View Original Format

In this article, Duane Layton from Mayer Brown discusses the decision issued by the World trade Organization dispute settlement panel on European Union Anti dumping measures on imports of Certain Fatty Alcohols from Indonesia. The dispute concerned the EU's imposition of anti-dumping duties in 2011 on certain fatty alcohols imported from Indonesia, in particular imports from PT Musim Mas (Musim Mas), an Indonesian producer of fatty alcohols.

MAYER # BROWN

Legal Update

January 3, 2017

WTO Panel Issues Mixed Decision on Anti-dumping Duties in EU Fatty Alcohols Dispute

On December 16, 2016, a World Trade Organization (WTO) dispute settlement panel issued its report in *European Union – AntiDumping Measures on Imports of Certain Fatty Alcohols from Indonesia*.[1] The dispute concerned the EU's imposition of anti-dumping duties in 2011 on certain fatty alcohols imported from Indonesia, in particular imports from PT Musim Mas (Musim Mas), an Indonesian producer of fatty alcohols.

Before the panel, Indonesia challenged downward adjustments made by the European Union to the export price of fatty alcohols sold in the European market for a price markup given to a trading company related to Musim Mas. According to Indonesia, as a result of the price adjustment, the EU did not make a fair comparison between the normal value of fatty alcohols sold in Indonesia and the export price contrary to the requirements of Article 2.4 of the WTO Anti-Dumping Agreement (ADA). Indonesia claimed that the European Union mischaracterized the costs as a trading commission rather than a transfer of funds within a "single economic entity." In addition, Indonesia argued that the European Union violated Articles 3.1 and 3.5 of the ADA because it did not adequately take into account in its causation analysis the injurious effects of the economic crisis and the European domestic industry's access to raw materials. Finally, Indonesia claimed that the European Union violated Article 6.7 of the ADA because it did not disclose the results of verification visits to the companies being investigated.

The panel issued a mixed ruling, upholding the dumping and causation findings of the European Union, while faulting the European Union for failing to appropriately disclose the results of the on-the-spot verifications. Of particular note is the panel's reasoning for its determination that the European Union was entitled to make allowances for certain costs incurred by Musim Mas's related trader despite the alleged existence of a single economic entity. This position is a significant departure from European jurisprudence on the issue of price adjustments for a single economic entity.

The Panel's Findings Concerning the Export Price Adjustment

ALLOWANCES FOR FACTORS AFFECTING PRICE COMPARABILITY ARE ASSESSED ON A CASE-BY-CASE BASIS

In an anti-dumping investigation, the investigating authority compares the export price of the goods subject to the investigation to their normal value, which is generally the price of the goods when sold in the domestic home market. The investigating authority will find that dumping has occurred when the goods are sold in the export market at less than their normal value. Article 2.4 of the ADA requires that the investigating authority make a fair comparison between the export price and the normal value and that such comparison must be made at the same level of trade, usually at the ex-factory level (i.e., at the moment the goods leave the factory to be sold domestically or for export). Article 2.4 allows for adjustments to the export price and normal value for differences that affect price comparability.

In its investigation, the European Union considered a markup granted by Musim Mas to its related trader, ICOF-S, as a difference affecting price comparability that warranted a downward adjustment to Musim Mas's export price. Indonesia alleged this adjustment constituted an improper allowance, as the markup did not affect price comparability but was "*simply an allocation, or shifting, of funds (profits) from 'one pocket to another' within a single economic entity.*" [2]

Based on prior Appellate Body decisions, the panel explained which factors may justify an allowance for differences that affect price comparability under Article 2.4 of the ADA. It stated that such factors must be "*'features', 'characteristics' or 'identifiable components' of the transactions and prices in questions that have, or are likely to have, an impact on the comparison of those prices*" and that this could be evidenced if the "*'feature', 'characteristic' or 'identifiable component' of the prices in question is linked exclusively either to the domestic sales or to relevant export sales subject to comparison, or to both sides of the comparison but in different amounts.*" [3] Moreover, the panel emphasized that, to the extent Article 2.4 does not prescribe a specific methodology for achieving a fair comparison, whether allowances are to be made "*involve[s] a case-specific analysis of the particular evidence available in a given investigation.*" [4]

Based on this understanding of Article 2.4, the panel then turned to the question of whether the EU authorities had sufficient evidence to treat the markup granted by Musim Mas to ICOF-S as a "difference which affects price comparability." The panel upheld both of the EU's factual findings supporting this treatment, namely (i) ICOF-S was granted a markup linked to export sales only and (ii) ICOF-S had functions similar to an agent working on a commission basis.

