

World Trade Organization

Panel Proceedings

*Ukraine – Anti-Dumping Measures on Ammonium Nitrate from
Russia*

WT/DS493

Third Party Oral Statement

by

Norway

at the Third Party Session of the Panel

Geneva, 27 July 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, Norway will in this oral statement take the opportunity to offer some views on the interpretation of the Second condition of Article 2.2.1.1 of the Anti-Dumping Agreement, and the application of Panel and Appellate Body reports in EU – Biodiesel.¹
2. The obligations on the investigating authorities according to Article 2.2.1.1, is subjected 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.
3. If these two conditions are fulfilled, the investigating authorities “*shall normally*” calculate the costs on the basis of the records kept by the exporter or producer under investigation.
4. With regards to the second condition, the parties disagree on whether Article 2.2.1.1 “*allows an investigating authority to disregard input prices reasonably reflected in records kept by the investigated producers and ex-porters on the grounds that due to governmental regulation domestic input prices are lower than prices charged for exporter of the input concerned and/or in the markets of third countries*”.²

¹ DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina.

² Russia’s First Written Submission para. 64.

5. Ukraine contends, among other, that following the guidance of the Appellate Body and Panel in EU – Biodiesel, the second condition of Article 2.2.1.1 allows the investigating authority to “*examine the reliability and accuracy of the costs recorded in the records of the producers/exporters*”, and disregard such records when they do not reasonably reflect the costs associated with the production and sale of the product under consideration, because the recorded costs of inputs do not reflect transactions concluded on terms and conditions that are compatible with normal commercial practices.
6. Regarding the content of the second condition, Norway notes that the Appellate Body in EU – Biodiesel clearly established that the wording “*reasonably reflect*” of Article 2.2.1.1 relates to the “*records*”, and not the “*costs associated with the production and sale of the product under consideration*”. It is the “*records*” that stand the test of reasonableness, and not the “*costs*”.
7. Furthermore, regarding the “*costs*”, both the Panel and the Appellate Body in EU – Biodiesel established that “*costs associated with the production and sale of the product under consideration*” relates to the “*actual*” costs incurred that are genuinely related to the production and sale of the specific product under consideration.³
8. In connection to this, the Panel in EU – Biodiesel underlined that the condition at issue relates to whether the costs set out in a producer’s or exporter’s records “*correspond – within acceptable limits – in an accurate and reliable manner[] to all the actual costs incurred by the particular producer or exporter under consideration*”.⁴ In addition the Panel further underlined that “*the object of comparison is to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under different set of conditions or circumstances and which the*

³ Appellate Body Report in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 6.30.

⁴ Panel Report in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 7.247.

*investigating authority consider more “reasonable” than the costs actually incurred”.*⁵

Ms. Chairperson, Members of the Panel,

9. Norway does not intend to delve into the facts of the case, but it seems from the written submissions of the parties that the Ukraine does not dispute that the costs recorded by the producers accurately and reliably capture all the relevant production activities that have actually incurred related to the production of the specific product. The real issue in dispute would seem to be whether the input price of gas in Russia can be disregarded due to it being subsidized or distorted through government regulations so that the producer receives gas for less than market value.
10. In this respect, Norway notes that “dumping” is defined as price discrimination by the investigated producer between domestic and export markets.⁶ Anti-dumping measures are available to counter such discriminatory behavior by exporters. Government regulation or intervention in the home market, that affect the producers’ cost of production, for instance price caps or the provision by a Government of an input for less than market value, is more appropriately considered under the Subsidies Agreement⁷, and is not as such a reason to reject the actual cost of production in a dumping investigation.

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11. In conclusion, Article 2.2.1.1 of the Anti-dumping Agreement does not allow the investigating authorities to reject records by the producer or exporter, on the grounds that the records do not reasonably reflect the costs associated with the production and

⁵ Panel Report, in DS473 – EU – Anti-Dumping Measures on Biodiesel from Argentina, para. 7.242.

⁶ GATT Article VI:1(b)(ii) and *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* Article 2.1.

⁷ Cf. *Agreement on Subsidies and Countervailing Measures* Article 1.1(a)(1)(iii) and Article 14(d).

sale of the product under investigation, because the price of an input is considered not to reflect market value due to governmental regulation.

12. This concludes Norway's statement here today. Thank you.