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 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.

([1]) OJ L 83, 27.3.2015, p. 6.
([2]) Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty on imports of biodiesel originating in Argentina and Indonesia (OJ L 315, 26.11.2013, p. 2).
([3]) WT/DS473/AB/R and WT/DS473/AB/R/Add.1.
([4]) WT/DS473/R and WT/DS473/R/Add.1.

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 ([1]) 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.

(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 ([2]) ('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.

([1]) OJ C 476, 20.12.2016, p. 3. Notice of initiation regarding the anti-dumping measures in force on imports of biodiesel originating in Argentina and Indonesia, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization in the EU — Anti-Dumping Measures on Biodiesel dispute (DS473), 2016/C 476/04.

([2]) *European Union — Anti-Dumping Measures on Biodiesel from Indonesia*, DS480.

(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, 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 ([1]). 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.

([1]) See, for instance, Opinion of Advocate General Jacobs of 29 April 2004 in Case C-422/02 P Europe *Chemi-Con (Deutschland)* v *Council*, ECLI:EU:C:2004:277, at paragraph 36.

(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 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 ([1]). 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 that the measures against Indonesia should be amended. In its view, the Commission is competent under the WTO enabling Regulation to amend a non-disputed measure and that its authority to act *ex officio* could therefore not be put into question. Finally, Wilmar claimed that should the Commission's findings vis-à-vis Indonesia be postponed then also the findings concerning Argentina should be postponed. From its perspective, there are legal issues pending in the Indonesian WTO proceeding that might also become relevant and applicable to the measures concerning imports of biodiesel from Argentina, notably in relation to the profit margin.

(32) The Commission agreed with Wilmar that it is in principle competent to make findings with regard to a non-disputed measure under Article 2(1) of the WTO enabling Regulation. However, as explained above in recital 16, the Commission, after having examined the comments received, did not consider it appropriate, at this stage, to conclude the review investigation as far as Indonesia is concerned by legitimately exercising its discretion provided for in Article 2(1) of the WTO enabling Regulation.

([1]) See judgment of 7 May 1991 in Case C-69/89 *Nakajima All Precision* v *Council*, ECLI:EU:C:1991:186, at paragraph 120. See also, most recently, Opinion of Advocate General Campos Sánchez-Bordona of 20 July 2017 in Case C-256/16 *Deichmann*, ECLI:EU:C:2017:580, at paragraph 49.

(33) With regard to Wilmar's claim that also the findings concerning Argentina should be postponed, the Commission recalled that the WTO reports confirmed the methodology used in the definitive Regulation to establish a profit margin. The issue at stake in the pending Indonesian case was not raised in so far as Argentina was concerned. In any case, the Union and Argentina have agreed on a reasonable time period to implement the findings of the reports, which should be respected.

5.2. **Determination of the normal value and calculation of the dumping margins**

(34) This section sets out the reassessed findings of the original investigation regarding the recommendations and rulings of the Reports that the Union acted inconsistently with:

— Article 2.2.1.1 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers and

— 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.

— 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

(35) As mentioned in recital 28 of the definitive Regulation, the Commission 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.

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

(37) 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.

(38) 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 (recital 42 of the definitive Regulation).

(39) Both the Panel and the Appellate Body shared the opinion that the Commission's determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine 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, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel.

(40) Following the Reports, the Commission recalculated the normal value for exporting producers in Argentina. The methodology used for this recalculation was identical to the methodology explained in recitals 40 to 49 for Argentina of Commission Regulation (EU) No 490/2013 ([1]).

(41) For reasons explained in recital 45 of the provisional Regulation, the domestic sales were not considered as being made in the ordinary course of trade and the normal value of the like product had to be constructed under Articles 2(3) and 2(6) of the basic Regulation. This was done by adding to the adjusted production costs during the investigation period, the selling, general and administrative expenses incurred ('SG&A') and a reasonable profit margin.

([1]) Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional duty on imports of imports of biodiesel originating in Argentina and Indonesia ('the provisional Regulation') (OJ L 141, 28.5.2013, p. 6).

(42) As explained in recital 46 of the provisional Regulation, the Commission considered that the amount for profit could not be based on the actual data of the sampled companies in Argentina. Therefore, the amount for profit used when constructing the normal value was determined under Article 2(6)(c) of the basic Regulation on the basis of the reasonable amount of profit that a young and innovative capital intensive industry of this type under normal conditions of competition in a free and open market could achieve, that is 15 % based on turnover.

