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Article

EU-Biodiesel: "Input Costs" in Constructed Normal Value

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The WTO Appellate Body (AB) has recently delivered the final word on construction of normal value. In *European Union - Anti-Dumping Measures on Biodiesel from Argentina* (DS 473) [see End Note 1], the Appellate Body rendered its decision in the matter in October, 2016 and the key issue in the dispute was with respect to EU's use of reference benchmark prices for calculation of "costs" in the construction of normal value of Biodiesel originating in Argentina. The present article examines the nature of the examination in terms of Article 2.2 and 2.2.1.1 of the Anti-Dumping Agreement in the light of findings of the Panel and Appellate Body Reports in *EU-Biodiesel*.

Factual Background

The present dispute arose due to technical and substantive issues raised by Argentina against EU's conduct of anti-dumping proceedings against imports of biodiesel from Argentina. In the investigation, the EU investigating authorities used 'reference prices' published by the Argentine Ministry of Agriculture to establish the costs of soybeans and soybean oil, the main raw materials, used in the production of biodiesel, in the calculation of a constructed normal value (CNV). The EU authority disregarded the domestic sales prices, as provided by the Argentinean producers, since the "*domestic sales of biodiesel in Argentina were not made in the ordinary course of trade due to government intervention*".

The "government intervention" which led to the price distortion was a Differential Export Taxation (DET) system maintained by Argentina, as per EU claims. The DET applied to the export of soybean and soybean oil at a higher level and to the export of biodiesel at a lower level, causing the price of soybean and soybean oil to remain suppressed and artificially low in the domestic market. Before the panel, Argentina claimed that both the EU Basic Regulation [see End Note 2] authorizing the use of reference prices for input costs (i.e. "as such" claims) and the EU's application of the regulations in this investigation (i.e. "as applied" claims) were in breach of the AD Agreement.

Legal provisions

AD Agreement Articles 2.2 and 2.2.1.1 provide:

> *2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an*

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appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1.1 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. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.

Issues

The primary issues raised in this dispute concern the calculation of the CNV, and questions:

1. The investigating authority's replacement of actual input costs incurred by exporters with a benchmark/reference input cost in the calculation of the CNV, on the ground that the actual input costs are distorted or artificially lowered;
2. Whether the use of a benchmark/reference input cost in the calculation of a CNV would result in the imposition of anti-dumping duties in excess of the dumping margins that should have been established in accordance with the WTO AD Agreement?
3. Where a reference price is used, whether "fair comparison" mandates an analysis by the authority to make due allowance for export taxes in both Normal Value (as was done) and export price (which was not done);

Examination and Conclusion

In its examination, both the Panel and the Appellate Body concurred that the EU acted inconsistently with the AD Agreement Article 2.2.1.1 by failing to calculate the cost of production on the basis of records kept by producers. It held that the EU investigating authority's determination violated the AD Agreement (Article 2.2 and GATT VI:1(b)(ii)) in so far as it used a "cost" for inputs that was not the cost prevailing "in the country of origin". EU also breached Article 9.3 of

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the AD Agreement and Article VI:2 of GATT by imposing anti-dumping duties in excess of the margins that would have been rightly established under Article 2.

Specifically, the Appellate Body observed that the second condition under Article 2.2.1.1, "*provided that such records … reasonably reflect the costs associated with the production and sale of the product under consideration*" is concerned with the maintenance of records by the exporters regarding costs which are reflective of actual costs of production in the country of origin rather than whether the prices of the goods were "fair" prices, in normal circumstances excluding the alleged distortion [See End Note 3]. Thus, according to the Appellate Body, the EU determination that domestic prices of soybeans in Argentina were "artificially low" due to the Argentine differential export tax system was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel in Argentina.

However, both the Panel and the Appellate Body rejected Argentina's "as such" claims against Article 2(5) of the Basic Regulation since the law does not *require* EU 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 considered to be "artificially or abnormally low" as a result of a distortion. Moreover, the Panel and Appellate Body were also of the opinion that Article 2(5) of the Basic Regulation prescribes what has to be done *after* the EU authorities have determined that a producer's records do not reasonably reflect the costs of production, and does not govern the determination of *whether* those records reasonably reflect the costs of production, and thus, the Argentinean claim was misguided.

Further, since the "costs", and thereby the CNV, were found to be inflated, the AB also determined that EU violated Article 9.3 by imposition of anti-dumping duties in excess of the dumping margins that should have been established in accordance with the AD Agreement.

