EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM INDONESIA

(DS480)

RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS TO THIRD PARTIES

April 11, 2017

Question 1. Indonesia contends that the European Union acted inconsistently with Article 2.2.2(iii) of the Anti-Dumping Agreement because the European Union: (i) failed to calculate the profit cap, i.e. "the amount for profit so established shall not exceed 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", and (ii) the European Union's method for determining profit was not reasonable.

a. Is an investigating authority required to calculate a profit cap? Does the word "normally" as it appears in Article 2.2.2(iii) have any bearing on whether an investigating authority is required to calculate a profit cap?

1. The text of Article 2.2.2(iii) does not expressly set out an obligation to determine, calculate, or establish a so-called profit cap. Rather, the text sets out that, in the circumstance in which an investigating authority is determining "the amounts" for profit "on the basis of … any other reasonable method", that amount "*so established* shall not exceed 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." That is, a complaining party may demonstrate a breach of Article 2.2.2(iii) results when the *amount* of profit determined under "any other reasonable method" *exceeds* the amount of normally realized profit according to the criterion set out in that provision.

2. If the information necessary for such calculation exists on the administrative record before the investigating authority, then, we understand that the investigating authority should normally calculate the profit cap under Article 2.2.2(iii) to ensure the limitation on the amount of profit is not exceeded. However, Article 2.2.2 (iii) does not require an investigating authority to calculate the profit cap if no evidence exists to support the presence of such a "cap" in the market. Based on the text of Article 2.2.2(iii), the adverb "normally," by modifying the verb "realized," indicates that the drafters of the profit cap proviso recognized that there may be cases in which *no* profits are realized by other exporters or producers on sales of products of the same general category in the domestic market. The most obvious case is when no such other exporters or producers exist in that domestic market. If the profits exist (i.e., are realized), the proviso operates to establish a cap; but if these profits do not exist (i.e., are not realized), the proviso is not operative because there is no such "profit normally realized."

b. Is a method necessarily not reasonable for purposes of Article 2.2.2(iii) if such a profit cap is not established?

3. No, a method for calculating a profit is not rendered unreasonable simply because the administrative record does not contain sufficient information for determining a profit cap. When an investigating authority cannot calculate an amount for profit based on the preferred method in the main text of Article 2.2.2, alternative (iii) under Article 2.2.2 allows the investigating authority to use "any other reasonable method." Alternative (iii) is subject to the following proviso: "provided that the amount for profit so established shall not exceed 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." As described above, the proviso in alternative (iii) of Article 2.2.2 itself conceives of circumstances in which there will be no basis to calculate the

cap. The proviso is linked to "the profit *normally* realized" by other producers or exporters, which recognizes that profits may vary. Where there are no producers or exporters making sales of products of the same general category in the domestic market, there is no basis to calculate a cap based on "profit normally realized."[1] The investigating authority must, in that circumstance, still make its determination of the amounts "on the basis of" a "reasonable method".

4. The term "reasonable" means "[i]n accordance with reason; not irrational or absurd."[2] In the context of Article 2.2.2, whether a methodology is reasonable must be determined in light of the aim of that article, i.e., to approximate the profit from the sales of the like product in the domestic market. The "any other reasonable method" alternative thus permits the investigating authority to calculate profit using a wide range of methods as well as profit sources without explicitly limiting the choice for profit to sales of a particular product, or to a particular industry or market, so long as the methodology is reasonable in light of specific evidence in the record of the relevant investigation.

c. Who bears the burden of proof to establish that there is a profit cap when applying Article 2.2.2(iii)? Is an investigating authority required to provide details on whether a chosen amount for profits does not exceed the profit cap? Is an investigating authority required to collect information needed to determine whether there are sales of "products of the same general category in the domestic market" to establish such a cap? What if it is not possible to establish a profit cap based on evidence before it?

