EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM INDONESIA

(DS480)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

April 18, 2017

EXECUTIVE SUMMARY OF U.S. THIRD PARTY WRITTEN SUBMISSION

I. INDONESIA'S CLAIMS REGARDING ARTICLES 2.2.1.1 AND 2.2 OF THE AD AGREEMENT

1. Indonesia's claims under Article 2.2.1.1 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994 – related to the determination of the European Union to reject reported costs of crude palm oil (CPO) by Indonesian exporting producers of biodiesel – rely heavily upon the recent findings of the Appellate Body in *EU – Biodiesel*. Indonesia contends that the substance of its claims are "indistinguishable from the European Union's decision to disregard Argentine exporting producers' recorded costs of soybeans found by the Panel and the Appellate Body to be in violation of Article 2.2.1.1 of the Anti-Dumping Agreement in *EU – Biodiesel*." Accordingly, "Indonesia… submits that given the identical fact pattern and decisions made by the European Union, this claim warrants the same finding of inconsistency with the [AD] Agreement."

2. The European Union does not appear to contest Indonesia's characterization of the facts. Nor does the EU present a rebuttal to Indonesia's substantive legal arguments.

3. Although the substantive issues do not appear to be contested, the United States notes that Article 11 of the DSU nonetheless requires the Panel to make an objective assessment of the matter before it, including an objective assessment of the facts, and an objective assessment of the applicability of and conformity of those facts with the relevant covered agreements. Indeed, panels consistently have made their own objective assessments in situations involving uncontested claims. For example, in *US – Zeroing (Korea)*, the Panel concluded that, notwithstanding uncontested claims, it was nevertheless obliged to "reach our own conclusion on the matter before us, in accordance with Article 11 of the DSU."

4. Accordingly, and given that the EU has not presented a rebuttal to Indonesia's substantive arguments, in this dispute the Panel should make an objective assessment of whether Indonesia has made a *prima facie* case that the EU measure breaches the EU's obligations under Article 2.2.1.1 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994.

5. Indonesia likewise relies upon the Appellate Body's recent findings in *EU – Biodiesel* to support its claim that the European Union acted inconsistently with Article 2.2 of the AD Agreement when it replaced the reported costs of CPO by Indonesian exporting producers of biodiesel with the reference export price. Indonesia specifically alleges that "the substance of the present claim, similar to its claim under Article 2.2.1.1 of the Anti-Dumping Agreement, is based on a set of circumstances essentially identical to the factual circumstances of Argentina's claim under Article 2.2 of the Anti-Dumping Agreement with respect to the European Union's decision to substitute the cost of soybeans in the records of the Argentine exporting producers by an average of the FOB reference price."

6. In these circumstances as well, the European Union does not appear to dispute the relevant facts, nor does the EU present a rebuttal to Indonesia's substantive legal arguments. As noted above, in these circumstances the Panel should make an objective assessment of whether Indonesia has made a *prima facie* case. This should entail an objective assessment of the facts,

as well as an objective assessment of the applicability of and conformity of those facts with the relevant covered agreements.

II. INDONESIA'S CLAIMS REGARDING PROFIT UNDER ARTICLES 2.2 AND 2.2.2(III) OF THE AD AGREEMENT

7. The United States would like to offer the following observations with respect to Indonesia's claims under Articles 2.2 and 2.2.2(iii) of the AD Agreement. Indonesia contends that the European Union acted inconsistently with Article 2.2.2(iii) of the AD Agreement because (1) the European Union's method for determining profit in the investigation was unreasonable, and (2) the European Union failed to calculate a profit cap.

8. First, with respect to the issue of whether the methodology for determining the constructed value (CV) profit is consistent with Article 2.2.2(iii) of the AD Agreement, the United States agrees with the European Union that Article 2.2.2(iii) does not prescribe a particular methodology and that the methodology used by the investigating authority must be reasonable.

9. Article 2.2.2 provides four methodologies for the calculation of CV profit – one preferred method and three alternative methods. It states that, "[f]or the purpose of paragraph 2, the amounts [to construct value] . . . shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation" (referred to below as the "preferred method").

10. Article 2.2.2 establishes no hierarchy among the three alternative methodologies. Therefore, if the preferred method is not available, the investigating authority may determine which of these alternatives is appropriate in a given investigation.

11. The introductory clause of Article 2.2.2 – "[f]or the purpose of paragraph 2" – indicates that the calculation of CV profit relates to the obligations established by Article 2.2. In this way, each of the methodologies is intended to create a reasonable proxy for the profit amount from the sales of the like product in the ordinary course of trade in the domestic market.

12. The preferred method and alternatives (i) and (ii) specify the source of the data that can be used to calculate the profit amount for each method. That is, the preferred method requires the use of actual amounts pertaining to production and sales in the ordinary course of trade *of the like product by the exporter or producer under investigation*. Alternative (i) permits the authority to calculate profit based on actual amounts in respect of production and sales *of the same general category of products in the domestic market*. Alternative (ii) permits the authority to average the actual amounts of *other* exporters or producers *of the like product in the domestic market*. In contrast, alternative (iii) does not specify the source of the data that may be used. Instead, alternative (iii) allows the authority to calculate profit amounts based on "any other reasonable method."

13. 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 so long as the selected methodology is reasonable in light of evidence in the record of the relevant investigation.

14. Accordingly, 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. In the United States' view, 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 is reasonable.

15. Second, with respect to the issue of profit cap, the United States observes that both Indonesia and the European Union appear to accept the common sense proposition that an investigating authority is not required to calculate the profit cap when necessary information for calculating the profit cap is unavailable. For example, Indonesia contends that "the European Commission at no point alleged that such a cap was established; that it attempted to establish this cap; or *that it was impossible to establish such a cap*." In turn, the European Union contends that "none of the sampled Indonesian companies had sales in the ordinary course of trade of the same general category of products," that "all sampled companies did not have domestic sales in the ordinary course of trade of the same general category of products," and, therefore, "no 'cap' could be established."