Indeed, the panel considered that there was sufficient evidence for the European Union to reasonably determine that the "*mark-up was a component of the price of exports to the European Union representing the payment for a service (…) and that there was no concomitant pricing or expense component on the domestic side*." The panel found that there existed a "*feature or characteristic of the prices to be compared that is linked exclusively (…) to relevant export sales,*" thus demonstrating "*the existence of a difference which affects price comparability under Article 2.4.*" [5] Moreover, the panel considered that the EU's conclusion that "*ICOF-S had functions similar to an agent working on a commission basis*" based on "*PT Musim Mas' direct sales, ICOF-S' trade in products of unrelated entities, and the terms of the Sale and Purchase Agreement between PT Musim Mas and ICOF-S*" [6] supported the EU's finding that the markup was a difference affecting price comparability. The panel concluded that the European Union had a sufficient evidentiary basis to adjust the export price in accordance with Article 2.4.

A "SINGLE ECONOMIC ENTITY" IS NOT AN AUTOMATIC BAR TO PRICE ALLOWANCES

The panel next examined Indonesia's arguments that the markup constituted an internal allocation of funds within a single economic entity, which can never affect price comparability. The panel rejected this approach and considered that the existence of a "single economic entity" was not "*dispositive of whether a given payment is a difference which affects price comparability under Article 2.4 [of the ADA.]*" [7] To the contrary, it held that "*the fact that the benefit of a sale to a final buyer might accrue to an overall entity does not negate the possibility that a given expense that is tied only to export or domestic sales (or both in different amounts) could be incurred within that entity, with the potential to affect price comparability.*" [8]

Having established that the existence of a single economic entity was not "*the 'dividing line' between payments that do affect price comparability and those that do not*" and based on its previous finding that such dividing line must rest on the facts and evidence before an investigating authority, [9] the panel held that the European Union did not act inconsistently with Article 2.4 of the ADA.

ALLOWANCES CAN BE MADE AT THE LEVEL OF THE SG&A AND PROFITS INCURRED BY A RELATED TRADER

The panel also addressed Indonesia's argument that the European Union incorrectly adjusted Musim Mas's export price because the value of the adjustment was calculated on the basis of selling, general and administrative costs (SG&A) and profits. Indonesia claimed that no adjustments could be made for SG&A and profits incurred by ICOS-F as (i) this would create an asymmetry absent a similar adjustment to the normal value and (ii) Article 2.4 does not allow for such allowances as SG&A and profits of the "seller," namely the "single economic entity" formed by Musim Mas and ICOF-S, are essential components of the prices being compared.

First, the panel rejected that an asymmetry existed to the extent that both the export price and the normal value included similar allocations of amounts for SG&A, and the Profit and Loss statement of Musim Mas recorded profits for both direct domestic sales and sales to ICOF-S.

Second, the panel, after having acknowledged that both the normal value and export price should in principle reflect costs elements pertaining to SG&A and profit, held nonetheless that "*the intervention of downstream participants in the sales chain may result in 'additional costs and profit' which are likely to affect price comparability across markets.*" [10] Further, the panel held that to determine the proper amount of the adjustment to be made, an investigating authority may examine whether the actual value of the expense differs from its reported value. Therefore, the European Union was entitled to consider that, as the markup granted to ICOF-S was designed to cover the cost of the service rendered, the SG&A and profits of ICOF-S represented a reasonable basis for calculating the actual value of this service and, consequently, the value of the price adjustment.

THE PANEL'S TREATMENT OF ALLOWANCES FOR "A SINGLE ECONOMIC ENTITY" CONTRASTS WITH EUROPEAN CASE LAW

As explained above, the panel held that the costs incurred within a "single economic entity" could be deducted in the process of calculating the dumping margin because the existence of a close relationship between a producer and a trader is not dispositive of whether a payment can be treated as a factor affecting price comparability. This finding differs from European case law.

In the *Interpipe* case, a separate case involving anti-dumping duties, the European General Court, upheld by the Court of Justice of the European Union, stated that:

Where it is found that a producer entrusts tasks normally falling within the responsibilities of an internal sales department to a company for the distribution of its products which it controls economically and with which it forms a single economic entity, the fact that the institutions base their reasoning on the prices paid by the first independent buyer from the affiliated distributor is justified. Taking the prices of the affiliated distributor into account avoids costs which are clearly included in the sale price of a product when that sale is carried out by an integrated sales department in the producer's organisation no longer being included where the same sales activity is carried out by a company which is legally distinct, even though economically controlled by the producer . [11]

In *Interpipe*, the General Court found that the EU investigating authorities had made a manifest error of assessment by making an adjustment for a commission to a related party on the basis of Article 2(10)(i) of the Basic AntiDumping Regulation, which is the European regulation that implements Article 2.4 of the ADA, insofar as the relevant producer and its related trader formed a single economic entity.