(43) In several submissions made during this review, EBB claimed that the Reports do not preclude the Commission from making an adjustment to the raw material costs when constructing the normal value, provided it is adequately justified. It claimed that given the dramatic impact on the Union market of the Differential Export Tax (DET) mechanism and the various legal possibilities contemplated by these reports as a basis for such an adjustment, the measures against Argentina should be kept at their current level, albeit based on a different reasoning.

(44) In particular EBB referred to the statement in the report of the Appellate Body that 'the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of soybeans' (paragraph 6.55 of the Appellate Body report) and claimed that the WTO reports retained the possibility of disregarding raw material costs and adjusting these costs if such costs are found to be unreliable.

(45) According to EBB, the DET system distorts the market for raw materials to the extent that normal conditions of supply and demand are no longer determinant factors for a transaction and effectively causes a transfer of value from raw material producers to biodiesel producers that is deprived of market justifications. This is, according to EBB, similar to situations of non-arms-length transactions, and/or 'other practices' that could affect the reliability of the costs in the records of an exporting producer and which are justified reasons for disregarding such costs, albeit they are actually incurred.

(46) In support of its claim that the DET distorts the raw material market, EBB relies in particular on an analysis provided by its own experts as well as a study commissioned by them entitled 'Measuring the Distortion to Biodiesel Costs in Argentina Caused by Differential Export Taxes on Soybean Products' (the 'Heffley study'), which allegedly both demonstrate that the differential export tax system artificially and significantly depresses domestic prices of the raw material in question and are thus not reliable.

(47) The Heffley study collected data from 2010-2016 in Argentina and the United States on the cost of producing biodiesel in these two countries. It also provided a specific market analysis for October 2011 to September 2012. It found that the cost of production for soybean biodiesel (SME) in Argentina was lower than the cost of production of the same product in the United States. This difference of 27 % was, in view of the study, 'entirely due to the DET'.

(48) In a second step, the study compared the export price of SME from Argentina (without specifying the destination) to the average market price for SME in the United States. The average Argentinian export price of 875 USD/MT was lower than the US domestic market price of 1 198 USD/MT. This would create a strong incentive for the importation of Argentine biodiesel. The study concludes that this distortion 'stems directly' from the DET.

(49) EBB further stressed that correcting such distortions would clearly be within the logic of the anti-dumping process. It claimed that such distortions should be corrected by making appropriate cost adjustments, in particular to raw material costs, so that they were at the level at which they would have been incurred if there had been no distortions. In doing so, allegedly the Commission would be re-establishing what the real costs would actually be on the exporter's market for the production and sale of the relevant product under normal market conditions.

(50) Several biodiesel producers contested EBB's proposition that the Commission should disregard the recorded costs for raw material on the basis that the DET system rendered those costs unreliable. They reiterated that the Panel and the Appellate Body specifically rejected the argument that the DET, in itself, could be a basis to disregard the recorded costs and that, in any event, an investigating authority cannot reject recorded costs when the records accurately and faithfully reflect the costs actually incurred.

(51) The Commission acknowledged that the Appellate Body did not preclude, per se, the possibility that an investigating authority could, in certain specific circumstances depart from recorded costs if the investigation would demonstrate that costs had been, e.g. over- or understated or whether non-arm length transactions or other practices had affected the reliability of the reported costs (para. 6.41 of the Appellate Body report).

(52) However, the Appellate Body also stated that the Argentine export tax system was not, in itself, a sufficient basis for concluding that the producers' records did not reasonably reflect the costs of raw material associated with the production and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel (paragraph 6.55 of the Appellate Body report).

(53) EBB's arguments rely on the premise that the alleged distortive effect of the DET system would make the cost for the raw material in question unreliable and should therefore be disregarded. EBB sustains that the domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system. However, accepting this argument would be tantamount to admit, contrary to Appellate Body findings, that the DET system, in itself, produced such effects that the costs actually incurred and reported in the company records should be disregarded, just because they were lower than international prices. In this respect, the Commission further recalls that the original investigation confirmed that the actual costs incurred for raw materials were adequately and faithfully reflected in the companies' records.

(54) The Commission therefore rejected EBB's claim since accepting it would not be in line with the findings of the Reports.

(55) Therefore, in order to bring the measures into conformity with the Reports and WTO consistent, the Commission found it necessary to construct the normal value on the basis of the actual costs incurred as reflected in the respective company's records.

(56) Following disclosure, EBB repeated that the WTO ruling allowed the Commission to resort to a cost adjustment in the present case. It claimed that the Commission had misinterpreted the WTO ruling and EBB's argument.

