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Page: 1/4

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## EUROPEAN UNION — ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

### NOTIFICATION OF AN OTHER APPEAL BY ARGENTINA UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 25 May 2016, from the delegation of Argentina, is being circulated to Members.

1. Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23 of the Working Procedures for Appellate Review (WT/AB/WP/6) ("Working Procedures"), Argentina hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law covered in the Panel Report in *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (WT/DS473/R) ("Panel Report") and certain legal interpretations developed by the Panel in that Report.

2. Pursuant to Rules 23(1) and 23(3) of the Working Procedures, Argentina simultaneously files this Notice of Other Appeal and its Other Appellant Submission with the Appellate Body Secretariat. Argentina is providing as well an Executive Summary of the Other Appellant Submission, in accordance with the Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings (WT/AB/23).

3. Pursuant to Rule 23(2)(c)(ii) of the Working Procedures, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice of Argentina's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

4. Argentina requests the Appellate Body to reverse various findings and conclusions of the Panel as a result of the errors of law and of legal interpretation contained in the Panel Report as identified below.

#### 1 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO ARGENTINA'S CLAIM UNDER ARTICLE 2.2.1.1 OF THE ANTI-DUMPING AGREEMENT CONCERNING ARTICLE 2(5) OF THE BASIC REGULATION

5. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that Article 2(5), second subparagraph, of Council Regulation No. 1225/2009 ("the Basic Regulation") is inconsistent as such with Article 2.2.1.1 of the Anti-Dumping Agreement. The Panel erred in its application of Article 2.2.1.1 of the Anti-Dumping Agreement and failed to make an objective assessment, as required by Article 11 of the DSU, when it concluded that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with Article 2.2.1.1.<sup>1</sup> In particular, Argentina has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- the Panel erred in the application of Article 2.2.1.1 of the Anti-Dumping Agreement when finding that Article 2(5), second subparagraph, of the Basic Regulation only

<sup>1</sup> Panel Report, paras. 7.127–7.154 and 8.1(b)(i).

deals with what has to be done after the EU authorities have determined that a producer's records do not reasonably reflect the costs of production pursuant to the first subparagraph. Based on its incorrect understanding of the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, the Panel erroneously concluded that Article 2(5), second subparagraph, is not inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement;

- the Panel erred in the application of Article 2.2.1.1 of the Anti-Dumping Agreement when finding that Article 2(5), second subparagraph, of the Basic Regulation does not require the European Union to determine that a producer's records do not reasonably reflect the costs associated with the production and sale of the product under consideration when these records reflect prices that are considered to be artificially low or abnormally low as a result of a distortion. Based on its incorrect understanding of the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, the Panel erroneously concluded that Article 2(5), second subparagraph, is not inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement;
- the Panel failed to make an objective assessment of the matter before it when examining the scope, meaning and content of Article 2(5), second subparagraph, contrary to Article 11 of the DSU.

6. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to complete the analysis by finding that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent as such with Article 2.2.1.1 of the Anti-Dumping Agreement.

7. Consequently, the Appellate Body should also reverse the Panel's findings and conclusions that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.<sup>2</sup>

## **2 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO ARGENTINA'S CLAIM UNDER ARTICLE 2.2 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:1(B)(II) OF THE GATT 1994 CONCERNING ARTICLE 2(5) OF THE BASIC REGULATION**

8. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that Article 2(5), second subparagraph, of the Basic Regulation is inconsistent as such with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. The Panel erred in its interpretation and application of Article 2.2 and of Article VI:1(b)(ii) and acted inconsistently with Article 11 of the DSU when it concluded that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent as such with these provisions.<sup>3</sup> In that respect, Argentina has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and of Article VI:1(b)(ii) of the GATT 1994 when finding that these provisions "do not limit the sources of information that may be used in establishing the costs of production", that they do not "prohibit an authority resorting to sources of information other than producers' costs in the country of origin" but would "require that the costs of production established by the authorities reflect conditions prevailing in the country of origin"<sup>4</sup>;

<sup>2</sup> Panel Report, paras. 7.175 and 8.1(b)(iii).

<sup>3</sup> Panel Report, paras. 7.155–7.174 and 8.1(b)(ii).

<sup>4</sup> Panel Report, para. 7.171.

