost, first, to identify the below-cost sales, and second, to assess whether the below-cost sales exhibited the characteristics set out in the first sentence of Article 2.2.1, specifically the second and the third characteristics. We have already found that MEDT of

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[200] Appellate Body Report, *US – Zeroing (Japan)*, para. 140 (fn omitted). See also, Panel Report, *EU – Footwear (China)*, para. 7.260.

[201] Investigation Report, (Exhibit RUS-10b), pp. 25-26. (emphasis added)

[202] Ukraine's response to Panel question No. 50, paras. 17-18.

[203] Ukraine's response to Panel question No. 14, paras. 59, 61, and 63 (emphasis added); Investigation Report, (Exhibit RUS-10b), pp. 25-26.

[204] Ukraine's responses to Panel question No. 14, paras. 59, 61, and 63, and No. 49, paras. 5-16.

[205] Ukraine's response to Panel question No. 50, paras. 17-18.

Ukraine's rejection of the reported gas cost was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement. Thus, the use of costs that were calculated inconsistently with Article 2.2.1.1 tainted MEDT of Ukraine's ordinary-course-of-trade test.

7.115. Ukraine takes the view that a finding that MEDT of Ukraine calculated costs inconsistently with Article 2.2.1.1 cannot lead to a violation of Article 2.2.1. In this regard, Ukraine puts forth two arguments. First, Ukraine argues that 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 to find a consequential violation under Article 2.2.1 due to inconsistencies with Article 2.2.1.1 would "greatly diminish[]" the importance of this provision, and create systemic problems.[206] Second, Ukraine asserts that Russia has not made a *prima facie* case that if costs were not calculated on the basis of the methodology adopted by MEDT of Ukraine, the results of the ordinary-course-of-trade test under Article 2.2.1 would be different.[207] We disagree with Ukraine's arguments.

7.116. With respect to its first argument, we note that Article 2.2.1.1 applies to "[p]aragraph 2". The reference to "[p]aragraph 2" covers not just Article 2.2 but also Article 2.2.1. The panel in *EC – Salmon (Norway)* recognized that the rules for calculating the costs used in a determination under Article 2.2.1 are found in Article 2.2.1.1.[208] It would follow, in our 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. Further, if we were to accept Ukraine's arguments, we would essentially be concluding that the investigating authority was free to disregard the specific rules under Article 2.2.1.1 when calculating the cost of production used for the purposes of the ordinary-course-of-trade test under Article 2.2.1. However, there is nothing in the text of Article 2.2.1 or Article 2.2.1.1 to support such a view. Such an interpretation is also likely to create systemic problems as in conducting their ordinary-course-of-trade test under Article 2.2.1 investigating authorities would be free to use a cost of production calculated inconsistently with Article 2.2.1.1, thereby frustrating the very purpose of this test.[209]

7.117. As regards Ukraine's second argument, we are not permitted to examine whether the results of MEDT of Ukraine's ordinary-course-of-trade test would have been different if it had calculated the costs consistently with its obligations under Article 2.2.1.1 as such an examination would be outside our mandate, and would require us to conduct a *de novo* review of the record evidence. Thus, Russia is not obligated to show that the results of MEDT of Ukraine's ordinary-course-of-trade test would have been different if the reported gas cost was used. We note that Ukraine's argument is that the outcome of the ordinary-course-of-trade test would not have changed if MEDT of Ukraine had calculated the costs of the investigated Russian producers consistently with Article 2.2.1.1 and thus essentially argues that the violations under Article 2.2.1 constituted harmless error. We do not consider such an argument of harmless error to be relevant to our analysis.[210]

7.118. Based on the foregoing, we find that MEDT of Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because in making its determinations under this provision it relied on costs that were calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement.

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[206] Ukraine's response to Panel question No. 15, paras. 67-70.

[207] Ukraine's response to Panel question No. 15, paras. 71-72.

[208] Panel Report, *EC – Salmon (Norway)*, para. 7.252.

[209] Ukraine also makes a contextual argument under Article 2.2.2 of the Anti-Dumping Agreement, contending that if the use of costs calculated inconsistently with Article 2.2.1.1 in the ordinary-course-of-trade test could lead to a violation under Article 2.2.1, then any mistake in the determination of administrative, selling, and general costs or profits under Article 2.2.2 in the ordinary-course-of-trade test could also lead to a violation under Article 2.2.1. Such a result, in Ukraine's view, will be "undesirable and *de facto* absurd" because it would not clarify what authorities should rectify under Article 2.2.1. (Ukraine's response to Panel question No. 15, para. 70). We disagree. While we do not address a claim under Article 2.2.2 in this dispute, in our view, a violation under Article 2.2.1 due to an investigating authority's failure to follow the specific rules set out in the Anti-Dumping Agreement would not be undesirable or absurd.

[210] See, e.g. Panel Reports, *EC – Salmon (Norway)*, fn 763; and *US – Anti-Dumping Methodologies (China)*, para. 7.92. These panels have taken a similar view with respect to parties' arguments based on the concept of harmless error.

7.4.2.2.2 Claim under Article 2.1 of the Anti-Dumping Agreement

7.119. Russia asserts that if in calculating the cost of production, MEDT of Ukraine had used the reported gas cost of the investigated Russian producers, instead of the surrogate price of gas, it would not have been able to conclude that the domestic sales of these producers were outside the ordinary course of trade by reason of price.[211] Thus, it would not have had a proper basis under Article 2.2 of the Anti-Dumping Agreement to disregard the domestic sales of the investigated Russian producers in calculating normal value, and would not have been able to construct the normal value.[212] Therefore, in Russia's view, MEDT of Ukraine should have calculated the dumping margins of these producers by comparing the export price with the comparable price of the like product destined for consumption in Russia, as provided in Article 2.1. Russia submits that MEDT of Ukraine acted inconsistently with Article 2.1 by failing to do so.[213] With respect to the Appellate Body's finding in *US – Zeroing (EC)* that Article 2.1 is a definitional provision, and read in isolation, does not impose independent obligations, Russia asserts that it strongly disagrees with the approach set out in this finding.[214] Russia argues that nothing in the text of Article 2.1 indicates that it does not contain an independent obligation.[215] Ukraine argues that Article 2.1 is a definitional provision and does not impose obligations in isolation.[216] Further, Ukraine submits that Article 2.1 does not apply to the facts of the present case as there were no sales of ammonium nitrate in Russia in the ordinary course of trade.[217]

7.120. Article 2.1 stipulates that a product is to be considered as being dumped i.e. introduced into the commerce of another country at less than its normal value, "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". We share the Appellate Body's view, set out in paragraph 7.112 above, that Article 2.1 is a definitional provision, which when read in isolation, does not impose independent obligations.

7.121. We note that while Russia expresses strong disagreement with the Appellate Body's view in this regard, it does not properly show how MEDT of Ukraine could be said to have acted inconsistently with this provision in the underlying reviews. In particular, Russia's Article 2.1 claim is premised on its view that if MEDT of Ukraine had complied with its obligations under Articles 2.2.1.1 and 2.2.1 in the manner proposed by Russia, it would not have found any basis to conclude that the domestic sales of the investigated Russian producers were not in the ordinary course of trade by reason of price. However as we noted in paragraph 7.117 above, it is not for us to conduct a *de novo* review of the record evidence to ascertain what the results of MEDT of Ukraine's ordinary-course-of-trade test under Article 2.2.1 would have been if the WTO-inconsistencies that we have found with respect to MEDT of Ukraine's determination in this regard were removed. Further, Russia's claim is essentially based on a hypothesis that if MEDT of Ukraine conducted its dumping determinations in the manner proposed by Russia, it would not have any basis to construct the normal value, but would have used domestic sales instead. Even if one assumes that were true, Russia does not show how that makes MEDT of Ukraine's dumping determinations in the underlying reviews inconsistent with Article 2.1 of the Anti-Dumping Agreement. In any case, our role is to resolve this dispute based on the determinations actually made by the investigating authority, and not on the basis of hypothetical situations.

7.122. Based on the foregoing, we find that Russia has not shown that MEDT of Ukraine acted inconsistently with Article 2.1 of the Anti-Dumping Agreement, and reject Russia's claim.

7.4.3 Fair comparison under Article 2.4 of the Anti-Dumping Agreement

7.123. Russia contends that a comparison of the investigated Russian producers' export price with a constructed normal value, which was inflated due to the replacement of the reported gas cost with the surrogate price of gas, was not "fair" within the meaning of the first sentence of

[211] Russia's first written submission, para. 140.
[212] Russia's response to Panel question No. 16, para. 32; second written submission, para. 405; and first written submission, para. 140.
[213] Russia's second written submission, para. 405.
[214] Russia's opening statement at the second meeting of the Panel, para. 132.
[215] Russia's opening statement at the second meeting of the Panel, para. 136.
[216] Ukraine's first written submission, para. 19.
[217] Ukraine's first written submission, paras. 20-22.

Article 2.4.[218] Russia clarifies that its claim is under the first sentence of Article 2.4, and not the second or third, and thus Russia is not arguing that adjustments should have been made to the export price or constructed normal value to ensure a fair comparison between them.[219] Ukraine states that the substance of Russia's claim concerns MEDT of Ukraine's calculation of the constructed normal value based on the surrogate price of gas.[220] Ukraine submits that this is an issue governed under Article 2.2.1.1, not Article 2.4.[221]

7.124. The first sentence of Article 2.4 of the Anti-Dumping Agreement provides that "[a] fair comparison shall be made between the export price and the normal value". This is an independent obligation under Article 2.4.[222]

7.125. We have already found that MEDT of Ukraine acted inconsistently with Articles 2.2, 2.2.1.1, and 2.2.1 of the Anti-Dumping Agreement by rejecting the reported gas cost and replacing it with the surrogate price of gas in calculating the cost of production of the investigated Russian producers. Thus, MEDT of Ukraine constructed the normal value of ammonium nitrate in a WTO-inconsistent manner.

7.126. Russia's claim under Article 2.4 is that MEDT of Ukraine failed to make a "fair" comparison between the export price and normal value because the constructed normal value was "inflated" due to the use of the surrogate price of gas, instead of the reported gas cost. Thus, Russia's claim takes issue with the manner in which MEDT of Ukraine constructed the normal value. Having already concluded that MEDT of Ukraine constructed the normal value of ammonium nitrate in a WTO-inconsistent manner, we do not find it necessary to additionally consider whether by comparing such a constructed normal value with the export price of the investigated Russian producers, MEDT of Ukraine also acted inconsistently with the fair comparison obligation under Article 2.4.

7.127. Based on the foregoing, we exercise judicial economy with respect to Russia's claim under Article 2.4 of the Anti-Dumping Agreement.[223]

7.4.4 Claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement

7.128. Russia, as noted in paragraph 7.62 above, argues that MEDT of Ukraine acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement because in making its likelihood-of-dumping determinations it relied on dumping margins that were calculated inconsistently with Articles 2.1, 2.2, 2.2.1, 2.2.1.1, and 2.4 of the Anti-Dumping Agreement.[224] Russia also makes an independent claim under Article 11.1 in this regard.[225] Ukraine asks us to dismiss these claims based on its view that MEDT of Ukraine calculated the dumping margins consistently with Article 2 of the Anti-Dumping Agreement.[226]

7.129. We recall that Article 11.2 provides that interested parties shall have the right to request the authorities to examine whether the continued imposition of the anti-dumping duty is necessary to offset dumping, and if the authorities determine that the anti-dumping duty is no longer warranted, they shall terminate it immediately. Article 11.3 requires a determination that the expiry of the anti-dumping duty would be likely to lead to, *inter alia*, continuation or recurrence of

[218] Russia's first written submission, para. 133.
[219] Russia's response to Panel question No. 17, para. 34.
[220] See, e.g. Ukraine's second written submission, para. 70.
[221] Ukraine's second written submission, para. 71.
[222] See, e.g. Appellate Body Reports, *US – Zeroing (Japan)*, para. 168; *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142. The Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* found, for example, that the manner in which the dumping margin was calculated by the investigating authority was not impartial, even-handed or unbiased, and thus did not satisfy the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement. (See also Panel Report, *US – Zeroing (Japan)*, para. 7.154).
[223] We note that the Appellate Body in *EU – Biodiesel (Argentina)*, having upheld the panel's finding that the EU authorities acted inconsistently with Articles 2.2.1.1 and 2.2 in calculating the cost of production used for the purpose of constructing normal value, found it unnecessary to examine whether the EU authorities acted inconsistently with the obligation under Article 2.4 to make a fair comparison between the export price and the constructed normal value. (Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.89).
[224] Russia's first written submission, para. 147; second written submission, para. 408.
[225] Russia's first written submission, para. 152; second written submission, paras. 409-410.
[226] Ukraine's first written submission, para. 209.

dumping. These determinations must rest on a sufficient factual basis that allows the investigating authorities to draw reasoned and adequate conclusions.

7.130. Past panels and the Appellate Body have held that if investigating authorities rely on dumping margin calculations as part of their determinations under Article 11.2 or Article 11.3, they must ensure that the margins are calculated consistently with Article 2.[227] If the dumping margins relied on in this regard are calculated inconsistently with the relevant provisions of Article 2, this inconsistency would lead to a violation not just under the relevant provisions of Article 2, but also Articles 11.2 or 11.3 of the Anti-Dumping Agreement.[228] We agree with these findings, and find no reason to adopt a different approach in these proceedings.

7.131. We note that MEDT of Ukraine made a likelihood-of-dumping determination as part of the underlying reviews. It is undisputed that MEDT of Ukraine relied on the dumping margins that it calculated for the investigated Russian producers to make affirmative determinations regarding the likelihood of dumping.[229] We have already found that MEDT of Ukraine calculated the dumping margins inconsistently with Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement in the underlying reviews. Therefore, we find that MEDT of Ukraine also acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement.

7.132. With respect to Article 11.1 of the Anti-Dumping Agreement, while Russia asserts that its claim under this provision is independent of its claims under Articles 11.2 and 11.3[230], we do not consider additional findings under Article 11.1 to be necessary to resolve this dispute.[231] Thus, we exercise judicial economy with respect to this claim under Article 11.1.

7.133. Based on the foregoing, we find that the Ukrainian authorities acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement in relying on dumping margins calculated inconsistently with Articles 2.2, 2.2.1 and 2.2.1.1 to make their likelihood-of-dumping determinations. We exercise judicial economy with respect to Russia's claim under Article 11.1 of the Anti-Dumping Agreement.

7.5 Non-termination of investigation against EuroChem

7.134. We recall, as stated in paragraph 2.1 above, that the Ukrainian authorities originally imposed anti-dumping duties on imports of ammonium nitrate from Russia through the 2008 original decision. EuroChem successfully challenged this decision before the domestic courts in Ukraine. ICIT, as discussed in more detail in paragraph 7.137 below, implemented the judgments of these courts through the 2010 amendment to the 2008 original decision, thereby reducing the anti-dumping duty on EuroChem to 0%. The Ukrainian authorities, however, included EuroChem within the scope of the underlying reviews, and imposed an anti-dumping duty of 36.03% on it pursuant to the 2014 extension decision.[232]

[227] Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.393; Appellate Body Report, *US – Corrosion-Resistant Sunset Steel Review*, para. 127.

[228] Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.393; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127.

[229] Russia's response to Panel question No. 18, para. 37; Ukraine's response to Panel question No. 18, para. 74.

[230] Russia's response to Panel question No. 5, para. 3.

[231] Russia claims that MEDT of Ukraine violated Article 11.1 because the dumping determinations were inconsistent with the relevant provisions of Article 2. (Russia's second written submission, para. 408). This issue is adequately resolved through our findings under Articles 11.2 and 11.3. Further, Russia contends that MEDT of Ukraine would have determined negative dumping margins for the investigated Russian producers if it had used their reported gas cost to calculate these dumping margins, and thus would not have imposed anti-dumping duties. (Russia's second written submission, para. 410). We cannot find a violation under Article 11.1 on this basis as we are not permitted to speculate on whether MEDT of Ukraine would have found these margins to be negative if it calculated them consistently with its WTO obligations.

[232] 2014 extension decision, (Exhibit RUS-4b).

7.135. Russia claims that the Ukrainian authorities acted inconsistently with their WTO obligations in respect of their treatment of EuroChem in the original investigation phase[233] as well as in the underlying reviews, stating in particular that:

a. With respect to determinations made in relation to the original investigation, the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because[234]:

   i. the 2008 decision, as amended by the 2010 amendment, which we refer to as the 2008 amended decision, failed to terminate the investigation against EuroChem; and

   ii. the 2010 amendment imposed a 0% anti-dumping duty on EuroChem, rather than terminate the investigation against it.

b. With respect to the underlying reviews, the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because they[235]:

   i. included EuroChem within the scope of the underlying reviews, instead of excluding it from the scope of such measures; and

   ii. imposed an anti-dumping duty on this producer following the determinations made in the underlying reviews.

c. With respect to the underlying reviews, the Ukrainian authorities' inclusion of EuroChem within the scope of the underlying reviews, as well as subsequent duty imposition, also resulted in violations under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement.[236]

7.5.1 Treatment of EuroChem in the original investigation phase

7.136. MEDT of Ukraine calculated an above *de minimis* dumping margin of 10.78% for EuroChem in the original investigation on imports of ammonium nitrate from Russia.[237] ICIT accepted the recommendations and dumping margins proposed by MEDT of Ukraine, and on this basis imposed an anti-dumping duty of 10.78% on EuroChem, through its 2008 original decision. EuroChem challenged this decision before the District Administrative Court of Ukraine (District Court), contending that the authorities had made errors in calculating its dumping margin. The District Court concluded:

> The case files reaffirm the calculations of the normal value presented by the plaintiff, the export price and the dumping margin which has a **negative value/rate**.
>
> …
>
> Based on the evidence collected and examined in the court session in the aggregate, the court comes to the conclusion on the **absence of dumping**, and, therefore, on the need to satisfy the claims of the plaintiff for declaring unlawful and partial reversal of the [2008 original decision].[238]

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[233] We use the term "original investigation phase" to refer collectively to the original investigation before MEDT of Ukraine/ICIT, domestic court proceedings where the Ukrainian authorities' original determinations were challenged under domestic law, and ICIT's order implementing the judgment of these domestic courts.