Following the judgment of the European Court of Justice in *Interpipe*, the European Union decided to reopen the fatty alcohols anti-dumping investigation and eventually found in a revised determination that the factual circumstances for another Indonesian producer of fatty alcohols were similar to those of the exporter in *Interpipe*. As such, the

European Union concluded that the other Indonesian producer and its related trader should be considered to form a "single economic entity," thus preventing adjustment to its export price. In contrast, the European Union found that circumstances of the relationship between Musim Mas and its related trader ICOF-S did not support a similar conclusion and therefore an adjustment to Musim Mas's export price was made.

Interestingly, the panel indirectly criticized the EU's treatment of the other Indonesian producer. Indonesia argued that the difference in treatment between Musim Mas and the other Indonesian producer was evidence of a violation of Article 2.4. On this point, the panel expressed concerns about the "reasonableness and adequacy" [12] regarding the EU's explanation for why the commission granted by the other Indonesian manufacturer to its related trader was not treated as a difference which affects price comparability. However, the panel concluded this point was insufficient to demonstrate a violation of Article 2.4 of the ADA in respect of Musim Mas, as Indonesia was "*not making a claim that EU authorities violated Article 2.4 by not making an allowance to [the other producer's] export price or by changing their assessment after the end of the investigation. In that context, [the panel does] not consider that an insufficient explanation for the different outcome with respect to [the other producer] affects the EU authorities' determination that the mark-up granted to ICOF-S was a difference which affects price comparability.*" [13]

The Panel's Findings Concerning the "Economic Crisis" and "Access to Raw Materials" as Other Known Factors of Injury

Article 3.5 of the ADA requires a demonstration that dumped imports are causing injury to the domestic industry of the importing country. As part of their causation analysis, investigating authorities must examine any known factors other than the dumped imports which simultaneously are injuring the domestic industry, and cannot attribute any injuries caused by these other factors to the dumped imports. Indonesia argued that the European Union acted inconsistently with Article 3.5 in its consideration of the economic crisis as a known factor of injury, *inter alia,* by failing to adequately separate and distinguish the injurious effects of the economic crisis from those of the dumped imports and by failing to address certain arguments and evidence presented during the investigation by interested parties.

The panel started its analysis by recalling that Article 3.5 does not prescribe a particular methodology for separating and distinguishing the injurious effects of the dumped imports from other known factors. However, based on the evidence available to it, and in light of the methodology applied by the European Union, the panel considered that the European Union had not unreasonably "*inferred (…) that the dumped imports largely contributed to material injury suffered by the domestic industry regardless of the economic crisis."* [14] Moreover, the panel held that "*an investigating authority's determination need not expressly address a particular argument or piece of evidence raised by an interested party during an investigation where: (a) the arguments or evidence at issue have been 'implicitly considered' in the authorities' determination; or (b) the arguments or evidence at issue are of insufficient probative value to warrant their express consideration in the determination.*" [15] These criteria were eventually found to be fulfilled with respect to the points raised by Indonesia. [16]

Second, Indonesia alleged that the European Union acted inconsistently with Article 3.5 by disregarding evidence relating to the European domestic industry's access to raw materials and the effects of fluctuations in the price of those materials as a factor of injury. Indonesia and the EU notably disagreed as to whether the concept of "other known factors" should cover "structural disadvantages" in the conditions of competition between the domestic industry and the producers/exporters under investigation. Indonesia argued that the EU fatty alcohols industry faced a structural disadvantage compared to Indonesian producers with respect to the access to and prices of raw materials. According to Indonesia, this structural disadvantage should have been considered a known factor of injury. The European Union countered that the raw materials factor was not a separate cause of injury but rather a condition of competition reflected in price differences between the Indonesian imports and domestic fatty alcohols.

The panel held that "access to raw materials" could not constitute such a "known factor," and consequently there is no requirement to examine it under Article 3.5. With respect to the price fluctuations for raw materials, the panel considered that the evidence presented by Musim Mas during the investigation did not sufficiently demonstrate such fluctuations to be a separate other known factor of injury. Moreover, the panel found that the European Union had implicitly considered the effect of price fluctuations as part of its analysis of the economic crisis factor.

The Panel's Findings Concerning the Obligation to Disclose Verification Visit Results

Article 6.7 of the ADA authorizes investigating authorities to carry out investigations at the premises of exporters in order to verify information received during the investigation or gather additional relevant information. This article requires investigating authorities to make the results of such verification visits available to the exporters. Indonesia asserted that the European Union failed to properly disclose the results of the on-the-spot investigations of two Indonesian producers under investigation, contrary to Article 6.7 of the ADA.

The panel first noted that, when investigating authorities choose to carry out verification visits, they must communicate the results thereof to the pertinent firms either (i) by making the results of such visits available to the companies concerned or (ii) by including the results of such verification in the disclosure of essential facts provided for under Article 6.9 of the ADA.

