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Case Summaries: WTO Disputes

The following summaries provide a brief factual background and describe the key findings of recent WTO panel and Appellate Body reports.

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European Union – Anti-Dumping Measures on Biodiesel from Argentina (EU–Biodiesel), DS473

Adopted	26 October 2016
Complainant	Argentina
Respondent	European Union
Third Parties	Australia, China, Colombia, Indonesia, Malaysia, Mexico, Norway, Russia, Saudi Arabia, Turkey, and the United States

Measures at Issue

This dispute concerned two measures of the European Union (EU): (i) the anti-dumping measure imposed by the EU on imports of biodiesel originating in Argentina;[1] and (ii) the second subparagraph of Article 2(5) of Council Regulation (EC) No. 1225/2009 on protection against dumped imports from countries not members of the European Community (Basic Regulation).[2] Argentina challenged various aspects of the anti-dumping measure on an 'as applied' basis, and challenged the second subparagraph of Article 2(5) of the Basic Regulation on an 'as such' basis.[3]

Main Adopted Findings of the Panel and Appellate Body

ADA Article 2.2.1.1 (constructing normal value with costs calculated on the basis of records kept by the exporter or producer under investigation)

With respect to Argentina's claim against the anti-dumping measure 'as applied', the Appellate Body agreed with the Panel that the EU authorities' determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis for concluding

1 See Appellate Body Report, paras. 5.2––5.10; Panel Report, para. 2.3.
2 See Appellate Body Report, paras. 5.11–5.14; Panel Report, para. 2.2.
3 Panel Report, para. 7.1.

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that the producers' records did not 'reasonably reflect the costs' of soybeans associated with the production and sale of biodiesel, or for disregarding the relevant costs in those records when constructing the normal value of biodiesel. Further, the Appellate Body considered that the Panel did not err in rejecting the EU's argument that the second condition in the first sentence of Article 2.2.1.1 includes a general standard of 'reasonableness' with respect to whether the records kept by the exporter or producer 'reasonably reflect the costs associated with the production and sale of the product under consideration'. Accordingly, the Appellate Body upheld the Panel's finding that the EU acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of the product under investigation on the basis of records kept by producers.[4]

With respect to Argentina's claims against the Basic Regulation 'as such', the Appellate Body agreed with the Panel that neither the text of the Basic Regulation, nor other elements cited by Argentina, supported the view that, in applying the second subparagraph of Article 2(5) of the Basic Regulation, EU authorities are to determine that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration when those records reflect prices that are considered to be artificially or abnormally low as a result of distortion.[5] The Appellate Body therefore upheld the Panel's finding that Argentina had not established that the second subparagraph of Article 2 (5) of the Basic Regulation is inconsistent 'as such' with Article 2.2.1.1 of the Anti-Dumping Agreement.[6]

ADA Article 2.2 and GATT Article VI:1(b)(ii) (comparison with the cost of production in the country of origin)

With respect to Argentina's claim against the anti-dumping measure 'as applied', the Appellate Body agreed with the Panel that references to 'the cost of production in the country of origin' do not limit the sources of information or evidence that may be used in establishing the costs of production in the country of origin to sources inside the country of origin.[7] At the same time, the Appellate Body considered that when an investigating authority relies on out-of-country information to determine the 'cost of production in the country of origin', the investigating authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin', and this may require the investigating authority to adapt that information.[8] With respect to the EU's use of a surrogate price for soybeans reflecting the level of international prices, the Appellate Body concluded that the EU authorities specifically selected the surrogate price to remove the perceived distortion in the cost of soybeans in Argentina, and agreed with the Panel that the surrogate price used by the EU authorities did not represent the cost of soybeans in Argentina for producers or exporters of

4 Appellate Body Report, paras. 6.56–6.57; Panel Report, paras. 7.248–7.249.
5 Appellate Body Report, para. 6.198.
6 Appellate Body Report, para. 6.213; Panel Report, para. 7.154.
7 Appellate Body Report, para. 6.74; Panel Report, para. 7.171.
8 Appellate Body Report, para. 6.73.