[234] Russia's response to Panel question No. 24, paras. 56-58; second written submission, para. 455.

[235] Russia's response to Panel question No. 24, paras. 56 and 59-60; second written submission, para. 455.

[236] Russia's second written submission, para. 461; response to Panel question No. 47, para. 33.

[237] Ukraine's response to Panel question No. 19(a), para. 75; Russia's response to Panel question No. 19(a), para. 38.

[238] Judgment of the District Court 2009, (Exhibit RUS-6b) (emphasis added). In addressing EuroChem's petition, the District Court found that MEDT of Ukraine erroneously considered in the original investigation that EuroChem had provided a discount on domestic sales prices that were used in calculation of the normal value, and thus incorrectly adjusted this normal value by adding the value of the discount to the

7.137. This judgment was upheld on appeal by the higher courts in Ukraine.[239] ICIT implemented these court judgments, noting in its 2010 amendment that "in pursuance of" the judgments of the Ukrainian courts, including the District Court, it had decided:

> 1. To **terminate** in regards of [EuroChem], Commission decision of 21.05.2008 number AD-176/2008 / 143-47 "\On the Application of the Definitive Anti-Dumping Measures on Import into Ukraine of Ammonium Nitrate Originating in the Russian Federation "[i.e. the 2008 decision].
>
> 2. The third paragraph of Section. 2.4 [of the 2008 decision] shall be read as follows:
>
> "For the exporter JSC MCC EuroChem, which is located at: 115114, Russian Federation, m. Moscow Kozhevnicheskiy travel, 4, d. 1.2 - **0%** ".[240]

7.138. Both parties take the view that though the 2010 amendment specifically refers to ICIT's decision to "terminate" the 2008 original decision with regard to EuroChem, there was no termination within the meaning of Article 5.8 of the Anti-Dumping Agreement, which requires "immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*".[241] Ukraine acknowledges that EuroChem, despite imposition of a 0% duty, was not formally excluded from the scope of the original anti-dumping measures.[242] The Ukrainian authorities subsequently included EuroChem in the scope of the underlying reviews; MEDT of Ukraine calculated an above *de minimis* dumping margin for this producer in these reviews; and ICIT imposed an anti-dumping duty on this basis.[243]

7.5.2 Legal standard

7.139. Article 5.8 of the Anti-Dumping Agreement states:

> An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. **There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price.** The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the

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domestic sales prices when calculating the dumping margin. The District Court found that no such discount had, in fact, been given by EuroChem, and thus the adjustment to the normal value was not correct.

[239] Judgment of the Appellate Court 2009, (Exhibit RUS-5b). In upholding the judgment of the District Court, the Kiev Appellate Administrative Court concluded that the District Court "correctly established the circumstances of the case, the court's decision was rendered pursuant to the norms of substantive and procedural law, the respondent did not prove the lawfulness of the issued decision [i.e. the 2008 original decision] and acted contrary to the Constitution and the laws of Ukraine". The Higher Administrative Court of Ukraine, which heard appeals against the judgment of the District Court, and the Kiev Appellate Administrative Court concluded, *inter alia*:

> It also follows from the case files that no discounts were granted by the claimant [i.e. EuroChem] in the ordinary course of trade operations, the conclusion of the first instance court that [MEDT of Ukraine] did not have any grounds for adjustment is lawful.
>
> Under such circumstances, the panel of judges is of the opinion that the first instance court and the court of appeal correctly established the actual circumstances of the case, thoroughly investigated the existing evidence, correctly evaluated them and made a lawful and grounded decision in accordance with the requirements of substantive and procedural law.

(Judgment of the Higher Court, (Exhibit RUS-7b))

[240] 2010 amendment, (Exhibit RUS-8b). (emphasis added)

[241] Russia's response to Panel question No. 20, para. 41; Ukraine's response to Panel question No. 20, para. 78.

[242] Ukraine's response to Panel question No. 20, para. 79.

[243] Investigation Report, (Exhibit RUS-10b), p. 28; 2014 extension decision, (Exhibit RUS-4b).

> importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.[244]

7.140. The second sentence of Article 5.8 requires "immediate termination" of the investigation where investigating authorities determine that the margin of dumping is *de minimis*, i.e. less than 2%. The second sentence has been interpreted by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. Based on the text of the second sentence, and in light of the context provided by other provisions of the Anti-Dumping Agreement, it concluded that Article 5.8 requires immediate termination of the investigation in respect of producers for which a zero or *de minimis* dumping margin is determined in the original investigation.[245] The Appellate Body also stated that the only way to terminate immediately an investigation in respect of such producers is to exclude them from the scope of the anti-dumping duty order.[246] Investigating authorities cannot impose anti-dumping duties – including duties at 0% – on producers excluded from such measures.[247] Indeed, the issuance of an order imposing anti-dumping duty is the ultimate step of an "investigation" contemplated under Article 5.8, and follows the final determination made by the investigating authority.[248] Therefore, if the investigation itself were to be terminated, there could be no order imposing anti-dumping duty, even at 0% rates.[249] The parties do not dispute this interpretation of the second sentence of Article 5.8 by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, or ask us to revisit it.

7.141. Past panels or the Appellate Body have not made any specific findings under Articles 11.1, 11.2, or 11.3 of the Anti-Dumping Agreement regarding the inclusion of a producer found to have had *de minimis* dumping margin in the original investigation, within the scope of an interim or expiry review. But in addressing claims under Article 5.8 of the Anti-Dumping Agreement and Article 11.9 of the SCM Agreement, the panel in *Mexico – Anti-Dumping Measures on Rice* examined the WTO-consistency of a domestic law provision that required an annual review of producers that were found not to have engaged in, *inter alia*, dumping during the original investigation.[250] The panel in that case found that the logical consequence of terminating an investigation against a producer that was found not to be dumping in the original investigation is that this producer cannot be subjected to administrative or changed circumstances reviews, the latter being a review conducted under Article 11.2 of the Anti-Dumping Agreement.[251] The panel concluded on this basis that this domestic law provision was inconsistent with Article 5.8 of the Anti-Dumping Agreement.[252] On appeal, the Appellate Body agreed with the panel's finding, noting, *inter alia*, that because changed circumstances reviews under Article 11.2 examine "the need for the *continued imposition* of the duty", producers excluded from the anti-dumping measure by virtue of their *de minimis* dumping margins in the original investigation cannot be subjected to changed circumstances reviews.[253] The Appellate Body added that if investigating authorities were to undertake a review of producers that were excluded from the anti-dumping measure by virtue of their *de minimis* margins, those producers effectively would be made subject to the anti-dumping measure, inconsistently with Article 5.8.[254]

7.5.3 Evaluation

7.142. We will first examine Russia's claim under Article 5.8 alleging that the Ukrainian authorities acted inconsistently with the second sentence of this provision in the context of the original investigation phase. Then we will examine its claim under Article 5.8 challenging EuroChem's inclusion in the underlying reviews as well as the subsequent imposition of

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[244] Emphasis added.

[245] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 217; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140.

[246] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219.

[247] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 305.

[248] See, e.g. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219.

[249] See, e.g. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219. The Appellate Body found that given that the order establishing anti-dumping duties necessarily occurs after the final determination is made, the only way to terminate immediately an investigation in respect of producers for which a *de minimis* dumping margin is determined is to exclude them from the scope of the anti-dumping duty order.

[250] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.250-7.251.

[251] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.251.

[252] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.251.

[253] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 305. (emphasis added)

[254] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 305.

anti-dumping duty on it pursuant to the reviews. Finally, we will examine Russia's claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement.

7.5.3.1 Claim under Article 5.8 of the Anti-Dumping Agreement concerning the determinations in the original investigation phase

7.143. Russia contends that the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because in implementing the Ukrainian court judgments that found that EuroChem had a negative dumping rate in the original investigation, ICIT: (a) failed to exclude, through the 2008 amended decision, EuroChem from the scope of the original anti-dumping measures; and (b) imposed anti-dumping duty of 0% on EuroChem through the 2010 amendment rather than terminate the measure against it by excluding it from the scope of these measures. Russia argues, relying on the Appellate Body Report in *Mexico – Anti-Dumping Measures on Rice*, that the only way to terminate an investigation *immediately* in respect of a producer with a *de minimis* margin of dumping, as required by Article 5.8 of the Anti-Dumping Agreement, is to exclude it from the scope of the anti-dumping duty order.[255] The Ukrainian authorities failed to do so, and thus, according to Russia, acted inconsistently with Article 5.8.

7.144. Russia disputes in this regard Ukraine's argument that the obligations under Article 5.8 do not apply to the present case because the Ukrainian courts did not have the legal competence under domestic law to calculate EuroChem's dumping margin, and the Ukrainian authorities themselves never calculated a *de minimis* dumping margin for EuroChem in the original investigation. Russia asserts that such an argument is based on Ukrainian domestic law, and is not relevant in WTO proceedings.[256] Russia asserts that considering ICIT implemented the orders of Ukrainian courts that found absence of dumping by EuroChem, the combined effect of the Ukrainian court judgments, and their implementation by ICIT's 2010 amendment, was that the dumping margin in the original investigation phase for EuroChem was found to be *de minimis*.[257]

7.145. Ukraine, in rebutting Russia's arguments, does not dispute that if a *de minimis* dumping margin is determined for a producer in the original investigation, pursuant to the second sentence of Article 5.8, the investigating authority would have to terminate the investigation against this producer. Ukraine acknowledges that the imposition of a 0% anti-dumping duty on EuroChem is evidence that its authorities did not terminate, within the meaning of Article 5.8, the investigation against EuroChem.[258] However, it argues that the "central aspect" of the Appellate Body's finding in *Mexico – Anti-Dumping Measures on Rice* was that there should be a legally valid determination of a *de minimis* dumping margin in respect of a given producer.[259] Ukraine also contends that in the original determination, the Ukrainian authorities calculated an above *de minimis* dumping margin for EuroChem because: (a) the Ukrainian courts did not have the authority under domestic law to recalculate EuroChem's dumping margin; (b) ICIT imposed an anti-dumping duty of 0% on EuroChem to implement the court orders, but never recalculated its dumping margin.[260] Therefore, in Ukraine's view, the obligations under the second sentence of Article 5.8 of the Anti-Dumping Agreement were not triggered in the present case.[261]

7.146. We note that the parties do not disagree on the legal interpretation of the second sentence of Article 5.8, which requires "immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*". Instead, they disagree on whether these obligations were triggered in the present case, as Ukraine contends no legally valid *de minimis* dumping margin was determined for EuroChem in the original investigation phase. Thus, the question that we have to address is a factual one: Was a *de minimis* dumping margin determined for EuroChem in the original investigation phase? If it was, then the obligations under the second sentence of Article 5.8 of the Anti-Dumping Agreement would apply, and we would rule that the Ukrainian authorities were required to terminate the original investigation against EuroChem.

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[255] Russia's first written submission, para. 175.
[256] Russia's second written submission, para. 479.
[257] Russia's second written submission, para. 474; opening statement at the second meeting of the Panel, para. 171.
[258] Ukraine's response to Panel question No. 20, paras. 78-79.
[259] Ukraine's first written submission, para. 238.
[260] Ukraine's first written submission, para. 253; response to Panel question No. 21, para. 83; and opening statement at the first meeting of the Panel, para. 138.
[261] Ukraine's first written submission, para. 256.

7.147. In this regard, we note, as set out in paragraph 7.136 above, that the District Court concluded that there was "absence of dumping" by EuroChem in the original investigation. Further, the District Court found that the case files reaffirmed the calculations presented by EuroChem showing that its dumping margin had a "negative value/rate". This District Court judgment was upheld by higher courts, which found that the District Court had correctly established the circumstances of the case, and thoroughly investigated the existing evidence.[262] ICIT itself implemented these court judgments, stating that in "pursuance" of the court judgments it had decided to, *inter alia*, make the anti-dumping duty on EuroChem 0%. We find nothing in this 2010 amendment, or other evidence on record that would suggest to us that in implementing the court judgments, ICIT disputed the finding of the courts that EuroChem had a negative value/rate of dumping.[263] Indeed, Ukraine submits that it does not question the legal validity of the rulings made in the court judgments for EuroChem.[264] In these circumstances, we agree with Russia 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 *de minimis*.[265]

7.148. Further, Ukraine's argument as to why no "legally valid" dumping margin was calculated for EuroChem in the original investigation phase is based on the following principal grounds:

a. the courts made their findings based on dumping margin calculations presented by EuroChem alone, and ICIT itself could not provide refuting evidence to the Ukrainian courts as it has a policy of not disclosing confidential dumping margin calculations in court proceedings, which in Ukraine are open to the public[266];

b. the Ukrainian courts were not permitted to calculate any dumping margins as only MEDT of Ukraine and ICIT have the authority under Ukrainian law to calculate dumping margins[267];

c. ICIT's 2010 amendment only enforced the rulings of the Ukrainian courts that EuroChem's dumping margin was not correctly determined, and ICIT itself did not recalculate the dumping margin originally determined[268]; and

d. in the absence of any specific instructions by the court to reopen the investigation and apply a particular methodology for calculating the dumping margin, ICIT could not recalculate the dumping margin, but had to bring down the duty to 0%.[269]

7.149. These grounds, however, are essentially matters under Ukrainian domestic law. It is up to each WTO Member to decide how it implements decisions of its domestic courts, but these arrangements or classifications under domestic law are not determinative of issues raised in WTO

[262] See fn 239 above.

[263] Ukraine submits in this regard that ICIT did not accept that EuroChem had a negative or *de minimis* dumping margin because it did not exclude EuroChem from the original anti-dumping measures but merely assigned it a 0% duty. (Ukraine's response to Panel question No. 21, para. 82). We do not see how ICIT's conduct in this regard, which Russia alleges is WTO-inconsistent, is proof that ICIT did not accept the courts' finding (which it implemented) that EuroChem had a negative rate of dumping. Moreover, Ukraine submits that Exhibits UKR-53 (BCI), UKR-54 (BCI), UKR-55 (BCI), and UKR-56 (BCI) show that the Ukrainian authorities did not recalculate the dumping margin, and did not endorse any dumping margin calculated by the Courts. (Ukraine's second written submission, para. 99). However, Ukraine does not attempt to show what in these exhibits supports Ukraine's submission in this regard.

[264] Ukraine's first written submission, para. 253.

[265] We also find it relevant to note that accepting Ukraine's argument essentially means that if investigating authorities correctly calculate the dumping margin in an original investigation, and find the dumping margin to be *de minimis*, they would be required, pursuant to the second sentence of Article 5.8, to immediately terminate the investigation against an exporter. But, if the margins are calculated as above *de minimis* due to substantive or clerical errors in the authorities' determination, and these errors are successfully challenged in domestic courts, investigating authorities may rely on domestic law provisions to avoid complying with the obligations under this second sentence. We do not consider that such an asymmetrical application of the second sentence of Article 5.8 is rational, or intended under the Anti-Dumping Agreement.

[266] Ukraine's response to Panel question No. 21, paras. 84-85.

[267] Ukraine's opening statement at the first meeting of the Panel, paras. 138 and 142; response to Panel question No. 21, para. 83.

[268] Ukraine's opening statement at the first meeting of the Panel, para. 138.

[269] Ukraine's second written submission, para. 97; response to Panel question No. 22, paras. 92-93.

dispute settlement proceedings.[270] Thus, we are not persuaded that the grounds advanced by Ukraine show that no *de minimis* dumping margin was determined for EuroChem in the original investigation phase.

7.150. We note, for instance, Ukraine's assertion that because court hearings are open to the public in Ukraine, ICIT could not provide its own dumping calculations, or refuting evidence to the courts. Thus, the courts' judgments were based on submissions made by EuroChem alone. Even if this was true, such supposed restraints on ICIT arise under domestic law. We do not see how they affect the probative value of the court judgments, as implemented by ICIT, in these panel proceedings.[271] Further, considering ICIT implemented court judgments that found that EuroChem had a negative rate of dumping, we do not see on what basis Ukraine now argues that no negative or *de minimis* dumping margin was found for EuroChem in the original investigation phase. The fact that in implementing the court judgments which found negative rate of dumping, ICIT did not, or could not, recalculate the dumping margin itself is, again, a matter of domestic law, and does not diminish the probative value of these court judgments or ICIT's order implementing it.[272] Ukraine thus has failed to rebut Russia's submission that the record evidence in the original investigation phase shows the absence of dumping by EuroChem.

7.151. Therefore, we agree with Russia that the obligation under the second sentence of Article 5.8 applies in this case because EuroChem had a *de minimis* dumping margin in the original investigation phase. In these circumstances, the Ukrainian authorities would have been required pursuant to the second sentence of Article 5.8 to immediately terminate the investigation against EuroChem. As stated in paragraph 7.140 above, the only way to terminate the investigation against a producer found to have *de minimis* dumping margin in the original investigation is to exclude that producer from the scope of the anti-dumping measures, and not to impose any anti-dumping duty on it, even at a 0% rate. However, as Ukraine acknowledges, the Ukrainian authorities failed to exclude EuroChem from the scope of the original anti-dumping measures, specifically the 2008 amended decision. They also imposed a 0% anti-dumping duty on EuroChem through the 2010 amendment. Thus, the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement.

