

World Trade Organization

Panel Proceedings

***European Union – Anti-Dumping Measures on Biodiesel from
Indonesia***

WT/DS480

Third Party Oral Statement

by

Norway

at the Third Party Session of the Panel

Geneva, 30 March 2017

Ms. Chairperson, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel. Without taking any position on the facts of this dispute, I will in this oral statement take the opportunity to offer some views on the interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.
2. Indonesia submits that the European Union acted inconsistently with the obligation laid down in the sentence referred to above since it did not calculate the costs on the basis of the records kept by the exporting producers under investigation.¹ Emphasizing the Appellate Body’s interpretation of the first sentence of Article 2.2.1.1 in EU – Biodiesel, Indonesia submits that the said Article obliges the investigating authorities to calculate the costs based on the records kept by the exporter or producer when the two conditions set forth in the article are met. Furthermore, Indonesia submits that the test of reasonableness set forth in the second condition in the first sentence of Article 2.2.1.1 relates to the quality of the records as such, and does not include a general standard of reasonableness that allows investigation authorities to disregard the records in situations where the authorities find that the costs reflected in the records are “abnormally or artificially low”, in comparison with hypothetical costs that might prevail in a hypothetical market.
3. As we know, the first sentence of Article 2.2.1.1 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.

¹ First Written Submission of Indonesia, para 44.

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’*”.²
5. The obligation on the investigating authorities, according to Article 2.2.1.1, is subject to two cumulative conditions:
 - 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 investigative authorities “shall normally” calculate the costs on the basis of records kept by the exporter or producer under investigation.
7. Regarding the meaning of the second condition in the first sentence of Article 2.2.1.1, Norway notes that the question regarding whether the test of reasonableness is related to the quality of the records as such was accurately clarified in the Appellate Body Report in EU – Biodiesel.
8. In our view the Appellate Body precisely stressed in EU - Biodiesel that “*in accordance with the ordinary meaning of the terms in their context and in the light of the object and purpose of the Anti-Dumping Agreement, we understand this*

² See Appellate Body Report, United States – Clove Cigarettes, para. 273.

*condition as referring to whether the records kept by the exporter or producer sustainably 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”.*³

9. Namely, the Appellate Body clearly underlines that the second condition of Article 2.2.1.1 relates to the quality of the records. It is the records that have to pass the test of reasonableness in regards to the costs incurred by the exporter or producer, not the costs as such.
10. Furthermore, Norway notes that the Appellate Body on this issue fully upheld the Panel Report in EU – Biodiesel, which clarified that *“the object of the comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical cost that might have been incurred under different set of conditions or circumstances and which the investigating authority considers more “reasonable” than the costs actually incurred”.*⁴
11. Norway recalls that the conclusions set forth in both the Panel Report and the Appellate Body Report in EU – Biodiesel are circumscribed to the facts of that case. The very basis of the system is that reports are binding only on the parties to the dispute. The Appellate Body has however underlined *“that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute. Following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same. This is also in line with a key objective of the dispute settlement system*

³ Appellate Body Report, EU – Biodiesel, para 6.26.

⁴ Panel Report, EU – Biodiesel, para. 7.242.

*to provide security and predictability to the multilateral trading system.”*⁵ Norway would add that by following previous Appellate Body reports, panels also contribute to ensuring fewer disputes and preserve both the system and the systemic function of the Appellate Body.

12. Mr. Chairman, Members of the Panel,

13. This concludes Norway’s statement here today. Thank you.

⁵ Appellate Body Report, United States – Continued Zeroing, para. 362.