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WTO Panel Report: EU – Biodiesel

Case Comment: Brendan McGivern, Partner

Summary

Decision: A WTO Panel has delivered a mixed ruling in Argentina's challenge to part of the EU's anti-dumping law, and its application in an anti-dumping investigation of biodiesel. The Panel rejected Argentina's "as such" claim against the EU Basic Regulation on anti-dumping, related to the determination of dumping margins. However, it accepted some of the "as applied" claims against the EU anti-dumping order on imports of biodiesel from Argentina, ruling that parts of the investigation violated the EU's obligations under the WTO Anti-Dumping Agreement.

Significance of decision

The provisions of the Anti-Dumping Agreement related to the determination of dumping margins are among the most technical aspects of the WTO covered agreements. Yet the outcome of this process is of critical commercial importance to companies caught in an anti-dumping investigation. As the Appellate Body stressed in *EC – Fasteners (China)*, "we consider that the determination of a dumping margin is a prerequisite for the imposition of an anti-dumping duty and that, therefore, a duty cannot be imposed unless a margin has been calculated, in part because the margin sets the ceiling on the amount of anti-dumping duty that may be imposed". The calculation of the dumping margin can thus have a determinative effect on exporters.

As noted above, the Panel in the present case dismissed the "as such" challenge to the EU Basic Regulation, but found fault with the way the EU conducted the anti-dumping investigation on biodiesel. It ruled, among other things, that the EU violated the Anti-Dumping Agreement by failing to calculate the cost of production of biodiesel on the basis of the records kept by the producers, and it acted inconsistently with the rules of the Agreement on the determination of injury to the EU industry.

Indonesia has also brought a WTO challenge against EU anti-dumping measures on biodiesel (DS480). That Panel has yet to rule.

The European Biodiesel Board (EBB), the complainant in this investigation, issued a press release on March 31 stating that the WTO decision is only "a first episode in a long, strenuous legal battle over the legitimacy of the EU defense measures" and that "[i]t is thus essential that the Commission appeal the questionable parts of the report before the Appellate Body". The Panel's decision is indeed likely to be appealed.

Report

Background: Three main claims

Argentina made three broad challenges to EU measures:

- An "as such" claim against Article 2(5) of the EU Basic Regulation on anti-dumping, which related to the determination of dumping margins. This challenge related to the law itself, independently of its application in any case;
- An "as applied" claim against the EU determination of dumping margins for imports of biodiesel from Argentina; and
- An "as applied" claim against the EU determination that the EU industry sustained injury as a result of imports of biodiesel.

A non-exhaustive summary of the Panel's key rulings on these claims is described briefly overleaf.

"As such" claim against the EU Basic Regulation

Argentina argued that part of Article 2(5) of the EU Basic Regulation violated certain provisions of the WTO Anti-Dumping Agreement.

The Anti-Dumping Agreement provides that a product will be considered as "dumped" where it is "introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country".

Implementing these broad principles into practice can be difficult. Article 2.2 of the Agreement provides in part that "[w]hen 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", then the dumping margin is determined by comparison with a "comparable price of the like product when exported to an appropriate third country", or "with the cost of production in the country of origin".

Article 2(5) of the EU Basic Regulation provides that:

> Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.
>
> If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.

Argentina argued that under this provision, when the EU authorities took the view that "the costs reported in an investigated producer's records reflect prices that are 'abnormally low' or 'artificially low' because of what they consider to be a 'distortion'", the Basic Regulation "requires the EU authorities to determine that the costs of production and sale of the product under investigation are not 'reasonably reflected' in the producer's records and, consequently, to reject or adjust those costs in establishing the investigated producer's costs of production and sale".