More importantly, the panel established that the results made available or disclosed must be "*sufficiently specific for the interested parties to understand at a minimum those parts of the questionnaire response or other information supplied for which supporting evidence was requested and whether (a) any further information was requested; (b) the producer made available the evidence and additional information requested; (c) the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies, inter alia in their questionnaire response.*" [17]

The panel emphasized that "*the disclosure obligation in Article 6.7 is unqualified and rests entirely on the investigating authorities,*" i.e., whether this duty has been fulfilled must be assessed based on actions taken by the investigating authority to comply with such obligations [18] Thus, a violation of Article 6.7 could occur, regardless of whether the exporter requested access to the results of the investigation or whether the lack of disclosure had a demonstrated impact on the due process rights of the exporter. In the present case, the panel found that the EU authorities did not satisfy such obligation with respect to the verification visit at the premises of Musim Mas. Although it did not issue a verification report, the European Union argued that other documents issued as part of the investigation contained the results of its visit. The panel found that these documents did not satisfy the EU's obligation under Article 6.7 because they failed to explain what information the European Union had sought to verify during the visit, what information Musim Mas provided during the visit, and whether the European Union was able to confirm the accuracy of the information provided by Musim Mas.

For more information about this topic, please reach out to any of the following contacts.

Margaret-Rose Sales
+1 202 263 3414
msales@mayerbrown.com

Edouard Gergondet
+32 2 5515946
egergondet@mayerbrown.com

EUROPE

NikolayMizulin

+32 2 551 5967
nmizulin@mayerbrown.com

ASIA

Cecil Leong
+65 6327 0254
cecil.leong@mayerbrown.com

AMERICAS

Duane W. Layton
+1 202 263 3811
dlayton@mayerbrown.com

Endnotes

[1] Panel report, European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia, WT/DS442/R, 16 December 2016 (hereinafter EU – Fatty Alcohols (Indonesia)).

[2] EU – Fatty Alcohols (Indonesia), paras. 7.31 – 7.32.

[3] EU – Fatty Alcohols (Indonesia), para. 7.58.

[4] EU – Fatty Alcohols (Indonesia), paras. 7.59-7.60.

[5] EU – Fatty Alcohols (Indonesia), para. 7.88.

[6] EU – Fatty Alcohols (Indonesia), para. 7.96.

[7] EU – Fatty Alcohols (Indonesia), para. 7.105.

[8] EU – Fatty Alcohols (Indonesia), para. 7.105.

[9] EU – Fatty Alcohols (Indonesia), para. 7.107 et seq.

[10] EU – Fatty Alcohols (Indonesia), para. 7.128.

[11] General Court, Case T-249/06, Interpipe Niko Tube ZAT and Interpipe NTRP VAT v. Council, 10.03.2009, para. 178.

[12] EU – Fatty Alcohols (Indonesia), para. 7.159

[13] EU – Fatty Alcohols (Indonesia), para. 7.159.

[14] EU – Fatty Alcohols (Indonesia), para. 7.179.

[15] EU – Fatty Alcohols (Indonesia), para. 7.184.

[16] EU – Fatty Alcohols (Indonesia), para. 7.184 et seq.

[17] EU – Fatty Alcohols (Indonesia), para. 7.228.

[18] EU – Fatty Alcohols (Indonesia), para. 7.229.

Mayer Brown is a global legal services organization advising many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory & enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit our web site for comprehensive contact information for all Mayer Brown offices. www.mayerbrown.com

Any tax advice expressed above by Mayer Brown LLP was not intended or written to be used, and cannot be used, by any taxpayer to avoid U.S. federal tax penalties. If such advice was written or used to support the promotion or marketing of the matter addressed above, then each offeree should seek advice from an independent tax advisor. Mayer Brown comprises legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and

Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown Mexico, S.C., a sociedad civil formed under the laws of the State of Durango, Mexico; Mayer Brown JSM, a Hong Kong partnership and its associated legal practices in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. Mayer Brown Consulting (Singapore) Pte. Ltd and its subsidiary, which are affiliated with Mayer Brown, provide customs and trade advisory and consultancy services, not legal services.

"Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

This publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek legal advice before taking any action with respect to the matters discussed herein.

Document Information

Title:	WTO Panel Issues Mixed Decision on Anti-dumping Duties in EU Fatty Alcohols Dispute (Mayer Brown)
Date Posted:	01/09/2017 14:55
Date Released:	01/09/2017 14:55
Areas of Interest:	Customs & Excise Centre
Document Source(s):	Other
Topic(s):	Customs
General Subject Area:	Excise/Customs

Jurisdiction: Foreign

End of Document