7.152. Based on the foregoing, we find that the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement because they:

a. failed to exclude EuroChem from the scope of the original anti-dumping measures, specifically the 2008 amended decision; and

b. imposed a 0% anti-dumping duty on EuroChem through the 2010 amendment, instead of excluding it from the scope of the anti-dumping duty order.

[270] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 82.

[271] See, e.g. Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, fn 452. The Appellate Body noted in this case that restrictions under domestic law on the executive branch from taking any action on a matter during the pendency of domestic judicial proceedings could not provide a basis for delaying compliance with the DSB's recommendations and rulings beyond the reasonable period of time.

[272] In any event, we observe that Ukraine has changed its factual arguments over the course of the proceedings on whether, as a matter of Ukrainian domestic law, the Ukrainian authorities could recalculate the dumping margin pursuant to the court judgments. In its first written submission, Ukraine stated that "under the Ukrainian Anti-Dumping Law and the Constitution of Ukraine (Article 19), a re-calculation of a dumping margin can be performed only in course of a review of an anti-dumping duty". (Ukraine's first written submission, fn 85). However, in subsequent responses it stated that "[i]t is only when the Court specifically instructs ICIT to reopen the investigation and adopt a particular methodology" can ICIT recalculate the dumping margin. (Ukraine's response to Panel question No. 22, para. 94). These two descriptions appear to contradict each other. The first description suggests that the Ukrainian authorities can only calculate the dumping margins in a review, and thus cannot do so pursuant to a court judgment. The second description suggests that the Ukrainian courts can ask ICIT to recalculate dumping margins even in the absence of a review. In this regard, we also observe that in support of its argument that absent court instructions to reopen the investigation and to apply a particular methodology to calculate the dumping margin, ICIT had no other option under Ukrainian law but to reduce the anti-dumping duty down to zero, Ukraine cites Articles 258-259 of the Code of Administrative Procedure of Ukraine (Exhibit UKR-43) and Article 4 of Ukraine's Law on enforcement proceedings, (Exhibit UKR-44). (Ukraine's second written submission, para. 97; response to Panel question No. 22, para. 92). Ukraine does not show how these provisions of Ukrainian law support its argument.

7.5.3.2 Claim under Article 5.8 of the Anti-Dumping Agreement concerning the underlying reviews

7.153. Russia argues that the Ukrainian authorities' inclusion of EuroChem within the scope of the underlying reviews, and their decision to impose an anti-dumping duty on this producer through the 2014 extension decision was inconsistent with the obligation under Article 5.8 to "immediately terminate" an investigation against a producer found not to be dumping in the original investigation.[273] We note that Ukraine makes two main arguments as to why the Ukrainian authorities did not violate the second sentence of Article 5.8 in including EuroChem in the underlying reviews, and then imposing an anti-dumping duty on it following the review determinations. First, it argues that no legally valid *de minimis* dumping margin was determined for EuroChem in the original investigation phase.[274] Second, it submits, relying on the panel reports in *US – Corrosion-Resistant Steel Sunset Review* and *US – DRAMS*, that Article 5.8 does not apply to review determinations, and thus Russia's claim under this provision fails.[275] Thus, Ukraine contends that even if the dumping margin calculated in a review is *de minimis*, Article 5.8 does not impose an obligation on investigating authorities to terminate such a review. In any case, Ukraine notes that the margin calculated for EuroChem in the underlying reviews was not *de minimis*.

7.154. We have already rejected in paragraph 7.151 above Ukraine's first argument that no legally valid *de minimis* dumping margin was determined for EuroChem in the original investigation phase. With respect to its second argument, we note Russia's submission that Ukraine's reliance on the panel reports in *US – Corrosion-Resistant Steel Sunset Review* and *US – DRAMS* is inapposite because the question before the Panel is not whether a *de minimis* threshold applies in review determinations, as was discussed by the panels in these two cases.[276] Instead, the question in Russia's view concerns the consequences of a finding that a producer had a *de minimis* dumping margin in the original investigation phase on the subsequent interim or expiry review.[277] We agree.

7.155. The interpretative issue before us is indeed not the same as that before the panels in *US – Corrosion-Resistant Steel Sunset Review* and *US – DRAMS*. The issue in those cases was whether the *de minimis* standard of Article 5.8 applies in the context of determinations made in expiry and other types of reviews. The panels found in this context that the *de minimis* standard of Article 5.8 applies to original investigations, not such types of reviews.[278] In contrast, the issue before us is whether Article 5.8 permits investigating authorities to include in a review a producer found to have had a *de minimis* dumping margin in the *original* investigation and impose anti-dumping duties on it pursuant to such review.

7.156. We consider that once an investigation is terminated, or brought to an end against a producer, it cannot subsequently be revived through an interim or expiry review. We find support for this view in the panel and the Appellate Body reports in *Mexico – Anti-Dumping Measures on Rice* which stated that the logical consequence of terminating an investigation against a producer that was found not to be dumping in the original investigation is that this producer cannot be subjected to administrative or changed circumstances reviews.[279] The inclusion of such a producer in an interim or expiry review as well as the subsequent anti-dumping duty imposition on it following such reviews would be inconsistent with the obligation under the second sentence of Article 5.8 to immediately terminate the original investigation against it. Therefore, we reject Ukraine's second argument as well.

7.157. Based on the foregoing, we find that the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement in including EuroChem within the scope of the review determinations, and in imposing anti-dumping duties on it through the 2014 extension decision.

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[273] Russia's response to Panel question No. 24, paras. 59-60.
[274] Ukraine's first written submission, para. 238.
[275] Ukraine's second written submission, paras. 90-91.
[276] Russia's opening statement at the second meeting of the Panel, para. 160.
[277] Russia's opening statement at the second meeting of the Panel, para. 160.
[278] Panel Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.85; *US – DRAMS*, paras. 6.89-6.90.
[279] See para. 7.140 above.

7.5.3.3 Claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement concerning the underlying reviews

7.158. Russia's claims under Articles 11.1, 11.2, and 11.3 are based on the "link" between these provisions and Article 5.8.[280] Russia contends that the Ukrainian authorities acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement by including EuroChem within the scope of the underlying reviews and imposing anti-dumping duties on it following these reviews.[281] Russia also submits that the Ukrainian authorities acted inconsistently with Article 11.1 of the Anti-Dumping Agreement because if there should have been no anti-dumping duty to start with, the question of that duty remaining in force to the extent necessary to counteract dumping, as provided in Article 11.1 does not arise.[282] Ukraine argues that Russia's claims under Articles 11.1, 11.2, and 11.3 must be rejected because they are purely consequential to its claims under Article 5.8; that, in its first written submission, Russia merely cited the provisions of Articles 11.1, 11.2, and 11.3 without specifying any action or inaction of the Ukrainian authorities that resulted in a violation under these provisions; and that Russia has failed to make a *prima facie* case as to why these provisions were violated.[283]

7.159. We note that Russia's claims under Articles 11.1, 11.2, and 11.3 arise from the same basis as its claims under Articles 5.8 with respect to the underlying reviews, namely, the inclusion of EuroChem within the scope of the underlying reviews and imposition of anti-dumping duty on it following the determinations made in the underlying reviews. In these circumstances, we do not consider that additional findings under these provisions would contribute towards the positive resolution of this dispute.

7.160. Based on the foregoing, we exercise judicial economy with respect to Russia's claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement.

7.6 Likelihood-of-injury determination

7.161. In its panel request, and its request for findings in the first written submission, Russia claimed that Ukraine acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because the Ukrainian authorities "determined and relied on" injury which was not established in accordance with Articles 3.1 and 3.4 of this Agreement.[284] Russia explains that this request covers the following two separate claims[285]:

a. MEDT of Ukraine violated Articles 11.2, 11.3, and 3.1 of the Anti-Dumping Agreement because it failed to exclude imports of the Russian producer EuroChem, which had negative dumping margin in the original investigation phase, from the volume of dumped imports[286]; and

b. MEDT of Ukraine violated Articles 11.2, 11.3, and 3.4 of the Anti-Dumping Agreement because its evaluation of economic factors and indices having a bearing on the state of the Ukrainian domestic industry was not based on an objective examination of positive evidence.[287]

[280] Russia's first written submission, paras. 172 and 177.
[281] Russia's first written submission, para. 177; second written submission, para. 520.
[282] Russia's response to Panel question No. 26, para. 73.
[283] Ukraine's first written submission, para. 235; second written submission, paras. 112 and 115.
[284] Russian's panel request, item number 17; first written submission, para. 347(8).
[285] In addition to these two claims, Russia made what it described as an "argument" challenging MEDT of Ukraine's analysis in a section of the Investigation Report titled "[p]ossibility of new types of dumping that will cause injury to the national producer". (Russia's response to Panel question No. 37, para. 110). In this section, MEDT of Ukraine considered certain arguments regarding the possible increase of imports from Russia into Ukraine because, for instance, other countries had already imposed anti-dumping duties on Russian exports of ammonium nitrate, and Ukraine was one of the key consumers of ammonium nitrate from Russia. (Investigation Report, (Exhibit RUS-10b), p. 16). Russia clarified that this "argument" does not pertain to any of the two claims made by Russia in these proceedings. (Russia's response to Panel question No. 53, para. 45). Therefore, we have no basis to address this argument.
[286] Russia's response to Panel question No. 33, para. 94.
[287] Russia's response to Panel question No. 33, para. 94.

7.162. In response to Ukraine's submission that MEDT of Ukraine made a likelihood-of-injury determination in the underlying reviews, and that Article 11, not Article 3, applies to such a determination, Russia states that when investigating authorities assess the *current* state of the domestic industry in a review to ascertain whether the industry is suffering injury, this assessment has to comply with the relevant provisions of Article 3.[288] Russia asserts that MEDT of Ukraine made such an assessment in the underlying reviews, and thus made an injury determination within the meaning of Article 3, but this determination did not comply with Articles 3.1 and 3.4.[289] However, Russia clarifies that it is not actually making independent claims under Articles 3.1 and 3.4, in the sense that it is not asking us to make independent findings under these provisions.[290] Instead, it is contending that because MEDT of Ukraine relied on an injury assessment that did not comply with Article 3 to make its likelihood-of-injury determination, it acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement.[291]

7.163. Ukraine states that MEDT of Ukraine was neither required to nor made an injury determination under Article 3 of the Anti-Dumping Agreement.[292] Instead, it made a likelihood-of-injury determination within the meaning of Articles 11.2 and 11.3. Ukraine asks us to dismiss Russia's injury-related claims because they suffer from a legal error inasmuch as Russia asks us to review MEDT of Ukraine's likelihood-of-injury determination under Article 3, rather than Article 11 of the Anti-Dumping Agreement.[293]

7.6.1 Legal standard

7.164. The enquiries relating to injury under Article 11.2 and Article 11.3 of the Anti-Dumping Agreement, while worded differently, are similar. Article 11.2 states that interested parties shall have the right to request the authorities to examine, *inter alia*, "whether the injury would be likely to continue or recur if the [anti-dumping] duty were removed or varied". If pursuant to a review conducted under Article 11.2, the authorities determine that the anti-dumping duty is no longer warranted, they shall terminate this duty immediately. Article 11.3 refers to a determination on whether the expiry of the existing anti-dumping duty "would be likely to lead to continuation or recurrence of dumping and injury". Article 11.3 requires investigating authorities to terminate the existing anti-dumping duty unless the authorities find a likelihood of injury (and dumping) in the expiry review.

7.165. Neither Article 11.2 nor Article 11.3 prescribes a specific methodology that investigating authorities must follow when making a likelihood-of-injury determination. Thus, investigating authorities have some discretion in this regard. However, like in the context of likelihood-of-dumping determinations, the use of the words "review" and "determine" in Article 11.3 suggests that the investigating authorities' likelihood-of-injury determination must rest on a sufficient factual basis that allows the authorities to draw reasoned and adequate conclusions.[294] Considering the use of the words "review" and "determine" in Article 11.2, as stated above, the same standard may be said to apply to likelihood-of-injury determinations made in the context of interim reviews conducted pursuant to this provision.[295] Moreover, as we noted above, investigating authorities are also under a general obligation, pursuant to Article 17.6(i) of the Anti-Dumping Agreement, to establish facts properly and evaluate them in an unbiased and objective manner, and this obligation applies in reviews as well. Therefore, if the authorities' conclusions regarding the likelihood of injury are not reasoned and adequate, or based on a sufficient factual basis, thus showing that their determination was not based on an objective and unbiased evaluation of properly established facts, the determination would be inconsistent with Articles 11.2 and 11.3 of the Anti-Dumping Agreement.

7.166. With respect to the application of Article 3 of the Anti-Dumping Agreement to likelihood-of-injury determinations made in the context of Article 11 reviews, the Appellate Body

[288] Russia's response to Panel question No. 32(b), para. 93.
[289] Russia's responses to Panel question No. 32(a), para. 92; and No. 31, para. 91.
[290] Russia's responses to Panel question No. 32(a), para. 92; and No. 51, para. 35.
[291] Russia's responses to Panel question No. 32(a), para. 92; and No. 51, para. 35; opening statement at the second meeting of the Panel, para. 200.
[292] Ukraine's first written submission, paras. 269 and 274.
[293] Ukraine's first written submission, paras. 264 and 305.
[294] See, e.g. Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.
[295] Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.367 and 7.375. This panel took a similar view with respect to the obligations under Article 11.2 of the Anti-Dumping Agreement.

has noted that Article 3 is titled "[d]etermination of injury" and lays down the steps involved and the evidence to be examined in order to make an injury determination.[296] This determination is mandatory in the context of an original investigation where investigating authorities must demonstrate, pursuant to such a determination, that the domestic industry is facing injury or a threat thereof at the time of this investigation.[297] However, the Appellate Body has clarified that such an injury determination under Article 3 is not required in an expiry review, which requires a likelihood-of-injury determination, not an injury determination.[298]

7.167. The Appellate Body's clarification was based on the fact that there are no cross-references to Article 3 in the text of Article 11.3, and Article 3 itself does not indicate that the investigating authorities must make an injury determination in a review.[299] The Appellate Body also explained that the lack of a textual basis to apply Article 3 in likelihood-of-injury determinations makes sense in light of the different nature and purpose of original investigations on one hand, and reviews on the other. In particular, unlike in the case of an original investigation, investigating authorities are not required to demonstrate in an interim or expiry review that the domestic industry is suffering material injury at the time of the review. Instead, to allow authorities to maintain an existing anti-dumping duty, Article 11.3 requires them to review an anti-dumping duty order that has already been established – following the prerequisite determinations of dumping and injury – so as to determine whether that order should be continued or revoked.[300] Similarly, Article 11.2 gives interested parties the right to request investigating authorities to, *inter alia*, examine whether the injury would be likely to continue or recur if the anti-dumping duty were removed, or varied, or both.

7.168. While injury determinations are not required in the context of reviews, certain of the analyses mandated by Article 3 may prove to be probative, or possibly even required, in order for investigating authorities to arrive at a "reasoned conclusion".[301] Factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination.[302] The necessity of conducting such an analysis in a given case results from the requirements imposed by Article 11.3 (or Article 11.2) – not Article 3 – that a likelihood-of-injury determination rest on a sufficient factual basis so as to allow the authorities to draw reasoned and adequate conclusions.[303]

7.169. While there is no obligation to make an injury determination under Articles 11.2 and 11.3, past panels have dealt with situations where the investigating authorities were alleged to have made an injury determination under Article 3 in a review. In *EU – Footwear (China)*, there was no dispute between the parties that the investigating authority had made an injury determination, and relied on it in making its likelihood-of-injury determination.[304] The panel stated that if investigating authorities make an injury determination in a review that is inconsistent with Article 3, and rely on that injury determination to make a likelihood-of-injury determination, the inconsistency with Article 3 would taint the likelihood determination.[305] The panel's rationale was that in such a case the likelihood determination would not rest on a sufficient factual basis, and thus not allow the investigating authorities to draw reasoned and adequate conclusions regarding the likelihood of injury.[306] Thus, the likelihood-of-injury determination would be inconsistent with

[296] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 277.
[297] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 279. See, e.g. Article 3.5 of the Anti-Dumping Agreement, which requires investigating authorities to "demonstrate[] that the dumped imports are … causing injury … to the domestic industry".
[298] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 279.
[299] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 278. The Appellate Body's findings were under Article 11.3, not Article 11.2, but considering the similar text and nature of enquiry on injury in both of these provisions, we consider that the Appellate Body's finding is equally relevant to determinations under Article 11.2.
[300] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 279.
[301] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.
[302] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.
[303] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284. While the Appellate Body reached its conclusions with respect to Article 11.3, considering the similar text and purpose of Article 11.2 of the Anti-Dumping Agreement, the same standards may be said to apply to likelihood-of-injury determinations in interim reviews as well.
[304] Panel Report, *EU – Footwear (China)*, paras. 7.334 and 7.338.
[305] Panel Report, *EU – Footwear (China)*, para. 7.337.
[306] Panel Report, *EU – Footwear (China)*, para. 7.337.

