

(As delivered)

IN THE WORLD TRADE ORGANIZATION

Before the Appellate Body

European Union – Anti-Dumping Measures on Biodiesel from Argentina

(AB-2016-4 / DS473)

Oral Statement

by

Norway as a Third Participant

Hearing of the Appellate Body

Geneva

21-22 July 2016

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. In this statement, we will offer some views on the interpretation of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.
2. 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.
3. 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.
4. Norway notes that both conditions apparently 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”.
5. With regard to the second condition, the European Union claims that the Panel erred in its interpretation as well as in its application of the Anti-Dumping Agreement Article 2.2.1.1 through its assessment of what needs to be “reasonable”.
6. According to the European Union, the Panel “pre-judged the issue” by considering the second condition to refer to records that reasonably reflect the *actual* costs associated with the production and sale of the product under consideration.¹ Contrary to this, the European Union holds that “the costs reflected in the records must be ‘reasonable’ for the production of the good in question”,² i.e. arguing a standard of reasonableness, which informs the determination of costs. The European Union asserts this follows from a “holistic analysis

¹ See e.g. European Union’s Appellant Submission, para. 114 referring to Panel Report para. 7.222.

² European Union’s Appellant Submission, para. 149.

of the ordinary meaning, context and object and purpose of Article 2.2.1.1”, which should have been carried out by the Panel.³

7. In our view, by asserting this, the European Union is reading into Article 2.2.1.1 words that are not there. In this regard, we refer to customary rules of treaty interpretation, as set out in Article 31(1) of the Vienna Convention, that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Norway agrees with Argentina and other Third Participants that the first sentence of Article 2.2.1.1 does not suggest an interpretation that the records must reflect costs that are reasonable.⁴ The ordinary meaning and the structure of the terms contained in the first sentence of Article 2.2.1.1 suggest that the second condition only concerns whether the *records* in a *reasonable* way *reflect* the costs associated with the production and sale of the product under consideration. Norway agrees with Indonesia that the European Union appears to overly focus on broad context and the object and purpose of the provision.⁵
8. In light of the above, it is Norway’s opinion that Article 2.2.1.1 prevents investigating authorities from determining the costs by rejecting costs actually incurred and recorded.
9. Thank you.

³ European Union’s Appellant Submission, paras. 34, 156 and 190.

⁴ Argentina’s Appellee Submission, para. 17; China’s Third Participant Submission, Indonesia’s Third Participant Submission; Saudi-Arabia’s Third Participant Submission.

⁵ Indonesia’s Third Participant Submission, para. 16. See also Argentina’s Appellee Submission.