- the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 when finding that Article 2(5), second subparagraph, "is formulated in permissive terms" and only lays out a series of options for the EU authorities in establishing the costs and when finding that this measure concerns "the sources of information" as opposed to the costs themselves. Based on its incorrect understanding of the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, the Panel erroneously concluded that the measure at issue is not inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994;
- the Panel failed to make an objective assessment of the matter before it when examining the scope, meaning and content of Article 2(5), second subparagraph, of the Basic Regulation, contrary to Article 11 of the DSU;
- the Panel applied an erroneous legal standard for the establishment of the "as such" claim when it found that Argentina was required to demonstrate that Article 2(5), second subparagraph "cannot be applied in a WTO-consistent manner".<sup>5</sup>

9. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to find that Article 2(5), second subparagraph, of the Basic Regulation is, as such, inconsistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

10. Consequently, the Appellate Body should also reverse the Panel's findings that Article 2(5), second subparagraph, of the Basic Regulation is not inconsistent with Article XVI:4 of the WTO Agreement and Article 18:4 of the Anti-Dumping Agreement.<sup>6</sup>

### **3 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO ARGENTINA'S CLAIMS CONCERNING THE ANTI-DUMPING MEASURES IMPOSED BY THE EUROPEAN UNION ON IMPORTS OF BIODIESEL FROM ARGENTINA**

#### **3.1 Review of the Panel's findings with respect to Argentina's claim under Article 2.4 of the Anti-Dumping Agreement**

11. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that the European Union violated Article 2.4 of the Anti-Dumping Agreement by failing to make a fair comparison between normal value and export price, and in particular, by failing to make due allowances for differences affecting price comparability.<sup>7</sup> The Panel erred in its interpretation and application of Article 2.4 of the Anti-Dumping Agreement, amongst others, in the following respects:

- the Panel erred in finding that the difference at issue is not a difference affecting price comparability, in particular because it is one that arose from the methodology used to construct the normal value;
- the Panel erred when finding that its conclusion is consistent with the views of the Appellate Body in *EC – Fasteners (China)* (Article 21.5 – China).

12. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions and to find that the European Union violated Article 2.4 of the Anti-Dumping Agreement because by failing to make adjustment for differences affecting price comparability, including differences in taxation, it failed to make a fair comparison between the normal value and the export price.

#### **3.2 Review of the Panel's findings with respect to Argentina's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement**

13. Argentina seeks review by the Appellate Body of the Panel's findings and conclusions concerning Argentina's claim that the European Union violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement in failing to ensure that the injury caused by the overcapacity of

<sup>5</sup> Panel Report, para. 7.174.

<sup>6</sup> Panel Report, paras. 7.175 and 8.1(b)(iii).

<sup>7</sup> Panel Report, paras. 7.292–7.306 and 8.1(c)(v).

the European Union industry was not attributed to the allegedly dumped imports.<sup>8</sup> The Panel erred in the interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement when it concluded that the European Union did not act inconsistently with Articles 3.1 and 3.5 with respect to the treatment of overcapacity as an "other factor" of injury to the EU domestic industry. In that respect, Argentina has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- the Panel erred in its interpretation and application of the obligation to make an "objective examination" based on "positive evidence" of the overcapacity of the EU industry pursuant to Articles 3.1 and 3.5 of the Anti-Dumping Agreement;
- the Panel erred in its application of Articles 3.1 and 3.5 when it failed to distinguish overcapacity from capacity utilization and when it failed to note the inconsistency of the EU authorities' conclusion in light of the evidence before it.

14. Argentina requests the Appellate Body to reverse the Panel's findings and conclusions with respect to Argentina's claim under Articles 3.1 and 3.5 of the Anti-Dumping Agreement with regard to the issue of overcapacity, and to find that the European Union violated these provisions with respect to overcapacity as an "other factor" of injury to the EU domestic industry.

### **3.3 Review of the Panel's findings with respect to Argentina's claim under Article 2.2.1.1 of the Anti-Dumping Agreement**

15. If the Appellate Body reverses the Panel's findings under Article 2.2.1.1 of the Anti-Dumping Agreement concerning the European Union's failure to calculate the cost of production of the product under investigation on the basis of the records kept by Argentinean producers, Argentina requests the Appellate Body to complete the analysis of Argentina's second claim under Article 2.2.1.1 of the Anti-Dumping Agreement for which the Panel did not make findings.<sup>9</sup>

16. In that regard, Argentina requests the Appellate Body to find that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production of that product.

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<sup>8</sup> Panel Report, paras. 7.462–7.472 and 8.1(c)(x).

<sup>9</sup> Panel Report, paras. 7.268–7.269 and 8.1(c)(iii).