Article 11.3. On the basis of this understanding, that panel considered whether the investigating authority had failed to act in accordance with Article 3 of the Anti-Dumping Agreement when it made its injury determination in the review.[307] However, it clarified that it would make its findings under Article 11.3, not Article 3 *per se*, as Article 3 is not directly applicable to likelihood-of-injury determinations.[308] In *US – Oil Country Tubular Goods Sunset Reviews*, the panel stated that it would address the complainant's claims under Article 3 only to the extent it found that the investigating authority had made an injury determination, as opposed to a likelihood-of-injury determination in the expiry review.[309] Having concluded that the investigating authority did not make an injury determination, the panel confined its review to claims under Article 11.3, and declined those relating to Article 3.[310]

7.6.2 Evaluation

7.170. We must consider two threshold questions before examining the substantive aspects of Russia's injury-related claims. First, we must decide whether, as a legal matter, we can examine the consistency of injury-related aspects of MEDT of Ukraine's determinations in an interim and expiry review with Article 3 of the Anti-Dumping Agreement. We acknowledge Russia's clarification that it is not making independent claims under Article 3, and thus we are not expected to make independent findings of violations with respect to Article 3 provisions.[311] But, Russia claims that MEDT of Ukraine acted inconsistently with Articles 11.1, 11.2, and 11.3 "because it determined and relied on injury which was not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement".[312] Russia asks us to conclude, as part of its Article 11 claims, that MEDT of Ukraine's determinations did not comply with Articles 3.1 and 3.4 (without making independent findings in this regard).[313] Therefore, we must consider whether MEDT of Ukraine made a determination in the underlying reviews that is governed under Article 3, and specifically Articles 3.1 and 3.4.

7.171. In this regard, Russia acknowledges the Appellate Body's finding in *US – Oil Country Tubular Goods Sunset Reviews* that Article 3 does not apply to expiry reviews, and does not ask us to deviate from these findings of the Appellate Body.[314] However, it asserts that if investigating authorities make a determination of injury under Article 3, they must ensure that this injury determination complies with the relevant provisions of Article 3.[315] Russia contends that MEDT of Ukraine made such an injury determination in the underlying reviews.[316] In our view, the issue that we have to resolve is a factual one: Did MEDT of Ukraine make an injury determination under Article 3 of the Anti-Dumping Agreement?

7.172. If we find that MEDT of Ukraine did not make such an injury determination, then the second question that we must address is whether we can, consistent with our terms of reference, examine Russia's injury-related claims under Articles 11.1, 11.2, and 11.3. In particular,

[307] Panel Report, *EU – Footwear (China)*, para. 7.340.
[308] Panel Report, *EU – Footwear (China)*, para. 7.157.
[309] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.276.
[310] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.279.
[311] Russia's response to Panel question No. 51(a), para. 35.
[312] Russia's first written submission, para. 347(8), opening statement at first meeting of the Panel, para. 125; and second written submission, para. 551.
[313] See, e.g. Russia's first written submission, para. 347(8); second written submission, paras. 551 and 553; and opening statement at the second meeting of the Panel, para. 200.
[314] Russia's second written submission, para. 569. Russia appears to distinguish the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews* by arguing that provisions other than Articles 3.7 and 3.8 were not subject to detailed analysis in this case. (Russia's second written submission, paras. 563-565). But it ultimately concludes, based on its understanding of the panel's and the Appellate Body's finding in this case, that Article 3 generally does not apply to expiry reviews, but if investigating authorities make an examination falling within Article 3, then they are bound by Article 3. (Russia's second written submission, para. 569). We do not preclude the possibility that investigating authorities may, on their own volition, make an injury determination under Article 3 in the context of a review, in which case they would have to follow the obligations under Article 3. But, contrary to Russia's assertion, the Appellate Body's finding is not limited to Articles 3.7 and 3.8 of the Anti-Dumping Agreement. The Appellate Body specifically upheld the panel's finding that Article 3 does not apply to likelihood-of-injury determinations, and declined to make any findings under Articles 3.1, 3.2, 3.4, and 3.5. (Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 285).
[315] Russia's second written submission, paras. 566 and 569; opening statement at the first meeting of the Panel, paras. 133-134.
[316] Russia's response to Panel question No. 31, para. 91.

considering Russia claimed in the panel request that the Ukrainian authorities acted inconsistently with these Article 11 provisions because they "determined and relied on injury" which was not established in accordance with provisions of Article 3, should Russia's claim fail if we find that MEDT of Ukraine did not make such an injury determination?

7.6.2.1 Whether MEDT of Ukraine made an injury determination under Article 3 in the underlying reviews

7.173. Russia bears the burden of establishing that MEDT of Ukraine made an injury determination under Article 3 in the underlying reviews.[317] Ukraine denies that MEDT of Ukraine made such an injury determination, and submits instead that MEDT of Ukraine only examined, as part of its likelihood-of-injury determination, whether the domestic industry had completely recovered from the material injury it was found to suffer in the original investigation.[318] Russia contends, however, that MEDT of Ukraine made such an injury determination because it assessed the *current* state of the domestic industry in the underlying reviews, and did not make a purely prospective analysis.[319] Russia makes two main arguments in support of its view.

7.174. First, noting that Articles 11.2 and 11.3 refer to the likelihood of *continuation* or *recurrence* of injury to the domestic industry, Russia states that MEDT of Ukraine made a likelihood-of-*continuation*-of-injury determination in the underlying reviews, and not a likelihood-of-*recurrence*-of-injury determination, though Ukraine disputes this statement.[320] Russia asserts that considering only existing injury can continue, investigating authorities can make a positive determination of likelihood of *continuation* of injury only when they find that the domestic industry is suffering material injury during the period of review, or currently suffering injury.[321] Therefore, in Russia's view, MEDT of Ukraine must have examined the existing or current state of the domestic industry, and thus made an injury determination under Article 3. Second, Russia points to MEDT of Ukraine's statements in several parts of the Investigation Report that allegedly show that it made such an injury determination.[322]

7.175. Regarding Russia's first argument, as we stated above, whether or not MEDT of Ukraine made an injury determination is a factual issue that has to be resolved based on an examination of its Investigation Report. Thus, we cannot assume that MEDT of Ukraine made an injury determination, even assuming that MEDT of Ukraine made a determination regarding the likelihood of continuation, not recurrence of injury, to the domestic industry.[323] We thus turn to Russia's second argument, i.e. the Investigation Report shows that MEDT of Ukraine made an injury determination under Article 3.

7.176. Russia quotes from parts of the Investigation Report that allegedly show that MEDT of Ukraine made an injury determination. Russia notes in this regard that:

a. MEDT of Ukraine examined and evaluated such factors qualifying the state of the domestic industry as the volume of dumped imports, production and sales of ammonium nitrate by domestic producers, capacity utilization and stock reserves, productivity of

[317] Russia as the complainant has the burden of making a *prima facie* case with respect to its claims. Moreover, as the party asserting that MEDT of Ukraine made an injury determination, it has the burden to prove it.

[318] Ukraine's first written submission, para. 270.

[319] See, e.g. Russia's response to Panel question No. 32(a), para. 92.

[320] Russia's response to Panel question No. 35(b), para. 104; Ukraine's second written submission, para, 137. Ukraine states that MEDT of Ukraine made a determination regarding the *recurrence*, not *continuation*, of injury to the domestic industry.

[321] Russia's response to Panel question No. 35(b), para. 105.

[322] Russia's response to Panel question No. 31, paras. 88-91.

[323] Russia does not argue that MEDT of Ukraine was *required* to make an injury determination because it made a likelihood-of-continuation-of-injury determination. (Russia's response to Panel question No. 55, para. 49). Instead, Russia's argues that MEDT of Ukraine made a likelihood-of-continuation-of-injury determination in support of its factual assertion that MEDT of Ukraine made an injury determination. Considering, as stated above, we have to examine, as a factual matter, whether MEDT of Ukraine made an injury determination, we do not find it necessary to resolve the disagreement between the parties as to whether MEDT of Ukraine made a determination regarding the *continuation*, or *recurrence*, of injury to the domestic industry.

labour, investments, the financial performance of the domestic producers, and the liquidity of assets.[324]

b. It assessed through such an examination whether the conditions of the domestic industry had deteriorated due to dumped imports.[325]

c. Based on this analysis of the current state of the domestic industry, MEDT of Ukraine concluded that injury to the domestic industry was not completely eliminated, and further when making its recommendations stated that the level of anti-dumping measures "was not sufficient to eliminate injury to the [domestic industry]".[326]

7.177. Russia takes the view that MEDT of Ukraine could only have reached a conclusion that injury to the domestic industry was not completely eliminated by examining the current state of the domestic industry, and this examination was not conducted in accordance with Article 3 of the Anti-Dumping Agreement.[327] In addition, Russia submits that the following references in the Investigation Report show that MEDT of Ukraine made an injury determination:

a. MEDT of Ukraine stated in section 11.3 of the Investigation Report that it would conduct an "analysis of the state of the Ukrainian [domestic] industry"[328];

b. considered "the changes in the situation of the Ukrainian domestic industry since the imposition of the anti-dumping measures"[329]; and

c. concluded that "the Ukrainian industry had not completely recovered from the injury".[330]

7.178. Russia states that there is no difference between a finding that the domestic industry did not completely recover from injury, and a finding that the domestic industry was suffering material injury caused by dumped imports.[331]

7.179. To ascertain whether MEDT of Ukraine made an injury determination, we must holistically review its injury analysis, and consider the references relied upon by Russia in their proper context. We note that MEDT of Ukraine's analysis on injury-related issues is contained in section 11 of the Investigation Report, specifically sub-sections 11.1, 11.2, 11.3, and 11.4. Russia quotes mainly from section 11.3 in support of its view that MEDT of Ukraine made an injury determination.

7.180. Section 11.3 is titled "[e]xamination of the effect the dumping import had on the Claimant [i.e. the domestic industry]".[332] MEDT of Ukraine stated here that "[b]ased on information obtained during the [period of] [r]eview", it "determined whether the [domestic industry's] conditions [had] deteriorated due to the dumped imports". Based on its consideration of the performance of the domestic industry across various economic factors and indices having a bearing on the state of the domestic industry, it concluded:

> The analysis of the information provided demonstrated that the *consequence of the anti-dumping measures* in respect of the import into Ukraine of Product originating from the Russian Federation was the opportunity of the national producers to increase the production volumes, the percentage of the used production capacity, the growth of sales of the Products and the share in the domestic market of Ukraine, and retain the number of employees on the Claimant's payroll.

[324] Russia's response to Panel question No. 31, para. 88.
[325] Russia's second written submission, para. 590.
[326] Russia's response to Panel question No. 31, paras. 89-90. See also opening statement at the second meeting of the Panel, paras. 215-216.
[327] Russia's second written submission, para. 593.
[328] Russia's response to Panel question No. 31, para. 91; second written submission, para. 598.
[329] Russia's response to Panel question No. 31, para. 91; second written submission, para. 598.
[330] Russia's response to Panel question No. 31, para. 91; second written submission, para. 598.
[331] Russia's second written submission, para. 588.
[332] Investigation Report, (Exhibit RUS-10b), p. 34.

> However, *the financial performance of the Claimant and the ratio of coverage of the current liabilities precludes the Ministry from concluding that the injury is completely eliminated* that was caused to the national producer due to the definitive anti-dumping measures in respect of the import into Ukraine of the Product originating from the Russian Federation.[333]

7.181. Having reviewed section 11.3 of the Investigation Report as a whole, it appears to us that MEDT of Ukraine was assessing in this section the effectiveness of the anti-dumping measures already in place, rather than establishing that the domestic industry was suffering material injury during the period of review. For instance, in setting out its conclusions in section 11.3, quoted above, MEDT of Ukraine considered "the consequence of the anti-dumping measures", which were put in place following the dumping and injury determinations in the original investigations, on the performance of the domestic industry. It acknowledged the improvement in performance in light of the existence of such measures, while also noting the negative performance in profitability. Similarly, in concluding that "the injury [was] [not] completely eliminated" "due to the definitive anti-dumping measures", MEDT of Ukraine was reviewing the effectiveness of the original anti-dumping measures in eliminating the injury established in the original investigation. These are precisely the sort of analyses that investigating authorities could be expected to make to determine whether the expiry of the anti-dumping duty, or change in its rate thereof, would lead to the continuation or recurrence of injury to the domestic industry. We do not see why such an analysis should be understood to be an injury determination, as opposed to an analysis of the possible impact on the domestic industry if the anti-dumping duties originally imposed were to expire, or be varied.[334]

7.182. Further, we find it conceivable that in assessing the effectiveness of the anti-dumping measures already in force, and considering whether the existing anti-dumping duty had the desired effect of mitigating the material injury that the domestic industry was found to suffer in the original investigation, investigating authorities would consider the current state of the domestic industry. It is also conceivable that as a result of the anti-dumping measure already in force, the situation of that domestic industry may have improved relative to the original period of investigation, but the likelihood of continuation or recurrence of injury to the domestic industry persists. Thus, some of the analyses that would be relevant in an injury determination, such as the effect of subject imports on prices, or the impact of those imports on the domestic industry, may also be relevant in a likelihood-of-injury determination. Indeed, it may be difficult to make an objective and unbiased examination of the likelihood of injury without considering to some extent the effect of imports from the subject countries on the current state of the domestic industry. However, such a consideration does not show that the investigating authorities were making an injury determination, as opposed to a likelihood-of-injury determination. We consider our views to be consistent with that taken by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, where it stated:

> [W]e are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on "positive evidence" and an "objective examination" would be equally relevant to likelihood determinations under Article 11.3. It seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An 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*

[333] Investigation Report, (Exhibit RUS-10b), p. 35. (emphasis added)

[334] We note that, at first glance, and when read in isolation, certain statements in the Investigation Report may suggest that MEDT of Ukraine was making an injury determination. For instance, the above-quoted title of section 11.3 reads" [e]xamination of the effect the dumping import had on the Claimant". However, when read in proper context, it is clear that MEDT of Ukraine was not making such an injury determination, i.e. a determination that dumped imports caused material injury to the domestic industry during the period of review. For example, as is clear from the conclusion of section 11.3, MEDT of Ukraine was focused on the impact of the original anti-dumping measures on the economic state of the domestic industry.

> – 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".[335]

7.183. The Appellate Body's statement recognizes that factors such as the impact of dumped imports on the domestic industry, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination.[336] However, the necessity of conducting such an analysis arises from Article 11.3 of the Anti-Dumping Agreement, which governs likelihood-of-injury determinations, and not Article 3, which governs injury determinations. Hence, just because an investigating authority considers the existing state of the domestic industry, based, *inter alia*, on various factors and indices showing the performance of that industry, does not mean that it was seeking to establish that the domestic industry was suffering material injury during the period of review.

7.184. Moreover, in assessing whether MEDT of Ukraine made an injury determination, we must consider the totality of its injury-related analysis in the underlying reviews, including that contained in sections 11.1, 11.2, and 11.4 of the Investigation Report. In section 11.1, MEDT of Ukraine considered the impact of the definitive anti-dumping measures already in force, and noted that these measures had the "expected result" considering the changes in the volume and price of dumped imports during the examined period.[337] It considered that in case of termination of the existing anti-dumping measures, the volume of the imports from Russia could increase.[338] In section 11.2, in considering the price effects of subject imports on the domestic industry, MEDT of Ukraine evaluated the effect of subject imports on domestic industry prices during the time the anti-dumping measures were applied.[339] In section 11.4, MEDT of Ukraine focused on whether imports from Russia could increase if the existing anti-dumping duties were suspended or reduced, by considering facts such as the production capacity and export orientation of Russian producers of ammonium nitrate.[340] These references show that MEDT of Ukraine's analysis was focused on the impact of the anti-dumping measures already in force, and the likelihood of injury to the domestic industry continuing or recurring if such measures were terminated. This further confirms our view that MEDT of Ukraine was making a likelihood-of-injury determination in the underlying reviews.

7.185. Based on the foregoing, we find that Russia has not established that MEDT of Ukraine made an injury determination under Article 3 of the Anti-Dumping Agreement in the underlying reviews. Considering Article 3 governs injury determinations, and not likelihood-of-injury determinations, we cannot examine whether MEDT of Ukraine's determinations in the underlying reviews were consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.6.2.2 Whether Russia can claim violations under Articles 11.1, 11.2, and 11.3 even if MEDT of Ukraine did not determine injury under Articles 3.1 and 3.4

7.186. We set out in paragraph 7.161 above the two claims that Russia makes with respect to MEDT of Ukraine's injury analysis in the underlying reviews. These claims are derived from item number 17 of the panel request. We stated in paragraph 7.44 above that item number 17 of the panel request needs to be read in conjunction with item numbers 14-16 of that request. In item numbers 14-16, Russia stated how different aspects of the Ukrainian authorities' "determination" and "findings" on injury were inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement. In item number 17, Russia cross-referred to the Article 3 violations alleged in item numbers 14-16, and stated that Ukrainian authorities acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because they "*determined and relied on injury* which

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[335] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284. (emphasis original)

[336] We understand the Appellate Body's statement in *US – Oil Country Tubular Goods Sunset Reviews* that the fundamental requirement of Article 3.1 that an injury determination be based on "positive evidence" and an "objective examination" would be equally relevant to likelihood determinations under Article 11.3 to mean that likelihood determinations should rest on a sufficient factual basis so as to allow the investigating authorities to draw reasoned and adequate conclusions. This does not mean that a likelihood-of-injury determination can be found to be inconsistent with Article 3.1 of the Anti-Dumping Agreement. We recall, as set out in footnote 314 above, the Appellate Body itself decided not to make a finding under, *inter alia*, Article 3.1 of the Anti-Dumping Agreement.

[337] Investigation Report, (Exhibit RUS-10b), p. 32.

[338] Investigation Report, (Exhibit RUS-10b), pp. 32-33.

[339] Investigation Report, (Exhibit RUS-10b), pp. 33-34.