With respect to the "fair comparison" issue, the Appellate Body and the Panel rejected Argentina's claims that the EU investigating authority was required to make an adjustment to the export price of the exporter reflecting actual prices of soybean and soybean oil because it had made such an adjustment to the normal value by including export taxes on soybean and soybean oil in the CNV leading to an "artificial imbalance". The Panel observed that "*the perceived distortion itself was caused by the export tax, and the undistorted price ultimately used by the EU authorities closely resembled the domestic price plus the export tax. But this does not transform the export tax on soybeans into an identifiable component of the constructed normal value itself. Unlike the examples in the illustrative list in Article 2.4, it*

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is not a characteristic of the transactions being compared. It was a methodological approach that affected the price of biodiesel, but it did not affect the price comparability of the normal value and the export price." On this basis, the Panel rejected the Argentinean claim. The Appellate Body, on the other hand, felt that once the issue of CNV had been settled, it was unnecessary to rule on Argentina's "fair comparison" claim.

Conclusion

On the basis of the foregoing findings, the Appellate Body has unequivocally clarified the need to establish Constructed Normal Value on the basis of the exporters' records, rather than resort to construction on another basis. This provides definitive understanding on the Authority's inability to deviate from the exporters' records in the calculation of normal value, a practice that has seen booming usage, particularly with investigations involving Non Market Economy countries, like China.

The EU has already begun amendment of its Basic Regulation, keeping in mind the graduation of China from NME status, and the proposed amendments affect provisions which had been challenged in *EU-Biodiesel* as well. The amendments [See End Note 4] have gathered support and may find acceptance from EU Members. It is foreseeable that the enactment of these amendments may be put forth by EU as its "compliance" in the present case. However, the scope, impact and vulnerability of the amendments or any compliance can only be gauged once the proposals are formally enacted.

In any case, it is hoped that the *EU-Biodiesel* finding would discourage authorities from unduly constructing normal value by usage of reference / benchmarks even where appropriately maintained exporter's records are available.

End Notes:

1. Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina,* WT/DS473/AB/R.
2. Article 2 (5) of the Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), Official Journal of the European Union, L Series, No. 343 (22 December 2009), pp. 51-73, and corrigendum thereto, L Series, No. 7 (12 January 2010), pp. 22-23
3. *EU-Biodiesel,* Appellate Body Report at paragraphs 6.54-6.57.
4. *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union*, dated 9 November, 2016.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Colour coated / pre - painted flat products of alloy or non-alloy steel	China, EU	F.No.14/28/2016-DGAD, Corrigendum	30-11-2016 (published 1-12-2016)	Footnote added to clarify scope of subject goods
Colour coated/ pre-painted flat products of alloy or non-alloy steel	China and EU	2/2017-Cus. (ADD)	11-1-2017	Provisional ADD imposed
Jute Products	Bangladesh and Nepal	1/2017-Cus. (ADD)	5-1-2017	Definitive ADD imposed
Seamless tubes, pipes & hollow profiles of iron, alloy or non-alloy steel	China	F.No.14/02/2015-DGAD	9-12-2016	Imposition of definitive anti-dumping duty recommended
Soda Ash	China, EU, Kenya, Pakistan, Iran, Ukraine and USA	55/2016-Cus. (ADD)	21-12-2016	Rescinds Notification No. 34/2012-Cus. (ADD). However rescission shall remain in abeyance pending final order of the Gujarat High Court in Special CA No. 16426 and 16428 of 2016
Soda Ash	Turkey and Russia	56/2016-Cus. (ADD)	21-12-2016	Rescinds Notification No. 08/2013-Cus. (ADD). However rescission shall remain in abeyance pending final order of Gujarat High Court in Special CA No. 16427 and 16429 of 2016
Unwrought Aluminium (Aluminium not alloyed and Aluminium alloys)	All countries	F.No.22011/10/2016/Pt-VIII	13-12-2016	Final Finding recommends no Safeguard duty on PUC

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Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Cast iron articles	EU	2016/C 461/07	10-12-2016	Initiation of AD proceedings
New Pneumatic Off-the-Road Tires	USA	82 FR 2946 [C-533-870]	10-1-2017	CVD – Final subsidy rates determined
Stainless Steel Bar	USA	[A-533-810] 81 FR 91118	16-12-2016	Initiation of Anti-dumping duty changed circumstances review
Sulfanilic Acid	USA	82 FR 1693 [C-533-807]	6-1-2017	CVD – Affirmative finding in sunset review
Sulfanilic Acid	USA	82 FR 1321 [A-570-815]	5-1-2017	ADD – Affirmative finding in sunset review

