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Commission Implementing Regulation (EU) 2017/1578 of 18 September 2017 amending Implementing Regulation (EU) No 1194/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia

COMMISSION IMPLEMENTING REGULATION (EU) 2017/1578

of 18 September 2017

amending Implementing Regulation (EU) No 1194/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia

THE EUROPEAN COMMISSION,

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

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[(1)] ('the WTO enabling Regulation'), and in particular Articles 1 and 2 thereof,

Whereas:

1. MEASURES IN FORCE

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

2. REPORTS ADOPTED BY THE WTO DISPUTE SETTLEMENT BODY

(2) On 26 October 2016, the Dispute Settlement Body ('DSB') of the World Trade Organization ('WTO') adopted the Appellate Body Report[(3)] and the Panel Report[(4)] as modified by the Appellate Body report ('the Reports'), in the dispute 'European Union — Anti-Dumping Measures on Biodiesel from Argentina' (WT/DS473/15). DSB stated that the Panel Report should be read in conjunction with the Appellate Body Report. The Appellate Body report found, inter alia, that the European Union had 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 when constructing the normal value of biodiesel; and

— 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

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established under Article 2 of the ADA and Article VI:1 of the GATT 1994, respectively.

(3) In addition, the Panel found, inter alia, that the European Union had acted inconsistently with:

— Articles 3.1 and 3.4 of the ADA in its examination of the impact of the dumped imports on the domestic industry, insofar as the examination related to production capacity and capacity utilisation are concerned.

(4) The Appellate Body recommended that the DSB request the European Union to bring its measures into conformity with the ADA and the GATT 1994.

3. PROCEDURE

(5) On 20 December 2016, under Article 1(3) of the WTO enabling Regulation, the European Commission ('the Commission') initiated a review ('the review') by the publication of a Notice[5] in the *Official Journal of the European Union* ('the Notice of Initiation'). The Commission informed interested parties in the investigation that led to Implementing Regulation (EU) No 1194/2013 ('the original investigation') of the review and of the manner in which the Commission intended to take into account the findings of the Reports.

(6) Interested parties had an opportunity to comment on the initiation of the review investigation and to request a hearing with the Commission and/or the Hearing Officer in trade proceedings.

(7) The Commission sent a questionnaire regarding production and production capacity data of the Union industry to the European Biodiesel Board ('EBB') and subsequently carried out a verification visit at their premises.

4. PRODUCT CONCERNED

(8) 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').

(9) The Reports do not affect the findings set out in recitals 16 to 27 of the definitive Regulation concerning the product concerned and the like product.

5. REVISED DUMPING FINDINGS BASED ON THE REPORTS

(10) As indicated in the Notice of Initiation, the Commission reassessed the definitive findings of the original investigation by taking into account the recommendations and rulings of the DSB. This reassessment was based on information collected in the original investigation and information received by interested parties after the publication of the Notice of Initiation.

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(11) The original investigation of dumping and injury covered the period from 1 July 2011 to 30 June 2012 ('investigation period' or 'IP'). 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').

(12) This Regulation seeks to correct WTO inconsistent aspects of the definitive Regulation and to bring it into conformity with the Reports.

5.1. **Inclusion of Indonesia**

(13) In the Notice of Initiation, the Commission referred to the anti-dumping measures on imports of biodiesel from Indonesia imposed by the same definitive Regulation. These measures are at present subject to a pending WTO dispute by Indonesia against the Union[6] ('EU Measures concerning Indonesia'). In that dispute, Indonesia has raised claims similar to those that were addressed in the Reports. As the Appellate Body's legal interpretation contained in the Reports appears to be also relevant for the investigation concerning Indonesia, the Commission considered it appropriate that the anti-dumping measures imposed on imports of biodiesel from Indonesia should also be examined in a concurrent review conducted under Article 2(1) of the WTO enabling regulation, in particular as far as the definitive Regulation was found inconsistent with Article 2.2.1.1 of the ADA.

(14) In recitals 12 to 20 of the general disclosure document, the Commission set out its preliminary analysis of the application of the Appellate Body's interpretation of Article 2.2.1.1 of the ADA for the Indonesian investigation.

(15) After disclosure, interested parties submitted comments questioning the Commission's analysis, challenging, inter alia, the applicability of the Appellate Body's interpretation as well as the Commission's authority to act *ex officio* on that interpretation under the WTO enabling Regulation.

(16) Because that analysis requires further time, the Commission decided not to terminate the review concerning Indonesia at this point, but instead to continue its analysis in light of the comments received. The review initiated under Article 2(1) of the WTO enabling Regulation is therefore still ongoing and remains open insofar as it concerns Indonesia. All interested parties were informed accordingly by way of a revised disclosure document of 31 July 2017 and granted the opportunity to comment.

(17) The Indonesian government claimed that the Commission had infringed general principles of European Union law by first disclosing its intention to amend the definitive Regulation with regard to Indonesia and subsequently by reversing that intention in order to continue the investigation concerning Indonesia.