[340] Investigation Report, (Exhibit RUS-10b), pp. 38-39.

was not established in accordance with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement".[341] Russia did not invoke Articles 3.2 and 3.5 in its first written submission, but, closely reflecting its panel request, asked us to find that:

> Ukraine acted inconsistently with Articles 11.1, 11.2 and 11.3 of the Anti-Dumping Agreement because it *determined and relied on injury* which was not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In particular, Ukraine failed to properly establish facts and to conduct an unbiased and objective examination of these facts in its likelihood of injury determination[.][342]

7.187. In our view, Russia's claims, as presented in its panel request, clearly showed that its claims under Articles 11.1, 11.2, and 11.3 were dependent on the premise that MEDT of Ukraine determined, and then relied on, injury not established in accordance with Articles 3.1 and 3.4. However, in response to our questions at the second substantive meeting, Russia argued that its two claims did not depend, or did not entirely depend, on a conclusion that MEDT of Ukraine failed to act in compliance with Articles 3.1 and 3.4.[343]

7.188. Russia's first claim, as set out in paragraph 7.161 above, is that MEDT of Ukraine violated Articles 11.2, 11.3, and 3.1 of the Anti-Dumping Agreement because it failed to exclude imports of the Russian producer EuroChem, which had a negative dumping margin in the original investigation phase, from the volume of dumped imports. Russia explains that Article 11.3 itself obligates investigating authorities to make an objective examination of positive evidence, and thus we need not examine this aspect of the measure under Article 3.1 as well.[344] Therefore, Russia contends that we may examine pursuant to Article 11.3 whether MEDT of Ukraine's action to include imports from EuroChem in the volume of subject imports was objective and unbiased, even if we do not examine whether MEDT of Ukraine acted in accordance with Article 3.1 in this regard.[345]

7.189. Russia's second claim, as also set out in paragraph 7.161 above, is that MEDT of Ukraine violated Articles 11.2, 11.3, and 3.4 of the Anti-Dumping Agreement because its evaluation of the economic factors and indices having a bearing on the state of the Ukrainian domestic industry was not based on an objective examination of positive evidence. Russia states that this second claim is premised on Russia's view that MEDT of Ukraine acted inconsistently with Article 3.4 of the Anti-Dumping Agreement.[346] However, it qualifies this acknowledgment by stating that its claims of violations under Articles 11.2 and 11.3 do not "entirely depend[]" on violation of Article 3.4, as the obligation under Article 11.3 to make an objective examination based on positive evidence applies to expiry reviews even if the panel cannot find any inconsistency under Article 3.4.[347] Therefore, Russia appears to argue that because the objectivity standard under Article 11.3 applies, even if we do not examine whether MEDT of Ukraine acted in accordance with Article 3.4 in this regard, its claim under Article 11.3 should succeed.

7.190. While we find Russia's responses somewhat confusing in certain respects[348], the main point that it makes is that a WTO panel *can* review the objectivity of an investigating authority's likelihood-of-injury analysis under Article 11.3 (and Article 11.2), even if it did not make an injury determination under Article 3. We, of course, agree. Articles 11.2 and 11.3 are precisely the provisions setting out the rules applicable to a likelihood-of-injury determination.

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[341] Emphasis added.

[342] Russia's first written submission, para. 347(8) (emphasis added). Russia reiterated in its opening statement at the first substantive meeting, as well as its second written submission, how MEDT of Ukraine's determination and reliance on injury not established in accordance with Articles 3.1 and 3.4 had led to violations under these Article 11 provisions. (Russia's opening statement at first meeting of the Panel, para. 125; second written submission, para. 551).

[343] Russia's response to Panel question No. 52, paras. 40 and 42.

[344] Russia's response to Panel question No. 52, para. 38.

[345] See, e.g. Russia's response to Panel question No. 52, paras. 38 and 40.

[346] See, e.g. Russia's response to Panel question No. 52, para. 41.

[347] See, e.g. Russia's response to Panel question No. 52, para. 42.

[348] It is not clear to us for example how Russia reconciles its statement that its second claim is premised on its view that MEDT of Ukraine acted inconsistently with Article 3.4, with its statement that this claim does not "entirely depend[]" on our conclusion regarding any violation under Article 3.4. (Russia's response to Panel question No. 52, paras. 41-42). Moreover, while Russia invokes the standard of objectivity under Article 11.3, it does not specifically invoke Article 11.1 or Article 11.2 in its responses, though it makes claims under these provisions as well. (See, e.g. Russia's response to Panel question No. 52, paras. 38-39 and 42).

However, the question before us is not whether a panel *can* review a likelihood-of-injury determination under Articles 11.2 and 11.3, but whether, having claimed violations under Articles 11.1, 11.2, and 11.3 in its panel request because MEDT of Ukraine determined, and relied on, injury not established in accordance with Articles 3.1 and 3.4, Russia can now claim violations under these Article 11 provisions even if MEDT of Ukraine did not make an injury determination under Article 3.

7.191. It is well established that the panel request delineates the scope of the claims that the complainant may pursue before a panel, and that a panel's terms of reference do not extend to matters that fall outside this scope. Nothing in Russia's panel request suggests that it intended to challenge MEDT of Ukraine's likelihood-of-injury determination on its own terms under Articles 11.1, 11.2, and 11.3. Indeed, the panel request does not even refer to a determination regarding the likelihood of continuation or recurrence of injury to the domestic industry, as is provided for in Articles 11.2 and 11.3. Instead, item number 17 of Russia's panel request clearly states that Russia claims violations under Articles 11.1, 11.2, and 11.3 because MEDT of Ukraine determined and relied on injury not established in accordance with Articles 3.1 and 3.4. Russia's request for findings in paragraph 347(8) of its first written submission further confirms our understanding of the nature of Russia's Article 11 claims in this regard.[349] It follows, that if MEDT of Ukraine did not make an injury determination under Article 3, as we found that it did not, Russia's Article 11 claims must also fail.[350]

7.6.2.3 Conclusion

7.192. Based on the foregoing, we find that Russia has not established that MEDT of Ukraine acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement because it determined and relied on injury not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[351]

7.7 Facts available

7.193. Russia challenges under Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement MEDT of Ukraine's rejection of the reported gas cost of the investigated Russian producers, and its use of the surrogate price of gas instead, to calculate the cost of production of these producers.[352] Russia submits that by doing so, MEDT of Ukraine *de facto* resorted to "facts available".[353] Russia asserts that the conditions under Article 6.8 for use of "facts available" were not met in this case, and that MEDT of Ukraine acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in rejecting the costs data of the investigated Russian producers because[354]:

a. First, it resorted to "facts available" though the investigated Russian producers cooperated and provided necessary information within a reasonable period of time.

b. Second, it failed to inform the investigated Russian producers of the reasons for the rejection of submitted evidence and information and also failed to give them an opportunity to provide such explanations within a reasonable period of time.

[349] In any case, defects in a panel request cannot be cured in subsequent submissions made by the parties in panel proceedings. (Appellate Body Report, *US – Carbon Steel*, para. 127).

[350] We also disagree with the distinction that Russia draws between its first and second claims, inasmuch as it states that its first claim does not depend on whether MEDT of Ukraine relied on an injury determination that was not made in accordance with Article 3.1, even if its second claim could be said to be premised on the view that MEDT of Ukraine relied on an injury determination not made in accordance with Article 3.4. Both of these claims are derived from item number 17 of the panel request and paragraph 347(8) of the request for findings section of its first written submission, and Russia did not make the sort of distinction in its panel request or the first written submission that it now seeks to make.

[351] We find our views to be consistent with taken by past panels. (See, e.g. Panel Report, *US – OCTG (Korea)*, paras. 7.320-7.324).

[352] Russia's first written submission, paras. 249 and 275-276.

[353] Russia's opening statement at the second meeting of the Panel, para. 249.

[354] Russia's response to Panel question No. 28, paras. 78-80; first written submission, para. 270.

c. Third, although the investigated Russian producers fully cooperated and submitted verifiable information in a timely fashion so that it could be used in the underlying reviews without undue difficulties, this information was rejected.

7.194. Ukraine submits that MEDT of Ukraine rejected the reported gas cost on substantive grounds, pursuant to the rules set out in Article 2.2.1.1 of the Anti-Dumping Agreement, and did not take a decision to resort to facts available under Article 6.8 to reject this cost.[355] Ukraine contends that considering MEDT of Ukraine did not use facts available under Article 6.8, Russia's claim in this regard is devoid of any factual basis.[356]

7.195. We note that Article 6.8 states that "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of facts available". Article 6.8 further states that the "provisions of Annex II [of the Anti-Dumping Agreement] shall be observed in the application of this paragraph". Article 6.8 identifies the circumstances in which investigating authorities may overcome a lack of information in responses of interested parties, by using "facts" which are otherwise "available" to the investigating authorities.[357] In particular, it permits investigating authorities, under certain circumstances, to fill in the gaps in the information necessary to arrive at conclusions regarding dumping and injury.[358]

7.196. In reviewing the factual basis of Russia's claims, we note that Russia has not alleged the rejection of any information other than the reported gas cost. Thus, the factual basis of Russia's claims in this regard is limited to the rejection of the reported gas cost.[359] With respect to the rejection of this cost, the Investigation Report shows that MEDT of Ukraine rejected the reported gas cost after finding, pursuant to a domestic law provision analogous to the second condition of Article 2.2.1.1, that the records of the investigated Russian producers did not completely reflect the costs associated with the production and sale of ammonium nitrate, insofar as the reported gas cost was concerned.[360] Russia has not pointed to anything in the Investigation Report that suggests that MEDT of Ukraine rejected the reported gas cost pursuant to the criteria set forth in Article 6.8 or Annex II of the Anti-Dumping Agreement. Thus Russia has not shown that MEDT of Ukraine resorted to the facts available mechanism under Article 6.8. In these circumstances, we agree with Ukraine that Russia's claims do not have a proper factual basis, and therefore, must fail.[361]

7.197. In this regard, we note our finding above that MEDT of Ukraine's rejection of the reported gas cost was inconsistent with Article 2.2.1.1 because it did not provide a sufficient basis under the second condition to justify such rejection. However, that finding does not mean that we can also find a violation with respect to a determination (under Article 6.8 or Annex II of the Anti-Dumping Agreement) that was never made by MEDT of Ukraine.[362]

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[355] Ukraine's first written submission, para. 311.
[356] Ukraine's first written submission, para. 312.
[357] Appellate Body Report, *US – Hot-Rolled Steel*, para. 77.
[358] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.
[359] See e.g. Russia's responses to Panel question No. 28, paras. 77-80, and No. 29, para. 81.
[360] Investigation Report, (Exhibit RUS-10b), p. 23.
[361] Russia argues that Article 6.8 applies not only when investigating authorities reject information submitted by investigated exporters or producers on evidentiary grounds, but also when such rejection is for substantive reasons. (Russia's opening statement at the second meeting of the Panel, para. 246). In our view, the question of whether an investigating authority acted inconsistently with Article 6.8 of the Anti-Dumping Agreement has to be necessarily assessed on a case-by-case basis considering, *inter alia*, the specific nature and scope of the findings made by these authorities, and the information rejected. However, when, as here, it is clear that the investigating authority did not make a determination based on the criteria set forth in Article 6.8 or Annex II, but rather rejected the reported gas cost based on its view that the records did not meet the analogous domestic law provisions of the second condition of Article 2.2.1.1, we see no factual basis to find a violation under Article 6.8, or paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement. We find support for our view in the panel report in *US – Shrimp II (Viet Nam)*, where, having concluded that the investigating authority did not make a determination based on facts available, the panel rejected the claims under Article 6.8 and Annex II of the Anti-Dumping Agreement. (Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.233).
[362] The Anti-Dumping Agreement recognizes that in certain situations it may not be possible for investigating authorities to use an exporter's or producer's data for substantive reasons. For example, in

7.198. Based on the foregoing, we find that Russia has not established that MEDT of Ukraine acted inconsistently with Article 6.8, and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement.

7.8 Disclosure of essential facts

7.199. In the underlying reviews, the disclosure took place through the issuance of the Investigation Report by MEDT of Ukraine. This report contained MEDT of Ukraine's draft findings and recommendations regarding the continued imposition of anti-dumping duty on imports of ammonium nitrate from Russia, at modified rates. ICIT subsequently issued its notice accepting the findings and recommendations made in this report.

7.200. MEDT of Ukraine prepared a confidential and a non-confidential version of its Investigation Report. It made the non-confidential version of the Investigation Report available to the interested parties. In this section, we refer to this document as the "disclosure". We also refer, where relevant, to the Confidential Version of the Investigation Report. The disclosure was issued on 25 June 2014, and MEDT of Ukraine gave interested parties time until 27 June 2014, i.e. two days, to file their comments on the disclosure.

7.201. Russia claims that this disclosure was inconsistent with Articles 6.9 and 6.2 of the Anti-Dumping Agreement because MEDT of Ukraine failed to set out in this disclosure the essential facts underlying its likelihood-of-injury and dumping determinations (disclosure claims).[363] Russia also claims that MEDT of Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because it failed to give the interested parties "sufficient time" to respond to the disclosure.[364] Ukraine asks us to dismiss all of Russia's claims.

7.8.1 Legal standard

7.202. Article 6.9 of the Anti-Dumping Agreement, which sets out the specific obligations that apply to the disclosure of essential facts, states:

> The authorities shall, 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. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.203. As the first sentence makes clear, Article 6.9 requires the disclosure of *essential* facts, and not *all* the facts that are before an investigating authority.[365] The context provided by the last part of the first sentence of Article 6.9, and its second sentence clarifies that essential facts are those facts that "form the basis for the decision whether to apply definitive measures", and the disclosure of which ensures the ability of the interested parties to defend their interests.[366] These are the facts that are significant in the process of reaching a decision on whether or not to apply definitive measures, and include facts that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome.[367] Thus, essential facts are not only those facts that support the decision ultimately reached by the investigating authorities, but include those facts that are necessary to the process of analysis and decision-making by the investigating authorities.[368] Whether a particular fact is significant in the process of reaching such decisions, and thus essential, would depend on the nature and scope of the substantive obligations that investigating authorities need to meet to apply definitive measures, the content of a particular

addition to Article 2.2.1.1, which permits rejection of costs in an exporter's or producer's records if the conditions set out therein are not met, Articles 2.2.2 (ii) and (iii) of the Anti-Dumping Agreement refer to situations where profit is determined on the basis of the data of "other exporters or producers subject to investigation". If an investigating authority acts inconsistently with the rules set out in these provisions, a panel may find violations under these particular provisions. However, we do not see any textual basis to conclude that findings of violations under these provisions could automatically lead to violations under Article 6.8 or paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement.

[363] Russia's first written submission, para. 347(10); response to Panel question No. 38, para. 111.
[364] Russia's first written submission, para. 347(11).
[365] Appellate Body Report, *China – GOES*, para. 240.
[366] Appellate Body Report, *China – GOES*, para. 240.
[367] Appellate Body Report, *China – GOES*, para. 240.
[368] Panel Report, *EC – Salmon (Norway)*, para. 7.807.

finding needed to satisfy the substantive obligation at issue, and the factual circumstances of each case, including the arguments and evidence submitted by the interested parties.[369]

7.204. In the context of an original investigation, where investigating authorities may take an affirmative decision to apply definitive measures only when dumping, injury, and causal link between dumping and injury exist, the Appellate Body has stated that essential facts would include those facts that form the basis of the authorities' conclusions on dumping, injury, and causal link. Essential facts would also include those facts that would be necessary to understand the factual basis of the intermediate findings that form the basis of the authorities' conclusions on dumping, injury, and causal link.[370] Such facts could include the data forming the basis for these intermediate findings.[371]

7.205. In our view, in the context of a review carried out under Article 11.3 of the Anti-Dumping Agreement, where definitive measures must be terminated unless the investigating authorities find a likelihood of continuation or recurrence of dumping and injury to the domestic industry, the essential facts would include those facts that form the basis for the authorities' likelihood-of-dumping and likelihood-of-injury determinations. They would also include the facts that would be necessary to understand the factual basis of the intermediate findings that form the basis of these determinations.

7.206. Where there is a revision in the dumping margins pursuant to interim reviews under Article 11.2 of the Anti-Dumping Agreement, and subsequent modification in the anti-dumping duty rate, the essential facts would include those facts that are necessary to understand the factual basis of the new dumping determinations. The Appellate Body has clarified in this regard that with respect to dumping determinations, investigating authorities are expected to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, and the calculation methodology that they applied to determine the dumping margin.[372]

7.207. These essential facts must be disclosed in a coherent manner so as to permit an interested party to understand the basis for the decision to apply definitive measures.[373] This means that the interested party must be able to clearly understand what data was used by the investigating authorities in their determinations, and how, so that it can defend its interests.[374] It also means that the disclosure should allow the interested parties to comment on the completeness and correctness of the conclusions reached by the investigating authorities from the facts being considered, to provide additional information or correct perceived errors, and to comment on or make arguments as to the proper interpretation of those facts.[375]

7.208. When the essential facts are confidential, investigating authorities may meet their disclosure obligations through the disclosure of non-confidential summaries of those facts.[376] The Appellate Body has clarified in this regard, however, that even if a WTO panel finds that essential facts redacted from a disclosure on grounds of confidentiality were not properly treated as confidential under Article 6.5 of the Anti-Dumping Agreement the panel cannot presume that such inconsistencies with Article 6.5 will also lead to inconsistencies with Article 6.9.[377] Instead, the panel must examine whether *any* disclosure made, including that made through non-confidential summaries, meet the legal standard under Article 6.9.[378] All disclosures should take place in sufficient time for the parties to defend their interests.

