COMMISSION IMPLEMENTING REGULATION (EU) 2018/1570

of 18 October 2018

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

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

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

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

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

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

(5) The General Court held that the institutions failed to establish to the requisite legal standard that there was appreciable distortion of the prices of the main raw materials used for the production of biodiesel in Argentina and Indonesia as a result of a Differential Export Tax system that applied different tax rates on raw materials and on biodiesel. It ruled that the institutions should not have taken the view that the price of the raw materials was not reasonably reflected in the records of the Argentinian and Indonesian exporting producers and should not have disregarded those records when constructing a normal value for biodiesel produced in Argentina and Indonesia.

([1]) OJ L 176, 30.6.2016, p. 21.
([2]) OJ L 83, 27.3.2015, p. 6.
([3]) OJ L 141, 28.5.2013, p. 6.
([4]) 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).
([5]) Judgments of 15 September 2016 in Case T-80/14, PT Musim Mas v Council, Case T-111/14 Unitec Bio SA v Council of the European Union, Cases T-112/14 to T-116/14 and T-119/14, Molinos Río de la Plata SA and Others v Council of the European Union, Case T-117/14, Cargill SACI v Council of the European Union, Case T-118/14, LDC Argentina SA v Council of the European Union, Case T-120/14, PT Ciliandra Perkasa v Council of the European Union, Case T-121/14, PT Pelita Agung Agrindustri v Council of the European Union (OJ C 402, 31.10.2016, p. 28).
([6]) Case T-139/14, PT Wilmar Bioenergi Indonesia and PT Wilmar Nabati Indonesia v Council of the European Union (OJ C 392, 24.10.2016, p. 26).
([7]) Argentinian exporting producers Unitec Bio SA, Molinos Rio de la Plata SA, Oleaginosa Moreno Hermanos SACIFI y A, Vicentin SAIC, Aceitera General Deheza SA, Bunge Argentina SA, Cargill SACI, Louis Dreyfus Commodities S.A. (LDC Argentina SA), and Indonesian exporting producers PT Pelita Agung Agrindustri, PT Ciliandra Perkasa, PT Wilmar Bioenergi Indonesia, PT Wilmar Nabati Indonesia, PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas).
([8]) Orders of the President of the Court of 15 February 2018 in Joined Cases C-602/16 P and C-607/16 P to C-609/16 P, and of 16 February 2018 in cases C-603/16 P to C-606/16 P.

(6) On 26 October 2016 the WTO Dispute Settlement Body (DSB) adopted the panel report, as modified by the Appellate Body report ('the Argentina Reports') ([1]), in the European Union — Anti-Dumping Measures on Biodiesel from Argentina dispute (DS473).

(7) On 28 February 2018, the DSB also adopted the panel report in the European Union — Anti-Dumping Measures on Biodiesel from Indonesia dispute (DS480) ('the Indonesia Report') ([2]). Both Indonesia and the EU did not appeal that report.

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

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

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

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

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

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

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

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

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

(11) Following the Argentina Reports, the Commission had initiated a review ([3]) under Article 1(3) of Regulation (EU) 2015/476 of the European Parliament and of the Council ([4]) ('the review'). At the initiation of the review, the Commission announced that it considered it appropriate to examine the consequences of the findings of the Argentina Reports also for the measures imposed on biodiesel from Indonesia, as the legal interpretations contained in the Argentina Reports appeared to be also relevant for the investigation concerning Indonesia.

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

(13) On 18 September 2017, the Commission adopted Implementing Regulation (EU) 2017/1578 amending the definitive Regulation ('the amending Regulation') in so far as Argentinian exporting producers were concerned ([5]).

([1]) WTO, Report of the Appellate Body, AB-2016-4, WT/DS473/AB/R, 6 October 2016, and WTO, Report of the Panel, WT/DS473/R, 29 March 2016.
([2]) WTO, Report of the Panel, WT/DS480/R, 25 January 2018.
([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) (OJ C 476, 20.12.2016, p. 3).
([4]) 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 (OJ L 83, 27.3.2015, p. 6).
([5]) Implementing Regulation (EU) 2017/1578 amending Implementing Regulation (EU) No 1194/2013 of 18 September 2017 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia (OJ L 239, 19.9.2017, p. 9).

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

(15) On 28 May 2018 a Notice ([1]) was published re-opening the original investigation concerning imports of biodiesel originating in Argentina and Indonesia that led to the adoption of the definitive Regulation ('the Notice'). At the same time the pending review with regard to Indonesia was closed.

(16) According to the case-law of the Court, the procedure for replacing an annulled act may be resumed at the very point at which the illegality occurred. The Union's institutions, in so complying with the judgments, have the possibility to remedy the aspects of the definitive Regulation which led to its annulment in respect of the exporting producers concerned ([2]).

(17) The Commission should observe not only the operative part of the judgments but also the grounds which led to those judgments and constituted its essential basis, inasmuch as they were necessary to determine the exact meaning of what was stated in the operative part. Other findings reached in the definitive Regulation which were not contested within the time-limits for a challenge or which were contested but rejected by the General Court's judgments, and therefore did not lead to the annulment of the definitive Regulation, remain valid ([3]).