16. The United States likewise considers that there cannot be an obligation on an investigating authority to calculate the profit cap when the necessary information for such calculation does not exist. The United States recalls that the so-called profit cap represents "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." The word "normally" means "in a regular manner; . . . under normal or ordinary conditions; as a rule, ordinarily [; or] . . . in a normal manner, in the usual way." By linking the profit cap to "profit normally realized," Article 2.2.2(iii) foresees situations when there may be no information about the profits in question, because there are no other exporters or producers of sales of products of the same general category in the domestic market, or because this information simply does not appear in the record of the proceeding. Article 2.2.2(iii) thus should be applied as the word "normally" suggests: If information exists to calculate the profit cap, the proviso is operative. If such a calculation is not possible because information does not exist, then the proviso is not operative. In either case, an investigating authority remains bound under Article 2.2 to calculate "a reasonable amount . . . for profits."

17. Indonesia further contends that "*the same general category of products*" was construed too narrowly by the European Union's investigating authority and that it should include "oleochemicals" and not only "any other fuel." The European Union argues that "Indonesia does not meet its burden of proof, failing to explain why other oleochemicals, irrespective of their end uses and the specific markets, may nevertheless constitute the same category of products with biofuels within the meaning of Article 2.2.2 (iii)." The European Union contends that "the 'same general category' of products with biodiesel are other fuels and not any oleochemicals, irrespective of their end uses, which may constitute a different market and have a different profit margin."

18. In the United States' view, Article 2.2.2 does not limit the application of "any other reasonable method" to data from any particular market (*i.e.*, a particular country), but the constructive normal value must be representative of the price of the like product (here, biodiesel). In this regard, when an investigating authority constructs normal value, it is required by Article 2.2 to include "a reasonable amount for . . . profits." The panel in *Thailand – H-Beams* understood that, under Article 2.2.2(i), "[t]he broader the [same general] category [of products], the more products other than the like product will be included, and thus in our view the more potential there will be for the constructed normal value to be unrepresentative of the price of the like product." The European Union's finding that biodiesel is within the same general category with any other fuel, but not with non-fuel chemicals, does not appear to be unreasonable in light of the facts before the investigating authority, especially given the European Union's finding that non-fuel products may be sold in different markets from biodiesel and other fuels and have a different profit margin. From this perspective, then, the European Union's definition of the "same general category of products" was reasonable and produced a more accurate proxy for profit than the Indonesian respondents' more expansive definition, which included highly dissimilar products.

19. Indonesia also contends that the European Union breached Articles 2.2 and 2.2.2(iii) of the AD Agreement by failing to provide an explanation in its determination as to why it had not established a cap, and, accordingly, that any arguments now advanced by the European Union would be "irrelevant" because they would be "*post factum*."

20. As discussed above, Article 2.2.1(iii) sets out substantive obligations regarding the calculation of profit. In contrast, a different AD Agreement provision – namely, Article 12 – sets out the obligations pertaining to the explanation of determinations. For example, under Article 12.2, authorities must make available "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." And under Article 12.2.1(iii), the authorities must provide "a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2 . . . ." In the view of the United States, Indonesia's allegations regarding the adequacy of the European Union's explanation should have been lodged pursuant to the AD Agreement provision addressed to this issue, namely, Article 12.2.1(iii). Indonesia, however, chose not to present any claims under Article 12. Accordingly, Indonesia's claims about the adequacy of the European Union's explanation appear to be outside the terms of reference of the dispute.

21. Indonesia also errs in contending that any explanation provided in these proceedings is irrelevant for purposes of the Panel's assessment of the European Union's compliance with Article 2. The inquiries into whether an investigating authority has complied with Article 2 and Article 12 are separate. Failure to comply with Article 12 (which, as noted, is not an issue within the scope of this proceeding) does not *ipso facto* mean that an investigating authority has failed to comply with other provisions of the AD Agreement.

III. INDONESIA'S CLAIMS REGARDING ARTICLES 7.1 AND 7.2 OF THE AD AGREEMENT

22. With respect to Indonesia's claims under Articles 7.1 and 7.2 of the AD Agreement concerning provisional measures, the United States takes no position concerning the specific errors in the Provisional Regulation alleged by Indonesia.

23. The United States would note, however that the relevant text of Article 7.2 of the AD Agreement, which also informs the interpretation of Article 7.1, states as follows: "Provisional measures may take the form of a provision duty or, preferably, a security – by cash deposit or bond – equal to the amount of the anti-dumping duty *provisionally estimated*, being not greater than the *provisionally estimated* margin of dumping." As posited by the European Union, the term "provisionally estimated" connotes an approximate magnitude for which some imprecision is to be expected. In this regard, the panel in *Canada – Welded Pipe* found that the concept of a "provisional estimate" reflects the fact that "the provisional determination may be based on data that is incomplete, or that the investigating authority has not yet satisfied itself is accurate." Accordingly, a proper interpretation of Articles 7.1 and 7.2 of the AD Agreement should give appropriate meaning to the term "provisionally estimated."

EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

Question 3 regarding Article 3.2 of the AD Agreement

24. Article 3.1 of the AD 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. 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."

25. In some investigations, undercutting trends may be significant; in other investigations, the sheer number of comparisons in which undercutting is present may be probative. 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." 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" 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 Regarding Article 7.2 of the AD Agreement

26. Article 7.2 of the AD 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." 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 AD Agreement.

27. 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. 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."

28. However, Article 7.5 goes on to require that the duty comply with the relevant provisions of Article 9 of the AD 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.

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