

(As delivered)

IN THE WORLD TRADE ORGANIZATION

Before the Appellate Body

Ukraine – Anti-Dumping Measures on Ammonium Nitrate

(AB-2018-5 / DS493)

Oral Statement

by

Norway as a Third Participant

Hearing of the Appellate Body

Geneva

20-21 May 2019

Presiding Member, Members of the Division,

1. Norway welcomes this opportunity to make a brief statement as a Third Participant before the Appellate Body in this appeal.
2. In this dispute, the Parties disagree, amongst others, on whether government regulation or intervention in the home market may affect the calculation of costs, as set forth in Article 2.2.1.1 of the *Anti-Dumping Agreement*.
3. It is Norway's understanding, based on the Panel Report, that it is not disputed that the respondent company has reported the actual costs. The issue is whether the price of an input, that has been fixed by government regulation or intervention in the home market, allows an investigative authority to reject the respondent company's actual input cost and compute a constructed normal value.
4. In this statement, Norway will offer its view on the interpretation of Article 2.2.1.1 of the *Anti-Dumping Agreement* and its relationship with Article VI of GATT 1994, the Ad note to this provision and the *Agreement on Subsidies and Countervailing Measures*. Norway will not, however, take a stand in the dispute between Russia and Ukraine.
5. Norway would, *firstly*, like to underscore that WTO agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions in harmony.¹ In line with the customary rules of interpretation of international law, the panel in *US–1916 Act* described the GATT 1994 Article VI and the *Anti-Dumping Agreement* as part of an “inseparable package of rights and obligations” that must not be interpreted in a way that would deprive either of meaning.²
6. In this context, Norway recalls that Article VI of the GATT 1994 contains rules on both “Anti-dumping and Countervailing Duties”. The starting point of the definition of dumping in Paragraph 1 is that “products of one country are introduced into the commerce of another country at less than the normal value of the products”. A “Countervailing Duty”, on the other hand, is defined as “a special duty levied for the purpose of offsetting any bounty or

¹ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 570.

² Panel Report, *US – 1916 Act (Japan)*, para. 6.92

subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise”.³

7. The rules on anti-dumping duties and countervailing duties thus complement each other. The rules on anti-dumping address the private practice of price discrimination, whereas the rules on subsidies address price distortion through government intervention. Addressing domestic government subsidies through the *Anti-Dumping Agreement* runs counter to the system set up by the GATT 1994 Article VI and could lead to depriving one of the sets of rules of its meaning.
8. Turning, *secondly*, to the interpretation of Article 2.2.1.1 of the *Anti-Dumping Agreement*, and the question of whether the records “reasonably reflect the costs associated with the production”. The Panel in this case established - with reference to the Appellate Body in *EU – Biodiesel* - that it is the “records” that should stand the test of reasonableness in this provision, and not the “costs”.⁴
9. The Panel further confirmed the reasoning of the Appellate Body in *EU – Biodiesel* that the “costs associated with the production and sale of the product under consideration”, referred to in Article 2.2.1.1, relates to the costs incurred that are genuinely related to the production and sale of the specific product under consideration.⁵ Norway shares the Panel’s interpretation of this article.⁶
10. In Norway’s view, the definition of dumping in the GATT 1994 Article VI underpins this interpretation of Article 2.2.1.1. Government regulation or intervention in the home market will typically affect prices on domestically consumed products and exported products alike. Thus, the products are not “introduced into the commerce of another country at less than the normal value of the products”, as required by the dumping definition.
11. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body explained this, in the context of “double remedies”:

³ GATT 1994 Article VI para. 3.

⁴ Panel Report, paras. 7.84-7.85.

⁵ Panel Report, para. 7.87.

⁶ Panel Report, para. 7.90.

“[D]omestic subsidies will, in principle, affect the prices at which a producer sells its goods in the domestic market and in export markets in the same way and to the same extent. Since any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation, the overall dumping margin will not be affected by the subsidization. In such circumstances, the concurrent application of duties would not compensate for the same situation, because no part of the dumping margin would be attributable to the subsidization. Only the countervailing duty would offset such subsidization.”⁷

12. Lastly, to address the most profound results of government regulation in the home market, the second Ad Note to Article VI Paragraph 1 clarifies that for non-market economies, “a strict comparison with domestic prices [...] may not always be appropriate”. Based on case law from the Appellate Body, it is clear that the exception for non-market economies in the Ad Note has a very limited scope.⁸

13. Thank you.

⁷ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568.

⁸ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 569, Appellate Body Report, *EC - Fasteners*, footnote 460 to para. 285.