European Union – Anti-Dumping Measures on Biodiesel from Argentina
(WT/DS473)

Third Party Written Submission of Australia

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I. INTRODUCTION

1. Australia considers that these proceedings initiated by Argentina under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) raise significant issues of legal interpretation of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (the Anti-Dumping Agreement).

2. In this submission, Australia addresses the meaning of the first sentence in Article 2.2.1.1 of the Anti-Dumping Agreement, particularly the language "records [that] reasonably reflect the costs associated with the production and sale of the product under consideration."

3. Australia reserves the right to raise other issues in the third party hearing with the Panel.

I. THE ANTI-DUMPING AGREEMENT


4. A material issue in this matter is the interpretation of language "records [that] reasonably reflect the costs associated with the production and sale of the product under consideration” in Article 2.2.1.1 of the Anti-Dumping Agreement. This language derives from the first sentence of Article 2.2.1.1, which reads:

   For the purpose 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.

5. Two questions are of critical importance to this analysis: what it means for records to reasonably reflect the costs associated with production and sale of the product under consideration; and, whether records that accurately detail the actual expenses of the exporter or producer automatically constitute records that must be used in the calculation of costs (provided they also accord with generally accepted accounting principles (GAAP) – in this submission Australia assumes that the GAAP proviso is met). Relevantly, the Panel in China – Broiler Products (US) noted that

   …although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall normally be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with [generally accepted accounting principles - GAAP] or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration.

1 Report of the Panel, China – Broiler Products (US), para. 7.164.
6. Argentina argues that records that detail the actual expenses of the exporter or producer would reasonably reflect the costs associated with production and sale of the product under consideration, and so must be used in the production cost calculation under Article 2.2.1.1. In Australia’s view, this may not always be the case. Rather, Article 2.2.1.1 permits investigating authorities to look beyond the records to consider whether the costs reflected therein are reasonably related to the cost of producing and selling the product. The reasonableness of costs of inputs or raw materials would be relevant to this analysis.

7. In this respect, Australia recalls the Panel’s approach to analysing the calculation of cost of production in *Egypt – Rebar (Turkey)*, where the Panel considered that it must …reach a conclusion as to whether…there was evidence in the record that the short-term interest income was “reasonably” related to the cost of producing and selling rebar, and that the IA thus should have included it in the cost of production calculation.

8. This supports a reading of Article 2.2.1.1 whereby any element that “reasonably” relates to the cost associated with production and sale should be taken into account, including in relation to inputs or raw materials, and might lead to the adjustment or replacement of certain costs. Indeed, this appears to be the situation in *US – Softwood Lumber*, where the Panel did not take issue with respect to testing for arm’s length prices. In such cases, where the investigating authority has established that the records do not reasonably reflect the costs, there is no obligation under Article 2.2.1.1 to calculate costs using the records.

9. This interpretation is consistent with the ordinary meaning of Article 2.2.1.1 and is the only sensible reading when considered in the context and in light of the object and purpose of the Anti-Dumping Agreement. In particular, Australia recalls that the purpose of costs constructed under Article 2.2.1.1 is to provide a point of comparison for determining a dumping margin where there are no sales of the like product in the ordinary course of trade or where such sales do not permit a proper comparison. In such situations, a holistic analysis of costs is warranted in order to arrive at a proper cost calculation that provides a point of comparison that is closest to a “normal” value. All costs that would be reasonably related to the production of the goods, or at least those that are significant enough to affect the overall production costs, are relevant to such an analysis.

10. To suggest that the meaning of the first sentence of Article 2.2.1.1 prevents or limits investigating authorities from examining whether records reasonably reflect costs, having established that there are no sales in the ordinary course of trade, would render this provision inutile. It would be circuitous in preventing authorities to address not being able to make a proper comparison in determining the margin of dumping.

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5 Anti-Dumping Agreement, Article 2.2.
6 Anti-Dumping Agreement, Article 2.1.
II. CONCLUSION

11. Central to this dispute are important issues of legal interpretation concerning aspects of the Anti-Dumping Agreement, principally the meaning of the language "records [that] reasonably reflect the costs associated with the production and sale of the product under consideration" as used in Article 2.2.1.1. Principally, the interpretation of this language is relevant to the scope of cost construction, and particularly what elements can and cannot be taken into account.

12. Australia is of the view that an investigating authority should be permitted to consider whether the costs as reflected in the record of the exporter or producer are reasonable and, where they are not, to adjust or replace them in an appropriate manner. In this way, the investigating authority is most likely to arrive at the proper point of comparison to determine the margin of dumping where there are no sales of the like product in the ordinary course of trade, or where such sales do not permit a proper comparison.