5. An investigating authority has the obligation to seek out the information necessary to its determinations. But the burden lies with interested parties to provide the investigating authority with the evidence necessary to make such determinations, including in this case information about the product, the industry, and the profits normally realized by the exporters and producers in the exporting country. As described above, the investigating authority should calculate the profit cap under Article 2.2.2(iii) of the Antidumping Agreement, if the information necessary for such calculation exists on the administrative record before the investigating authority. Where there are no producers or exporters making sales of products of the same general category in the domestic market – or where no such evidence has been provided by interested parties – there is no basis to calculate a cap based on "profit normally realized." In such a case, the investigating authority must make its determination of the profit amounts "on the basis of" a "reasonable method". In the context of WTO dispute settlement, a complaining party seeking to make out a breach of Article 2.2.2(iii) on the basis of the profit cap criterion must bring forward evidence that "the amounts" for profit determined by the investigating authority under "any other

[1] An argument that the absence of data to calculate a profit cap means no alternative method may be used at all is also contrary to the plain language of Article 2.2.2, which provides that an investigating authority "may" use one of the three alternative methods listed in subparagraphs (i) through (iii) as "the basis of" determining the amounts for costs and profit. *Cf. US – Upland Cotton (Panel)*, para. 7.1377. The word "may" should be given meaning and read so as to allow an investigating authority to use a reasonable method when data needed to calculate CV profit under the preferred method, alternative (i), or alternative (ii), or data needed to calculate the profit cap under alternative (iii), are unavailable. *Cf. US – Upland Cotton (Panel)*, para 7.1388.

[2] *New Shorter Oxford English Dictionary*, Volume 2, p. 2496.

reasonable method" exceeds "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."

d. Was the EU authorities' approach, which considered evidence about profits from a previous investigation, and tested that amount against country-specific benchmarks a reasonable approach?

6. The Panel should examine the facts and circumstances of this case and determine whether the methodology used by the European Union's investigating authority is a "reasonable method," *i.e.*, in accordance with reason; not irrational or absurd. As we explained in our third participant submission, the United States considers the European Union's methodological approach of using a profit margin from a prior investigation of biodiesel (*i.e.*, substantially the same product, albeit from a different country) and testing it against several benchmarks to be reasonable.[3]

Question 3. The Appellate Body Report in *China – HP-SSST*, at para. 5.159, states that "a proper reading of 'price undercutting' under Article 3.2 suggests that the inquiry requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation (POI)." As the Appellate Body explained, this includes assessing whether import and domestic prices are moving in the same or contrary directions, and whether there has been a sudden and substantial increase in the domestic prices. We are interested in your understanding of the "dynamic assessment of price developments and trends" in the relationship between the prices of the imported and domestic products, as discussed in the Appellate Body Report in *China – HP-SSST*. We would also welcome your views in relation to the application of that notion in the case at issue.

7. Article 3.1 of the Antidumping Agreement provides that a determination of injury "shall be based on positive evidence and involve an objective examination of," *inter alia*, "the effect of dumped imports on prices in the domestic market for like products." In turn, the second sentence of Article 3.2 provides specific considerations related to price effects, including the examination of "whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member." In order to examine whether price undercutting has an effect on price, the examination would normally encompass price comparisons over the period of investigation.[4] As the Appellate Body found in *China – GOES*, "an investigating authority is required to consider the relationship between subject imports and prices of like domestic products, so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices."[5]

[3] US Third Participant Submission, at para. 16.

[4] *See China – GOES (Panel)*, para. 7.528 ("{T}he determination of a single price point intended to represent prices throughout the course of an entire year does not provide a sufficiently precise basis, in our view, for comparing prices. Given the possibility of prices varying over time, an objective and impartial investigating authority would rather conduct contemporaneous price comparisons, or at least comparisons during a relatively short period of time.").

[5] *China – GOES (AB)*, para. 154.

8. In some investigations, undercutting trends may be significant; in other investigations, the sheer number of comparisons in which undercutting is present may be probative.[6] With regard to the overall examination of the effects of dumped imports for the purposes of examining whether there has been price depression or suppression, and the role of any price undercutting in depressing or suppressing domestic prices, this examination should encompass a "dynamic assessment of price developments and trends."[7] In performing such an assessment, an investigating authority may ascertain whether subject imports depressed or suppressed domestic like product prices to a significant degree, or whether subject import underselling led to a shift in market share from the domestic industry to subject imports. Factors other than underselling – for example, the existence of a "cost-price squeeze"[8] or evidence from purchasers confirming declines or foregone increases in prices offered by domestic producers in response to subject import competition – may also be used to demonstrate that subject imports significantly depressed or suppressed prices of the domestic like product.

