



EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM INDONESIA

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY INDONESIA

The following communication, dated 30 June 2015, from the delegation of Indonesia to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

1. Consultations

On 10 June 2014, the Government of the Republic of Indonesia ("Indonesia") requested consultations with the European Union¹ pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Articles 17.2 and 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("the Anti-Dumping Agreement"), with respect to the below-mentioned measures concerning specific provisions of Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ("Basic AD Regulation")² and related practices and measures, and the anti-dumping measures imposed on biodiesel imports from Indonesia³ including provisional measures imposed as regards one Indonesian exporting producer.

Consultations were held between Indonesia and the European Union on 23 July 2014, with a view to reaching a mutually satisfactory solution. These consultations however failed to resolve the dispute.

2. Measures at issue and claims

Indonesia considers that the measures at issue as described below are inconsistent with the European Union's obligations under the relevant provisions of the WTO Agreements elaborated hereunder. The measures at issue include all those mentioned below as well as any subsequent amendments and replacements.

¹ The request for consultations dated 17 June 2014, WT/DS480/1, G/L/1071, G/ADP/D104/1.

² Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), OJ L 343, 22.12.2009, p. 51 and corrigendum to Council Regulation (EC) No 1225/2009, OJ L 7, 12.1.2010, p. 22, as amended, including by Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012, OJ L 237, 3.9.2012, p.1; Regulation (EU) No 1168/2012 of the European Parliament and of the Council of 12 December 2012, OJ L 344, 14.12.2012, p.1 and Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014, OJ L18, 21.1.2014, p.1.

³ Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, OJ L 141, 28.5.2013, p. 6 and Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, 26.11.2013, p. 2.

2.1 "As such" claims concerning the Basic AD Regulation and the European Union's methodologies, procedures or practices:**(i) Article 2(5) of the Basic AD Regulation⁴ and the European Union's 'cost adjustment methodology, procedure or practice'**

A. The second paragraph of Article 2(5) of the Basic AD Regulation which provides that "[i]f 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". Pursuant to this provision, the European Union assesses the reasonability of the actually incurred costs of inputs used in the production of the product under consideration by investigated exporters or producers on the basis of a non-distortion test against prices or benchmarks of those inputs in supposedly undistorted markets/from undistorted sources; disregards the actually incurred and accurately recorded costs of inputs as not being reasonable and thus not reasonably reflected in the accounting records of the investigated exporters or producers even though the records of those exporters or producers are in accordance with the generally accepted accounting principles of the investigated country and reasonably as well as accurately reflect the costs associated with the production and sale of the product under investigation, in the event the European Union finds that the non-distortion test is not met and/or that the costs of inputs incurred are artificially or abnormally low, distorted, regulated, below/lower than market prices paid in unregulated markets, or not in line with world market prices/prices in representative markets; and adjusts or replaces those input costs with other data including that pertaining to markets or sources outside the country of origin which it considers to be undistorted.

B. The European Union's 'cost adjustment methodology, procedure or administrative practice' pursuant to Article 2(5) of the Basic AD Regulation, in original investigations and reviews for the establishment of the cost of production of the product under consideration. Pursuant to the 'cost adjustment methodology, procedure or administrative practice' the European Union assesses the reasonability of the actually incurred costs of inputs used in the production of the product under consideration by investigated exporters or producers on the basis of a non-distortion test against prices or benchmarks of those inputs in supposedly undistorted markets/from undistorted sources; disregards the actually incurred and accurately recorded costs of inputs as not being reasonable and thus not reasonably reflected in the accounting records of the investigated exporters or producers even though the records of those exporters or producers are in accordance with the generally accepted accounting principles of the investigated country and reasonably as well as accurately reflect the costs associated with the production and sale of the product under investigation, in the event the European Union finds that the non-distortion test is not met and/or that the costs of inputs incurred are artificially or abnormally low, distorted, regulated, below/lower than market prices paid in unregulated markets, or not in line with world market prices/prices in representative markets; and adjusts or replaces those input costs with other data including that pertaining to markets or sources outside the country of origin which it considers to be undistorted.

Indonesia considers the above-mentioned measures to be inconsistent as such with the following provisions of the Anti-Dumping Agreement, the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement"):

1. Articles 2.2, 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 because these provisions require that the costs be calculated on the basis of the records kept by the producers under investigation when 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 and do not permit (a) the rejection and subsequent adjustment or replacement of the costs actually incurred by the producers under investigation by other costs because they are considered to be artificially or abnormally low, distorted, regulated, below/lower than market prices paid in unregulated markets, or not in line with world market prices/prices in representative markets nor do they permit the assessment of the reasonability of the input costs on the basis of out-of-country of origin input costs/prices from

⁴ Including any subsequent amendments and replacements.

supposedly undistorted markets/sources; and (b) because these provisions require that the costs used be associated with the production and sale of the product under consideration.

2. Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, because these provisions do not permit the adjustment or establishment of the cost of production on the basis of data or information other than that in the country of origin.

3. Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement, insofar as the European Union has not taken all steps to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the GATT 1994 and of the Anti-Dumping Agreement.

