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

(DS442)

EXECUTIVE SUMMARY OF THE THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

March 3, 2017

I. ARTICLE 2.4 OF THE AD AGREEMENT[1]

1. Indonesia argues that the Panel applied an incorrect legal interpretation of Article 2.4 in determining that the authorities' deduction to the export price for a commission paid to a trader was not improper. Indonesia claims the Panel erred in finding that a determination of whether the producer and trader formed part of a single economic entity ("SEE") was not dispositive.

2. The essential requirement for any adjustment under Article 2.4 is that the relevant factor must affect price comparability. The United States agrees with the Panel that whether an entity constitutes an SEE would not be dispositive of the need for adjustments under Article 2.4, and that depending on the underlying facts, transactions between affiliated entities may impact price comparability.

II. ARTICLE 17.6 OF THE AD AGREEMENT AND DSU ARTICLE 11

3. Indonesia claims the Panel failed to engage in an objective assessment, as required by Article 11, because it concluded that the authorities did not act inconsistently with Article 2.4 of the AD Agreement *before* addressing Indonesia's arguments and evidence. The United States does not view a panel's task to be resolving claims independent of the specific arguments that are raised by the parties. However, not every error rises to the level of a breach of Article 11. In this case, the Panel did address Indonesia's arguments later in its report. The United States also notes that a panel has no obligation to address in its report all arguments and evidence raised by a party.

III. THE CONTESTED MEASURE'S ALLEGED EXPIRY

4. The EU argues that the Panel erred in making recommendations and that Indonesia's appeal should be dismissed because the contested measure expired before the Panel's report was circulated. However, this alleged expiry is not a fact found by the Panel, and the Appellate Body may not consider new facts on appeal. Therefore, the EU's appeal must be rejected.

5. The Appellate Body and panels have consistently refused to consider new evidence submitted during interim review. Since the EU submitted evidence of the expiry after the Panel concluded its interim review, the Panel appropriately did not consider it. The Appellate Body also may not consider it, since DSU Article 17.6 limits the scope of Appellate Body review to legal matters developed by the panel. Nothing in the DSU suggests that the Appellate Body or the Director-General could modify the record of the Panel's proceedings to add the evidence of expiry.

6. The evidence of expiry was also irrelevant. Panels are tasked with determining whether the measures at issue are consistent with the relevant obligations at the time of establishment of the Panel. The alleged expiry of the EU measure just before circulation of the panel report is not relevant to the legal situation as of the date of the Panel's establishment.

[1] This executive summary contains a total of 1230 words (including footnotes), and the U.S. third participant submission contains 13241 words (including footnotes).

7. Based on the foregoing, the Appellate Body's analysis of the EU's appeal should end there.

8. To the extent the Appellate Body considers the EU's substantive arguments, the United States considers the Panel's making of recommendations on the contested measure to be consistent with the requirements of the DSU. Pursuant to Articles 7.1 and 6.2, it is the challenged measures, as they existed at the time of the panel's establishment, that are within the panel's terms of reference and on which the panel should make findings. Pursuant to Article 19.1, a panel *must* make a recommendation where it has found a measure within its terms of reference to be inconsistent with the relevant Member's obligations. The expiry of the measure does not change this.

9. Other panels and the Appellate Body have reached similar conclusions. Statements by the Appellate Body suggesting that a recommendation may not be required, for example in *US – Certain EC Products*, were made in *obiter dicta*. That Appellate Body report does not examine the text of DSU Article 19.1 nor seek to reconcile its *obiter dicta* with the clear meaning of that text.

10. Defining the scope of a dispute based on the measures at the time of panel establishment benefits parties by balancing the interests of complainants and respondents, and by preventing Members from avoiding compliance by withdrawing, then re-imposing, offending measures.

11. The United States also views the EU's request that Indonesia's appeal be dismissed to be inappropriate and without legal authority. The Appellate Body is charged by the DSU to address the issues raised by the parties and to recommend that an offending Member bring any WTO-inconsistent measure, as it existed at the time of panel establishment, into conformity. This duty is not affected by expiry of the measure.

IV. ARTICLE 12.12 OF THE DSU

12. The EU appeals the Panel's finding that the DSB authority for the panel proceedings had not lapsed under Article 12.12.

13. The United States submits that the circumstance in Article 12.12 arises only when there is a panel to which the complaining party may direct its "request," and only if the panel has decided to exercise its discretion to accede to that request. Neither can occur before a panel has been composed. Further, the "work" of the panel refers to the examination by the panel, once composed, of the matter referred to it. Therefore, Indonesia's request *to the Secretariat* to suspend a meeting *to compose* the panel would not constitute a request *to the panel* that it "suspend its *work*." The United States also considers that the proper interpretation and application of Article 12.12 lead to a desirable policy outcome.

V. ARTICLE 6.7 OF THE AD AGREEMENT

14. The EU argues that the Panel's interpretation of Article 6.7 requires, in practice, a description of the investigation process.

15. The United States considers that, at a minimum, Article 6.7 requires that the authority's verification report include discussion of information that was verified, not verified, or corrected with respect to essential facts referenced in Article 6.9. For example, the term "essential facts" relates necessarily to the determination of normal value and export prices, *as well as* to the data underlying those determinations. Accordingly, information verified or corrected at verification relating to these "essential facts" must be disclosed. On the other hand, trivial or immaterial aspects of the verification need not be disclosed.

VI. BUSINESS CONFIDENTIAL INFORMATION ("BCI")

16. The EU argues that the Panel's handling of BCI was inconsistent with DSU Articles 12.1 and 12.7 and the Panel's Additional Working Procedures.

17. The United States considers that Article 12.1 does not provide an adequate legal basis for the EU's claim. Even if the Panel's bracketing could be considered contrary to DSU Appendix 3 or the Additional Working Procedures, there is no basis to say that the Panel's decision to do "otherwise" after consulting the parties is inconsistent with the requirements of Article 12.1. The United States also considers that Article 12.7 does not require a panel to disclose all factual findings in its report. In determining whether the Panel complied with Article 12.7, there must be consideration of the degree to which a bracketed fact is material to the "basic rationale behind any findings and recommendations."