

(As delivered)

**World Trade Organisation**

**Panel Proceedings**

*European Communities – Anti-Dumping Measures  
on Biodiesel from Argentina*

*DS473*

**Third Party Oral Statement**

**by**

**Norway**

**Geneva, 19 March 2015**

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Mr Chair, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. We will not comment upon all the issues raised by the Parties. Rather, we will confine ourselves to offer some views on the interpretation of the first sentence of Article 2.2.1.1 of the *Anti-Dumping Agreement*.

2. As we know, the first sentence provides that

*[f]or the purposes 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.*

3. The parties disagree, amongst others, on whether Article 2.2.1.1 allows the “investigating authorities to reject or adjust costs of certain inputs used in the production of the product under consideration because the prices of these inputs in their domestic market are found to be ‘abnormally or artificially low’”.<sup>1</sup>

4. A legal analysis of a WTO provision starts, of course, with an inquiry into the ordinary meaning of the terms. Article 2.2.1.1 uses the word “shall”, which indicates that it establishes an obligation of some sort. In this case, the word “shall” is qualified by the terms “normally” and “provided that”. We understand “normally” in this context to point to the existence of conditions, rather than to “alter the characterization of [the] obligation as constituting a ‘rule’”.<sup>2</sup>

5. The obligation on the investigating authorities according to Article 2.2.1.1, is subject to two cumulative conditions:

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<sup>1</sup> Argentina’s First Written Submission para. 87 and 88. See also Argentina’s First Written Submission para. 195. European Union’s First Written Submission, for instance, para. 154 and 254.

<sup>2</sup> See Appellate Body Report, *United States – Clove Cigarettes*, para. 273.

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- i) that the records kept by the exporter or producer are in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and
  - ii) that such records reasonably reflect the costs associated with the production and sale of the product under consideration.
6. If these two conditions are fulfilled, the investigating authorities “shall normally” calculate the costs on the basis of records kept by the exporter or producer under investigation.
  7. In light of the ordinary meaning of the terms in Article 2.2.1.1, Norway notes that both conditions seem to relate to the quality of the records as such. It is the *records* that must be in accordance with the GAAP, and the *records* that must “reasonably reflect the costs associated with the production and sale of the product under consideration”. The European Union, however, argues that the second condition should be interpreted to mean that *the costs themselves* need to be reasonable. The European Union submits, amongst others, that “it would be counterintuitive to assert that Article 2.2.1.1 [...] mandates the investigating authorities to base their calculations on costs that are ‘unreasonable’”.<sup>3</sup>
  8. In our view, by asserting this, the European Union is reading into Article 2.2.1.1 words that are simply not there. The structure of the first sentence of Article 2.2.1.1 does not suggest an interpretation that the records must reflect costs that are reasonable – or not “abnormally or artificially low”. Rather, the structure and the ordinary meaning of the terms suggest that the second condition only concerns whether the records in a reasonable way reflects the costs associated with the production and sale of the product under consideration.
  9. Accordingly, Norway is of the opinion that Article 2.2.1.1 does not allow investigation authorities to disregard the records in situations where the authorities

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<sup>3</sup> European Union’s First Written Submission para. 131.

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find that the costs reflected in the records are “abnormally or artificially low”, as long as the two explicitly mentioned conditions are met.

Mr. Chair, Members of the Panel,

10. This concludes Norway’s statement. I thank you for your attention.