Commission Implementing Regulation (EU) 2018/1570 of 18 October 2018 terminating the proceedings concerning imports of biodiesel originating in Argentina and Indonesia and repealing Implementing Regulation (EU) No 1194/2013

COMMISSION IMPLEMENTING REGULATION (EU) 2018/1570

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terminating the proceedings concerning imports of biodiesel originating in Argentina and Indonesia and repealing Implementing Regulation (EU) No 1194/2013

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union[(1)] ('the basic Regulation'), and in particular Article 14(1) thereof,

Having regard to Regulation (EU) 2015/476 of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters[(2)] ('the WTO enabling Regulation') and in particular Articles 1 and 2 thereof,

Whereas:

1. PROCEDURE

(1) On 28 May 2013, the Commission imposed by Regulation (EU) No 490/2013 a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia ('the provisional Regulation')[(3)].

(2) On 19 November 2013, the Council imposed by Implementing Regulation (EU) No 1194/2013 a definitive anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia ('the definitive Regulation')[(4)].

(3) On 15 September 2016, the General Court of the European Union ('the General Court') delivered judgments in cases T-80/14, T-111/14 to T-121/14[(5)] and T-139/14[(6)] ('the judgments') annulling Articles 1 and 2 of the definitive Regulation to the extent that they apply to the applicants in those cases ('the exporting producers concerned')[(7)].

(4) The Council of the European Union had initially appealed the judgments. However, following the Council's decision to withdraw its appeals, the cases were removed from the European Court of Justice's Register on 2 and 5 March 2018[(8)]. Consequently, the judgments became definitive and binding as from the date of their delivery.

(5) The General Court held that the institutions failed to establish to the requisite legal standard that there was appreciable distortion of the prices of the main raw

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materials used for the production of biodiesel in Argentina and Indonesia as a result of a Differential Export Tax system that applied different tax rates on raw materials and on biodiesel. It ruled that the institutions should not have taken the view that the price of the raw materials was not reasonably reflected in the records of the Argentinian and Indonesian exporting producers and should not have disregarded those records when constructing a normal value for biodiesel produced in Argentina and Indonesia.

(6) On 26 October 2016 the WTO Dispute Settlement Body (DSB) adopted the panel report, as modified by the Appellate Body report ('the Argentina Reports')[9], in the European Union — Anti-Dumping Measures on Biodiesel from Argentina dispute (DS473).

(7) On 28 February 2018, the DSB also adopted the panel report in the European Union — Anti-Dumping Measures on Biodiesel from Indonesia dispute (DS480) ('the Indonesia Report')[10]. Both Indonesia and the EU did not appeal that report.

(8) In the Argentina and Indonesia Reports ('the Reports'), it was found, inter alia, that the EU acted inconsistently with:

— Article 2.2.1.1 of the WTO Anti-Dumping Agreement ('ADA') by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers;

— Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina and Indonesia when constructing the normal value of biodiesel;

— Article 9.3 of the ADA and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the ADA and Article VI:1 of the GATT 1994, respectively.

(9) In the Indonesia Report the panel found, in addition, that the EU had acted inconsistently with:

— Articles 2.2.2(iii) and 2.2 of the ADA by failing to determine the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin;

— Article 2.3 of the ADA by failing to construct the export price of one Indonesian exporting producer, P.T. Musim Mas, on the basis of the price at which the imported biodiesel produced by P.T. Musim Mas was first resold to independent buyers in the EU;

— Articles 3.1 and 3.2 of the ADA, by failing to establish the existence of significant price undercutting with regard to Indonesian imports.

(10) The Panel recommended that the DSB request the EU to bring its measures into conformity with the ADA and the GATT 1994.

(11) Following the Argentina Reports, the Commission had initiated a review[11] under Article 1(3) of Regulation (EU) 2015/476 of the European Parliament and of the Council[12] ('the review'). At the initiation of the review, the Commission announced

that it considered it appropriate to examine the consequences of the findings of the Argentina Reports also for the measures imposed on biodiesel from Indonesia, as the legal interpretations contained in the Argentina Reports appeared to be also relevant for the investigation concerning Indonesia.

(12) However, during the review, the Commission received a number of comments from interested parties concerning, in particular, the applicability of the interpretation of the Argentina Reports to the measures on biodiesel from Indonesia. The Commission considered that the analysis of the comments with regard to Indonesia required more time and decided not to include an examination of Indonesia in the amending Regulation, but instead to keep the review open as far as it concerned Indonesia.

(13) On 18 September 2017, the Commission adopted Implementing Regulation (EU) 2017/1578 amending the definitive Regulation ('the amending Regulation') in so far as Argentinian exporting producers were concerned[(13)].

(14) The annulment by the General Court of the operative parts of the definitive Regulation with regard to the exporting producers concerned also affects the validity of the amending Regulation. As the amending Regulation amended the Regulation of which the operative parts have been annulled, it has itself also become void and not applicable in respect of the exporting producers concerned.

(15) On 28 May 2018 a Notice[(14)] was published re-opening the original investigation concerning imports of biodiesel originating in Argentina and Indonesia that led to the adoption of the definitive Regulation ('the Notice'). At the same time the pending review with regard to Indonesia was closed.

(16) According to the case-law of the Court, the procedure for replacing an annulled act may be resumed at the very point at which the illegality occurred. The Union's institutions, in so complying with the judgments, have the possibility to remedy the aspects of the definitive Regulation which led to its annulment in respect of the exporting producers concerned[(15)].