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

(19) The Notice included in its scope the reasoning of the General Court's judgments for the exporting producers concerned and the possibility to extend the findings to all exporting producers from Argentina and Indonesia. Furthermore, it took into account the findings of the WTO panels and Appellate Body, both in respect of Argentina and Indonesia, in order to bring the measures found WTO inconsistent into full compliance with the WTO Agreements, in accordance with Article 19.1 of the Dispute Settlement Understanding.

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

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

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

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

(23) The Commission has the possibility to remedy the aspects of the definitive Regulation which led to its annulment, while leaving unchanged the parts of the assessment which are not affected by the judgments ([4]).

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

(25) One Indonesian exporting producer, Wilmar, has claimed, before and after disclosure, that there is no legal basis to reopen the investigation with regard to Wilmar as the General Court had annulled the definitive Regulation in

([1]) Notice concerning the judgments of the General Court of 15 September 2016 in Cases T-80/14, T-111/14 to T-121/14 and T-139/14 regarding Council Implementing Regulation (EU) No 1194/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on Argentinian and Indonesian imports of biodiesel, and following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organisation in disputes DS473 and DS480 (EU — Anti-Dumping Measures on Biodiesel disputes) (OJ C 181, 28.5.2018, p. 5).
([2]) Case C-458/98 P Industrie des poudres sphériques (IPS) v Council [2000] ECR I-08147.
([3]) Case C-256/16, Deichmann SE, ECLI:EU:C:2018:187. para. 87.
([4]) Case C-458/98 P Industrie des poudres sphériques (IPS) v Council [2000] ECR I-08147.

its entirety for that company. However, Article 266 TFEU provides that an institution whose act has been declared void must take the necessary measures to comply with the Court's judgment. In addition, the EU must bring the anti-dumping measures imposed on imports of biodiesel from Indonesia into conformity with the recommendations and rulings contained in the WTO Reports. In order to examine what measures should be taken to comply with the Court and WTO rulings, it was necessary to re-open the investigation at the time when the illegality was found for both countries and for all exporting producers concerned. Whether a measure is annulled in whole or in part is irrelevant for the purposes of determining whether the Commission must in consequence reinvestigate all the aspects of the investigation which preceded the annulled measure. The Commission therefore rejected this claim.

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

3. PRODUCT CONCERNED

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

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

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

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

4.1. Cost adjustment

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

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

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

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

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

(35) The Panel and Appellate Body, in the Reports for both Argentina and Indonesia, are of the opinion that the Commission did not provide a legally sufficient basis under Article 2.2.1.1 for concluding that the Indonesian and Argentinian producers' records did not reasonably reflect the costs associated with the production and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel.

(36) Following the Argentina Reports, the Commission had recalculated the normal value for exporting producers in Argentina using the methodology explained in recitals 40 to 49 for Argentina of the provisional Regulation ([1]). As explained above in recital 11 and 12, the Commission had initially also recalculated the normal value for exporting producers in Indonesia, using the methodology explained in recitals 60 to 65 for Indonesia of the provisional Regulation ([1]). The Commission now re-applied this methodology for both countries.

(37) In its submissions made after the re-opening of this case, EBB claimed that the Reports do not preclude recourse to a cost adjustment to the raw material costs when constructing the normal value, provided it is properly explained. The same claim was made during the Review following the Argentina Reports, and rejected by the Commission as accepting it would not be in line with the findings of the Reports, as explained in recitals 43 to 53 of the amending Regulation. As that explanation remains valid after the Indonesia Report, the Commission continued to reject this claim.

(38) For reasons explained in recitals 44 and 64 of the provisional Regulation, the domestic sales in either country 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 Article 2(3) and (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.

(39) As explained in recitals 46 and 65 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 Indonesia. 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.

(40) In the Argentina and Indonesia WTO cases, the determination of an amount of profit of 15 % was challenged by both countries who claimed that the amount for profit was not based on a 'reasonable method' as required by Article 2.2.2(iii) ADA. The WTO adjudicating bodies found in both cases that the EU had not acted inconsistently with the ADA in this respect. Therefore, the amount for profit used for the construction of the normal value remains 15 %.

(41) One exporting producer from Indonesia, PT Cermerlang Energi Perkasa, claimed in its submission that the Commission should base its calculation on the data of the sampled producers, or in any case not automatically resort to Article 2(6)(c) of the basic Regulation. Following disclosure, it repeated the claim. However, as explained in recital 40, the WTO adjudicating bodies found that recourse by the Commission to and the application of this Article was not inconsistent with WTO rules. The Commission therefore rejected this claim.

4.2. **Profit cap**

(42) Although the WTO panel had upheld the EU's determination of the amount of profit under Article 2.2.2(iii) ADA, it did find in the Indonesia Report that, when an authority determines the profit on the basis of any other reasonable method under Article 2(6)(c) of the basic Regulation, the ADA requires it to ensure that that profit will not exceed the profit normally realised by other exporters of the same general category of products in the country. In the panel's view, the EU had failed to establish such a profit cap.

