



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

15 September 2016*

(Dumping — Imports of biodiesel originating in Indonesia — Definitive anti-dumping duty — Article 2(5) of Regulation (EC) No 1225/2009 — Normal value — Production costs)

In Case T-120/14,

PT Ciliandra Perkasa, established in Jakarta (Indonesia), represented by F. Graafsma and J. Cornelis, lawyers,

applicant,

v

Council of the European Union, represented initially by S. Boelaert, and subsequently by H. Marcos Fraile, acting as Agents, and by R. Bierwagen and C. Hipp, lawyers,

defendant,

supported by

European Commission, represented by J.-F. Brakeland, M. França and A. Stobiecka-Kuik, acting as Agents,

and by

European Biodiesel Board (EBB), established in Brussels (Belgium), represented by O. Prost and M.-S. Dibling, lawyers,

interveners,

ACTION pursuant to Article 263 TFUE for annulment of Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia (OJ 2013 L 315, p. 2) in so far as it imposes an anti-dumping duty on the applicant,

THE GENERAL COURT (Ninth Chamber),

composed of G. Berardis, President, O. Czúcz (Rapporteur) and A. Popescu, Judges,

Registrar: M. Junius, Administrator,

having regard to the written part of the procedure and further to the hearing on 14 April 2016,

* Language of the case: English.

gives the following

Judgment

Background to the dispute

Administrative procedure

- 1 The applicant, PT Ciliandra Perkasa, is an Indonesian company which produces and exports biodiesel to the European Union.
- 2 Biodiesel, an alternative fuel similar to conventional diesel, is produced in the European Union, but it is also imported in large quantities. In Indonesia, it is mainly produced from crude palm oil ('CPO'), the main raw material used in the production of biodiesel.
- 3 Following a complaint lodged on 17 July 2012 by the European Biodiesel Board (EBB) on behalf of producers accounting for more than 60% of the total production of biodiesel in the European Union, the European Commission published, on 29 August 2012, a notice of initiation of an anti-dumping proceeding concerning imports of biodiesel originating in Argentina and Indonesia (OJ 2012 C 260, p. 8), in accordance with Article 5 of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51) ('the basic regulation').
- 4 The investigation of dumping and injury covered the period from 1 July 2011 to 30 June 2012 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2009 to the end of the investigation period.
- 5 The applicant was selected for inclusion in the sample of Indonesian exporting producers in the context of the investigation in question and replied to the Commission's questionnaires in that context.
- 6 On 27 May 2013, the Commission adopted Regulation (EU) No 490/2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia (OJ 2013 L 141, p. 6) ('the provisional regulation'). In that regulation, the Commission, inter alia, disclosed the details underlying the essential facts and considerations on the basis of which the provisional anti-dumping measures were imposed. The provisional duty applicable to the applicant was zero, the normal value of the like product having been calculated on the basis of the data contained in its replies to the questionnaires referred to in paragraph 5 above without adjustment for the cost of CPO.
- 7 According to recital 63 of the provisional regulation, the Commission calculated the normal value of the like product in accordance with the procedure provided for in Article 2(3) and (6) of the basic regulation on the basis of the exporting producers' production costs during the investigation period, plus the selling, general and administrative expenses and a reasonable profit margin. It also stated that the question whether those costs reasonably reflected the costs associated with the production of the product concerned was to be further examined at the definitive stage of the investigation because it did not have enough information about whether the Differential Export Tax system ('DET system') in force in Indonesia depressed the prices of palm oil and therefore distorts the costs of biodiesel producers.
- 8 In recitals 64 and 65 of the provisional regulation, the Commission noted that the investigation had shown that the Indonesian domestic market for biodiesel was heavily regulated by the State, with the result that the amount of profit could not be based on actual data from the sampled companies given

that the domestic sales are not regarded as being made in the ordinary course of trade. It also stated that, therefore, the amount for profit used when constructing the normal value had been determined pursuant to Article 2(6)(c) of the basic regulation.