7.209. The question whether the failure to disclose essential facts leads to a violation under Article 6.9 as well as Article 6.2 has been discussed in past cases. The panels in *EC – Salmon*

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[369] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.
[370] See, e.g. Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.
[371] See, e.g. Appellate Body Report, *China – GOES*, para. 248; and Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.241.
[372] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.
[373] Appellate Body Reports, *China – GOES*, para. 240; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.
[374] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.131 and 5.133.
[375] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131; *China – GOES*, fn 390; and Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[376] Appellate Body Reports, *China – GOES*, para. 247; *Russia – Commercial Vehicles*, para. 5.183.
[377] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.183.
[378] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.183 and 5.189.

(Norway) and *Guatemala – Cement II*, for instance, examined the claims regarding failure to disclose essential facts under Article 6.9. Based on their conclusions under Article 6.9, they exercised judicial economy on the Article 6.2 claims, or rejected them.[379]

7.8.2 Evaluation

7.210. We will first consider Russia's claims under Articles 6.2 and 6.9 of the Anti-Dumping Agreement concerning MEDT of Ukraine's alleged failure to disclose the essential facts under consideration, specifically those concerning its likelihood-of-injury and dumping determinations. Then, we will consider Russia's claim under Article 6.9 concerning MEDT of Ukraine's alleged failure to give the interested parties "sufficient time" to comment on the disclosure.

7.8.2.1 Disclosure claims

7.211. Russia contends that MEDT of Ukraine's failure to provide the investigated Russian producers with the essential facts deprived them of an "opportunity to defend their interests".[380] Thus, in the view of Russia, MEDT of Ukraine acted inconsistently with Articles 6.2 and 6.9 of the Anti-Dumping Agreement.[381] While Russia makes claims under Article 6.2 and Article 6.9, it does not raise any factual issues with respect to its Article 6.2 claims that are additional to, or distinct from, those it presents with respect to its Article 6.9 claims. Instead, it confirms that the factual basis of its claims under Articles 6.2 and 6.9 with respect to the disclosure of essential facts is the same.[382] Nonetheless, Russia submits that its claims under Article 6.2 are independent of, and not consequential to, its claims under Article 6.9.[383]

7.212. Considering the factual basis of Russia's claims concerns the disclosure of essential facts, which is an issue specifically addressed under Article 6.9, and it does not provide any separate basis for us to make independent findings under Article 6.2, we will not make any findings under Article 6.2.[384] To the extent we find a violation under Article 6.9 of the Anti-Dumping Agreement, we will exercise judicial economy with respect to Russia's corresponding claim under Article 6.2 of the Anti-Dumping Agreement. If we find no violation under Article 6.9, we will reject Russia's corresponding claim under Article 6.2 as well. Our approach is consistent with that taken by past panels.[385]

7.8.2.1.1 Disclosure of essential facts forming the basis of the likelihood-of-injury determination

7.213. Russia claims that MEDT of Ukraine failed to disclose the essential facts underlying its likelihood-of-injury determination[386], specifically the facts underlying its conclusions regarding:

a. the negative impact of dumped imports on domestic industry prices, or price effects[387]; and

b. the economic state of the domestic industry.[388]

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[379] Panel Reports, *EC – Salmon (Norway)*, para. 7.809; *Guatemala – Cement II*, para. 8.232.
[380] Russia's second written submission, para. 668; opening statement at the first meeting of the Panel, para. 148.
[381] Russia's second written submission, para. 667. See also first written submission, para. 313.
[382] Russia's response to Panel question No. 38, para. 111.
[383] Russia's second written submission, para. 666; opening statement at the first meeting of the Panel, paras. 146-147.
[384] Russia explains that "[e]ven if certain information [were] not considered as essential facts" there would "still [be] a broader obligation under Article 6.2 to provide interested parties with a full opportunity to defend their interests". Thus, in the view of Russia, investigating authorities "may" violate this obligation under Article 6.2 if they fail to disclose information that does not qualify as essential facts but nevertheless, enables interested parties to defend their interests. (Russia's second written submission, para. 667). However, Russia does not show why the situation it hypothesizes is relevant to the facts of this case.
[385] Panel Reports, *EC – Salmon (Norway)*, para. 7.809; *Guatemala – Cement II*, para. 8.232.
[386] Russia's first written submission, para. 298.
[387] Russia's first written submission, para. 300.
[388] Russia's first written submission, para. 301.

7.214. In its second written submission, Russia also contended that MEDT of Ukraine's failure to disclose the export price of the domestic industry in the disclosure resulted in a violation of Article 6.9.[389] Russia asserts that this particular information formed part of the essential facts that MEDT of Ukraine was required to disclose, but makes no argument showing why this information was relevant to the conclusions set out in the paragraph above, or why it constituted an essential fact. In the absence of any arguments from Russia in this regard, we decline to address this issue in our analysis below.

7.8.2.1.1.1 Disclosure on price effects

7.215. Russia contends that the disclosure does not contain any figures or analysis on price effects, or any substantial facts supporting the conclusion that the alleged dumped imports had a negative impact on domestic industry prices.[390] In particular, Russia asserts that the level of price-undercutting, price-suppression, or price-depression (if any) is unclear from the disclosure.[391] Ukraine argues that Russia has not made a *prima facie* case that these facts were "essential".[392] In Ukraine's view, investigating authorities are not obligated to make a price effects analysis as part of their likelihood-of-injury determinations, and thus the analysis on price effects or the facts underlying them is not "essential".[393] The issue before us is whether the analysis and figures on price effects were "essential", and if so, whether MEDT of Ukraine disclosed them consistently with Article 6.9 of the Anti-Dumping Agreement.

7.216. To the extent Russia's reference to the "analysis" on price effects refers to the reasoning based on which MEDT of Ukraine reached its conclusions, we agree with Ukraine that investigating authorities are not required to disclose them. Investigating authorities need to disclose the essential facts under Article 6.9, not their reasoning.[394]

7.217. However, as stated in paragraph 7.205 above, investigating authorities are required to disclose the essential facts underlying their likelihood-of-injury determination, including the facts necessary to understand the basis of intermediate findings or analysis on which this determination is based. MEDT of Ukraine's price effects analysis, in section 11.2 of the disclosure, formed one of the bases for its overall likelihood-of-injury determination in section 11 of the disclosure. Thus, as part of its disclosure of the essential facts underlying its likelihood-of-injury determination, MEDT of Ukraine would have been required to disclose the facts necessary to understand the factual basis of its price effects analysis, irrespective of whether it was required under the Anti-Dumping Agreement to conduct such an analysis in the first place.[395]

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[389] Russia's second written submission, para. 688.
[390] Russia's first written submission, para. 300.
[391] Russia's first written submission, para. 300.
[392] Ukraine's first written submission, para. 325.
[393] Ukraine's first written submission, paras. 326-327.
[394] See, e.g. Panel Reports, *China – GOES*, para. 7.407; *Argentina – Poultry Anti-Dumping Duties*, paras. 7.227-7.228; and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.148.
[395] The panel and the Appellate Body report in *China – GOES* support this view. In *China – GOES*, the issue was the disclosure of essential facts underlying a price effects analysis made under Article 3.2 of the Anti-Dumping Agreement. Article 3.2 states that "[w]ith regard to the effect of the dumped imports on prices" the investigating authority shall consider whether there has been a significant price undercutting by dumped imports, or whether the effect of such imports is to depress or suppress domestic prices. The panel in this dispute agreed with China that its authorities had not made any specific finding that the subject imports were significantly undercutting the prices of domestically produced like products. (Panel Report, *China – GOES*, para. 7.553). But it found that in reaching an affirmative conclusion on the existence of price suppression and price depression, the investigating authority had relied on its finding of low prices of subject imports relative to domestic like product prices. For this reason, the panel considered that the investigating authority was required to disclose information on the price comparisons underlying the finding regarding the low prices of subject imports, or price undercutting. (Panel Report, *China – GOES*, paras. 7.568-7.569). This finding of the panel was upheld by the Appellate Body. (Appellate Body Report, *China – GOES*, paras. 250-251). Thus, the panel and the Appellate Body found that to the extent the investigating authority made its price depression and suppression analysis by relying on its findings of price undercutting by subject imports, it would have to disclose the factual basis of this finding, irrespective of whether it was required to make a price undercutting analysis under Article 3.2 in the first place. This finding confirms our view that the relevant issue is not whether MEDT of Ukraine was required to make a price effects analysis in a review. Instead, even assuming there was no such requirement, to the extent MEDT of Ukraine made such an analysis, and it formed the basis of its likelihood-of-injury determination, the facts underlying that analysis would be essential.

7.218. In the underlying reviews MEDT of Ukraine conducted its price effects analysis by comparing the export price of the investigated Russian producers (subject import prices) with the domestic selling prices and cost of production of the domestic industry.[396] This analysis is set out in section 11.2 of the disclosure.

7.219. Table 11.2.1 in this section sets out the subject import prices, domestic industry prices and domestic industry costs, in 2010, 2011, 2012, and the period of review. The actual figures on domestic industry prices and costs were set out in the Confidential Version of the Investigation Report, but redacted from the disclosure. Instead, growth/drop percentage rates were provided as follows:

Table 1: Table 11.2.1

	2010	2011	2012	RIP
Average price of Product originating in the Russian Federation	**186.2**	**265.1**	**260**	**274.8**
Growth/drop rate, %	-	42.37	39.63	47.58
Average price of ammonium nitrate of the national producers	[ ]	[ ]	[ ]	[ ]
Growth/drop rate, %	-	42.12	46.47	45.39
Cost of sales of the domestic producers, USD/t	[ ]	[ ]	[ ]	[ ]
Growth/drop rate, %	-	29.33	61.19	58.76

Source: Investigation Report, (Exhibit RUS-10b), p. 33; Ukraine's translation of Table 11.2.1 (Exhibit UKR-17).

7.220. In the accompanying text in section 11.2, MEDT of Ukraine stated that:

> During the examination period, *the prices of import of the Product to Ukraine were lower than the sales price* and *the production cost of like products sold by the Claimant* in the domestic market of Ukraine.
>
> …
>
> These conditions of the import into Ukraine of the Product under the Review negatively influenced the construction of sale prices for like products of the national manufacturers in the domestic market of Ukraine and deprived them of the opportunities to sell their own Products at the prices proportionate to the increased production cost, which led to losses by the national producer in 2012 and the [review investigation period] from the sales of the Product in the domestic market of Ukraine.[397]

7.221. The italicized part in the first paragraph of the quoted excerpt shows that MEDT of Ukraine found that:

a. subject import prices were *lower* than the prices at which the domestic industry sold the like product in the Ukrainian market; and

b. subject import prices were *lower* than the cost of production of the domestic industry.

7.222. The second paragraph of the quoted excerpt shows that MEDT of Ukraine relied, *inter alia*, on this finding of lower-priced subject imports to conclude that these conditions negatively affected the domestic producers' sales prices for the like products, and deprived them of the opportunity to sell their products at prices proportionate to the increased production cost, which in turn led to losses.[398] MEDT of Ukraine went on to conclude based on this analysis that imports

[396] Ukraine's response to Panel question No. 42, para. 106.
[397] Investigation Report, (Exhibit RUS-10b), p. 33. (emphasis added)
[398] Investigation Report, (Exhibit RUS-10b), p. 33.

from Russia, during the time-frame the original anti-dumping measures were applied, adversely affected the sales price of the domestic industry, leading to losses in their sales in the domestic Ukrainian market.[399] This shows that the existence of lower-priced subject imports formed the basis of MEDT of Ukraine's price effects analysis. Therefore, interested parties would have required access to information regarding the price comparison between subject import prices, domestic industry prices, and domestic industry costs to understand the factual basis of its price effects analysis. If this information was confidential, an adequate non-confidential summary would be required.

7.223. However, as Russia argues, the disclosure does not contain any information regarding the level of price-undercutting or price-suppression, or any price comparisons.[400] Specifically, Table 11.2.1 does not disclose this information. While it does disclose the year-on-year growth/drop percentage rates, such rates do not provide any indication of the prices of subject imports relative to domestic industry prices and costs.[401] Specifically, they do not indicate whether subject imports were higher or lower than domestic industry prices or costs during the examined period.[402] Thus, such rates were not sufficient to understand the factual basis of MEDT of Ukraine's conclusion that subject imports were priced lower than domestic industry prices and costs.

7.224. Ukraine additionally argues that MEDT of Ukraine disclosed the factual basis of its conclusions regarding the differences between subject import prices and domestic industry costs through the disclosure of injury margins. MEDT of Ukraine determined these injury margins pursuant to domestic law requirements, to calculate the amount of anti-dumping duty rate sufficient to avoid injury to the domestic industry.[403]

7.225. There are important differences in the comparison figures on domestic industry costs and subject imports discussed in Table 11.2.1 of the disclosure, and relied upon by MEDT of Ukraine to make its price effects analysis, and the injury margins. First, unlike Table 11.2.1, these margins were calculated only for the period of review, and not 2010-2012. Second, MEDT of Ukraine calculated, for the period of review, exporter-specific injury margin of 20.51% for one producer, and 36.03% for the other. It also calculated an injury margin of 36.03% at a country-wide level. Third, while Table 11.2.1 represented the differences between subject imports and domestic industry costs, Ukraine does not appear to argue that the injury margins disclosed these differences as such. Instead, the injury margins represented the differences between subject import prices and a target price, which, in turn was based on the domestic industry costs.[404] To calculate the target price, MEDT of Ukraine added a 10% profit margin to the cost of production.[405]

7.226. Ukraine takes the view that the knowledge of injury margins would have allowed interested parties to understand the differences between subject import prices and domestic industry costs during the period of review.[406] In particular, Ukraine asserts that the disclosure of injury margins for the period of review would have allowed the investigated Russian producers to know that their prices were lower than the cost of production of the domestic industry by 10-20%,

[399] Investigation Report, (Exhibit RUS-10b), pp. 33-34.
[400] Russia's first written submission, paras. 300 and 347(10).
[401] See, e.g. Appellate Body Report, *China – GOES*; paras. 246-247; and Panel Reports, *China – X-Ray Equipment*, para. 7.409; and *China – GOES*, para. 7.572. In *China – GOES*, for example, China argued that its investigating authority disclosed the essential facts regarding its price depression and suppression analysis, which was found to be based on the low-price of subject imports relative to domestic industry prices, by disclosing percentage changes in average domestic prices as well as costs over a given period. The panel as well as the Appellate Body found that the disclosure of such trends was not sufficient to meet the authorities' obligation to disclose the essential facts regarding its price depression analysis.
[402] For example, assume in a hypothetical situation, the domestic industry prices and cost increased or decreased in the period of review relative to what they were in the year before, but remained higher than the subject import prices. In such a situation, the growth/drop percentage rates showing changes in domestic industry prices and costs would not provide any indication on whether the subject import prices were lower or higher than those prices and costs.
[403] Investigation Report, (Exhibit RUS-10b), p. 29. MEDT of Ukraine explained in the disclosure that pursuant to Ukrainian domestic law, the amount of final anti-dumping duty rate may not exceed the amount of dumping margin, and may be lower than this margin, if such a lower rate was sufficient to avoid the injury suffered by the domestic industry. (Investigation Report, (Exhibit RUS-10b), p. 30).
[404] Ukraine's response to Panel question No. 56(a)(i), para. 29.
[405] Ukraine's response to Panel question No. 56(a)(i), para. 29.
[406] Ukraine's response to Panel question No. 56(a)(i), para. 29.

though it does not show how.[407] Further, in Ukraine's view, once the Russian producers had knowledge of the injury margin during the period of review, they could assess the differences between the subject import prices and cost of production over 2010-2012 as well because Table 11.2.1 provided the growth/drop percentage rates, representing the year-on-year changes in subject import imports and domestic industry cost.[408] Finally, Ukraine submits that because the two exporting Russian producers for which injury margins were calculated made up 100% of Russian exports to Ukraine, the disclosure of injury margins effectively led to a disclosure of the basis of MEDT of Ukraine's finding that subject imports were lower-priced than domestic industry costs.[409] We disagree with Ukraine's arguments.

7.227. Investigating authorities are required to disclose essential facts in a coherent manner. Thus, interested parties are not expected to engage in back-calculations and inferential reasoning, or piece together a puzzle to derive the essential facts. To derive, on the basis of these injury margins, the differences between subject import prices and domestic industry costs for the period 2010-2012 and the period of review based on which MEDT of Ukraine reached its conclusions on price effects, the interested parties would have to do precisely that. We are not convinced that interested parties should have had to derive the essential facts through such kind of back-calculations and inferential reasoning when MEDT of Ukraine could just as well have disclosed these facts in a coherent manner. Therefore, we find that the disclosure of such injury margins was not sufficient to understand the factual basis of MEDT of Ukraine's price effects analysis.

7.228. Based on the foregoing, we find that MEDT of Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because it failed to disclose the essential facts that were required to understand the factual basis of its conclusions on price effects in section 11.2 of the Investigation Report, and which formed one of the bases of its affirmative determination on the likelihood of injury. We exercise judicial economy on Russia's claim under Article 6.2 of the Anti-Dumping Agreement insofar as it arises from the same factual basis as this claim under Article 6.9 of the Anti-Dumping Agreement.