(57) In EBB's view, the Commission ignored the statements of the Reports that 'domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system'. EBB claimed that the ruling did not state, as claimed by the Commission, that the distorting effects of the DET would not, in itself, be a sufficient basis for making a cost adjustment.

(58) EBB further repeated and stressed the fact that the prices on the domestic market were unreliable due to the DET was 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 unreliability of the domestic prices allowed to disregard the recorded costs and EBB had provided the Commission with all information necessary to adjust the costs.

(59) EBB insisted that the Panel and the Appellate Body had held that investigating authorities were free to examine the reliability of the costs registered in the records of the producers/exporters, in particular, whether all costs incurred were captured; whether the costs incurred had been over- or understated; and whether non-arms-length transactions or other practices affected the reliability of the reported costs. According to EBB, the effect of the DET system was similar to transactions that were not at arm's length and/or amounted to another practice that could affect 'the reliability of the reported costs' ([1]).

(60) The Commission reassessed this claim also in light of the hearing with the Hearing Officer of 20 July 2017. The Commission put forward in recitals 51 to 55 that the actual costs incurred for raw materials were adequately and faithfully reflected in the Argentinian companies' records and that the previous cost adjustment made had been found incompatible with the EU's WTO obligations.

([1]) Panel Report, EU — Biodiesel, para. 7 .242, fn. 400; Appellate Body Report, EU — Biodiesel, para. 6.41.

(61) The Commission did not share EBB's interpretation of the Panel and Appellate Body's findings. For example, footnote 400 of the Panel Report is more nuanced than what EBB's submission suggests. The Panel found that 'the examination of the records that flows from the term 'reasonably reflect' in Article 2.2.1.1 does not involve an examination of the 'reasonableness' of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful'.

(62) Yet, by claiming that the effect of the DET system was similar to non-arms-length transactions and/or amounted to another practice, EBB precisely pointed in the direction for such examination of the reasonableness of these reported costs.

(63) Moreover, the effects of the DET system were (i) neither similar to a non-arms-length transaction; (ii) nor amounted to such 'other practice' that could affect the reliability of the costs in the records of an exporting producer. Whatever the precise scope of these concepts, the Panel and the Appellate Body specifically rejected the Commission's basic arguments that the price distortion caused by the Argentine export tax system (DET) was, in itself, a sufficient basis to reject costs in the records of an exporting producer ([1]).

(64) Following the revised disclosure, EBB maintained its position that the Commission had misinterpreted the Appellate Body's statement in paragraph 6.55 of its report and overlooked the possibility provided for in paragraph 6.41 of the same report to examine the reliability of the recorded raw material costs and disregard such costs if found unreliable and provided some additional arguments in support.

(65) With regard to the first claim EBB contended that the AB statement in paragraph 6.55 '…the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine 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, or for disregarding those costs when constructing the normal value of biodiesel' is not a legal assessment by the Appellate Body, as claimed by the Commission, but a mere quotation of the Commission's own conclusion in the definitive Regulation. EBB further claimed that the wording 'was not, in itself a sufficient basis' implies that the Argentine export tax system could have provided a sufficient basis to disregard the costs but the Commission failed to carry out the necessary analysis. Finally, the Commission's reading of paragraph 6.55 also disregarded the fact that the Appellate Body had found it necessary to also address the subsequent issue of a benchmark. This would not have been necessary if the Appellate Body had categorically ruled out that Argentine export tax system could form the basis for a cost adjustment.

(66) The Commission did not accept the interpretation suggested by EBB.

(67) First, the AB statement in paragraph 6.55 referred to above is not a mere quotation of the Commission's own conclusions. On the contrary, it forms an integral part of the Appellate Body's interpretation of Article 2.2.1.1 of the ADA in paragraph 6.56. The Appellate Body expressly agreed with the Panel that this provision did not provide a sufficient basis for the Commission's conclusion to disregard the recorded costs of Argentine biodiesel producers because domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system. The AB repeated this normative finding verbatim in the next paragraph 6.56 under the heading 'Conclusions'.

(68) Second, the phrase 'was not, in itself, a sufficient basis' implies, to the Commission's understanding, that the *mere existence of the export tax system* was not a sufficient basis to justify a cost adjustment as made in the original investigation. If instead (as argued by EBB) the main reason for the Appellate Body to find a WTO inconsistency of the EU measures was the insufficient *reasoning* of the Commission in the original Regulation, it would have expressly said so. However, nothing of the kind was stated the Appellate Body and the Panel. Rather, the wording 'in itself' was likely used to make clear that the operation of the export tax system in Argentina cannot 'as such' trigger a cost adjustment under Article 2.2.1.1 ADA however well-reasoned or documented its distortive effects may be.