- 9 On 1 October 2013, the Commission informed all the interested parties of the essential facts and considerations on the basis of which it intended to recommend the imposition of a definitive anti-dumping duty on the imports of the product concerned ('the definitive disclosure') and all parties were granted a period within which they could make comments on the definitive disclosure.
- 10 In the definitive disclosure, the Commission proposed to impose an anti-dumping duty on the applicant, corresponding to the difference between the dumping margin and that established during the preliminary phase following an adjustment to the cost of CPO. In the cover letter, the Commission informed the applicant of the possibility of offering an undertaking.
- 11 On 15 October 2013, the applicant attended a formal hearing, during which it contested the Commission's cost adjustment and the calculation of the reasonable profit margin for constructing the normal value of the like product.
- 12 On 17 October 2013, the applicant submitted its comments on the definitive disclosure document and an undertaking offer.
- 13 On 8 November 2013, the Commission informed the applicant that its undertaking offer could not be accepted.
- 14 On 19 November 2013, the Council of the European Union adopted 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 (OJ 2013 L 315, p. 2) ('the contested regulation').

Contested regulation

- 15 In the first place, in recital 28 of the contested regulation, the Council confirmed the conclusions of the provisional regulation, in accordance with which the normal value of the like product was calculated pursuant to Article 2(3) and (6) of the basic regulation. In that regard, the Council stated that domestic sales could not be regarded as being made in the ordinary course of trade, since the Indonesian biodiesel market was heavily regulated by the State.
- 16 However, as regards the calculation of costs relating to the production of the product under investigation, it is apparent from recitals 30, 34 and 66 to 74 of the contested regulation that, following a further investigation, the Council accepted the Commission's proposal to amend the conclusions in recital 63 of the provisional regulation. It confirmed, inter alia, the assessment that the DET system depressed the price of CPO, the main raw material, on the domestic market to an artificially low level, influencing the costs of the biodiesel producers. Given that the costs relating to the production and sale of the product concerned were therefore not reasonably reflected in the records of the Indonesian producers under investigation, the Council decided, in accordance with Article 2(5) of the basic regulation, to disregard the actual costs of CPO, as indicated in the records of the companies concerned, and to replace them with the price at which those companies would have purchased it in the absence of distortion, namely by the export reference price published by the Indonesian authorities which is in turn based on published international prices (Rotterdam, Malaysia and Indonesia) ('the HPE price').

- 17 As regards the calculation of the selling, general and administrative expenses, the Council *inter alia* accepted, in recitals 77 to 84 of the contested regulation, the use of a 15% profit margin, in essence, by confirming the analysis in recital 65 of the provisional regulation.
- 18 In the second place, in recitals 105 to 142 of the contested regulation, the Council confirmed the conclusions in the provisional regulation concerning the existence of material injury for the purposes of Article 3(5) of the basic regulation.
- 19 In the third place, in recitals 144 to 189 of the contested regulation, the Council confirmed the conclusion in the provisional regulation concerning the existence of a causal link between the imports and the injury suffered by the European Union industry.
- 20 In the fourth place, in recitals 190 to 201 of the contested regulation, the Council confirmed that the adoption of the anti-dumping measures in question remained in the European Union's interest.
- 21 In conclusion, the Council decided, *inter alia*, in view of the dumping margins found and the level of injury caused to the European Union industry, that the amounts secured by way of the provisional anti-dumping duty, imposed by the provisional regulation, should be definitively collected (recital 228 and Article 2 of the contested regulation) and that a definitive anti-dumping duty was to be imposed on imports of biodiesel originating in Indonesia (Article 1(1)).
- 22 In Article 1(2) of the contested regulation, the rate of the definitive anti-dumping duty applicable to the product concerned, in so far as concerns Indonesian imports, was set at EUR 76.94 per tonne net in respect of the applicant.

Procedure and forms of order sought

- 23 By application lodged at the Court Registry on 18 February 2014, the applicant brought the present action.
- 24 By documents lodged at the Court Registry on 13 May and 2 June 2014 respectively, the Commission and the EBB sought leave to intervene in the present proceedings in support of the form of order sought by the Council.
- 25 By order of 17 July 2014, the Commission's application for leave to intervene was granted.
- 26 By letters lodged at the Court Registry on 9 July and 8 August 2014, the applicant requested that certain documents and information in its written pleadings be treated as confidential with regard to the EBB, if the latter was granted leave to intervene.
- 27 By order of 22 September 2014, the EBB's application for leave to intervene was granted and the decision on the merits of the request for confidential treatment presented by the applicant was reserved.
- 28 The Commission lodged its statement in intervention on 1 October 2014.
- 29 By letter lodged at the Court Registry on 17 October 2014, the EBB contested the applicant's requests for confidential treatment.
- 30 By letters lodged at the Court Registry on 22 October and 3 November 2014, the Council requested that certain documents and information in its written pleadings be treated as confidential with regard to the EBB.