WTO News

Japan files complaint against Indian measures on iron and steel imports

Japan has notified the WTO Secretariat of its request for consultations with India on latter's Safeguard measures on iron and steel imports, *"India - Certain Measures on Imports of Iron and Steel Products"* (DS 518). According to Japan, the measures appear to be in violation of India's obligations under the GATT 1994 and the Agreement on Safeguards inasmuch as India failed to make reasoned and adequate findings and conclusions in its determination with respect to the alleged unforeseen developments, determination of domestic industry, existence of an alleged serious injury and/or threat of serious injury and causal link. Document WT/DS518/1, dated 9-1-2017 in this regard also states that India imposes Safeguard measures beyond the extent necessary to prevent or remedy serious injury and to facilitate adjustment. Additionally, Japan states that through Minimum Import Price system on iron and steel products, India appears to prohibit or restrict the importation of iron and steel products, thereby acting inconsistently with Article XI:1 of the GATT 1994.

EU dumping duties on fatty alcohol from Indonesia – Panel report issued

On 16 December, 2016, the WTO has issued a panel report in the case brought by Indonesia in *"European Union — Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia"* (DS 442). In this dispute, Indonesia challenged the EU's conduct of anti-dumping investigation on

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imports of certain fatty alcohols from Indonesia. The first of the two issues raised pertained to an allowance made by the EU investigating authority on the export price of fatty alcohols in order to account for the price mark-up received by a Singapore-based trader for sales to the EU. Indonesia claimed that since the Indonesian producer and the Singapore-based trader were closely related entities, no deduction for the mark-up should have been made to the export price. For Indonesia, the mark-up was not a difference affecting price comparability but merely a way of allocating profits within a single economic entity. However, the Panel held that the there was no legal basis in the text of the Anti-Dumping Agreement for Indonesia's claim that costs incurred within a single economic entity could not be deducted in the process of calculating the dumping margin of a product.

The second issue pertained to the European Union's failure to disclose the results of the on-the-spot verifications of Indonesian producers. Here, the Panel held that non-disclosure of the results of the verification visits to the companies concerned violated Article 6.7 of the Anti-Dumping Agreement. The Panel found that the European Union had not disclosed the results of the verification visit because it had failed to explain which information was requested from the company, whether the company had made available the information requested and whether the investigating authority had been able to confirm the accuracy of the information supplied in writing by the company.

Indonesian import restrictions on agricultural products violate WTO provisions

Panel report in the cases brought by the United States and New Zealand in *"Indonesia — Importation of Horticultural Products, Animals and Animal Products"* (DS477 and DS478) has been issued by the WTO on 22nd of December 2016. The panel has upheld the claims of US and New Zealand regarding the trade-restrictive nature of Indonesia's measures such as limited application windows (15 day period within which approvals need to be taken for imports within the next 6 months), periodic and fixed import terms which are a restriction on imports because it limits imports to the products, quantity, source and port of entry set out in the import approval documents thereby removing the ability of importers to respond to market forces and external factors, amongst other measures.

Canadian dumping duties on imports from Chinese Taipei exporters with final de minimis margins of dumping, violate WTO provisions

Panel report in the case brought by Chinese Taipei regarding *"Canada — Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe"* (DS482) has been issued on 21st of December 2016. The issues in the dispute pertained to technicalities in the conduct of the Canadian Investigation. The Panel upheld Chinese Taipei's claims that *de minimis* dumping margin against a particular exporter mandates termination of

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the proceedings against such exporters and also that imports from such exporters should not be treated as "dumped" in the analysis and final determinations of injury and causation. Certain "as such" claims brought by the Chinese Taipei against provisions of Canada's underlying anti-dumping legislation, with respect to the treatment of exporters with *de minimis* margins of dumping were also upheld to the extent that they relate to the treatment of exporters with final *de minimis* margins of dumping, but rejected to the extent that they relate to the treatment of exporters with preliminary *de minimis* margins of dumping. The Panel however rejected Chinese Taipei's claim regarding non-attribution of effect of subsidization of imports from India and the effect of overcapacity in the Canadian domestic industry.

Panels established in disputes over anti-dumping methods and rail equipment imports

Two panels have been established by the DSB of the WTO on 16th of December, 2016. While the first one pertains to complaint by Russia against EU's cost adjustment methodologies, second dispute is against certain Russian measures affecting importation of railway equipment from Ukraine. It may be noted that in "*European Union — Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint)*" (DS 494) Argentina, Australia, Brazil, Canada, China, India, Indonesia, Japan, Korea, Mexico, Norway, Ukraine, the United States and Viet Nam have reserved third-party rights to participate in the panel's proceedings. In dispute *"Russia — Measures Affecting the Importation of Railway Equipment and Parts thereof"* (DS 499) where the panel has been established pursuant to a second request from Ukraine, Canada, China, European Union, Indonesia, Japan, Singapore and the United States have reserved third-party rights.