7.8.2.1.1.2 Disclosure of essential facts regarding the economic state of the domestic Ukrainian industry

7.229. In section 11.3 of the disclosure, MEDT of Ukraine analysed and made findings regarding the economic state of the domestic industry. In its analysis, it examined various economic factors and indices (indices) having a bearing on the state of the domestic industry. The section contains six tables that show the performance of the domestic industry across these indices for the period 2010, 2011, 2012, and the period of review (Injury Tables 11.3.1 to 11.3.6). Tables 11.3.1 to 11.3.6 of the Confidential Version of the Investigation Report set out the absolute figures showing the domestic industry's performance for the period 2010-2012 and the period of review across the different indices examined in these tables.[410] It also provided a growth/drop percentage rate, which shows, in percentage form, the year-on-year changes in the performance of the domestic industry from 2010 up to the period of review. The absolute figures were redacted from the disclosure, and the growth/drop percentage rates were provided instead. The tables were also accompanied by narrative text.[411] The domestic industry, whose performance these Injury Tables

[407] Ukraine's response to Panel question No. 56(a)(i), para. 29.
[408] Ukraine's response to Panel question No. 56(a)(i), paras. 29-30.
[409] Ukraine's response to Panel question No. 56(b), paras. 31-32.
[410] MEDT of Ukraine examined the following indices in the Injury Tables: Table 11.3.1 – (a) sales of ammonium nitrate by domestic producers in the domestic market, (b) domestic consumption, (c) share of sales by the domestic producers in domestic consumption; Table 11.3.2 – (a) production volumes of the product of the national producer, (b) capacity utilization, (c) warehouse stock balance of the national producers at the end of the period; Table 11.3.3 – (a) average number of employees of domestic producers, (b) average monthly salaries in companies of the domestic producers, (c) employees engaged in production, sales and management, (d) employed in production of the product, (e) labour productivity; Table 11.3.4 – (a) domestic producers' investments; Table 11.3.5 – (a) financial result (profit/loss) of the domestic producers from sales of the ammonium nitrate in the internal market, (b) profitability on sales of ammonium nitrate by the domestic producers; Table 11.3.6 – absolute liquidity. (Investigation Report, (Exhibit RUS-10b), pp. 34-36; Confidential Version of the Investigation Report, (Exhibit UKR-52b (BCI)), pp. 41-43).
[411] Investigation Report, (Exhibit RUS-10b), pp. 34-36.

represented, comprised the following domestic producers: JSC Azot OJSC, JSC Rivneazot, CJSC Severodonetsk Azot Association, and JSC Concern Stirol.[412]

7.230. Russia contends that the absolute figures redacted from Injury Tables 11.3.1 to 11.3.6 constituted the essential facts underlying MEDT of Ukraine's likelihood-of-injury determination, which it should have disclosed.[413] Russia asserts that these figures represented aggregate figures of four different producers, and thus could not have been redacted for reasons of confidentiality.[414] Further, Russia submits that MEDT of Ukraine did not comply with Article 6.5 of the Anti-Dumping Agreement when treating these figures as confidential, as this provision permits confidential treatment of information only when "good cause" is shown, but no such good cause was shown by the domestic industry.[415]

7.231. Ukraine asserts that Russia has not made a *prima facie* case showing why the data in the Injury Tables constituted essential facts.[416] Ukraine submits in this regard that the sufficiency of the disclosure should be assessed taking into account the determinations made by the investigating authority.[417] Ukraine contends that in the underlying reviews, MEDT of Ukraine made its determinations on the basis of the trends in the various economic indices examined in the Injury Tables, rather than the absolute figures, and disclosed these trends through the growth/drop percentage rates.[418] Thus, in Ukraine's view, MEDT of Ukraine disclosed the essential facts forming the basis of its likelihood-of-injury determination, specifically its analysis of the state of the domestic industry.

7.232. Further, Ukraine notes that Article 6.9 does not require the disclosure of essential facts that benefit from confidential treatment under Article 6.5 of the Anti-Dumping Agreement, and when essential facts are properly treated as confidential under Article 6.5, disclosure obligations can be met through the issuance of non-confidential summaries of such essential facts.[419] Ukraine submits that absolute figures redacted from the Injury Tables were confidential, as they represented the aggregated figures of producers belonging to a single group of companies, namely, the Ostchem Group, and these producers sought confidential treatment for these aggregated figures.[420] Ukraine points to a collective submission made by these four domestic producers (Exhibit UKR-51b) in support of its view. Ukraine notes that in any case Russia did not make a claim under Article 6.5 of the Anti-Dumping Agreement, and therefore cannot question the confidential treatment of these absolute figures under this provision. Ukraine asserts that MEDT of Ukraine met its disclosure obligations through the issuance of non-confidential summaries, namely, the growth/drop percentage rates.[421]

7.233. We begin our analysis by noting that Russia has not made any claim under Article 6.5 challenging the confidential treatment of the absolute figures, and thus, we cannot examine whether MEDT of Ukraine acted inconsistently with this provision in treating these absolute figures as confidential.[422] We also note that Ukraine has asserted that the domestic industry sought confidential treatment for the absolute figures in the Injury Tables, and except information pertaining to certain indices in Injury Table 11.3.3[423], has substantiated its assertion by pointing to

[412] Investigation Report, (Exhibit RUS-10b), p. 7.
[413] Russia's first written submission, para. 301; second written submission, para. 684.
[414] Russia's response to Panel question No. 39, para. 114.
[415] Russia's opening statement at the second meeting of the Panel, paras. 264 and 265-266.
[416] Ukraine's first written submission, para. 328.
[417] Ukraine's first written submission, para. 339.
[418] Ukraine's first written submission, paras. 340-341.
[419] Ukraine's first written submission, para. 335.
[420] Ukraine's response to Panel question No. 40, para. 102; second written submission, para. 181.
[421] Ukraine's first written submission, para. 337.
[422] Our decision in this regard is consistent with that taken by other panels, which, in the absence of a claim under Article 6.5, have declined to examine whether the confidential treatment of essential facts was justified under this provision. (See, e.g. Panel Report, *Korea – Certain Paper*, para. 7.327). See also Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.327.
[423] Table 11.3.3 sets out figures pertaining to, *inter alia*, the following indices: (a) average monthly salaries in companies of the domestic producers; (b) employees engaged in production, sales and management; (c) employment in production of the product; and (d) labour productivity. Ukraine, as stated above, relied on Exhibit UKR-51b, to show that the domestic industry requested confidential treatment for aggregate figures pertaining to the indices set out in the Injury Tables. But Exhibit UKR-51b does not contain any request for confidential treatment for figures pertaining to these indices contained in Injury Table 11.3.3.

the relevant evidence on the record.[424] In addition, as clarified by the Appellate Body in its recent report in *Russia – Commercial Vehicles* "regardless of whether or not the essential facts at issue [are] treated [by the investigating authority] as confidential consistently with the requirements of Article 6.5, a panel must examine whether *any* disclosure made – including that made through non-confidential summaries under Article 6.5.1 – meets the requirements of Article 6.9".[425] Therefore, even if we were to assume that MEDT of Ukraine did not treat the essential facts at issue as confidential consistently with Article 6.5, as is argued by Russia, we would still have to examine whether *any* disclosure made, which includes in this case the growth/drop percentage rates disclosed by MEDT of Ukraine, was sufficient to discharge its obligations under Article 6.9. Thus, the question before us is not whether MEDT of Ukraine acted inconsistently with Article 6.9 in failing to disclose the absolute figures redacted from the Injury Tables, but whether the disclosure that it made was sufficient to meet the requirements of Article 6.9.

7.234. Ukraine, as noted earlier, makes two main (and alternative) arguments in this regard. First, it contends that MEDT of Ukraine made its determinations based on trends, rather than absolute figures, and the growth/drop percentage rates were sufficient to disclose the factual basis of the determinations actually made. Thus, in Ukraine's view, the growth/drop percentage rates, not the absolute figures, were the essential facts that needed to be disclosed. Russia does not respond to this argument. Instead, noting Ukraine's argument that the absolute figures redacted from the tables do not amount to essential facts, Russia simply asserts that "exactly those numbers [i.e. the absolute figures] that are missing precluded the Russian producers from a proper defence".[426]

7.235. Second, Ukraine contends that these rates constituted an adequate non-confidential summary of confidential facts, i.e. the absolute figures. Russia, instead of properly responding to this argument, continued to assert throughout these proceedings that the failure to disclose the absolute figures led to a violation of Article 6.9, and insisted that MEDT of Ukraine was required to disclose these figures to comply with its obligations in this regard.[427] These arguments, however,

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[424] Ukraine's response to Panel question No. 58(b), para. 34 and Annex I. Exhibit UKR-51b did not contain any request for confidential treatment for absolute figures pertaining to the following indices: (a) domestic consumption and share of sales by the domestic industry in Table 11.3.1; or (b) production volumes of the domestic industry in Table 11.3.2. However, with respect to domestic consumption and share of sales, we note Ukraine's argument that domestic consumption was calculated as the sum of total import sales (which was disclosed) and domestic sales of the domestic industry (for which confidential treatment was requested), and thus disclosure of absolute figures pertaining to these indices would have allowed interested parties to calculate the domestic sales volume of the domestic industry, thereby compromising its confidential treatment. Having reviewed the Confidential Version of the Investigation Report and the disclosure, we agree with Ukraine that, as a matter of fact, the disclosure of absolute figures with respect to domestic consumption would have compromised the confidential treatment of domestic sales of the domestic industry as interested parties could simply subtract figures on total volume of import sales from the volume of total domestic consumption. Similarly, the disclosure of the percentage market share of the domestic industry in domestic consumption would have also allowed interested parties to calculate the volume of domestic sales of the domestic industry in absolute terms. With respect to production volumes of the domestic industry, we note that this information was disclosed in another section of the disclosure (Table 4.1.1). Thus, while we could agree that this particular information could have been presented in a more organized manner in the disclosure, having reviewed the narrative part of Table 4.1.1, we consider that interested parties should have been able to understand that these figures pertained to the domestic production of the domestic industry, and make their comments on the disclosure on the basis of this information.

[425] Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.189. The panel in that case had found that if confidential treatment was granted to information that constitutes essential facts without complying with the requirements of Article 6.5, the obligations under Article 6.9 may not be met through the disclosure of non-confidential summaries within the meaning of Article 6.5.1 of the Anti-Dumping Agreement. (Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.188; Panel Report, *Russia – Commercial Vehicles*, paras. 7.268-7.269). The panel accordingly did not consider it necessary to examine the alleged disclosure of essential facts made through the non-confidential summaries of confidential information. (Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.188; Panel Report, *Russia – Commercial Vehicles*, para. 7.269). The Appellate Body noted that the panel understood that where essential facts are not properly treated as confidential in accordance with Article 6.5, this would automatically lead to an inconsistency with Article 6.9. The Appellate Body found this understanding to be erroneous and reversed the panel's findings in this regard. (Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.189).

[426] Russia's opening statement at the first meeting of the Panel, para. 152.

[427] For example, even as late as in its second written submission, Russia argued that "[w]ithout the knowledge of concrete figures", the Russian producers were unable to meaningfully address the issue by commenting on the figures, and that the information in the "blank space", i.e. redacted figures in the Injury Tables, should be treated as essential facts that MEDT of Ukraine failed to disclose. (Russia's second written

do not fully address Ukraine's point that the growth/drop percentages rates were adequate non-confidential summaries of confidential facts that it could not disclose. In response to our question to Russia as to why the growth/drop percentage rates did not constitute an adequate non-confidential summary Russia simply stated:

> [Russia] is of a strong opinion that the knowledge of the rate of increase/decrease across the factors is not enough to enable interested parties to properly defend their interests in accordance with the Anti-Dumping Agreement. These data do not give a concrete picture as to how the figures relate to each other, nor are they helpful to assess the state of the domestic industry. Taken alone, they might be indicative for one factor but together the figures do not add up to the sufficient degree of clarity to understand whether the likelihood-of-injury determination rests on objective examination of positive evidence.
>
> As an illustrative example, the absence of figures on sales in combination with the absence of figures on production volumes precludes interested parties from understanding the ratio between these numbers. In this regard, [Russia] recalls Appellate Body's understanding that essential facts are not only "those that are salient for a decision to apply definitive measures", but also "those that are salient for a contrary outcome."[428]

7.236. Ukraine contends that this response of Russia is substantially equal to a failure to respond.[429] Ukraine states that instead of providing a concrete response to the Panel's questions, Russia argues, essentially, that absolute figures should have been provided because such figures are generally more informative than a rate of increase/decrease, and that Russia cannot calculate the ratio of sales to production.[430] Ukraine submits that while absolute figures may well be more informative, to the extent they could not be disclosed on grounds of confidentiality, Russia does not present any argument as to why such rates could not constitute sufficient disclosure of the confidential figures.[431] We agree.

7.237. We note for instance that Russia argues that the absence of figures on sales and production volumes precluded interested parties from understanding the ratio between these numbers. However, Russia does not at all substantiate why such information was necessary to understand the factual basis of MEDT of Ukraine's determinations. It also does not substantiate why such information was salient for a decision to apply definitive measures, or salient to a contrary outcome. Similarly, in the opening statement that it presented at the second meeting of the Panel, Russia asserted that the non-confidential summaries provided in the Injury Tables were not consistent with Article 6.5.1 of the Anti-Dumping Agreement because these Tables did not show how the information across the different tables were related, in particular, the information on sales (Table 11.3.1) and that on production volumes (Table 11.3.2).[432] Russia, we note, has not pursued any claim under Article 6.5.1 in these proceedings. In addition, Russia's statement is extremely unclear. It is not clear to us, for instance, what kind of relation Russia expects between the information in the different Injury Tables for the growth/drop percentage rates to constitute an adequate non-confidential summary, and why.

7.238. We cannot make the case for Russia by considering, without adequate arguments from it, why: (a) the growth/drop percentage rates were not sufficient to meet MEDT of Ukraine's disclosure obligations though Ukraine contends that taking into account the nature of the determination made by MEDT of Ukraine (i.e. a determination based on trends, rather than absolute figures) the growth/drop percentages were sufficient to meet these disclosure obligations; and (b) the growth/drop percentage rates did not constitute an adequate

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submission, paras. 683-684). We note that these arguments were made under a subheading of the written submission titled "[t]he information provided does not constitute an effective non-confidential summary". But the arguments presented under this subheading focus on why MEDT of Ukraine needed to disclose absolute figures to comply with its obligation under Article 6.9. (Russia's second written submission, paras. 681-684).

[428] Russia's response to Panel question No. 39(b), paras. 118-119. See also second written submission, para. 683.

[429] Ukraine's second written submission, para. 188.

[430] Ukraine's second written submission, para. 188.

[431] Ukraine's second written submission, para. 189.

[432] See also Russia's second written submission, para. 683.

non-confidential summary, which was sufficient to understand the factual basis of MEDT of Ukraine's determinations. That was the task for Russia, which it has failed to fulfil.

7.239. Based on the foregoing, we find that Russia has not established that MEDT of Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement with respect to the disclosure of the essential facts underlying its analysis of the state of the domestic industry. We thus reject Russia's corresponding claim under Article 6.2 of the Anti-Dumping Agreement as well.

7.8.2.1.2 Disclosure of essential facts forming the basis of the dumping determinations

7.240. Russia contends that MEDT of Ukraine failed to disclose the essential facts underlying its dumping determinations, particularly the relevant data and formula applied in making the dumping calculations, and the precise figures used.[433] Russia submits that the disclosure does not set out the calculation methodology, whether in the form of worksheets and computer output or in details of the data and formulas applied.[434] Ukraine does not deny that the precise figures or the data underlying MEDT of Ukraine's dumping determinations, specifically, constructed normal value, export price, and adjustments, were not disclosed to the investigated Russian producers. Instead, Ukraine takes the view that this data was already in the possession of the investigated producers, and MEDT of Ukraine provided sufficient details in the narrative part of the disclosure to enable these producers to know which specific data in their possession was used to calculate their dumping margins, and how.[435]

7.241. We note that Russia's claim concerns the disclosure of the precise figures, data, and formulas used for dumping determinations. In the underlying reviews MEDT of Ukraine calculated separate dumping margins for the Russian producers EuroChem and JSC Dorogobuzh.[436] MEDT of Ukraine did not provide in the disclosure the actual figures showing the constructed normal value, export price, and adjustments.[437] The actual figures were instead replaced with an empty bracket. Ukraine also does not deny that MEDT of Ukraine did not disclose the data underlying its calculations of constructed normal value, export price, and adjustments to the interested parties, though it contends that this data was already in the possession of the concerned producers. With respect to the formulas, the specific formulas that Russia alleges were not disclosed are certain formulas applied by MEDT of Ukraine in calculating the cost of production of the product under consideration, and subsequently used in constructing normal value. Specifically, MEDT of Ukraine set out in the Confidential Version of the Investigation Report certain formulas used for calculating the cost of ammonia and nitric acid, but the disclosure does not refer to these formulas.[438]

7.242. Ukraine does not dispute that the figures, data, and formulas that MEDT of Ukraine did not disclose were essential facts. Instead, its arguments are based on the form in which such facts need to be disclosed. Thus, the question before us is whether MEDT of Ukraine disclosed, in a coherent manner, the facts necessary to understand the factual basis of its dumping determinations.

7.243. In addressing this question, we recall, as stated in paragraph 7.207 above, that the disclosure should allow the interested parties to comment on the completeness and correctness of the conclusions the investigating authorities reached from the facts being considered, to provide additional information or correct perceived errors, and to comment or make arguments as to the proper interpretation of those facts.[439] Moreover, the disclosure must allow the interested party to clearly understand what data the investigating authority has used, and how, to determine the dumping margin.[440] We consider in this regard Ukraine's argument that though MEDT of Ukraine did not disclose the precise figures, it did provide sufficient details in the disclosure to enable these

[433] Russia's first written submission, paras. 347(10), 304, and 308-310.
[434] Russia's first written submission, para. 310.
[435] Ukraine's first written submission, paras. 349, 355, and 358.
[436] Ukraine's first written submission, para. 342.
[437] Investigation Report, (Exhibit RUS-10b), pp. 19-21 and 24-28. It is not argued that company-specific disclosures were provided to the investigated Russian producers disclosing these details. Thus, this report is the only document relevant to our review.
[438] Investigation Report, (Exhibit RUS-10b), pp. 24-27; Confidential version of the Investigation Report, (Exhibit UKR-52b (BCI)), pp. 31-34.
[439] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131; *China – GOES*, fn 390; and Panel Report, *EC – Salmon (Norway)*, para. 7.805.
[440] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.

producers to know which specific data in their possession was used to calculate their dumping margins, and how. The issue before us is similar to that discussed by the panel and the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*.