- 31 By documents lodged at the Court Registry on 28 November 2014, the applicant and the Council submitted their observations on the Commission's statement in intervention.
- 32 The EBB lodged its statement in intervention on 12 December 2014. By document lodged at the Court Registry on 18 February 2015, the applicant submitted its observations on that statement.
- 33 By order of 18 May 2015, the requests for confidential treatment presented by the applicant were partially granted and those presented by the Council were granted.
- 34 Upon hearing the report of the Judge-Rapporteur, the Court (Ninth Chamber) decided to open the oral part of the procedure and, in the context of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure of the General Court, put a number of written questions to the parties, which answered them within the time limit prescribed.
- 35 The applicant claims, in essence, that the Court should:
- annul the contested regulation in so far as it concerns the applicant;
 - order the Council to pay the costs.
- 36 The Council, supported by the Commission and by the EBB, contends that the Court should:
- dismiss the action as unfounded;
 - order the applicant to pay the costs.

Law

- 37 The applicant puts forward five pleas in law in support of the action: the first plea in law alleges a manifest error of assessment in the conclusion that the applicant's purchase prices are distorted; the second alleges, in essence, an infringement of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103) ('the anti-dumping agreement'), which appears in Annex 1A to the Agreement Establishing the World Trade Organization (WTO), concerning the adjustment of the cost of producing CPO; the third alleges an infringement of Article 2(5) of the basic regulation; the fourth alleges that the determination of the reasonable profit margin is unlawful, and the fifth a failure to state reasons and an infringement of the obligation of due diligence and proper administration.
- 38 The Court considers that it is appropriate to begin by examining the third plea in law.
- 39 That plea in law consists, in essence, of three parts. In the context of the first part, the applicant claims that the Council and the Commission ('the institutions') did not discharge the burden of proof imposed on them to establish to the requisite legal standard that there is distortion of the CPO price under the DET system, in order to disregard the CPO prices in its records for the purposes of Article 2(5) of the basic regulation, and that the contested regulation is vitiated by a failure to state reasons in that regard. The second part alleges that the HPE price does not constitute a reasonable basis for adjusting the cost of CPO in the records, because it is itself affected by the alleged distortion caused by the DET system. The third part concerns the interpretation of Article 2(5) of the basic regulation in the present case and, *inter alia*, the application by analogy by the institutions of the judgment of 7 February 2013, *Acron and Dorogobuzh v Council* (T-235/08, not published, EU:T:2013:65).
- 40 The first and third parts should be examined together.