([1]) Appellate Body Report, EU — Biodiesel, paras. 6.54-6.55, Panel Report, EU — Biodiesel, paras. 7.248-7.249.

(69) Third, the Commission disagreed with EBB's inference that the fact that the Appellate Body addressed the claim regarding benchmarks in paragraphs 6.58 to 6.83 was an indication that the export tax system in Argentina could indeed have been a sufficient basis to disregard the recorded costs for raw material. As can be drawn from the heading preceding paragraph 6.58, the Appellate Body therein addressed a different claim from Argentina under Article 2.2 of the ADA.

(70) The Commission then turned to the second claim of the EBB, namely that paragraph 6.41 of the Appellate Body report provided a clear signal that costs recorded in the records of a company can be disregarded when they are based on practices which affect the reliability of the reported costs. The EBB also referred to the fact that while the Panel had presented this reasoning in a footnote only, the Appellate Body found it necessary to include it in the body of its report. This would indicate, according to EBB, that the Appellate Body wanted to dispel an overly restrictive interpretation of Article 2.2.1.1 of the ADA and give a clear signal that a cost adjustment remains possible in that context.

(71) In paragraph 6.41 the Appellate Body addressed the claim from the EU that the Panel report seemed to suggest that an investigating authority would have to accept any cost reported in a company's record as long as it accurately reflected the costs actually incurred 'no matter how unreasonable such cost would be compared to a proxy or benchmark consistent with normal market conditions'. It rejected that reading and recalled that the Panel had actually accepted that the investigating authority can examine the reliability and accuracy recorded in the records of the producers. The investigating authority could thus determine 'whether all costs incurred are captured; whether the costs incurred have been over- or understated; and whether non-arms-length transactions or other practices affect the reliability of the reported costs'.

(72) The Commission agreed with EBB that the Appellate Body had upheld the Panel's ruling that recorded costs could be discarded when the investigating authority has found non-arms-length transactions or other practices affecting their reliability. It also found it normal that the Appellate Body addressed a claim in the body of its ruling rather than in a footnote, as the Panel had done. However, neither the Panel nor the Appellate Body made any findings or suggestions that the export tax system in Argentina could fall under this exception of a practice affecting reliability. If the Panel or Appellate Body had considered that the Argentine export tax system could have qualified as another practice affecting reliability, they would have made this point clear and refrained from finding a WTO inconsistency of the EU measures.

(73) The Commission therefore maintained its interpretation of the Reports that the EU could not disregard the costs actually incurred and accurately recorded when constructing the normal value of biodiesel in Argentina on the basis of distortions stemming from the mere existence of the Argentina export tax system.

(74) In any event, the Commission then turned to the points made by EBB — and, upon disclosure also by FEDIOL, a supplier to the Union biodiesel industry —, that the Commission should look at alternative evidence for cost adjustments to counteract the distortive effects of the DET for the cost of production of biodiesel in Argentina. In this respect, it noted that collecting alternative evidence for cost adjustments to counteract the distortive effects of the DET was not the purpose of the present review investigation.

In any case, the Commission noted that the evidence contained in the Heffley Study could not be regarded as a sufficiently solid basis for a new cost adjustment, for the following reasons.

(75) First, the IP covered July 2011-June 2012, while the Heffley Study's specific analysis deals with October 2011 to September 2012. There is, consequently, only a partial overlap of the periods considered, making it questionable whether the study's findings can be translated to the underlying investigation without adjustments. The Commission was unable to correct this mismatch without data for the period July-September 2011.

(76) Second, the study estimated the cost of production in the US from the price of soybeans on the US market. This economic method is based on assumptions without, however, providing reliable of actual cost of production of US biodiesel. Even if one could rely on assumptions only, the idea that the costs of making biodiesel from crude soybean oil would be identical in the US and Argentina is not substantiated. Third, using an 'average' Argentinian export price overlooks the fact that the export price to the Union may be actually higher than the average.

Indeed, during the IP of the original investigation, the export price of Argentine biodiesel to the EU stood at 967 EUR/MT, which equals 1 294 USD/MT, using the exchange rates of the time, as recorded in the file. The study, though, used for this period an average export price of 1 071 USD/MT. This shows that the conclusion that the alleged benefit from the DET could not derive directly from the export prices to the Union.