The Panel rejected this claim. It agreed with the EU that Article 2(5) of the EU Basic Regulation "only lays down what the authorities can do – and allows them to exercise any one of the listed options for determining the costs of production – *after* they have made a determination… that the records do not reasonably reflect the costs" [original emphasis]. It added that the challenged provision did not contain "any of the terms or concepts used by Argentina to describe the measure at issue, i.e. 'artificially low', 'abnormally low', 'distortion', 'reflects market values'; 'regulated market', 'artificially distorted', etc. None of these terms are found in the text of the Article to be used by the EU authorities as criteria for determining whether the records reasonably reflect the costs of production and sale of the product under consideration".

After considering other factors, including the legislative history of the Basic Regulation and EU practice, the Panel dismissed Argentina's "as such" claim.

"As applied" claims against the biodiesel investigation

Argentina also argued that the EU violated the Anti-Dumping Agreement "as applied" in the investigation of imports of biodiesel by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers. The EU authorities had disregarded the records kept by the Argentine producers because they "reached the conclusion that the export tax applicable to soybeans and soybean oil depressed the domestic prices of the main raw material input in biodiesel to an artificially low level".

Article 2.2.1.1 of the Anti-Dumping Agreement provides that that "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." The Panel stated that:

> [W]e understand the ordinary meaning of the phrase "provided such records… reasonably reflect the costs associated with the production and sale of the product under consideration", in its context, to concern whether the costs set out in a producer/exporter's records reflect all the actual costs incurred by the producer/exporter under investigation in – within acceptable limits – an accurate and reliable manner. This, in our view, calls for a comparison between, on the one hand, the costs as they are reported in the producer/exporter's records and, on the other, the costs actually incurred by that producer. We emphasize, however, that the object of the 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 a different set of conditions or circumstances and which the investigating authority considers more "reasonable" than the costs actually incurred" [original emphasis].

The Panel found that the EU did not have "a legally sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs associated with the production and sale of biodiesel." It therefore ruled that "the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers." It also ruled that the EU "acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a 'cost' that was not the cost prevailing 'in the country of origin', namely, Argentina, in the construction of the normal value."

However, the Panel rejected Argentina's claim that the EU violated Article 2.4 of the Anti-Dumping Agreement by failing to make a "fair comparison" between the export price and the normal value in the underlying investigation. As noted above, the EU authorities had determined that the export tax on soybeans "depressed the domestic prices of the main raw material input in biodiesel to an artificially low level" and this was found "to distort the costs of production for biodiesel in Argentina". The EU authorities "replaced those costs with costs reflecting the price which they considered would have been the price at which those producers would have purchased the soybeans in the absence of the distortion caused by the export tax". The Panel rejected Argentina's claim under Article 2.4 on the grounds that this 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" [original emphasis].

"As applied" claims against the injury determination

Argentina challenged the determination made by the EU authorities that the EU industry suffered injury as a result of the alleged dumped imports of biodiesel. The Panel upheld part of this claim.

Article 3.1 of the Agreement provides that a determination of injury must be based on "positive evidence" and involve an "objective examination" of both "(a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products". Article 3.4 adds that the examination of the impact of the dumped imports on the domestic industry must include an "evaluation of all relevant economic factors and indices having a bearing on the state of the industry", including certain factors such utilization of capacity.

The Panel found that the EU breached both Articles as a result of its examination of certain revised data submitted by the EBB. It stated that "the circumstances surrounding what was a substantial revision of the data underlying the EU authorities' evaluation of production capacity and capacity utilization were such that an unbiased and objective authority should have exercised particular care in ascertaining the accuracy and reliability of the revised data."

However, the Panel dismissed Argentina's claims against the EU's non-attribution analysis. It did not agree with Argentina's contention that the EU "failed to properly assess the injury caused by the EU industry's imports of the product concerned and to separate and distinguish those injurious effects from that of the allegedly dumped imports".

The Report of the WTO Panel in *European Union – Ant Dumping Measures on Biodiesel from Argentina* (DS473) was released on March 29, 2016.

Note from Brendan McGivern, head of the World Trade Organization (WTO) practice of the White & Case LLP and Executive Partner of the Firm's Geneva office.

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