(17) The Commission should observe not only the operative part of the judgments but also the grounds which led to those judgments and constituted its essential basis, inasmuch as they were necessary to determine the exact meaning of what was stated in the operative part. Other findings reached in the definitive Regulation which were not contested within the time-limits for a challenge or which were contested but rejected by the General Court's judgments, and therefore did not lead to the annulment of the definitive Regulation, remain valid[(16)].

(18) In order to comply with its obligations, the Commission decided to resume the present anti-dumping proceeding at the very point at which the illegality occurred and thus to re-examine the methodology used for constructing a normal value.

(19) The Notice included in its scope the reasoning of the General Court's judgments for the exporting producers concerned and the possibility to extend the findings to all exporting producers from Argentina and Indonesia. Furthermore, it took into account the findings of the WTO panels and Appellate Body, both in respect of

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Argentina and Indonesia, in order to bring the measures found WTO inconsistent into full compliance with the WTO Agreements, in accordance with Article 19.1 of the Dispute Settlement Understanding.

(20) In the Notice the Commission invited the exporting producers concerned and the Union industry to make their views known in writing and to request a hearing within the time limit set out in the Notice.

(21) All parties who so requested within that time limit, and who demonstrated that there were particular reasons why they should be heard, were granted the opportunity to be heard.

(22) Representations were received from the European Biodiesel Board (EBB), five exporting producers in Indonesia and the authorities of Indonesia.

2. IMPLEMENTATION OF THE JUDGMENTS OF THE GENERAL COURT AND OF THE FINDINGS OF THE WTO

(23) The Commission has the possibility to remedy the aspects of the definitive Regulation which led to its annulment, while leaving unchanged the parts of the assessment which are not affected by the judgments[17].

(24) As indicated in the Notice, in addition the Commission reassessed the definitive findings of the original investigation by taking into account the findings of the WTO panels and Appellate Body both in respect of Argentina and Indonesia. The Commission decided to extend the findings to all exporting producers from Argentina and Indonesia. That reassessment was based on information collected in the original investigation and the review, as well as on information received by interested parties after the publication of the Notice.

(25) One Indonesian exporting producer, Wilmar, has claimed, before and after disclosure, that there is no legal basis to reopen the investigation with regard to Wilmar as the General Court had annulled the definitive Regulation in its entirety for that company. However, Article 266 TFEU provides that an institution whose act has been declared void must take the necessary measures to comply with the Court's judgment. In addition, the EU must bring the anti-dumping measures imposed on imports of biodiesel from Indonesia into conformity with the recommendations and rulings contained in the WTO Reports. In order to examine what measures should be taken to comply with the Court and WTO rulings, it was necessary to re-open the investigation at the time when the illegality was found for both countries and for all exporting producers concerned. Whether a measure is annulled in whole or in part is irrelevant for the purposes of determining whether the Commission must in consequence reinvestigate all the aspects of the investigation which preceded the annulled measure. The Commission therefore rejected this claim.

(26) The original investigation of dumping and injury covered the period from 1 July 2011 to 30 June 2012 (‘investigation period’). With respect to the parameters relevant in the context of the injury assessment, data covering the period from 1 January 2009 to the end of the investigation period were analysed (‘period considered’).

3. PRODUCT CONCERNED

(27) The product concerned is fatty-acid mono-alkyl esters and/or paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin, in pure form or as included in a blend originating in Argentina and Indonesia, currently falling within CN codes ex 1516 20 98, ex 1518 00 91, ex 1518 00 95, ex 1518 00 99, ex 2710 19 43, ex 2710 19 46, ex 2710 19 47, 2710 20 11, 2710 20 15, 2710 20 17, ex 3824 99 92, 3826 00 10 and ex 3826 00 90 (‘the product concerned’, commonly referred to as ‘biodiesel’).

(28) Neither the Court's judgments nor the Reports affect the findings set out in recitals 16 to 27 of the definitive Regulation concerning the product concerned and the like product.

4. DETERMINATION OF THE NORMAL VALUE AND CALCULATION OF THE DUMPING MARGINS

(29) The Commission reassessed the findings of the original investigation on the issues of cost adjustment, profit cap and double counting.

4.1. Cost adjustment

(30) The General Court judgments and the WTO findings mentioned in recital 8 all relate to the cost-adjustment done by the EU institutions in the definitive Regulation.

(31) As mentioned in recital 28 of the definitive Regulation, the Commission had determined that the normal value had to be constructed as the domestic sales were considered not to be in the ordinary course of trade. This finding has not been contested and remains valid. No interested party contested this finding in the course of this review either.

(32) In recitals 29 to 34 of the definitive Regulation, the Commission established that the difference in the export taxes imposed by Indonesia on the main raw material input (crude palm oil in Indonesia and soybean oil and soya beans in Argentina) and those imposed on the finished product (biodiesel) depressed domestic prices in Indonesia and Argentina, and hence this should be taken into account in the construction of the normal value.

(33) As a result, when constructing the normal value, the Commission replaced the costs of the main raw material reported in the records of the exporting producers with reference prices published by the relevant authorities of the countries concerned.

(34) The Commission further based its conclusions in the original investigation on the interpretation that Article 2.2.1.1 of the ADA allows the investigating authority to decline to use the records of the exporting producers if it determines that they are either (i) inconsistent with GAAP or (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration (recitals 42 and 72 of the definitive Regulation).