(77) Fourth, the study simply assumes, without adequate evidence to substantiate it, that the (low) cost of production on the Argentine domestic market during the period considered was exclusively caused by the DET. Indeed, the study does not consider other factors of comparative advantage which might make the production of biodiesel in Argentina cheaper than in the United States.

(78) The Commission thus concluded that it was unable to replace accurately the recorded cost in the records of Argentinian biodiesel producers by the benchmark suggested in the Heffley study.

(79) Following the revised disclosure, EBB clarified that the purpose of the study was only to demonstrate how the Commission, as an example, could appreciate and quantify the extent of distortion (unreliability) caused by the Argentina export tax system and not to substitute or replace an analysis by the Commission based on its own verified data collected during the original investigation.

(80) EBB also submitted a revised study with reference data that fully corresponded to the original investigation period which showed a very similar result, i.e. a distortion of domestic prices for soybeans at around 27 %. EBB further contested the Commission's understanding that the study relied on cost of production in the US. On the contrary, the study relied on an estimated cost of production of biodiesel in Argentina. Moreover, the Commission's criticism of the study for relying on an average export price is misplaced since that price, in itself, is irrelevant for calculating the distortion to biodiesel costs in Argentina that is caused by the export tax system. Finally, the EBB contends that any alleged comparative advantages cannot explain a price difference of around 30 % and, absent any evidence to the contrary, the only reasonable explanation for such a gap is the system of export taxes in Argentina.

(81) The Commission examined the explanations and clarifications provided by EBB. The Commission accepted that the revised study showed distortion of domestic soybean prices during the investigation period of around 27 %. However, it remained unconvinced by the other three points.

(82) As EBB itself acknowledged, the estimated processing cost for a producer in Argentina was based on three analyses: one based on six years average cost and price data for the United States and Argentina; one based on one year of the same data of the United States and Argentina; and one based on one year's data for Argentina, with the Argentine export price as a proxy for the world price. Clearly, the situation in the United States constituted an out-of-country benchmark to find out what the costs in Argentina would be absent the distortions from the export tax.

(83) Moreover, there was no good reason why Argentine export prices to Europe should be ignored when trying to establish the advantage that an Argentine biodiesel producer may have had as a result of the DET.

(84) In addition, the Commission has never contested that the DET was artificially lowering the input costs for Argentine biodiesel producers, but only took issue with the assumption that the DET was the *only* cause for such a huge benefit of around 30 %.

5.3. **Recalculated dumping margins**

(85) Following disclosure some Argentine exporting producers made company-specific comments regarding alleged mistakes in dumping calculations. Where appropriate, the Commission corrected these errors and revised the dumping margins and duties accordingly.

(86) The revised duty rates in respect of all Argentine exporters in light of the findings and recommendation in the WTO reports, expressed on the CIF Union border price, customs duty unpaid, are as follows:

Country	Company	Dumping margin
Argentina	Aceitera General Deheza S.A., General Deheza, Rosario; Bunge Argentina S.A., Buenos Aires	8,1 %
	Louis Dreyfus Commodities S.A., Buenos Aires	4,5 %
	Molinos Río de la Plata S.A., Buenos Aires; Oleaginosa Moreno Hermanos S.A.F.I.C.I. y A., Bahia Blanca; Vicentin S.A.I.C., Avellaneda	6,6 %
	Other cooperating companies	6,5 %
	All other companies	8,1 %

6. **REVISED INJURY FINDINGS BASED ON THE REPORTS**

(87) In the Reports, it was found, inter alia, that the EU 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 it relates to production capacity and capacity utilisation. The Reports did not, however, invalidate the conclusion that the Union Industry suffered material injury during the period considered.

(88) The Panel found that the EU authorities acted inconsistently with Articles 3.1 and 3.4 of the ADA by accepting revised data submitted by the EU domestic industry at a late stage of the investigation without assuring themselves of its accuracy and reliability (paragraph 7.395 of the Panel report). The revised data concerned 'idle capacity'. At the same time the Panel stated that the revised data did not have a significant role in the EU authorities' conclusion in the definitive Regulation on overcapacity as an 'other factor' causing injury (confirmed in paragraph 6.174 of the Appellate Body report).

(89) Some exporting producers and CARBIO, the Argentine biodiesel exporters association, argued that the concept of 'idle capacity', as it was explained in the definitive Regulation, was rather meaningless in this industry. Either capacity existed or it did not.

(90) For the importer Gunvor and CARBIO, it was the structural overcapacity of the industry resulting from unwarranted increases in production capacity, despite low capacity utilization rates, and not the capacity utilization rate itself, that was the cause of injury to the domestic industry.