(18) First, the Indonesian government considered that this results in unequal and discriminatory treatment of Indonesian producers vis-à-vis the Argentinian exporting producers given that the Commission had allegedly acknowledged, as stated in the Notice of Initiation, that Indonesian imports of biodiesel are in a similar situation to that of Argentinian imports. By delaying the review in respect of Indonesia,

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the Indonesian exporting producers are manifestly disadvantaged compared to the Argentinian exporters.

(19) Second, given that the Commission initiated the review with regard to both Indonesian and Argentinian imports of biodiesel, the Indonesian exporters could reasonably and legitimately expect to have the review concerning Indonesia concluded at the same time as for Argentina. This expectation was further amplified by the first disclosure document in which the Commission proposed to also amend the definitive Regulation for Indonesia. Accordingly, by changing its position through a revised disclosure the Commission allegedly infringed the principle of legitimate expectations.

(20) Third, the Indonesian government submitted that the Commission infringed the principle of good faith by excluding the Indonesian imports from the review at a late stage of the proceeding despite, including them throughout the investigation.

(21) At the outset, the Commission recalled that the WTO Dispute Settlement Body has already made definitive findings on the EU measures against imports of biodiesel from Argentina, while the separate dispute concerning anti-dumping measures on biodiesel from Indonesia is still pending before it. The latter are thus considered a non-disputed measure within the meaning of Article 2(1) of the WTO enabling Regulation. This is informed, inter alia, by the use of the term ‘report’ in Article 1(1) of the WTO enabling regulation to describe a disputed measure which the WTO Dispute Settlement Body has concerned itself with and adjudicated on.

(22) The Commission also recalled that, under European Union law, the concepts of ‘equal treatment’ and ‘non-discrimination’ prohibit treating similar situations differently, or different situations in the same way, without any objective ground for doing so[7]. For the purpose of implementing the WTO Reports, Indonesian and Argentinian exporting producers are not objectively in the same situation: the implementation exercise vis-à-vis the investigation into injurious dumping of the product concerned from Argentina occurred under Article 1(1) of the WTO enabling regulation and is terminated through this Regulation, whereas the implementation exercise vis-à-vis the investigation into the same practices from Indonesia occurred under Article 2(1) of the WTO enabling regulation and remains open. A situation of discrimination can only arise if there is a different legal treatment for operators in the same situation.

(23) Since, however, the review into implementation of the findings of the WTO Dispute Settlement Body vis-à-vis Argentina and Indonesia was commenced on different legal bases, completing the review into the investigation on injurious dumping from Argentina before that into the investigation on injurious dumping from Indonesia does not result in the differential treatment of a comparable situation. This is because operators find themselves in different situations.

(24) Contrary to the arguments by the Government of Indonesia, there is, consequently, no violation of the principle of ‘equal treatment’ or ‘non-discrimination’ for the purposes of European Union law. In any case, by including permissive language (‘may’ and ‘if it considers this appropriate’) in Article 2(1) of the WTO enabling

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Regulation, the EU legislature has vested the Commission with significant discretion on whether or not to implement a recommendation from the WTO in respect of a non-disputed measure.

(25) As noted above in recital 16, the Commission, after having analysed the comments received after disclosure, considered it appropriate not to conclude the review investigation as far as Indonesia is concerned at this point in time but, instead, to continue its assessment of the applicability of those findings also vis-à-vis Indonesia in light of the comments received.

(26) Moreover, the Commission cannot accept the argument that a disclosure document gives legitimate expectations as to the final conclusion of an investigation. On the contrary, the purpose of disclosure is to inform interested parties of the Commission's preliminary findings and grant them the possibility to effectively exercise their rights of defence. It is thus the very essence of the disclosure for the Commission to take into account arguments and facts presented by interested parties.

(27) For that reason, the cover letter to all interested parties expressly stated that 'this disclosure does not prejudice any subsequent decision which may be taken by the Commission, but where such decision is based on any different facts and considerations, these will be disclosed to your company as soon as possible'. In this particular case, that exercise led the Commission to take the position that it needs more time in analysing the applicability of the findings of the WTO Dispute Settlement Body insofar as it concerns Indonesia. This decision is of a preparatory nature and does not necessarily prejudice the Commission's final conclusion. That same decision is, furthermore, an exercise of the Commission's wide discretion when conducting the type of reviews commenced under the WTO enabling regulation, which fall within the realm of the Common Commercial Policy.

(28) Accordingly, an interested party cannot rely on the protection of legitimate expectations before the Commission has closed the review procedure at hand if the Commission chooses to act within the powers provided to it by the Union legislator[8]. That argument, too, must, consequently, be rejected.

(29) Finally, no bad faith can be inferred from the fact that his change occurred after initial disclosure of the Commission's preliminary position, nor has the Government of Indonesia presented evidence to this effect. The Commission has faithfully conducted all steps in the review investigation with full respect of due process rights of all interested parties.

(30) The Commission therefore rejected the claims that it had breached fundamental principles of EU law by exercising its discretion not to amend, at this stage of the review, the anti-dumping measures as far as Indonesia is concerned in full respect of due process rights of all interested parties.

(31) After the revised disclosure one exporting producer from Indonesia ('Wilmar') contested the Commission's view that it required further time to conclude its review vis-à-vis Indonesia given the clear findings of the WTO reports. It claimed also