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biodiesel.[9] Accordingly, the Appellate Body upheld the Panel's finding that the EU acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by not using the cost of production in Argentina when constructing the normal value of biodiesel.[10]

With respect to Argentina's claims against the Basic Regulation 'as such', Argentina argued that the Basic Regulation *requires* WTO-inconsistent action or, alternatively, that even if it does not *require* WTO-inconsistent action, it is nevertheless WTO-inconsistent because it provides for the possibility that such action may be taken.[11] Regarding Argentina's first line of argument, the Appellate Body found that Argentina did not establish that the second subparagraph of Article 2(5) of the Basic Regulation meant that, where the costs of other domestic producers or exporters in the same country cannot be used, the EU authorities are *required* to use information from other representative markets that does not reflect the costs of production in the country of origin.[12] Regarding Argentina's alternative argument, the Appellate Body found that Argentina had not satisfied its burden of proving that the second subparagraph of Article 2(5) of the Basic Regulation restricts, in a material way, the discretion of EU authorities to construct the costs of production in a manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.[13] The Appellate Body therefore upheld the Panel's finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent 'as such' with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

ADA Article 9.3 and GATT Article VI:2 (anti-dumping duty in excess of the margin of dumping)

The Appellate Body agreed with the Panel's understanding that the 'margin of dumping' referred to in Article 9.3 of the Anti-Dumping Agreement relates to a margin that is established in a manner that is *consistent* with the disciplines of Article 2 of the Anti-Dumping Agreement.[14] In this respect, the Appellate Body clarified that the errors under Article 2 that matter for the purposes of Article 9.3 are those that result in a *higher* dumping margin than the one that would have been calculated had the authority acted consistently with Article 2, and that not all breaches of Article 2 will invariably or predictably entail such a result.[15] With specific regard to the EU's anti-dumping measure, the Appellate Body considered that the Panel did not err in its reasoning and concluded that the anti-dumping duty imposed by the EU exceeded what the dumping margins could have been had they been established in accordance with Article 2. Accordingly, the Appellate Body upheld the Panel's finding that the EU had acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[16]

9 Appellate Body Report, para. 6.81; Panel Report, paras. 7.258.
10 Appellate Body Report, para. 6.83; Panel Report, para. 7.260.
11 Appellate Body Report, para. 6.231.
12 Appellate Body Report, para. 6.261.
13 Appellate Body Report, para. 6.281.
14 Appellate Body Report, para. 6.96; Panel Report, para. 7.359.
15 Appellate Body Report, para. 6.104.
16 Appellate Body Report, paras. 6.112–6.113; 7.367.

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ADA Articles 3.1 and 3.4 (evaluation of all relevant economic factors having a bearing on the state of the industry in determination of injury)

In findings that were not appealed, the Panel concluded that Argentina made a *prima facie* case that the EU authorities failed to base their evaluation of production capacity and 'utilization of capacity' on an 'objective examination' of 'positive evidence'. In particular, the Panel raised various concerns with the EU authorities' examination of production capacity that was not available for use (referred to as 'idle capacity') and related data submitted by the EU domestic industry. Accordingly, the Panel found that the EU acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in its examination of the impact of the dumped imports on the domestic industry, insofar as it relates to production capacity and utilization of capacity.[17]

ADA Articles 3.1 and 3.5 (non-attribution to factors other than the dumped imports in determination of injury and causation)

The Appellate Body found that the Panel did not err in interpreting Articles 3.1 and 3.5 of the Anti-Dumping Agreement because, contrary to Argentina's argument, the Panel had not articulated a legal standard whereby it is relevant to examine whether data on production capacity and capacity utilization played a 'significant role' in the EU authorities' conclusions on overcapacity as an 'other factor' causing injury.[18] With regard to the application of Articles 3.1 and 3.5 to the EU anti-dumping measure, the Appellate Body found that the Panel did not err in considering that the EU authorities' non-attribution analysis concerning overcapacity was not 'based on' or 'affected by' certain revised data on production capacity and capacity utilization.[19] Further, the Appellate Body also rejected Argentina's claim that the Panel erred in finding that the EU authorities were not required to give priority to the evolution of the domestic industry's overcapacity in absolute terms as opposed to its evolution in relative terms.[20] Accordingly, the Appellate Body upheld the Panel's finding that the EU authorities' treatment of overcapacity in the non-attribution analysis as an 'other factor' causing injury to the EU domestic industry was not inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.[21]

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17 Panel Report, paras. 7.413 and 7.431.
18 Appellate Body Report, para. 6.133.
19 Appellate Body Report, para. 6.140; Panel Report, para. 7.465.
20 Appellate Body Report, para. 6.145; Panel Report, para. 7.468.
21 Appellate Body Report, para. 6.148; Panel Report, para. 7.472.

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