

WTO Appellate Body Upholds Panel Ruling Rejecting Certain Cost Adjustment Methodologies by the EU in Anti-dumping Investigations

On October 6, 2016, the World Trade Organization (“WTO”) Appellate Body (“Appellate Body”) issued its report in *European Union – Anti-dumping Measures on Biodiesel from Argentina*.¹ The dispute concerned the EU’s imposition of anti-dumping duties on biodiesel imported from Argentina, the complainant. Argentina claimed before the panel that the European Commission erred in its method of calculating dumping rates in this particular investigation. Moreover, Argentina claimed that a particular provision of the EU’s anti-dumping legislation (the “Basic Regulation”) was inconsistent “as such” with the EU’s WTO obligations.

The European Union and Argentina brought separate challenges to the original panel report, which was circulated in March 2016. The Appellate Body report upheld all of the panel’s findings and did not rule on Argentina’s claim under Article 2.4 of the Anti-dumping Agreement (“Anti-dumping Agreement”). The Appellate Body recommended that the WTO’s Dispute Settlement Body (“DSB”) request that the European Union bring its anti-dumping measure on biodiesel from Argentina into conformity with the *Anti-dumping Agreement* and the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).

The Appellate Body’s decision addresses a particular methodology used by the European Commission in its anti-dumping investigations on imports from countries in which market

prices are distorted as a result of state intervention. The decision is of relevance in light of the upcoming reform of the EU’s Trade Defence Instruments (“TDIs”) and the new anti-dumping methodologies it might adopt in response to the expiry of Section 15(a)(ii) of China’s Protocol of Accession.

The Appellate Body’s Findings With Respect to the Anti-dumping Investigation on Biodiesel From Argentina

In the investigation on biodiesel from Argentina, the European Commission found that soybeans are “the main raw material purchased and used in the production of biodiesel.” The European Commission found that there was a significant degree of state intervention in the Argentinean biodiesel market because of the existence of an export tax system. Consequently, it found that sales of biodiesel were not made in “the ordinary course of trade.” Therefore the European Commission decided to construct the so-called “normal value” on the basis of the Argentinean producers’ own production costs in their records. However, the European Commission considered that “the domestic prices of the main raw material used by biodiesel producers (soybeans) in Argentina were ... lower than the international prices due to the market distortion created by the export tax system.” The costs of the main raw material were found not to be reasonably reflected in the records kept by the Argentinean producers.

The European Commission therefore decided to “disregard the actual costs of soybeans as recorded by the companies concerned in their accounts.” Instead, such actual costs were replaced by “the reference price used by the Argentinean government for the calculation of the export tax on soybeans” (a particular “cost adjustment methodology”). This reference price reflected the level of the “international prices” of soybeans. The European Commission determined that this reference price “would have been the price paid by the Argentinean producers in the absence of the export tax system.” On the basis of, *inter alia*, the revised constructed normal value, the EU authorities calculated dumping margins ranging from 41.9 percent to 49.2 percent for the Argentinean exporters/producers.

Before the panel, Argentina had successfully argued that the European Commission had failed to calculate the cost of production of the product under investigation *on the basis of records kept by the Argentinean producers* and by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production. Thereby the European Union had, according to Argentina, acted inconsistently with Article 2.2.1.1 of the Anti-dumping Agreement.

On appeal, the European Union challenged these findings of the panel. The Appellate Body considered that the second condition laid down in Article 2.2.1.1 of the Anti-dumping Agreement (that such records should “reasonably reflect the costs associated with the production and sale of the product under consideration”) relates to the issue of whether they “suitably and sufficiently correspond to, or reproduce, those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration.” Importantly, the Appellate Body confirmed that the European Commission’s determination that domestic prices of soybeans in Argentina were “artificially

low” due to the Argentinean 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. The Appellate Body therefore upheld the panel’s findings under Article 2.2.1.1.

Before the panel, Argentina had also successfully argued that the European Union had acted inconsistently with Article 2.2 of the Anti-dumping Agreement by “failing to construct the normal value of the exports of biodiesel *on the basis of the cost of production in the country of origin*” (emphasis added).

