

***EUROPEAN UNION – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN
FATTY ALCOHOLS FROM INDONESIA***

(AB-2017-1 / DS442)

**THIRD PARTICIPANT CLOSING STATEMENT OF
THE UNITED STATES OF AMERICA**

June 20, 2017

Mr. Chairman, members of the Division:

1. As a final point, we would like to draw attention to some of the hazards raised by the EU's attempt to expand the scope of appellate review to encompass various procedural aspects of panel proceedings. For example, as was discussed at length during the hearing, the EU has attempted to transform an administrative email into an uncontested fact, contrary to the text of the DSU.

2. Another example can be found in the laundry list of claims raised by the EU with respect to the bracketing of business confidential information (BCI) in the panel report.¹ In particular, the EU has included a claim under DSU Article 12.7, which sets forth the information that the panel is required to include in its report. The EU's inclusion of this claim appears to the United States to be hyper-litigious and deleterious to the dispute settlement system.

3. Article 12.7 should not be the basis for claims of legal error on appeal. Inventing a claim of error under Article 12.7 would invite WTO Members to request the Appellate Body to second guess not only every decision by a panel with respect to the bracketing of BCI, but also potentially with respect to which facts and arguments raised by the parties are included or omitted from a panel's report. Such claims would increase the size and complexity of appellate proceedings and further exacerbate the heavy work load and delay Members are experiencing before the Appellate Body.

¹ See EU's Other Appellant Submission, para. 182.

4. If a fact is so relevant that its bracketing or omission has a material effect on whether the panel adequately conveyed the “basic rationale” of its findings and recommendations, then the bracketing or omission of that fact should undermine some legal conclusion drawn by the panel. In such a case, the appropriate action would be to bring a claim on appeal with respect to the substantive provision at issue, not Article 12.7.

5. We thank the Division for its attention to both this and the other matters discussed during the course of this hearing.