(43) In order to establish the profit cap required under Article 2.2.2(iii) ADA, it needed to be determined which companies produce products that would qualify as falling within 'the same general category' as biodiesel.

(44) In the Indonesia Report, the Panel noted in par. 7.62 that 'Article 2.2.2(iii) ADA does not specify a particular requirement on an investigating authority as to how to define what products fall within the same general category of products, for purposes of determining 'the profit normally realized'. We agree with the European Union that there is no obligation to construe the scope of products in the same general category broadly'. In par. 7.63 it added 'in our view, a reasonable and objective authority may conclude that the same general category of products is a narrower category'.

([1]) OJ L 141, 28.5.2013, p. 6.

(45) Based on the findings of the Indonesia report, the Commission re-examined the data available to it that can be used to determine a profit cap, both for Argentina and Indonesia. It considered that there are two sets of data available to it that would fall in the same general category of products.

(46) The first set of data was supplied by the sampled companies during the original investigation. Article 2.2.2 ADA provides that the amount for profit for 'the exporter or producer under investigation' is capped under Article 2.2.2(iii) by the amount of profit normally realized by 'other exporters or producers on sales of products of the same general category'. The narrowest interpretation of the same general category of products under this article would be limited to the exact same product, i.e. biodiesel. The data needed to calculate the profit cap based on the profits realised by producers of biodiesel in Indonesia and Argentina are readily available to the Commission, as they were supplied to the Commission by the sampled companies during the original investigation.

(47) The fact that the profits actually realized by the sampled companies were not used to establish a profit margin for each of these producers under Article 2(6) of the basic Regulation does not preclude the Commission from using this data to establish the profit cap under Article 2(6)(c). This follows from the wording of the Panel in the Indonesia Report in par. 7.65 where the Panel does not agree with the argument that 'profit normally realized' in Article 2.2.2(iii) ADA means that an investigator may disregard the profit realized on sales that are considered not compatible with normal commercial practice. One Indonesian exporting producer, PT Cermerlang Energi Perkasa, also claimed in its submission that based on the Indonesia Report, when calculating the profit cap, the Commission is not allowed to ignore the profit relating to the domestic sales of biodiesel in Indonesia on the basis that the latter are not considered as being made in the ordinary course of trade.

(48) Following this narrow interpretation of the category of products, biodiesel, the Commission calculated the profit cap for an individual producer using the amount of profit realized by the other producers under investigation. For example, in order to calculate the amount of profit for the Indonesian producer Wilmar, the weighted average of profits realised by the other investigated and verified Indonesian producers P.T. Ciliandra, P.T. Musim Mas and P.T. Pelita was used. Conversely, for P.T. Ciliandra, the weighted average of profits realised by Wilmar, P.T. Musim Mas and P.T. Pelita was used. The same methodology was used to calculate a profit cap for the investigated and verified Argentinian producers.

(49) The second set of data includes the data of producers other than those under investigation that was provided to the Commission during the original investigation. One of the Indonesian producers under investigation at that time came forward with data from a related company on sales of blends of biodiesel and mineral diesel, as well as sales of diesel fuel and marine fuel oil ('other fuels'). The profit margin related to these sales was reported to be 10,2 %. If used as a profit cap, this profit margin would have likely led to no or *de minimis* dumping margins for all companies in Indonesia. However, this unverified data was provided for only one producer in Indonesia, while similar data was not made available to the Commission from other producers in either Indonesia or Argentina. As the data available can therefore not be applied in a consistent manner to both countries, the Commission considered it inappropriate to use the data from only one producer in one country to establish a profit cap. In addition, within the time available to the Commission following the re-opening of the investigation it was not feasible to verify the accuracy of the data provided and the underlying calculations. In any event, since as found in recital 62 the amount of dumping for the country as a whole is found to be *de minimis* and, accordingly, the investigation is terminated for all companies, the Commission did not deem it necessary to use the unverified reported profit data on sales of blends of biodiesel with mineral diesel for the purpose of establishing a profit cap. The Commission instead considered it more appropriate to rely on the data that was provided and verified during the original investigation.

(50) Two exporting producers in Indonesia, Wilmar and PT Pelita Agung Agrindustri, as well as the authorities of Indonesia claimed that the discretion of the Commission in choosing the data in order to determine a profit cap is limited by the findings of the Panel in the Indonesia Report. Following disclosure, Wilmar reiterated that point. According to these interested parties, the Commission must use either the profit amounts on sales of blends of biodiesel with mineral diesel or the profits obtained on sales of diesel fuels and marine fuel oil. However, nothing in the Indonesia Report prevents the Commission from using other available relevant data. The Panel states in par. 7.70 that the 'EU authorities could have considered these sales for the determination of the profit cap' and in par. 7.72 that 'the EU authorities should have considered sales of diesel fuels and marine fuel oil by [[***]] to determine the profit cap.' The use of the words 'could' and 'should' by the Panel in the Indonesia Report indicates that the Panel believes the Commission had to consider whether these data could be used to establish a profit cap

or not, rather than disregarding that information based on an incorrect interpretation of the phrase 'profits normally realized'. The consideration of these sales has now been done in recital 49, and the use of these particular sales was neither considered appropriate, nor necessary.