- 41 The applicant claims, in essence, that the basis on which the institutions concluded that the price of CPO sold on the Indonesian domestic market was artificially low is not clear from the contested regulation, since the ‘international’ prices referred to, in particular, are not explained. The applicant also submits, in that context, that the statement in recital 68 of the contested regulation that the DET system limits the possibilities of exporting CPO is disproved by the fact that Indonesia exports approximately 70% of its total production of CPO. Moreover, the HPE price is not an appropriate basis for reaching the conclusion that Indonesian CPO prices were distorted. Furthermore, the applicant disputes the admissibility of the studies relied on by the institutions in support of their argument that CPO prices were distorted in Indonesia following a distortion caused by that system. Moreover, the applicant submits that Article 2(5) of the basic regulation does not allow costs to be adjusted solely because they are low. Finally, the judgment of 7 February 2013, *Acron and Dorogobuzh v Council* (T-235/08, not published, EU:T:2013:65), cannot serve as a precedent to the extent that it required some form of direct government intervention, and the possibility of adjusting the costs reflected in the records is an exception to the general rule and must therefore be interpreted strictly.
- 42 The Council, supported by the Commission and the EBB, contends, in essence, that the institutions discharged their burden of proof as regards the existence of a distortion of CPO prices and correctly applied Article 2(5) of the basic regulation. In the contested regulation, the institutions explained the DET system and demonstrated that that system had created a distortion which made the domestic prices of CPO artificially lower than the HPE price for CPO published by the Indonesian authorities and in turn based on published international prices. Moreover, the effect of the Indonesian rules in terms of the benefits for the downstream industries has been acknowledged and calculated in a number of studies. The factual differences established in the case giving rise to the judgment of 7 February 2013, *Acron and Dorogobuzh v Council* (T-235/08, not published, EU:T:2013:65), are not decisive, since in that judgment the Court confirmed the general principle that, where the costs connected with the manufacture of the product under investigation are not reasonably reflected in the records of the companies at issue, they cannot serve as a basis for calculating normal value, which applies to the facts in the present case. As regards the various forms of State intervention claimed to be possible, that argument is also irrelevant since there was, in the present case, direct intervention by the Indonesian State in setting the export duty rates and influencing the auctions. The institutions did not therefore adjust the costs solely because they were low, but because they were distorted, which heavily influenced the domestic prices of CPO and, therefore, the records of the companies producing it.
- 43 In the present case, it must be stressed that, in the contested regulation, in the context of determining the normal value of the like product, the institutions did not calculate the costs of biodiesel production with reference to the CPO price reflected in the applicant’s records, but, as is apparent, inter alia, from recital 29 et seq. of that regulation, disregarded that price and replaced it with the HPE on the basis of Article 2(5) of the basic regulation.
- 44 In that regard, it must be recalled that, by virtue of Article 2(3) of the basic regulation, where there are no or insufficient sales of the like product in the ordinary course of trade, or where, because of the particular market situation, such sales do not permit a proper comparison, the normal value of that product is to be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative. That provision provides that a particular market situation for the product concerned within the meaning of the preceding sentence may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements.
- 45 Furthermore, it follows from the first subparagraph of Article 2(5) of the basic regulation that, when the normal value of the like product is calculated in accordance with Article 2(3) of that regulation, the costs of production are normally to be calculated on the basis of the records kept by the party

under investigation, provided that those records are in accordance with the generally accepted accounting principles of the country concerned and reasonably reflect the costs associated with the production and sale of the product in question.

- 46 Under the second subparagraph of Article 2(5) of the basic regulation, if costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they are to be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.
- 47 The objective of the first and second subparagraphs of Article 2(5) of the basic regulation is to ensure that the costs associated with the production and sale of the like product used in calculating the normal value of that product reflect the costs that a producer would have incurred on the domestic market of the exporting country.
- 48 Moreover, it follows from the wording of the first subparagraph of Article 2(5) of the basic regulation that the records kept by the party under investigation are the prime source of information in order to establish the costs of production of the like product and that the use of the data included in those records constitutes the rule and the adaptation or replacement of that data on another reasonable basis is the exception.
- 49 Since a derogation from or exception to a general rule must be interpreted narrowly (see judgment of 19 September 2013, *Dashiqiao Sanqiang Refractory Materials v Council*, C-15/12 P, EU:C:2013:572, paragraph 17 and the case-law cited), it must be considered, as the applicant argues, that the exception arising from Article 2(5) of the basic regulation must be interpreted narrowly.
- 50 In the present case, without calling into question the reasons leading the institutions to calculate the normal value of the like product on the basis of Article 2(3) of the basic regulation, the applicant contests the application of Article 2(5) of that regulation on the basis of which, as regards that calculation, the institutions did not rely on the CPO prices reflected in its records.
- 51 In the contested regulation, the institutions did not state that the applicant's records did not comply with the accounting principles generally accepted in Indonesia. By contrast, they maintained that its records did not reasonably reflect the costs associated with CPO required for the production of biodiesel.
- 52 As is clear from recitals 29 to 34 and 66 to 70 of the contested regulation, the institutions took the view that, inasmuch as it included differential export taxes on CPO and biodiesel, the DET system had caused distortion of the price of CPO in so far as that system depressed the CPO price on the domestic market to an artificially low level.
- 53 On the basis of the judgment of 7 February 2013, *Acron and Dorogobuzh v Council* (T-235/08, not published, EU:T:2013:65), the institutions considered in recital 31 of the contested regulation that when the prices of raw materials were regulated in such a way that they were artificially low on the domestic market, it could be presumed that the cost of producing the product concerned was affected by a distortion. Under such circumstances, they considered that the data included in the records of the exporting producers may not be considered reasonable and, consequently, should be adjusted.
- 54 In that regard, it is necessary to recall that, in paragraph 44 of the judgment of 7 February 2013, *Acron and Dorogobuzh v Council* (T-235/08, not published, EU:T:2013:65), the Court held that, given that natural gas was necessarily supplied at a very low price to the exporting producers concerned by virtue of Russian law, the production price of the product concerned in the case giving rise to that judgment was affected by a distortion of the domestic Russian market regarding the price of gas, as that price was not the result of market forces. The Court therefore considered that the institutions