The EU challenged the findings by the panel on this particular point. The Appellate Body’s analysis began with the observation that Article 2.2 of the Anti-dumping Agreement requires that the normal value be constructed on the basis of, *inter alia*, the “cost of production [...] in the country of origin.” Confirming the panel’s findings on this point, the Appellate Body found that the phrase “cost of production [...] in the country of origin” does not limit the sources of information or evidence that may be used in establishing such cost to sources inside the country of origin. Importantly, the Appellate Body held that when out-of-country information is relied on, an investigating authority has to ensure that such information is used to arrive at the *cost of production in the country of origin* and that this may require the investigating authority to adapt that information. Thus, in the context of the investigation on biodiesel, the surrogate price for soybeans used by the European Commission to determine the cost of production of biodiesel in Argentina was not a cost “in the country of origin.” The Appellate Body therefore confirmed the panel’s finding that the European Union acted inconsistently with Article 2.2 of the Anti-dumping Agreement by not using the cost of production in Argentina when constructing the normal value of biodiesel.

The Appellate Body's Findings With Respect to the EU's Basic Regulation

Before the panel, Argentina had unsuccessfully argued that the second subparagraph of Article 2(5) of the EU's Basic Regulation was inconsistent "as such" with, *inter alia*, Article 2.2.1.1 and 2.2 of the Anti-dumping Agreement. Contrary to an "as applied" claim, such as that against the anti-dumping investigation on biodiesel, a claim of "as such" inconsistency refers to a measure that has "general and prospective application" and which will, in each instance it is applied, lead to a WTO-inconsistent application.

On appeal, the Appellate Body upheld the panel's finding that the second subparagraph of Article 2(5) 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 considered to be "artificially or abnormally low" as a result of a distortion. The Appellate Body found no support in the text of the Basic Regulation for the view that the second subparagraph of Article 2(5) applies to such a determination by the EU authorities. As a consequence, the Appellate Body found that Argentina had not established that Article 2(5) of the Basic Regulation is "as such" inconsistent with Article 2.2.1.1 of the Anti-dumping Agreement and thereby upheld the panel's finding on this point.

Similarly, regarding Argentina's claim under Article 2.2 of the Anti-dumping Agreement, the Appellate Body upheld the panel's finding that the second subparagraph of Article 2(5) of the Basic Regulation does not *require* the EU authorities to establish the costs of production so as to reflect costs prevailing in other countries outside the country of origin. The Appellate Body held that the European Commission retains a degree of discretion and

that, therefore, the second subparagraph of Article 2(5) of the Basic Regulation is not inconsistent "as such" with the Anti-dumping Agreement. Consequently, the Appellate Body also upheld the panel's findings on this issue.

Relevance of the Findings in the Appellate Body Report

The importance of the Appellate Body Report in *EU – Biodiesel* is twofold. First, the finding that Article 2(5) of the Basic Regulation is not "as such" inconsistent with the EU's WTO obligations under the Anti-dumping Agreement means that the European Union will not have to alter the Basic Regulation on which all of its anti-dumping investigations are based. Second, and more importantly, the decision presents a significant blow to the EU's plans to increase the use of cost adjustment methodologies to deal with dumped imports from countries in which there is a significant degree of state intervention in the economy. The European Union had proposed to make more use of this type of methodology as a means to alleviate concerns of domestic industries within the European Union about the upcoming expiration of Section 15(a)(ii) of China's Protocol of Accession. This proposal has now been dealt a significant blow, as the Appellate Body found that the costs reported by the producer have to suitably and sufficiently correspond to those costs *incurred* that have a genuine relationship with the production and sale of the specific product under consideration. A determination that domestic prices of raw materials are "artificially low" due to a particular state intervention is not, in itself, a sufficient basis for concluding that producers' records do not reasonably reflect the costs of that raw material associated with the production and sale of the end product. Consequently, investigating authorities such as the European Commission cannot simply disregard the costs of producers because these are artificially low as a result of government intervention.

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Endnotes

¹ Appellate Body Report, *European Union – Anti-dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, October 6, 2016.
https://www.wto.org/english/tratop_e/dispu_e/473abr_e.pdf

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