(91) CARBIO, Argentinian and Indonesian exporting producers further submitted that the Commission was required to re-examine production capacity and capacity utilization on the basis of 'positive evidence'. Its examination should constitute an 'objective examination' of these factors.

(92) The Commission addressed this issue under sections 6.1 to 6.4 below.

6.1. **Questionnaire reply and verification**

(93) The Commission sent out a questionnaire to EBB requesting explanations as to (i) which methodology was applied to calculate both production capacity and capacity utilisation of the Union industry during the period considered, and (ii) why in the course of the original investigation this data was revised and on what basis the new figures were produced.

(94) The Commission also asked EBB to explain what their understanding of 'idle capacity' was; why in their view it had to be excluded from the total production capacity of the Union industry for the period considered and how the idle capacity was calculated for the non-EBB members.

(95) The Commission received the questionnaire reply, analysed it and subsequently carried out a verification visit at the premises of EBB on 26 April 2017. At the request of the Commission, the latter had prepared for the verification visit all supporting documents and worksheets used in preparing their questionnaire reply, in particular those linking the information supplied with management and accounting records for the on the spot verification by the Commission.

(96) The Commission verified the supporting documents, cross-checked the reported data for the period considered at their source and was able to reconcile the information in the management and accounting records with the revised data submitted in the original investigation on production capacity and capacity utilization covering the period from 1 January 2009 to the end of the investigation period. The documents contain confidential company specific data and cannot be disclosed.

(97) Gunvor and CARBIO made a submission arguing that the Commission's questionnaire addressed to EBB was not sufficient to meet the requirements under Articles 3.1 and 3.4 of the ADA. EBB needed to explain how the revised data was supported by public sources and the Commission should not simply accept the information provided by EBB.

(98) Moreover, Gunvor and CARBIO claimed that EBB's replies to the questionnaire had been significantly redacted and as a result, interested parties could not to understand how the data was collected, how it was assessed and how it was verified with other sources, and were therefore not in a position to evaluate whether the relevant information provided by EBB should be given any credit.

(99) Both parties submitted data collected by Eurostat on the production, capacity and consumption of biodiesel in the EU and noted the similarity between this data and that published in the provisional Regulation, which had been collected and provided to the Commission by EBB. They submitted that the Commission should have used Eurostat data rather than the EBB data adjusted for idle capacity.

(100) They further claimed that the definition provided by EBB regarding idle capacity was too vague and that the suggestion to reduce production capacity by excluding 'idle capacity' only emerged after the publication of the provisional Regulation, once it became clear that the figures quoted in the provisional Regulation would make it more difficult to validly establish a causal link between the allegedly dumped imports and the injury allegedly suffered by the EU industry.

(101) The Commission rejected these claims as explained under 6.2 to 6.4 below. It carefully assessed the questionnaire reply, subsequently verified the data during a verification visit at the premises of EBB and found that the submitted and revised data was accurate and reliable and that there was no need to change the revised figures used for the definitive Regulation (see also recitals 53-58).

(102) In addition, the Commission notes that the data collected by EBB is in line with the Eurostat data, and therefore the later provides independent confirmation of the accuracy and reliability of the EBB data. However, as the Eurostat data set was not published until 2014, it could not have been used in the original investigation.

(103) Therefore, the revised data used in the definitive Regulation (recital 131) (see table below) were correct and confirmed after the verification visit.

	2009	2010	2011	IP
Production capacity (tonnes)	18 856 000	18 583 000	16 017 000	16 329 500
Index 2009 = 100	*100*	*99*	*85*	*87*
Production volume (tonnes)	8 729 493	9 367 183	8 536 884	9 052 871
Index 2009 = 100	*100*	*107*	*98*	*104*
Capacity utilisation	46 %	50 %	53 %	55 %
Index 2009 = 100	*100*	*109*	*115*	*120*

6.2. **Total EU Production: Clarifications on EBB data collection process for production**

(104) In March 2013, before the publication of the provisional measures, EBB provided the Commission with production data for the Union industry, both for EBB and non-EBB members.

(105) The production data reported was given per company, whether they were EBB members or not. This bottom-up approach ensured that the production data provided an accurate picture of EU production.

(106) EBB members provide production data to EBB on a quarterly basis on a form sent by EBB and then this is cross-checked against market intelligence sources. A particular emphasis is put by EBB on production data as it is used to determine EBB members' financial contribution to the association.