Question 4. What is meant by the term "provisionally estimated margin of dumping" in Article 7.2? In addressing this question, please consider the following:

a. Is there a distinction between inaccuracies in the calculation of a provisional estimate that arise from demonstrated errors of a clerical nature versus inaccuracies in the calculation of a provisional estimate that arise from incomplete or unverified information on the record? Please explain.

b. Is there an obligation under the Anti-Dumping Agreement or the GATT 1994 not to definitively collect provisional security, in whole or in part, in cases where errors made in calculating the provisional duty rate result in the imposition of a provisional measure in excess of the amount that should otherwise have been collected?

c. The European Union argues at paragraph 129 of its first written submission that findings in the Definitive Regulation replace findings in the Provisional Regulation, which means that findings in the Provisional Regulation no longer exist. To the extent that the determination in the Definitive Regulation orders the definitive collection of provisional duties, may Indonesia challenge the decision to definitively collect provisional duties that it considers to be in excess

[6] In cases involving multiple sales of subject imports and the domestic like product, a single underselling margin covering the entire period of investigation would normally shed little light on the question of whether subject imports contributed to adverse price or market share trends experienced by the domestic industry during the period. There could, however, be an exception to this general rule in unusual circumstances; for example, if the investigated product is a specialized very high value product and there have been no more than a few sales or offers to sell such imported products during the entire period of investigation.

[7] *China – HP-SSST (AB)*, para. 5.159.

[8] A "cost-price squeeze" could be demonstrated where, due to subject import pricing, producers are unable to raise prices sufficiently to cover rising costs. *See, e.g., US – Tyres (China)* (AB), paras. 242-245 (upholding authority's assessment of "cost-price squeeze" in safeguards case under protocol of accession); *China – GOES (Panel)*, para. 7.546 (upholding authority's reliance on changes in the price-cost ratio to find price suppression).

of the provisional margin of dumping under Article 7 or Article 9 of the Anti-Dumping Agreement?

9. Article 7.2 of the Antidumping Agreement provides that "[p]rovisional measures may take the form of a provisional duty… being not greater than the provisionally estimated margin of dumping." The term "provisionally estimated margin of dumping" in Article 7.2 is not expressly defined nor is the method for performing such estimation prescribed. The term "provisional" means "of the nature of a temporary provision or arrangement; provided or adopted for present needs or temporarily; supplying the place of something regular, permanent, final, or better; tentative."[9] The United States therefore generally understands the term "provisionally estimated margin of dumping" in Article 7.2 to refer to the "margin of dumping" provisionally estimated as part of the preliminary affirmative determination of dumping and consequent injury to a domestic industry, as referenced in Article 7.1(ii) of the Antidumping Agreement.

10. The United States agrees with the observations of the European Union that the term "provisionally estimated" as used in Article 7.2 connotes an approximate magnitude that is temporary, not yet final and for which some imprecision is to be expected.[10] The text of Article 7.1 states that provisional measures may be applied if an investigation has been initiated and interested parties have been given opportunities to provide information and comments, and if a preliminary – but not final – determination has been made of dumping and consequent injury. Article 7.4 also indicates that provisional measures will be applied on a temporary basis, requiring that such measures "shall be limited to as short a period as possible."

11. However, Article 7.5 goes on to require that the duty comply with the relevant provisions of Article 9 of the Antidumping Agreement, which in turn requires, in Article 9.3, that the amount of the duty "shall not exceed the margin of dumping as established in Article 2." Therefore, although provisionally estimated, any duties applied during the provisional period must nonetheless conform to Article 2. Where the provisional duty applied is higher than it might have been due to an error, but is still lower than the definitive duty calculated according to Article 2, it would not be appropriate for the provisional duty to be reduced where doing so would lead to a re-estimated provisional duty that is not consistent with the final margin of dumping calculated under Article 2 and Article 9. The nature of the error – whether clerical or arising from incomplete or unverified information on the record – similarly would not appear material to an assessment of the accuracy of the estimate pursuant to Article 2.

12. This is consistent with Article 10, which provides further guidance regarding the anticipated difference between the amounts "provisionally estimated" and those based on a final, definitive dumping determination. Specifically, Article 10.3 provides that if the definitive duty is higher than the provisional duty, the difference "shall not be collected"; and if the definitive duty is lower than the provision duty, "the duty shall be reimbursed or the duty recalculated, as the case may be." That is, a provisional duty shall only be reimbursed or recalculated where it exceeds the definitive anti-dumping duty. Where the provisional duty is higher than it might

[9] *New Shorter Oxford English Dictionary*, Volume 2, p. 2394.
[10] EU's First Written Submission, paras. 131-143.

have been, but lower than the final duty, no reimbursement or recalculation would be required or warranted.

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