(ii) Article 2(6)(b) of the Basic AD Regulation⁵ and the European Union's 'profit adjustment methodology, procedure or practice'

A. Article 2(6)(b) of the Basic AD Regulation which provides that if the amounts (for SG&A costs and) for profits cannot be based on the actual data pertaining to the production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation, these amounts may be determined on the basis of the "*actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin*". (Emphasis added)

Pursuant to this provision, the European Union requires that the sales of the same general category of products be in the ordinary course of trade, in order for the actual profit amount realized by the exporter or producer subject to investigation in respect of the sales of the same general category of products to be used for the construction of the normal value, if the amount for the profit cannot be based on the actual data pertaining to sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. (Emphasis added)

B. The European Union's 'profit establishment methodology, procedure or practice' pursuant to Article 2(6)(b) of the Basic AD Regulation, in original investigations and reviews, for the establishment of the constructed normal value, pursuant to which the European Union requires that the sales of the same general category of products be in the ordinary course of trade, in order for the actual profit amount realized by the exporter or producer subject to investigation in respect of the sales of the same general category of products to be used for the construction of the normal value, if the amount for the profit cannot be based on the actual data pertaining to sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. (Emphasis added)

Indonesia considers the above-mentioned measures to be inconsistent as such with the following provisions of the Anti-Dumping Agreement and the Marrakesh Agreement:

1. Article 2.2.2(i) of the Anti-Dumping Agreement because this provision does not require that the actual profit amount realized in respect of the production and sales of the same general category of products by the exporter or producer subject to the investigation in the domestic market of the country of origin pertains to sales in the ordinary course of trade in order to be used for normal value establishment.

2. Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement, insofar as the European Union has not taken all steps to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Agreement.

2.2 "As applied" claims concerning the anti-dumping measures imposed on imports of Indonesian biodiesel⁶ and the underlying investigation

On 17 July 2012, the European Biodiesel Board filed an anti-dumping complaint on behalf of certain European Union producers of biodiesel and on 29 August 2012, the European Commission initiated an anti-dumping investigation against imports of this product from Indonesia and

⁵ Including any subsequent amendments and replacements.

⁶ Including any subsequent amendments and replacements.

Argentina. On 28 May 2013, provisional measures were imposed, followed by the imposition of definitive anti-dumping duties on 26 November 2013.

Indonesia considers that the anti-dumping measures⁷ imposed by the European Union on imports of biodiesel originating in Indonesia and the underlying investigation are inconsistent with the following provisions of the Anti-Dumping Agreement and of the GATT 1994:

1. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because the European Union incorrectly determined the existence of a particular market situation as regards the cost of a raw material used in the production of biodiesel by the Indonesian producers under investigation, as a basis to adjust the cost of production of biodiesel.

2. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 because in constructing the normal value for the Indonesian producers under investigation, the European Union did not calculate the cost of production of biodiesel on the basis of the records kept by those producers even though the records were in accordance with the generally accepted accounting principles and accurately and reasonably reflected the actual cost of production of biodiesel, and because the European Union therefore failed to properly calculate the cost of production and properly construct the normal value for those producers.

3. Article 2.2 of the Anti-Dumping Agreement because the European Union failed to construct the normal value for the Indonesian producers under investigation on the basis of the cost of production of biodiesel in the country of origin, *i.e.* Indonesia.

4. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 because when constructing the normal value for the Indonesian producers under investigation, the European Union included costs that were not incurred by those Indonesian producers and which therefore do not reasonably reflect the costs associated with the production and sale of biodiesel in Indonesia. The European Union therefore failed to properly calculate the cost of production and to properly construct the normal value for those producers.

5. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 because the replacement of the actual input costs of the Indonesian producers under investigation by the European Union with the 'reference export price' of crude palm oil was inherently unreasonable since (a) it was based on an improper establishment of facts, and (b) it did not result in the cost of production of biodiesel being reasonably reflected because among others, the 'reference export price' was distorted, and for some producers the adjustment was based on a feedstock, *i.e.* crude palm oil, which they did not actually use in the production of biodiesel. For instance, one Indonesian producer used palm fatty acid distillate and another producer used processed palm oil products. Thus, the European Union failed to properly calculate the cost of production and to properly construct the normal value for those producers.

6. Articles 2.2, 2.2.2 and 2.2.2(iii) of the Anti-Dumping Agreement because when constructing the normal value for the Indonesian producers under investigation, the European Union did not establish a cap for the profits as required by Article 2.2.2(iii); the amount for profits established was not determined by the European Union on the basis of a reasonable method; and the European Union improperly refused to base the amount for profits for some Indonesian producers on the actual amounts incurred and realized in respect of production and sales in Indonesia of the same general category of products. The European Union therefore failed to properly construct the normal value for those producers.