7.244. In that dispute, noting that the basic data underlying dumping determinations constitutes essential facts, the panel focused on the manner in which these facts were disclosed.[441] The panel found that the investigating authority had described, in the narrative part of its disclosure, the sales data under consideration, the basis for determining normal value and export price, and the adjustments made thereto.[442] Moreover, the investigating authority had specified when it used data or made adjustments requested by the exporters, and in addition, disclosed actual data when it departed from the data submitted by the exporters.[443] The panel found that the complainants had not shown why these narrative descriptions were not sufficient to meet the investigating authority's obligations under Article 6.9.[444]

7.245. The Appellate Body reversed the panel's findings. It found that such a disclosure was not sufficient to meet an investigating authority's obligation under Article 6.9 of the Anti-Dumping Agreement.[445] In particular, it found that the mere fact that an investigating authority refers in its disclosure to data that is in the possession of an interested party does not mean that the investigating authority has:

a. 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[446]; and

b. disclosed the essential facts that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures, and to defend its interests.[447]

7.246. Ukraine seeks to distinguish these findings by arguing that the dispute in *China – HP-SSST (Japan) / China – HP-SSST (EU)* concerned a situation where the investigated producers submitted various data, and it was not clear which data was selected by the investigating authority to calculate the dumping margins.[448] Ukraine submits that by contrast in the present case MEDT of Ukraine specifically identified the data used to determine the dumping margins in the narrative part of the disclosure.[449]

7.247. Contrary to Ukraine's arguments, however, the Appellate Body's finding in *China – HP-SSST (Japan) / China – HP-SSST (EU)* is not limited to cases where investigating authorities select some data, from amongst various data furnished by the investigated producers. The Appellate Body also raised other concerns. In particular, it said that such a type of disclosure would not allow the investigated producers to correct clerical and mathematical errors in dumping margin calculations or confirm that the investigating authority determined the dumping margin in the manner it purported to do.[450] Moreover, it stated that mere references to the data in possession of the investigated producer in the narrative part of a disclosure would not result in the disclosure of such essential facts to interested parties other than this producer.[451] Thus, we do not agree with Ukraine's understanding of the scope of the Appellate Body's findings in *China – HP-SSST (Japan) / China – HP-SSST (EU)*.

7.248. Instead, we find the concerns raised by the Appellate Body to be fully applicable to the situation before us. In particular, we do not consider that in the absence of precise figures or the

[441] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.235.
[442] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.236.
[443] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.236.
[444] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.236.
[445] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.131 and 5.133.
[446] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.131.
[447] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.133.
[448] Ukraine's first written submission, para. 348.
[449] Ukraine's first written submission, paras. 349, 355, and 358.
[450] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, fn 323.
[451] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, fn 325.

underlying data used for constructed normal value, export price, and adjustments, interested parties would be able to comment on the accuracy of the calculations made by MEDT of Ukraine or confirm that it actually did what it purported to do. We also find that MEDT of Ukraine's failure to disclose certain formulas used in calculating the cost of production deprived the interested parties of an opportunity to understand the basis for this calculation and comment on it.

7.249. Based on the foregoing, we find that MEDT of Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because it failed to disclose in a coherent manner the facts necessary to understand the factual basis of its dumping determinations, including the precise figures and data underlying its calculation of constructed normal value, export price, and adjustments thereto. Moreover, insofar as MEDT of Ukraine failed to disclose certain formulas that it used to calculate the cost of production, and constructed normal value, it also acted inconsistently with Article 6.9 of the Anti-Dumping Agreement. We exercise judicial economy on Russia's claim under Article 6.2 of the Anti-Dumping Agreement insofar as it arises from the same factual basis as this claim under Article 6.9.

7.8.2.2 Sufficiency of time given to respond to disclosure

7.250. MEDT of Ukraine gave the interested parties two days to comment on the disclosure. Russia considers this to be an "outrageous violation" of Article 6.9, which requires investigating authorities to give interested parties "sufficient time" to comment on the disclosed essential facts.[452] Russia states that taking into account the complexity of the issues discussed in the disclosure, the time of two days was insufficient.[453] Further, according to Russia, MEDT of Ukraine's decision to reject EuroChem's comments on the disclosure on the ground that they were filed after business hours on the due date was inconsistent with Article 6.9.[454] Ukraine considers that the time of two days was sufficient in this case, and notes that two of the three Russian producers filed comments on the disclosure.[455] With respect to EuroChem, Ukraine notes that it filed its comments on the disclosure after working hours on the due date and thus MEDT of Ukraine could not accept them.[456]

7.251. Article 6.9 stipulates that the disclosure of essential facts should take place in sufficient time for the parties to defend their interests. Thus, while Article 6.9 does not prescribe any particular time-frame, it does suggest that the time should be sufficient for the parties to defend their interests. We consider that the sufficiency of the time that investigating authorities give to parties to comment on the disclosure has to be assessed on a case-by-case basis considering, *inter alia*, the nature and complexity of the issues to which the parties have to respond in order to defend their interest.

7.252. Russia notes in this regard that the disclosure covered several issues regarding the product under consideration, export price and normal value determinations, dumping margin calculations as well as analyses on the injury suffered by the domestic industry.[457] Russia states that interested parties needed time to prepare a proper response regarding each part of these analyses.[458] Moreover, Russia observes that the investigated Russian producers became aware of MEDT of Ukraine's proposed rejection of the reported gas cost only when they received the disclosure, and would have needed time to make comments in this regard.[459] Ukraine does not deny that the investigated Russian producers became aware of MEDT of Ukraine's rejection of the reported gas cost only when the disclosure was issued.[460] But Ukraine contends that the investigated Russian producers were on notice prior to the issuance of the disclosure that MEDT of Ukraine would reject their reported gas cost for two reasons. First, these producers were aware that the domestic industry had requested MEDT of Ukraine to reject this reported gas cost.[461] Second, an investigating authority in another jurisdiction that initiated anti-dumping investigations on imports

[452] Russia's first written submission, paras. 321-324; second written submission, paras. 695-697 and 699.
[453] Russia's second written submission, paras. 698-699.
[454] Russia's second written submission, para. 707.
[455] Ukraine's first written submission, paras. 362 and 367.
[456] Ukraine's first written submission, para. 368.
[457] Russia's opening statement at the second meeting of the Panel, para. 271.
[458] Russia's opening statement at the second meeting of the Panel, para. 271.
[459] Russia's first written submission, para. 321
[460] Ukraine's response to Panel question No. 41, para. 104.
[461] Ukraine's first written submission, para. 364.

of ammonium nitrate, and in which the same producers had participated, had done the same.[462] Ukraine also asserts that the disclosure was quite short, and thus two days was sufficient for the parties to respond to it.

7.253. We agree with Russia that "two days" was insufficient time for the parties to comment on this disclosure, and thus not sufficient to defend their interests before the Ukrainian authorities. Besides the broad range of issues to which the investigated Russian producers had to respond, the disclosure was the first time that the investigated Russian producers were made aware of the factual basis of MEDT of Ukraine's dumping determinations, including the facts based on which the surrogate price of gas (rather than the reported gas cost) would be ascertained.[463] This added to the complexity of the issues to which the investigated Russian producers had to respond.

7.254. We disagree in this regard with Ukraine's argument that the investigated Russian producers were on notice that MEDT of Ukraine would reject the reported gas cost because that is what the domestic industry had requested, and that is what certain other anti-dumping authorities had done. The purpose of a disclosure under Article 6.9 is to disclose the essential facts that form the basis of an investigating authority's decision to apply definitive measures in sufficient time for the parties to defend their interests. Investigating authorities cannot forego this obligation simply because their decision to impose definitive measures is based on grounds that are similar or identical to that taken by investigating authorities in other jurisdictions, or based on a request made by the domestic industry.[464] Moreover, timely disclosure would also have been necessary to allow the interested parties to comment on the appropriateness or correctness of the facts that MEDT of Ukraine decided to use to calculate the surrogate price of gas, which could not have been communicated to them earlier than the disclosure. In any case, our findings are based on a review of the disclosure as a whole, and not just the disclosure regarding the gas prices used for normal value construction.

7.255. Based on the foregoing, we find that MEDT of Ukraine acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to give the parties "sufficient time" to defend their interests.[465]

7.9 Consequential claims

7.256. Russia contends that as a consequence of violations under the Anti-Dumping Agreement, the Ukrainian authorities acted inconsistently with Articles 1 and 18.1 of the Anti-Dumping Agreement as well as Article VI of the GATT 1994.[466] Ukraine asks us to reject these claims.[467]

7.257. With respect to Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement, we note that these claims are consequential to findings of violations under other provisions of the Anti-Dumping Agreement. Having found substantive violations under various provisions of the Anti-Dumping Agreement, we do not find it necessary to address Russia's consequential claims in

[462] Ukraine's first written submission, para. 365.
[463] Ukraine's response to Panel question No. 41, para. 104.
[464] We note that Ukraine contends that in *EU – Footwear (China)*, the investigating authority gave the interested parties only five days to comment on the disclosure, and this time was considered by the panel to be "sufficient" within the meaning of Article 6.9. (Ukraine's first written submission, para. 361). We do not share Ukraine's understanding of the panel report in *EU – Footwear (China)*. In that case, the investigating authority first issued a general disclosure, and subsequently sent an additional disclosure document, which reflected revisions made by the authority in response to comments received on the general disclosure. The authority gave interested parties five days to respond to this additional disclosure document. It is the time given to the interested parties to respond to this more limited additional disclosure document that was challenged in *EU – Footwear (China)*. (Panel Report, *EU – Footwear (China)*, para. 7.833). Unlike in *EU – Footwear (China)*, MEDT of Ukraine issued only one disclosure, and gave interested parties only two days to respond to that disclosure. Thus, we find Ukraine's reliance on *EU – Footwear (China)* to be inapposite.
[465] We note Russia's argument that MEDT of Ukraine's refusal to accept comments from EuroChem on the due date for submissions also led to a violation of Article 6.9. (Russia's opening statement at the second meeting of the Panel, para. 281). We have already found that the time given to the interested parties to comment on the disclosure was not sufficient for them to defend their interests. We thus need not separately address Russia's arguments challenging MEDT of Ukraine's decision to not accept EuroChem's comments on the disclosure.
[466] Russia's first written submission, paras. 345 and 347(13).
[467] Ukraine's first written submission, paras. 25-26.

this regard to secure a positive resolution of this dispute. Thus, we exercise judicial economy with respect to Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement.

7.258. With respect to Russia's claims under Article VI of the GATT 1994, we note that Russia simply presented a claim under Article VI, without identifying either in its panel request or in its written submissions the specific paragraphs or the specific obligations under these paragraphs that it seeks to challenge.[468] This was Russia's task, which it has failed to undertake.[469] Therefore, we reject Russia's claim under Article VI of the GATT 1994.

7.259. Based on the foregoing, we exercise judicial economy on Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement, but reject its claim under Article VI of the GATT 1994.

8 FINDINGS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, with respect to Ukraine's request for a preliminary ruling on our terms of reference, we find that:

a. ICIT's 2008 amended decision and the 2010 amendment are within our terms of reference;

b. the claims identified in the following item numbers of Russia's panel request are within our terms of reference:

   i. item number 1 of the panel request with respect to the claims under Articles 5.8, 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement;

   ii. item number 4 of the panel request with respect to claims under Article 6.8 and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement;

   iii. item number 17 of the panel request with respect to claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement insofar as they are based on the view that the Ukrainian authorities determined and relied on injury which was not established in accordance with Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement;

c. the claims identified in item number 7 of Russia's panel request under Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement fall outside our terms of reference because they did not reasonably evolve from the legal basis set out in the consultation request, and thus we do not consider these claims; and

d. Ukraine's request for a ruling that the alleged claims identified in item number 17 of the panel request under Articles 3.1 and 3.4 of the Anti-Dumping Agreement fall outside our terms of reference is moot.

8.2. For the reasons set forth in this Report, with respect to Russia's claims concerning the Ukrainian authorities' dumping and likelihood-of-dumping determinations in the underlying reviews, we find that:

a. the Ukrainian authorities acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement in rejecting the reported gas cost of the investigated Russian producers without providing an adequate basis under the second condition of Article 2.2.1.1;

[468] Russia's panel request, item number 19; first written submission, paras. 341, 344-346, and 347(13).
[469] See, e.g. Panel Report, *US – OCTG (Korea)*, para. 7.337. The panel in *US – OCTG (Korea)* reached a similar conclusion with respect to a claim of consequential violation under Article VI. We note that some panels have made findings of consequential violations under Article VI without identifying the specific obligation under this provision which was violated. (See, e.g. Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.336; and *Canada – Welded Pipe*, para. 7.223). However, we do not consider this approach is warranted in the present case.

b. the Ukrainian authorities acted inconsistently with Article 2.2 of the Anti-Dumping Agreement in using a cost for gas that did not reflect the cost of the product under consideration "in the country of origin", i.e. Russia;

c. the Ukrainian authorities acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement by relying on costs that were calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement to make their determinations under Article 2.2.1;

d. the Ukrainian authorities acted inconsistently with Articles 11.2 and 11.3 of the Anti-Dumping Agreement in relying on dumping margins calculated inconsistently with Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement to make their likelihood-of-dumping determinations;

e. Russia has failed to establish that the Ukrainian authorities acted inconsistently with Article 2.1 of the Anti-Dumping Agreement in connection with the Ukrainian authorities' decision to not use the domestic sales price of the like product in Russia to calculate normal value of the investigated Russian producers;

f. we do not need to address, and exercise judicial economy on, Russia's claim under Article 2.2 in connection with the Ukrainian authorities' rejection of the reported gas cost of the investigated Russian producers;

g. we do not need to address, and exercise judicial economy on, Russia's claim under Article 2.2.1.1 of the Anti-Dumping Agreement in connection with the Ukrainian authorities' use of the export price of gas from Russia at the German border to calculate the cost of production of the investigated Russian producers;

h. we do not need to address, and exercise judicial economy on, Russia's claim under Article 2.4 of the Anti-Dumping Agreement in connection with the Ukrainian authorities' alleged failure to make a fair comparison between the export price and the constructed normal value; and

i. we do not need to address, and exercise judicial economy on, Russia's claim under Article 11.1 of the Anti-Dumping Agreement.

8.3. For the reasons set forth in this report, with respect to Russia's claims concerning the non-termination of the investigation against EuroChem, we find that:

a. the Ukrainian authorities acted inconsistently with Article 5.8 of the Anti-Dumping Agreement by:

   i. failing to exclude EuroChem from the scope of the original anti-dumping measures, specifically the 2008 amended decision;

   ii. imposing a 0% anti-dumping duty on EuroChem through the 2010 amendment, instead of excluding it from the scope of the anti-dumping duty order;

   iii. including EuroChem within the scope of the review determinations, and imposing anti-dumping duties on it through the 2014 extension decision;

b. we do not need to address, and exercise judicial economy on, Russia's claims under Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement.

8.4. For the reasons set forth in this Report, we find that Russia has not established that the Ukrainian authorities acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement in connection with the Ukrainian authorities' alleged determination of and reliance on injury not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in making their likelihood-of-injury determination.

8.5. For the reasons set forth in this Report, with respect to Russia's claims challenging the Ukrainian authorities' conduct in the underlying reviews, we find that:

a. the Ukrainian authorities acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in failing to disclose the essential facts underlying:

   i. MEDT of Ukraine's price effects analysis, which formed part of the determinations on likelihood of injury;

   ii. MEDT of Ukraine's dumping determinations;

b. the Ukrainian authorities acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in failing to give interested parties sufficient time to comment on MEDT of Ukraine's disclosure;

c. Russia has failed to establish that the Ukrainian authorities acted inconsistently with Article 6.8, and paragraphs 3, 5, and 6 of Annex II of the Anti-Dumping Agreement in connection with alleged procedural violations by the Ukrainian authorities;

d. Russia has failed to establish that the Ukrainian authorities acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in connection with the disclosure of essential facts underlying its analysis of the economic state of the domestic industry, as part of the likelihood-of-injury determination;

e. Russia has failed to establish that the Ukrainian authorities acted inconsistently with Article 6.2 of the Anti-Dumping Agreement in connection with the disclosure of essential facts underlying its analysis of the economic state of the domestic industry, as part of the likelihood-of-injury determination; and

f. we do not need to address, and exercise judicial economy on, Russia's claims that the Ukrainian authorities acted inconsistently with Article 6.2 of the Anti-Dumping Agreement in failing to disclose the essential facts underlying:

   i. MEDT of Ukraine's price effects analysis, which formed part of its determinations on likelihood of injury;

   ii. MEDT of Ukraine's dumping determinations.

8.6. For the reasons set forth in this Report, with respect to the Russia's claims of consequential violations, we find that:

a. Russia has failed to establish that the Ukrainian authorities acted inconsistently with Article VI of the GATT 1994 as a consequence of alleged violations under the Anti-Dumping Agreement; and

b. we do not need to address, and exercise judicial economy on, Russia's claims under Articles 1 and 18.1 of the Anti-Dumping Agreement.

8.7. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Anti-Dumping Agreement, they have nullified or impaired benefits accruing to Russia under this agreement.

8.8. Pursuant to Article 19.1 of the DSU, we recommend that Ukraine bring its measures into conformity with its obligations under the Anti-Dumping Agreement.