were fully entitled to conclude that one of the items in the records of the applicants in that case could not be regarded as reasonable and that, consequently, that item had to be adjusted by having recourse to other sources from markets which the institutions regarded as more representative.

- 55 However, as the applicant correctly claims, unlike the situation at issue in the case which gave rise to the judgment of 7 February 2013, *Acron and Dorogobuzh v Council* (T-235/08, not published, EU:T:2013:65), it is not apparent from the file that the CPO price was directly regulated in Indonesia. The DET system referred to by the institutions merely provided for export taxes with different rates on CPO and biodiesel.
- 56 The fact that the DET system does not directly regulate the prices of CPO in Indonesia nevertheless does not, in itself, rule out the application of the exception referred to in Article 2(5) of the basic regulation.
- 57 It must be recalled, as the institutions point out, that the provision corresponding to the second subparagraph of Article 2(5) of the basic regulation was inserted into the preceding basic regulation, namely Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), by Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation No 384/96 (OJ 2002 L 305, p. 1).
- 58 It is apparent from recital 4 of Regulation No 1972/2002 that the insertion of the provision corresponding to the second subparagraph of Article 2(5) of the basic regulation sought to give some guidance as to what should be done if the records did not reasonably reflect the costs associated with the production and sale of the product under consideration, in particular in situations where, because of a particular market situation, sales of the like product did not permit a proper comparison. In such a case, that recital states that the relevant data should be obtained from sources which are unaffected by 'such distortions'.
- 59 Recital 4 of Regulation No 1972/2002 therefore envisages the possibility of relying on Article 2(5) of the basic regulation, in particular in a situation where the sales of the like product do not permit a proper comparison on account of distortion. It also follows from it that such a situation may arise, in particular, when a particular market situation exists, such as that referred to in the second subparagraph of Article 2(3) of the basic regulation, concerning artificially low prices of the product concerned, but that type of situation is not limited to cases in which there is direct regulation of prices of the like product or the raw materials of that product by the exporting State.
- 60 By contrast, it cannot reasonably be considered that any measure of the public authorities of the exporting State which could have an influence on the prices of the raw materials and, as a result, on the price of the product in question, may be the source of a distortion that permits, in the context of the calculation of the normal value of the like product, the prices included in the records of the party under investigation to be disregarded. As the applicant rightly states, if any measure taken by the public authorities of the exporting country which is capable of influencing, even slightly, the prices of the main raw materials could be taken into account, the principle enshrined in the first subparagraph of Article 2(5) of the basic regulation, to the effect that those records are the prime source of information in order to establish the costs of production of the like product, would risk being deprived of any useful effect.
- 61 Accordingly, a measure of the public authorities of the exporting country may lead the institutions to disregard, in the context of calculating the normal value of the like product, the prices of the raw materials included in the records of the party under investigation only when it causes appreciable distortion of the prices of those raw materials. Another interpretation of the exception provided for in Article 2(5) of the basic regulation, such as that recommended by the institutions, allowing, in a

situation such as that in the present case, that data to be replaced by costs established on another reasonable basis, risks disproportionately impairing the principle that those records are the prime source of information in order to establish the costs of production of that product.