7. Article 2.4 of the Anti-Dumping Agreement because when comparing the normal value and the export price, the European Union failed to make due allowances for differences affecting price comparability including differences in taxation thereby precluding a fair comparison between the export price and normal value on account of the following:

- (i) by comparing a constructed normal value that included a cost of production based on 'reference export price' of crude palm oil -- which was in turn based on 'international prices' that include the export tax on that raw material -- with export prices that

⁷ See Footnote 3.

reflected the actual costs of the raw material incurred by the Indonesian producers under investigation;

- (ii) by deducting alleged commissions or mark-up on export sales to the European Union that were made by an Indonesian producer via related companies located in a third country;
- (iii) by making an allowance for profits accruing to the Indonesian exporters' related importers in the European Union on a basis other than the actual profits that accrued to the related importers in the European Union in the investigation period; by rejecting the actual profits accrued; and by rejecting the positive evidence provided by certain Indonesian producers with regard to the level of the notional profit margins of the European Union importers of biodiesel.

8. Articles 2.3 and 2.4 of the Anti-Dumping Agreement because the European did not construct the export price for one Indonesian producer under investigation on the basis of the price at which the imported biodiesel was first resold to independent buyers in the European Union and/or because in comparing the constructed normal value with the constructed export price, the European Union failed to make due allowance for differences affecting price comparability, namely the premium received for "double-counting" biodiesel by this Indonesian producer for exports made to one European Union Member State.

9. Article 9.3 (chapeau) of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because on account of the inconsistencies with Article 2 specified above in the context of the calculation of the dumping margin for the Indonesian producers, the European Union calculated a margin of dumping and imposed and collected anti-dumping duties in excess of the actual dumping if any by the Indonesian producers. This resulted in the levy of anti-dumping duties on the Indonesian producers that exceeded their margin of dumping which, under Article 9.3 of the Anti-Dumping Agreement, operates as the ceiling for the amount of anti-dumping duty that can be levied in respect of the sales made by a producer/exporter.

10. Articles 3.1 and 3.2 of the Anti-Dumping Agreement because the European Union's determination of injury to the Union industry was not based on an objective examination of the volume of the allegedly dumped imports and the effect of those imports on prices in the domestic market for biodiesel and the consequent impact of those allegedly dumped imports on domestic producers of biodiesel. With regard to the volume of the allegedly dumped imports, the European Union failed to conduct an objective examination as it did not take into account in its analysis, *inter alia*, the large volume of the allegedly dumped imports made by the European Union industry. Furthermore, the European Union's findings regarding the price effects of the allegedly dumped imports including price undercutting were not based on an objective examination of the evidence on the record, as among others, the European Union did not ensure price comparability in terms of physical characteristics and model-matching and based its determination of price undercutting on partial and unexplained sales of the sampled European Union producers.

11. Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the European Union's injury determination was not based on positive evidence and did not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product, *inter alia*, in relation to the market share, capacity and capacity utilization of the Union industry and the European Union failed to conduct an objective examination of the overall developments and interaction among the injury factors taken together.

12. Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the European Union failed to conduct an objective examination, based on positive evidence, of the causal relationship between the allegedly dumped imports and the alleged injury to the domestic industry as the European Union failed to make an objective determination, on the basis of all relevant evidence before it, that the allegedly dumped imports were, through the effects of dumping causing injury and also failed to conduct an objective examination, based on positive evidence, of factors other than the allegedly dumped imports which at the same time were injuring the Union industry, and thus attributed the injury caused by these other factors to the allegedly dumped imports. These other factors include, the effect of the "double-counting" regimes on the demand for biodiesel in the European Union and on the European Union producers, the effect of the reduction of support by the European Union and its Member States for biodiesel, the overcapacity of the European Union

industry, the imports of biodiesel made by the European Union industry, and the lack of vertical integration and access to raw materials of the European Union industry.

13. Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement because first, the European Union treated certain information in the complaint and the submissions made in the course of the investigation by the complainant and the European Union producers as confidential, in the absence of showing of "good cause", and second, because the European Union failed to require the complainant and the European Union producers to furnish (a) sufficiently detailed non-confidential summaries permitting a reasonable understanding of the substance of the information that was treated as confidential, with respect to certain annexes of the complaint and data as well as information submitted during the course of the investigation, or (b) explanations appropriately justifying the reasons why non-confidential summarization was not possible for such information.

14. Articles 7.1, 7.2, 9.2 and 9.3 (chapeau) of the Anti-Dumping Agreement because the European Union incorrectly imposed and collected provisional anti-dumping duty with respect to the imports from one Indonesian producer under investigation, in excess of the actual provisional margin of dumping of this producer, as it based itself on a provisional dumping margin tainted by calculation errors.

15. In view of the claims set forth above, Indonesia considers that the European Union has also acted inconsistently with Article VI of the GATT 1994 and Article 1 of the Anti-Dumping Agreement.

The European Union's measures noted above, therefore, appear to nullify or impair, directly or indirectly, benefits accruing to Indonesia under the cited Agreements.

Indonesia respectfully requests, pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994 and Article 17.4 of the Anti-Dumping Agreement, that the Dispute Settlement Body ("DSB") establish a Panel with standard terms of reference as set out in Article 7.1 of the DSU to examine Indonesia's claims.

Indonesia asks that this request be placed on the agenda of the DSB meeting scheduled to take place on 20 July 2015.