(51) In its submissions, EBB provided an alternative set of data which the Commission could use to calculate a profit cap. These data concerned three companies that did not produce or sell the product concerned in one of the countries under investigation during the investigation period. Based on publicly available information and information provided by two of the exporting producers in Indonesia, it became clear that all three companies are not based in Indonesia but instead in Malaysia and Singapore. The data provided by EBB was aggregated data taken from annual reports and/or results announcement of the relevant companies and represents profit margins for possibly a wide range of products and related companies.

(52) The Commission did not agree that these data are appropriate to determine a profit cap. The main products of these companies are palm oil and products such as fatty acids, glycerine, fertilizers, sugar and molasses, stearin, cocoa butter or oleo chemicals. Some companies also provide unrelated services such as the operation of residential properties, treasury management or railroad maintenance. The products of these companies cannot be considered to fall within the same general category of products as the product concerned, biodiesel. This is especially the case for the product palm oil, as this is the raw material used as main input for the production of biodiesel. The Commission considers that including this product in the same general category as biodiesel would entail a too broad interpretation of that category. The Commission therefore rejected the use of the proposed data.

(53) In a recently concluded anti-dumping investigation on imports of biodiesel from Indonesia into the United States, the United States authorities had calculated a profit margin of 6,15 % ([1]). The Commission examined whether this figure could be used as a profit cap. However, given that it was derived from the financial statements of a producer based in Germany, it could not use these data either.

(54) In conclusion, the methodology set out in recitals 46 to 48 follows the logic of Article 2.2.2(iii) ADA and uses the data known and available on file to the Commission, without the need for further investigation. It is therefore considered that this methodology is the most appropriate in this case.

(55) Using this methodology yields the following results. For Argentina, all producers involved had an actual profit margin above the 15 % that, as explained in recitals 39 and 40, was used in the original investigation. A weighted average of any combination of these profit margins would therefore also always yield a profit cap of above 15 %. This means the 15 % profit margin that was determined in the original investigation is below the individual profit caps and is therefore the profit margin to be used for the calculations of the dumping margins.

(56) For Indonesia, the profit margins actually achieved by the producers under investigation were also above 15 % for all except for one company. As a weighted average is used to calculate the individual profit caps, this profit margin of below 15 % leads to profit caps for some producers that are below 15 %, and therefore necessitate a downward adjustment of some of the profit margins used for the calculation of the dumping margins. For one company the profit cap was above 15 %, which means the profit margin of 15 % is still to be used. The other three companies have profit caps below 15 %, which means the profit margins used to calculate normal value cannot be higher than that cap. The application of the methodology leads to the following results:

Table 1

Company	Profit margin
P.T. Ciliandra Perkasa, Jakarta	15 %
P.T. Musim Mas, Medan	12,87 %
P.T. Pelita Agung Agrindustri, Medan	14,42 %
P.T Wilmar Bioenergi Indonesia, Medan; P.T. Wilmar Nabati Indonesia, Medan	14,42 %

([1]) United States Department of Commerce, Investigation A-560-830, Memorandum, 'Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Wilmar Trading Pte. Ltd', 20 February 2018.

4.3. **Double Counting**

(57) The panel in its Indonesia Report found that the EU had failed to construct the export price of one Indonesian exporting producer, P.T. Musim Mas, on the basis of the price at which the imported biodiesel produced by P.T. Musim Mas was first resold to independent buyers in the EU as required under Article 2.3 ADA.

(58) A certain type of biodiesel (palm fatty acid distillate-based biodiesel) is eligible to be 'double counted' for the purpose of compliance with EU mandatory biodiesel blending targets. Because of this, EU blenders only have to use half as much of this type of biodiesel to comply with mandatory EU biodiesel blending targets. As this type of biodiesel is therefore more valuable to customers, a producer of this biodiesel can charge a premium to the client. In this specific case, the double counting issue concerns certain exports of P.T. Musim Mas to clients in Italy. In the original investigation, the EU had disregarded this premium in constructing the export price of biodiesel.

(59) In light of the WTO finding that the EU had incorrectly disregarded this premium paid by customers in Italy, the Commission reassessed its calculations and adjusted the export price for P.T. Musim Mas accordingly.