- 62 Furthermore, as regards the burden of establishing the existence of factors justifying the application of the first subparagraph of Article 2(5) of the basic regulation, it must be considered that, where the institutions consider that they must disregard the costs of production contained in the records of the party under investigation and replace them with another price deemed reasonable, the institutions must rely on direct evidence, or at least on circumstantial evidence pointing to the existence of the factor for which the adjustment was made (see, by analogy, judgment of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP v Council*, T-249/06, EU:T:2009:62, paragraph 180 and the case-law cited).
- 63 Consequently, given the fact that the disregard, in the context of calculating the normal value of the like product, of the production costs of that product included in the records of the party under investigation falls within the scope of an exception (see paragraph 49 above), where the distortion relied upon by the institutions is not an immediate consequence of the State measure from which it originates, as in the case giving rise to the judgment of 7 February 2013, *Acron and Dorogobuzh v Council* (T-235/08, not published, EU:T:2013:65), but of the effects that that measure is deemed to produce on the market, they must ensure that they explain the operation of the market in question and demonstrate the specific effects of that measure on it, without relying in that regard on mere conjecture.
- 64 It is necessary to examine, in the light of those considerations, whether the institutions have established to the requisite legal standard that the conditions were met in the present case for disregarding, in the context of calculating the normal value of the like product, the CPO prices contained in the applicant's records.
- 65 First, the measure of the Indonesian public authorities identified as the source of the distortion of the price of CPO, as indicated inter alia in recital 29 of the contested regulation, is the DET system, in that it includes differential levels of tax imposed on CPO and biodiesel, as the institutions confirmed at the hearing. It is apparent from recital 69 of that regulation that, during the investigation period, biodiesel exports were taxed at a rate between 2 and 5%, while, during the same period, the taxation rate for CPO exports was between 15 and 20% and there was a taxation rate for exports of between 5 and 18.5% for refined bleached deodorised palm oil.
- 66 Secondly, as regards the effects of the DET system, the Council maintained, inter alia, in recital 30 of the contested regulation, that a further investigation had shown that that system depressed the domestic price of the raw materials on the Indonesian market to an artificially low level.
- 67 Although, in that context, the Council indicated, in recital 68 of the contested regulation, that the DET system limited the possibilities of exporting CPO, since larger quantities of that oil were available on the domestic market and depressed CPO prices on that market, it must be noted that that regulation did not establish the extent to which that system, in that it included export taxes at differential rates on CPO and biodiesel, had led to appreciable distortion of the prices of that raw material on the Indonesian market.
- 68 In recital 68 of the contested regulation, the Council also explained that the difference between the price of CPO sold on the domestic market and its international reference price was very close to the export tax applied to CPO. However, in so doing, it did not state the effects that the difference between the rate of tax on CPO and the rate of tax on biodiesel could have had in itself on the price of that raw material on the market. The finding in that recital at most allows conclusions to be drawn

as regards certain effects that imposing an export tax on CPO could have on its price, but does not allow conclusions to be drawn on the effects that the difference between the rate of that tax and the rate of the tax on biodiesel could have had on the price of CPO on the Indonesian market.