US files appeal against panel ruling on tax breaks for civil aircraft production

United States has on 16-12-2016 filed a notice of appeal against Panel findings in the case brought by the European Union in *"United States — Conditional Tax Incentives for Large Civil Aircraft"* (DS487). The United States seeks review by the Appellate Body of the Panel's finding and conclusion that the Washington State B&O aerospace tax rate for the manufacturing or sale of Boeing 777X airplanes (the "B&O aerospace tax rate") is inconsistent with Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") because it is *de facto* contingent on the use of domestic over imported goods.

China seeks consultation with US, EU over price comparison methodologies

China has on 12-12-2016 notified the WTO Secretariat of its request for consultations with the United States (DS 515) and the European Union (DS 516) regarding special calculation methodologies used by the US and EU in anti-dumping proceedings. The issue raised in this dispute by China pertains

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to the methodology used by US and EU in treatment of China as a "non-market economy" in anti-dumping proceedings. According to document WT/DS515/1, dated 15-12-2016, from the delegation of China, WTO Members were required to terminate use of certain methodologies (not based on a strict comparison with domestic prices or costs in China) under Section 15(a)(ii) of the Protocol not later than 11 December 2016. The document states that continued use of these methodologies thereafter is in violation of a Member's obligations under the covered agreements.

Chinese tariff rate quotas on agricultural imports disputed by USA

Following China's consultation request pertaining to Non-market Economy issue, the United States has notified the WTO Secretariat of its request regarding consultations with China, *"China — Tariff-rate Quotas for Certain Agricultural Products"* (DS 517). The primary issue under challenge pertains to the maintenance by the Chinese administration of certain tariff-rate quotas (TRQs), including those for wheat, short and medium-grain rice, long grain rice, and corn. United States claims that maintenance of TRQs is contrary to China's commitments in its accession protocol as well as contrary to Article X:3 of GATT.

Ratio Decidendi

Anti-dumping investigation – Sufficiency of evidence of existence of dumping, injury or causal link, in complaint: European Union's Court of Justice has rejected the plea of exporter of bed linen from Pakistan in a case involving imposition of anti-dumping duty on imports from Pakistan. The exporter had alleged insufficiency of evidence of dumping, injury and the causal link, in the complaint filed by the EU domestic industry.

Contention that the specific product concerned was not representative of exports from Pakistan or that from the exporter to the EU, was rejected by the court observing that the Basic Regulation does not require, where the product concerned contains several types of products, that the complaint should provide information on all those product types. Reliance in this regard was placed on the WTO panel report in the dispute *United States — Final dumping determination on softwood lumber from Canada.* Further, the court was of the view that slight differences in terms of number of threads and weight between the product type referred to as '22/22 60/60', exported by the applicant and type '20/20 60/60' was not sufficient to consider those product types as not belonging to the same category of products for the purposes of the decision to initiate an antidumping proceeding.

Regarding the argument that the normal value presented in the complaint was not credible, the Court, noting that basic regulation did not require the complaint to contain information which is not reasonably available

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to the complainant, upheld the construction of normal value in the complaint on the basis of data coming from an EU producer. The Court also observed that the exporter could not demonstrate that the adjustment made by the authorities, considering the cost differences between the EU producer and the Pakistani exporter, was insufficient. In respect of injury analysis, the Court noted that Article 5 of the basic regulation does not require all the factors entering into the assessment of injury to develop negatively in order to initiate an investigation. It was hence held that after consideration of significant indicators such as reduction in market share, profitability and performance or investments, the Commission was entitled to consider that the information concerning the injury suffered by the EU industry in the complaint would justify initiation of investigation.

Similarly, contention that the authorities did not correctly assess the effect of the abolition of the previous anti-dumping duties and the implementation of the tariff preferences for imports of the product concerned, was also rejected by the Court observing that any effect of legislative measures, such as those in question, are on the imports, and accordingly, by analysing the volume and effects of those imports on prices of similar products on the EU market and their impact on the EU industry, the authorities also took into account the effects of those measures. [*Gul Ahmed Textile Mills Ltd. v. Council of the European Union* – Judgement of the General Court, dated 15-12-2016 in Case T-199/04 RENV, CJEU]

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