4.4. **Recalculated dumping margins**

(60) The revised duty rates in respect of all Indonesian and Argentinian exporters in light of the EU General Court judgments as well as the findings and recommendations in the Indonesia and Argentina Reports, expressed on the CIF Union border price, customs duty unpaid, are as follows:

Table 2

Country	Company	Dumping margin
Indonesia	P.T. Ciliandra Perkasa, Jakarta	– 4,0 %
	P.T. Musim Mas, Medan	– 4,7 %
	P.T. Pelita Agung Agrindustri, Medan	4,4 %
	P.T Wilmar Bioenergi Indonesia, Medan; P.T. Wilmar Nabati Indonesia, Medan	6,2 %
Argentina	Louis Dreyfus Commodities S.A., Buenos Aires	4,5 %
	Molinos Agro SA, Buenos Aires; Oleaginosa Moreno Hermanos SACIFI y A, Bahia Blanca; Vicentin SAIC, Avellaneda	6,6 %
	Aceitera General Deheza SA, General Deheza; Bunge Argentina SA, Buenos Aires	8,1 %

(61) In view of the high negative dumping margins for two of the four sampled Indonesian companies, the Commission verified whether the weighted average countrywide dumping margin taking account of the negative margins was above *de minimis* as provided for in Article 9(3) of the basic Regulation.

(62) The amount of dumping in the Indonesian sample, expressed as a percentage of the CIF value of exports of the sample, was 1,6 %, that is, below the 2 % *de minimis* threshold.

(63) In view of the countrywide *de minimis* dumping margin, the investigation should be terminated as regards imports of biodiesel from Indonesia without measures.

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

(64) In the Argentina Reports it was found, inter alia, that the EU 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 it relates to production capacity and capacity utilisation.

(65) In the amending Regulation that was adopted following the Argentina Reports, this issue was addressed in recitals 87 to 123 ([1]). Neither the judgments of the General Court nor the Indonesia Report hold any findings that would necessitate a re-assessment of this analysis which therefore still holds.

([1]) Implementing Regulation (EU) 2017/1578 amending Implementing Regulation (EU) No 1194/2013 of 18 September 2017 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia (OJ L 239, 19.9.2017, p. 9).

(66) During the original investigation, it was considered appropriate to perform a cumulative assessment of the imports from Argentina and Indonesia, as at that time the conditions set out in Article 3(4) of the basic Regulation were met. Conclusions regarding injury and causation were, therefore, based on the combined effect of imports of biodiesel from both countries. However, these conditions are now no longer met as it was determined that the country-wide level of dumping for Indonesia was below the 2 % *de minimis* level.

(67) It therefore needs to be determined whether a causation analysis limited to the dumped imports of biodiesel from Argentina would lead to the conclusion of causal link between the dumped imports and the injury suffered by the Union industry.

5.1. **Injury findings**

(68) The methodology that underlies the injury analysis done in the definitive Regulation is not affected by the findings of the Court judgments nor the Indonesia Report, in as far as Argentina is concerned. The relevant findings of the definitive Regulation therefore remain valid.

(69) Total Union production was around 9 052 871 tonnes during the period considered, while Union consumption of biodiesel increased by 5 %. Import volumes from Argentina increased by a total of 41 % during the period considered, while market share increased from 7,7 % to 10,8 % during the same period. Although import prices of biodiesel from Argentina rose during the period considered, they were still below the prices of the Union industry throughout the same period. The difference between the prices from Argentina and Union prices, expressed as a percentage of the Union industry's weighted average ex-works price, i.e. the price undercutting margin, ranged from 4,5 % to 9,1 %. While the profitability of the Union industry was 3,5 % in 2009, it subsequently dropped to losses and reached – 3,5 % in the original investigation period (1 July 2011 – 30 June 2012).

(70) The analysis in the definitive Regulation showed that the Union industry had suffered material injury as defined by Article 3(5) of the basic Regulation. While consumption increased, the Union industry lost market share and profitability. At the same time, imports gained market share and undercut Union producer prices.

5.2. **Revised causation findings**

(71) As explained in point 5.1 all imports from Argentina to the Union were found to be dumped during the investigation period. The findings of the definitive Regulation also showed that low-priced dumped imports from Argentina significantly increased in terms of volume (41 % during the period concerned) resulting in an increase of market share by 3 percentage points by the end of the period concerned.

(72) Despite a 5 % increase in consumption, the Union industry lost 5,5 percentage points of market share during the period considered. Although average prices of the dumped imports from Argentina increased by 54 % during the period considered, they were still significantly lower than those of the Union industry during the same period. The dumped imports undercut Union industry prices with an average undercutting margin of 8 % during the investigation period.

(73) Since the investigation was terminated in relation to Indonesia as explained in recitals 60 to 63, imports from Indonesia need to be assessed separately, as another factor that might also have caused injury.

