EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM INDONESIA

(DS480)

THIRD PARTY SUBMISSION OF
THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The United States welcomes the opportunity to present its views in this proceeding. In this submission, the United States will address the proper legal interpretation and application of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement"), the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").

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

A. Calculation of the Costs of Production Under Article 2.2.1.1 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994

2. 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 -- relies heavily upon the recent findings of the Appellate Body in *EU – Biodiesel*.[1] 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*."[2] 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."[3]

3. The European Union does not appear to contest Indonesia's characterization of the facts.[4] Nor does the EU present a rebuttal to the Indonesia's substantive legal arguments.

4. 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.[5] 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."[6]

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[1] Indonesia's First Written Submission, paras. 45-46, 91-95.
[2] Indonesia's First Written Submission, para. 45. *See also* Indonesia's First Written, para. 94 ("Indonesia notes that the facts of this case are identical to the circumstances in *EU – Biodiesel*.")
[3] Indonesia's First Written Submission, para. 45.
[4] EU's First Written Submission, para. 6 ("The European Union takes note of the factual description by Indonesia.")
[5] The United States does not agree with the positions advanced by Argentina in *EU – Biodiesel* with respect to Article 2.2.1.1 of the Anti-Dumping Agreement. *See* Executive Summary of the U.S. Third Party Submission, *EU – Biodiesel (Panel)*, at Annex D-10, paras. 3-16; Executive Summary of the U.S. Third Participant Submission, *EU – Biodiesel (AB)*, at Annex C-11, para. 2.
[6] *US – Zeroing (Korea)*, para. 7.16. *See also US – Shrimp (Ecuador)*, para. 7.3; *US – Shrimp (Thailand)*, para. 7.19, and *US Anti-Dumping Measures on PET Bags*, para. 7.5.

5. 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.

B. Construction of Normal Value on the Basis of the Cost of Production in the Country of Origin Under Article 2.2 of the AD Agreement and Article VI:1(b)(ii) of the GATT 1994

6. 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.[7] 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."[8]

7. In these circumstances as well, the European Union does not appear to dispute the relevant facts,[9] 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.[10]

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

A. Substantive Claims

8. The United States would like to offer the following observations with respect to Indonesia's claim under Articles 2.2 and 2.2.2(iii) of the AD Agreement.[11] 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) that the European Union failed to calculate the profit cap.[12]

9. First, with respect to the issue of whether the methodology for determining the constructed value profit is consistent with Article 2.2.2(iii) of the AD Agreement, the United

[7] Indonesia's First Written Submission, paras. 99-100.
[8] Indonesia's First Written Submission, para. 100.
[9] EU's First Written Submission, para. 14.
[10] The United States notes that it does not agree with the positions advanced by Argentina in *EU – Biodiesel* with respect to Article 2.2 of the Anti-Dumping Agreement. *See* Executive Summary of the U.S. Third Participant Submission, *EU – Biodiesel (AB)*, at Annex C-11, para. 3.
[11] Indonesia's First Written Submission, para. 145.
[12] *See, e.g.*, Indonesia's First Written Submission, para. 118.

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.

10. Article 2.2.2 provides four methodologies for the calculation of constructed value (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"). Article 2.2.2 further provides that, if the amount for certain costs and profit "cannot be determined on that basis, the amounts may be determined on the basis of:

> (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
>
> (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (iii) any other reasonable method, 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.

11. Article 2.2.2 establishes no hierarchy among the three alternative methodologies.[13] Therefore, if the preferred method is not available, the investigating authority may determine which of these alternatives is appropriate in a given investigation.

12. 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.[14] 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.

13. 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*.

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[13] *EC – Bed Linen (Panel)*, para. 6.62 (The order in which the three above options are set out "is without any hierarchical significance").

[14] *See EU – Biodiesel (Panel)*, para. 7.226 (finding with respect to Article 2.2.1.1 that the "opening phrase '[f]or the purpose of paragraph 2' makes clear that Article 2.2.1.1 elaborates on how the 'cost of production in the country of origin' in Article 2.2 is to be determined in constructing the normal value).

14. 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."

15. 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.

16. 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.

17. Second, with respect to the issue of profit cap, the United States observes that both Indonesia and the European Union appear to accept a 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*."[15] 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,"[16] that "all sampled companies did not have domestic sales in the ordinary course of trade of the same general category of products,"[17] and, "therefore, "no 'cap' could be established."[18]

18. 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."[19] 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."[20] 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

[15] Indonesia's First Written Submission, para. 130 (emphasis added).
[16] EU's First Written Submission, para. 39. We understand that the European Union contends that the sampled companies accounted for virtually all of the exports (approximately 99%).
[17] EU's First Written Submission, para. 50.
[18] EU's First Written Submission, para. 50.
[19] AD Agreement, Art. 2.2.2 (iii) (emphasis added).
[20] *The New Shorter Oxford English Dictionary*, Volume 2, p. 1940 (1993) (Exhibit USA-1).

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."

19. 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."[21] 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)."[22] 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."[23]

20. 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.[24]

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.[25] 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.

B. Procedural Claims

21. 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

[21] Indonesia's First Written Submission, para. 132.
[22] EU's First Written Submission, para. 47.
[23] EU's First Written Submission, para. 48.
[24] *Thailand – H-Beams (Panel)*, para. 7.115.
[25] EU's First Written Submission, para. 48.

established a cap, and, accordingly, that any arguments now advanced by the European Union would be "irrelevant" because they would be "*post factum*."[26]

22. 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.

23. 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.

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

24. 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.

25. 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."[27] As posited by the European Union, the term "provisionally estimated" connotes an approximate magnitude for which some imprecision is to be expected.[28] 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."[29] Accordingly, a proper interpretation of Articles 7.1 and 7.2 of the AD Agreement should give appropriate meaning to the term "provisionally estimated."

[26] Indonesia First Written Submission, para. 150.
[27] Emphasis supplied.
[28] EU's First Written Submission, paras. 131-143.
[29] *Canada – Welded Pipe (Panel)*, para. 7.64.

V. CONCLUSION

26. The United States believes that the proper interpretation and application of the provisions of the WTO Agreement discussed above have important systemic implications. We again express our appreciation for this opportunity to present our views.