(107) Production data from non-EBB members are collected through direct contacts with the companies. The data reported is then cross-verified through other market intelligence sources including: national associations, other producers and specialist publications.

(108) The data provided by EBB are thus the best available information on EU wide production for EBB and non-EBB members, based on consistent reporting by EBB of actual production for each of the EU companies producing biodiesel.

(109) This data was used by EBB to determine the total Union production on which it based its submissions.

6.3. **Total EU Production capacity: Clarifications on EBB data collection process for production capacity**

(110) In March 2013, before the publication of the provisional measures, EBB provided the Commission with production capacity data for the Union industry, both for EBB and non-EBB members.

(111) In the same way as the production data, this was given on a company level basis for both EBB and non-EBB members.

(112) Production capacity data from EBB members are provided by the members twice per year on a form sent by EBB and then this is cross-checked against market intelligence sources. To ensure that data are consistent, EBB requests its members to report capacity based on 330 working days per year, per plant to account for the unavoidable maintenance of plants.

(113) Production capacity data from non-EBB members are collected through direct contacts with the companies and as with production data this is then cross-verified.

(114) Because EBB only requests a 'snapshot' of the company's production capacity on a particular day and the concept of capacity is not always understood similarly by all companies, data provided by EBB on production capacity should be considered as being less precise than data on production.

(115) However, the data provided by EBB are the best available information on EU wide production capacity for EBB and non-EBB members, based on a consistent reporting by EBB of actual production capacity for each of the EU companies producing biodiesel.

6.4. **Clarifications on EBB identification of 'idle capacities'**

(116) After publication of the provisional Regulation, and as described in the definitive Regulation, it became apparent that the data published for production capacity were not accurately representing the reality of the situation of the Union industry. The Commission thus requested EBB to clarify its data on production capacity.

(117) EBB provided the Commission with updated data for both its members and the non-members which identified unavailable so-called 'mothballed' production capacity, or 'idle capacity', that had initially been reported as part of the total EU production capacity.

(118) Determination of idle capacity is made by EBB in the course of its calculation of production and production capacity from data submitted by the individual companies. Due to the nature of the data collection process described above, a review of the data provided regarding non-EBB members was necessary to ensure that production capacity data reflect as accurately as possible the reality of the EU industry.

(119) The data provided by EBB between the provisional and the definitive Regulations were the best available information on EU wide production capacity for EBB and non-EBB members based on a consistent reporting by EBB of actual production capacity for each of the EU companies producing biodiesel.

6.5. **Comments following disclosure**

(120) Following disclosure of the Commission's findings on injury several interested parties made comments on these findings.

(121) The association of Argentine biodiesel producers, CARBIO, reiterated its view made during the review investigation that current Eurostat data on production and capacity of biodiesel should be used in the current analysis of injury and causation, rather than the data used in the original investigation.

(122) The Commission rejected this claim. The Eurostat data coincided with the original data from EBB. However, EBB then corrected these data to better reflect idle capacity during the original investigation. As stated above in Section 6.4 the Commission verified these updates in the current review investigation. Accordingly, the original Eurostat data do not reflect the most accurate picture on production and biodiesel which had been specifically verified and used by the Commission in this case.

(123) CARBIO also stated that the Commission should further define 'idle capacity'. The Commission reiterated that it had defined idle capacity in recitals 131-132 of the definitive Regulation. As the WTO reports did not take issue with the Commission's concept of 'idle capacity', there was no reason to change it for this review.

7. **DISCLOSURE**

(124) All parties were informed of the Commission's findings and were granted a period within which they could submit comments.

(125) Following disclosure the exporting producer Molinos de la Plata informed the Commission that it exported to the Union under the name 'Molinos Agro S.A.' rather than under the name 'Molinos Río de la Plata S.A.' and provided evidence.

(126) The Commission scrutinized the evidence submitted and concluded that the name change was sufficiently substantiated and hence accepted the claim.

(127) Following disclosure the cooperating Indonesian exporter Wilmar requested and was granted a hearing. It made company-specific claims regarding dumping and injury calculations and especially requested its profit margin to be lowered.

(128) The Commission rejected these claims as they were not related to the implementation of the WTO report on Argentina. Moreover, most of them are currently pending before the WTO in the dispute brought by Indonesia.

(129) Following the revised disclosure, Wilmar insisted that its claim with regard to its profit margin for constructing the normal value is not pending before the WTO but is an issue independent thereof and the claim is based solely on the provisions of the basic anti-dumping regulation. This claim should therefore be addressed in this review. Wilmar also claimed that the maintenance of the measures is not in the Union interest and should therefore be terminated.