(74) The revised figures of imports from third countries (including Indonesia) give the following overview:

Table 3

		2009	2010	2011	IP
Sales EU producers	Sales volumes (tonnes)	9 454 786	9 607 731	8 488 073	9 294 137
	Index 2009 = 100	*100*	*102*	*90*	*98*
	Market share	84,7 %	83,3 %	76,1 %	79,2 %
	Index 2009 = 100	*100*	*98*	*90*	*94*

		2009	2010	2011	IP
Imports from Argentina	Total imports (tonnes)	853 589	1 179 285	1 422 142	1 263 230
	Index 2009 = 100	*100*	*138*	*167*	*148*
	Market share	7,7 %	10,2 %	12,7 %	10,8 %
	Index 2009 = 100	*100*	*135*	*167*	*141*
Imports from Indonesia	Total imports (tonnes)	157 915	495 169	1 087 518	995 663
	Index 2009 = 100	*100*	*314*	*689*	*631*
	Market share	1,4 %	4,3 %	9,7 %	8,5 %
	Index 2009 = 100	*100*	*303*	*689*	*600*
Other third countries	Total imports (tonnes)	699 541	256 327	161 973	175 370
	Index 2009 = 100	*100*	*37*	*23*	*25*
	Market share	6,3 %	2,2 %	1,5 %	1,5 %
	Index 2009 = 100	*100*	*35*	*23*	*24*

(75) There was a significant decrease in imports from the United States (USA), Norway and South Korea following the imposition of measures on imports from the USA in 2009 and an anti-circumvention investigation against imports consigned from Canada in 2010. On the other hand, imports from Indonesia increased their share from 1,4 % to 8,5 %, which represented an increase of 500 % during the period considered. At the same time, the Union industry experienced a decrease in market share from 84,7 % to 79,2 %.

(76) Similarly, imports from Indonesia more than quintupled during the period concerned, while Union industry lost sales. A closer look reveals that in 2010 sales volumes of imports from Indonesia increased 214 %. That same year, however, sales volumes of Union industry increased by 2 %. It is only the following year that the Union industry sales volumes dropped sharply, which coincided with a further increase of 119 % in imports from Indonesia from 2010 to 2011.

Table 4

Price per ton (EUR)	2009	2010	2011	IP
EU	797	845	1 096	1 097
Index 2009 = 100	*100*	*106*	*137*	*138*
Argentina	629	730	964	967
Index 2009 = 100	*100*	*116*	*153*	*154*
Indonesia	597	725	864	863
Index 2009 = 100	*100*	*121*	*145*	*145*
Other third countries (excluding Indonesia)	527	739	1 037	1 061
Index 2009 = 100	*100*	*140*	*197*	*201*

(77) Moreover, the average prices of imports from Indonesia were much lower than those of the Union industry and Argentinian imports throughout the period considered. However, as there are certain differences between the product from Indonesia and the product on the Union market, this export price needs to be adjusted to reflect the competitive relationship between the two.

(78) In recitals 93 to 97 of the provisional Regulation, the Commission had operated a price adjustment by taking the difference in price on the Union market between the sales of biodiesel at Cold Filter Plugging Point (CFPP) 13 (reflecting the Indonesian quality) with sales of biodiesel at CFPP 0 (reflecting the EU quality). Even after this adjustment, Indonesian export prices still undercut Union prices by 4 %.

(79) The panel in the Indonesia report, however, found in par. 7.158-159 that this price adjustment did not reflect properly the 'complexities in competitive relationships' between the imported Indonesian biodiesel and the blended product sold by Union industry. The panel did not offer any more precise guidance on the methodology to measure this relationship.

(80) The Commission noted that there is a very wide range of possibilities for blending different types of biodiesel with the Indonesian biodiesel to come to a comparable EU product. It is therefore not practical to calculate price data on these various types of biodiesel blends for the investigation period. Moreover, the European biodiesel producers consider that the original price adjustment, leading to a 4 % undercutting, properly reflected the competitive relationship. Finally, the panel itself indicated in par. 7.159 that a more complex analysis could still have justified a finding that the imports from Indonesia had a significant price undercutting effect on the price of the Union industry blended product. The Commission hence concluded that Indonesian exports during the investigation period undercut EU prices by at least 4 %.

(81) In order to establish a causal link between the dumped imports and the injury to the Union industry it must be demonstrated, in accordance with Article 3(6) and (7) of the basic Regulation, that the dumped imports have caused material injury to the Union industry, while the injury caused by other known factors is not attributed to the dumped imports. The notion of a causal link is interpreted in a WTO compatible manner, meaning it needs to be established that there is a genuine and substantial causal relationship between the dumped imports and the injury to the domestic industry ([1]). In recital 189 of the definitive Regulation the conclusion was drawn that no evidence had been provided that the effect of other factors, considered individually or collectively, was not such as to break the causal link between the dumped imports from Argentina and Indonesia together and the injury suffered by the Union industry.

(82) However, in light of the facts and revised analysis set out in recitals 71 to 80 following the limitation of the analysis to imports from Argentina only, this conclusion also had to be revised.

(83) During the investigation period almost half of all imports into the Union came from Indonesia at a price lower than Union as well as Argentinian prices. More importantly, the exponential increase on imports volumes from Indonesia as well their market share have significantly contributed to the material injury suffered by the Union industry.

(84) The impact of the Indonesian exports added to the other factors identified in the provisional Regulation, among others overcapacity of Union industry and self-inflicted injury (recitals 132-140 of the provisional Regulation).