- 69 Nor does the information provided by the Council in recitals 67 and 70 of the contested regulation, to the effect that the price of CPO recorded in the records of the relevant companies was replaced by the prices at which those companies would have purchased CPO on the domestic market in the absence of distortion, namely the HPE price, allow conclusions to be drawn as to the effects that the difference between the rate of export tax on CPO and the rate of export tax on biodiesel could have on the price of that raw material on that market. In so far as those recitals must be read as a finding of the Council that, in the absence of such a difference in rates, the price of CPO on that market would have been at the same level as the HPE price, it suffices to note that that has not been established in the contested regulation or in the proceedings before the Court.
- 70 Finally, it follows from recitals 73 and 74 of the contested regulation that the institutions do not dispute that CPO is exported from Indonesia in large quantities. In view of such a circumstance, it cannot suffice to draw the conclusion, in recital 68, that CPO is more widely available on the domestic market and its price lowered without providing further supporting explanations.
- 71 As regards the economic studies on which the institutions relied during the proceedings before the Court, without it being necessary to rule on their admissibility, it should be noted that it is true that it may be inferred from them that export taxes lead to an increase in the export price of the product affected by the tax compared with its price on the domestic market, a reduced export volume of that product and downward pressure on the prices of that product on the domestic market. It may also be inferred that a system of export taxes which taxes raw materials at a higher level than products on a downstream market protects and favours downstream domestic industries by providing them with raw materials in sufficient quantities at advantageous prices.
- 72 However, it must be noted that those studies merely analyse the effects of export taxes on the prices of the raw materials and not the effects of the differential rates used for export taxes on the raw materials and biodiesel.
- 73 The institutions therefore merely explained the relationship between the international prices and the domestic prices of CPO and gave indications as regards the impact of the export tax on CPO on the availability of that raw material on the domestic market and on its price, without, however, establishing specifically the effects that the DET system as such could have had on the price of CPO on that market and the extent to which those effects differ from those of a taxation system without a differential rate for export taxes on CPO and biodiesel.
- 74 Accordingly, it must be considered that the institutions failed to establish to the requisite legal standard that there was appreciable distortion of the price of CPO in Indonesia as a result of the DET system in that it included differential rates for export taxes on CPO and biodiesel. Therefore, by taking the view that the price of CPO was not reasonably reflected in the records of the Indonesian exporting producers examined and by disregarding them, the institutions infringed Article 2(5) of the basic regulation.
- 75 Contrary to what the institutions claim, that conclusion is not invalidated by the fact that they have broad discretion in the field of the common commercial policy, in particular, as regards complex economic assessments concerning commercial defence measures and that, in that regard, the Court must be restricted to checking that the rules governing procedure have been complied with, that the facts taken into account are materially accurate, and that there has been no manifest error of assessment of the facts or misuse of power (see, to that effect, judgment of 18 September 2002, *Since Hardware (Guangzhou) v Council*, T-156/11, EU:T:2012:431, paragraphs 134 to 136 and the case-law cited).

- 76 A review by the Court which merely determines whether the elements on which the European Union institutions base their findings are capable of substantiating the conclusions which they draw from them does not encroach on their broad discretion in the field of commercial policy (see, to that effect, judgment of 16 February 2012, *Council and Commission v Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 68).
- 77 In the present case, the Court has simply examined whether the institutions demonstrated that the conditions were met for disregarding, in the context of calculating the normal value of the like product, the costs associated with the production and sale of that product, as reflected in the records of the Indonesian exporting producers examined, in accordance with the rule laid down in Article 2(5) of the basic regulation.
- 78 It follows that the first and third parts of the third plea in law must be upheld without any need to examine the second part of that plea in law concerning the reasonable nature of the HPE price as a replacement value.
- 79 It is also necessary to examine the extent to which the error found justifies the annulment of the contested regulation, in so far as it imposes an anti-dumping duty on the applicant.
- 80 Contrary to the institutions' contention, in the circumstances of the present case, it is not possible partially to annul Article 1 of the contested regulation solely with regard to the error found concerning the method of calculation of the anti-dumping duty rate.
- 81 According to case-law, partial annulment of a European Union act is possible only if the elements whose annulment is sought may be severed from the remainder of the act. That requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance (judgment of 10 December 2002, *Commission v Council*, C-29/99, EU:C:2002:734, paragraphs 45 and 46).
- 82 As explained in relation to the examination of the third plea in law, the institutions' calculation of the normal value of the like product is based on incorrect considerations. Since the normal value is an essential condition for determining the applicable rate of anti-dumping duty, Article 1 of the contested regulation cannot be maintained, in so far as it imposes an individual anti-dumping duty on the applicant.
- 83 The contested regulation must therefore be annulled, in so far as it imposes an anti-dumping duty on the applicant, without there being any need to examine the other pleas in law.

Costs

- 84 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicant in accordance with the form of order sought by the applicant.
- 85 The Commission and the EBB shall bear their own costs, in accordance with the provisions of Article 138(1) and (3) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

- 1. Annuls Articles 1 of Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, in so far as it concerns PT Ciliandra Perkasa;**
- 2. Orders the Council of the European Union to bear its own costs and to pay the costs incurred by PT Ciliandra Perkasa;**
- 3. Orders the European Commission and the European Biodiesel Board (EBB) to bear their own costs.**

Berardis

Czúcz

Popescu

Delivered in open court in Luxembourg on 15 September 2016.

[Signatures]