(130) The Commission recalled that this review is initiated on the basis of the WTO enabling Regulation for the purpose of implementing the findings and recommendations of the Panel and Appellate Body in the dispute *European Union — Anti-Dumping Measures on Biodiesel from Argentina* (WT/DS473/15). The review is thus limited to issues before the WTO and possible consequential and/or technical changes arising therefrom. Therefore, neither of Wilmar's claims are admissible. In addition, the Commission recalled that a similar claim regarding the

profit margin was made by Wilmar already in the original investigation and rejected therein (see recitals 43 to 46 of the definitive Regulation). Following disclosure the cooperating Argentine exporting producer COFCO Argentina S.A. (formerly known as Noble Argentina S.A.) submitted a request that the company be treated as a 'newcomer' and be included in the list of companies with individual duty rates as 'other cooperating companies'.

(131) The Commission informed the company that it should follow the procedure for new exporting producers as set out in Article 3 of the definitive Regulation.

(132) Following disclosure EBB requested a hearing with the Hearing Officer on the grounds that the Commission's position had not been determined on the basis of objective legal reasoning, but on the basis of political interest.

(133) In the hearing of 20 July 2017, the Hearing Officer did not find that the rights of defence of EBB as an interested party had been infringed. At the same time, he called upon the Commission to substantiate its views why it could not disregard the Argentinian soybean prices as unreliable. The Commission included this point in its assessment of comments received upon disclosure as set out in recitals 60 to 63.

8. **DEFINITIVE MEASURES**

(134) On the basis of the above reassessment, the Commission concluded that the injurious dumping determined in the original investigation is confirmed.

(135) The anti-dumping measures applicable to imports of biodiesel originating in Argentina and Indonesia imposed by Implementing Regulation (EU) No 1194/2013 should therefore be maintained, with the revised dumping margins for Argentina recalculated as set out above.

(136) The rate of the definitive anti-dumping duty applicable to the product concerned shall be as follows:

Country	Company	Dumping margin	Injury margin	Anti-dumping duty rate
Argentina	Aceitera General Deheza S.A., General Deheza, Rosario; Bunge Argentina S.A., Buenos Aires	8,1 %	22,0 %	8,1 %
	Louis Dreyfus Commodities S.A., Buenos Aires	4,5 %	24,9 %	4,5 %
	Molinos Agro S.A., Buenos Aires; Oleaginosa Moreno Hermanos S.A.F.I.C.I. y A., Bahia Blanca; Vicentin S.A.I.C., Avellaneda	6,6 %	25,7 %	6,6 %
	Other cooperating companies	6,5 %	24,6 %	6,5 %
	All other companies	8,1 %	25,7 %	8,1 %

(137) Therefore, Article 1(2) of the definitive Regulation should be amended accordingly.

(138) The Committee established by Article 15(1) of Regulation (EU) 2016/1036 [1] did not deliver an opinion,

[1] 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 (OJ L 176, 30.6.2016, p. 21).

HAS ADOPTED THIS REGULATION:

Article 1

The table indicating the rates of the definitive anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, of the products manufactured by the companies listed in Article 1(2) of Implementing Regulation (EU) No 1194/2013 is replaced by the following table:

Country	Company	Duty rate EUR per tonne net	TARIC additional code
Argentina	Aceitera General Deheza S.A., General Deheza, Rosario; Bunge Argentina S.A., Buenos Aires	79,56	B782
	Louis Dreyfus Commodities S.A., Buenos Aires	43,18	B783
	Molinos Agro S.A., Buenos Aires; Oleaginosa Moreno Hermanos S.A.F.I.C.I. y A., Bahia Blanca; Vicentin S.A.I.C., Avellaneda	62,91	B784
	Other cooperating companies: Cargill S.A.C.I., Buenos Aires; Unitec Bio S.A., Buenos Aires; Viluco S.A., Tucuman	62,52	B785
	All other companies	79,56	B999
Indonesia	PT Ciliandra Perkasa, Jakarta	76,94	B786
	PT Musim Mas, Medan	151,32	B787
	PT Pelita Agung Agrindustri, Medan	145,14	B788
	PT Wilmar Bioenergi Indonesia, Medan; PT Wilmar Nabati Indonesia, Medan	174,91	B789
	Other cooperating companies: PT Cermerlang Energi Perkasa, Jakarta	166,95	B790
	All other companies	178,85	B999

Article 2

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 18 September 2017.

For the Commission

The President

Jean-Claude JUNCKER