(85) On this basis, the Commission concluded that the effect of imports of biodiesel from Indonesia to the Union and the other factors identified in the previous recital contributed to the injury suffered by the Union industry to such an extent that it cannot be established that there is a genuine and substantial causal relationship between the dumped imports from Argentina and the material injury suffered by the Union industry.

(86) Following disclosure, the EBB claimed that the nature of the injury caused by other factors, including Indonesian imports, does not attenuate the causal link between the material injury suffered by the Union industry and imports from Argentina. It further claimed that the Commission has applied an incorrect standard in its analysis, allegedly based on the assumption that dumped imports from Argentina should have been the principal, or only cause, of material injury and not only one of the causes of injury. In the EBB's view, it would be sufficient to demonstrate that imports from Argentina had a negative impact on the Union industry without it having to be the only or most important factor causing the injury suffered. Given that the volume of imports from Argentina in the period considered (2009 — mid-2012) was higher than imports from Indonesia, and given that the Argentinian undercutting of Union industry prices by 8 % was higher than the Indonesian undercutting of 4 %,

([1]) Consistent with the ruling of the WTO in EU – Countervailing Measures on Certain Polyethylene Terephtalate from Pakistan, where the Appellate Body determined that 'The key objective of a causation analysis under Article 15.5 of the SCM Agreement is for an investigating authority to establish whether there is a 'genuine and substantial relationship of cause and effect' between the subsidized imports and the injury to the domestic industry.' Report of the Appellate Body, AB-2017-5, WT/DS486/AB/R, 16 May 2018, in par. 5.226.

imports from Argentina had, in the EBB's view, clearly a negative impact on the situation of the Union industry, which is sufficient to establish a causal link between dumped imports from Argentina and the material injury suffered by the Union industry.

(87) In this respect, the Commission first points out that it has already explained the legal standard applied in recital 81. In that recital there is no mention of any notion of either 'principal' or 'main' cause for the causation analysis. The legal standard is based on Article 3(6) and 3(7) of the basic Regulation, according to which it must be shown that dumped imports are causing injury, while other known factors should also be examined to ensure that the injury caused by those other factors is not attributed to the dumped imports. Second, the EEB's claims that the pertinent test would be whether dumped imports have had a 'negative impact on the Union industry' do not find support on the legal framework. Indeed, the relevant legal test is to establish whether there was a 'genuine and substantial relationship' between the dumped imports from Argentina and the material injury suffered by the Union industry.

(88) The Commission is of the view that the facts on the file do not allow it to reach such a conclusion. Indeed, in 2009, when the Union industry already faced significant imports from Argentina but only low quantities from Indonesia, its profitability stood at 3,5 %. When Indonesian imports increased substantially, profitability turned negative and was – 2,5 % in the original investigation period. In this respect, it is important to note that the imports from Indonesia during that period increased at a significantly higher rate than Argentinian imports (see Table 3 above). The Commission therefore considers that the EBB's sole reliance on a comparison between the respective undercutting margins of imports from Indonesia (as adjusted for quality differences) and Argentina fails to fully and adequately reflect the impact that each exporting country's exports had on the situation of the Union industry in particular in relation to profitability.

(89) The Commission concludes it is not possible to establish a genuine and substantial causal relationship between the dumped imports from Argentina and the material injury suffered by the Union industry given the importance of other known factors contributing to that injury.

(90) One company, COFCO Argentina S.A., came forward after the publication of Implementing Regulation (EU) 2017/1578 claiming that they met all three criteria for new exporting producers set out in Article 3 of the definitive Regulation and provided supporting evidence. The Commission analysed the request and the evidence. However in light of the results of the re-opened investigation the request became moot.

6. **CONCLUSION**

(91) The investigation should be terminated (i) as dumping margins from Indonesia are *de minimis* and (ii) due to the fact that it cannot be established that there is a genuine and substantial causal relationship between the dumped imports from Argentina and the material injury suffered by the Union industry as required under Article 3(7) of the basic Regulation. This means that existing measures which are still in force for those exporting producers from Argentina and Indonesia that had not successfully challenged the anti-dumping measures before the General Court should be repealed. For the sake of clarity and legal certainty, Implementing Regulation (EU) No 1194/2013 should therefore be repealed.

(92) The definitive anti-dumping duties paid pursuant to Implementing Regulation (EU) No 1194/2013 on imports of biodiesel from Argentina and Indonesia and the provisional duties definitively collected in accordance with Article 2 of that Regulation, should be repaid or remitted insofar as they relate to imports of biodiesel sold for export to the Union by the companies which successfully challenged that Regulation in court, that is, Argentinian exporting producers Unitec Bio SA, Molinos Rio de la Plata SA, Oleaginosa Moreno Hermanos SACIFI y A, Vicentin SAIC, Aceitera General Deheza SA, Bunge Argentina SA, Cargill SACI, Louis Dreyfus Commodities S.A. (LDC Argentina SA), and Indonesian exporting producers PT Pelita Agung Agrindustri, PT Ciliandra Perkasa, PT Wilmar Bioenergi Indonesia, PT Wilmar Nabati Indonesia, PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas). The repayment or remission has to be requested from national customs authorities in accordance with the applicable customs legislation.

(93) Following disclosure, PT Cermerlang Energi Perkasa, claimed that the repayment and remission of anti-dumping duties should be available to all companies that had incurred such duties and not only to those companies that had successfully challenged the definitive Regulation in Court. It also claims that not only Implementing Regulation (EU) No 1194/2013 but also amending Implementing Regulation (EU) 2017/1578 should be repealed.

(94) First, the Commission recalled that Implementing Regulation (EU) 2017/1578 only amended Implementing Regulation (EU) No 1194/2013. As the latter regulation is repealed the amending regulation becomes void of any legal effect. Therefore, there is no need to repeal explicitly also that regulation. Second, the General Court's annulment of Implementing Regulation (EC) No 1194/2013 only applies to those companies that challenged that regulation before the Court. Accordingly, the anti-dumping duties that have been levied on other companies have been legally collected under Union law. In so far as the Indonesian WTO report found that the anti-dumping measures on imports from Indonesia should be brought into conformity with the Union's WTO obligations, the Commission has agreed with Indonesia to implement those findings by October 2018. In line with the general principles of WTO settlement, such implementation will only have effect as from the date of implementation. The Commission therefore rejected the claim that also those duties should be repaid or remitted.

(95) In view of the recent case-law of the Court of Justice [1], it is also appropriate to provide for the rate of default interest to be paid in case of reimbursement of definitive duties, because the relevant provisions in force concerning customs duties do not provide for such an interest rate, and the application of national rules would lead to undue distortions between economic operators depending on which Member State is chosen for customs clearance.

7. **DISCLOSURE**

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

(97) The Committee established by Article 15(1) of the basic Regulation did not deliver an opinion.

HAS ADOPTED THIS REGULATION:

Article 1

The anti-dumping proceeding concerning imports of 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 (TARIC codes 1516 20 98 21, 1516 20 98 29 and 1516 20 98 30), ex 1518 00 91 (TARIC codes 1518 00 91 21, 1518 00 91 29 and 1518 00 91 30), ex 1518 00 95 (TARIC code 1518 00 95 10), ex 1518 00 99 (TARIC codes 1518 00 99 21, 1518 00 99 29 and 1518 00 99 30), ex 2710 19 43 (TARIC codes 2710 19 43 21, 2710 19 43 29 and 2710 19 43 30), ex 2710 19 46 (TARIC codes 2710 19 46 21, 2710 19 46 29 and 2710 19 46 30), ex 2710 19 47 (TARIC codes 2710 19 47 21, 2710 19 47 29 and 2710 19 47 30), 2710 20 11, 2710 20 15, 2710 20 17, ex 3824 99 92 (TARIC codes 3824 99 92 10, 3824 99 92 12 and 3824 99 92 20), 3826 00 10 and ex 3826 00 90 (TARIC codes 3826 00 90 11, 3826 00 90 19 and 3826 00 90 30) ('biodiesel') is hereby terminated.

Article 2

The definitive anti-dumping duties paid pursuant to Implementing Regulation (EU) No 1194/2013 on imports of biodiesel from Argentina and Indonesia and the provisional duties definitively collected in accordance with Article 2 of that Regulation, shall be repaid or remitted insofar as they relate to imports of biodiesel sold for export to the Union by the following companies:

Company	TARIC additional code
Argentina	
Unitec Bio SA, Buenos Aires	C 330
Molinos Agro SA, Buenos Aires	B 784
Oleaginosa Moreno Hermanos SACIFI y A, Bahia Blanca	B 784
Vicentin SAIC, Avellaneda	B 784
Aceitera General Deheza SA, General Deheza	B 782

[1] Judgment of the Court of 18 January 2017, Case C-365/15, *Wortmann*, EU:C:2017:19, paragraphs 35 to 39.

Company	TARIC additional code
Bunge Argentina SA, Buenos Aires	B 782
Cargill SACI, Buenos Aires	C 330
Louis Dreyfus Commodities S.A. (LDC Argentina SA), Buenos Aires	B 783
Indonesia	
PT Pelita Agung Agrindustri, Medan	B 788
PT Ciliandra Perkasa, Jakarta	B 786
PT Wilmar Bioenergi Indonesia, Medan	B 789
PT Wilmar Nabati Indonesia, Medan	B 789
PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas), Medan	B 787

The repayment or remission shall be requested from national customs authorities in accordance with the applicable customs legislation.

Unless otherwise specified, the provisions in force concerning customs duties shall apply. The default interest to be paid in case of reimbursement that gives rise to a right to payment of default interest shall be the rate applied by the European Central Bank to its principal refinancing operations, as published in the C series of the *Official Journal of the European Union*, in force on the first calendar day of the month in which the deadline falls, increased by one percentage point.

Article 3

Implementing Regulation (EU) No 1194/2013 is repealed.

Article 4

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 October 2018.

For the Commission
The President
Jean-Claude JUNCKER