EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

(DS473 / AB-2016-4)

Third Participant Oral Statement of the United States of America

July 21, 2016

I. INTRODUCTION

1. Good morning Mr. Chairman, members of the division.

2. Today, we will provide additional comments on the application of Article 2.2.1.1 and Article 2.2 of the AD Agreement.

II. ARTICLE 2.2.1.1 OF THE AD AGREEMENT

3. As explained in our written submission, the Panel's reading of the phrase "reasonably reflect costs associated with the production and sale of the product under consideration" amounts to a fundamentally incorrect interpretation of the AD Agreement. The proposition that this phrase is limited to an examination of the accurate recordation of actual costs is not supported by the text of the Agreement. Article 2.2.1.1 uses the term "associated with," and does not contain the word "actual." In addition, the AD Agreement contains other provisions addressed to the accurate recordation of actual costs, and this context undermines the proposition that the second condition in Article 2.2.1.1 is limited to this same issue.

4. As the United States has noted, it is neither possible, nor appropriate, for this proceeding to examine all possible factual scenarios in which an authority might decide that recorded costs do not "reasonably reflect the costs associated with the production and sale of the product under consideration." Rather, that question in the first instance is presented to authorities. Where an authority determines to reject or adjust recorded costs under this provision, the issue to be addressed in WTO dispute settlement is whether the authority's decision was based on a reasoned and adequate explanation. In each case, this will involve a fact-based review of the administrative record.

5. Although development of a general rule on all possible explanations that may or may not support the rejection or adjustment of recorded costs is not possible, the United States has the following observations on the EU measure at issue in this dispute.

6. First, the United States does not take the position that Article 2.2.1.1 should be construed to mean that recorded costs may be rejected whenever they are lower than prices on the world market. Indeed, as the parties have noted, the constructed value should be based on the costs of production in the country of origin.

7. Second, as the United States understands the EU measure, the EU likewise did not reject recorded costs of Argentina soy simply because these costs were lower than world market prices. Rather, the decision of the EU authority was based on the specific facts involving a differential export tax scheme and the distortions caused by that specific scheme. In particular, the authority found a direct connection between the level of the differential export tax and the reduction in Argentina's domestic price as compared to what that price would have been absent the Argentine measure.

8. Third, the tax scheme at issue here both depressed domestic prices, and had a discriminatory effect because this same artificial reduction in cost was not available to foreign producers. Or put another way, because the tax applied only to soy used by foreign biodiesel producers, the tax provided an artificial advantage to Argentine producers.

9. Fourth, Argentina, the EU, certain third parties, and the Panel all agree that recorded costs may be rejected where the costs are artificial transfer prices between related entities. The United States likewise agrees. Thus, in a situation where an integrated producer decides to promote the interests of its biodiesel production affiliate by charging an artificially low price for soy, an authority may adjust the transfer price of soy to reflect the real costs of soy in the

domestic market. The situation created by Argentina's tax scheme is comparable. As noted, the EU authority found that Argentina's tax scheme directly caused a reduction in the price of soy in transactions between Argentine soy producers and Argentine biodiesel producers. Accordingly, Argentina's decision to adopt this tax measure amounts to a decision to promote domestic biodiesel production by creating an artificially low transfer price between the soy producer and the biodiesel producer. The United States does not see a basis under the AD Agreement to distinguish between this situation, and a situation involving related party transfer prices.

10. Fifth, to the extent that any party argues that the distortive effects of government conduct cannot be captured under the AD Agreement, this proposition is clearly wrong. The EU has discussed at length that multiple currency practices may be addressed under either dumping or countervailing duty provisions. Likewise, Article VI:5 of the GATT 1994 recognizes that export subsidization may be addressed as a matter of either dumping or subsidization. And, more broadly, one of the classic examples of dumping is where a producer takes advantage of a protected home market by selling at high prices to domestic consumers, while selling the same product at lower prices in foreign markets. No one would argue that this behavior would be exempted from antidumping measures because it arose from the government decision to protect its home market – for example, by imposing a high, but WTO-consistent tariff.

11. In sum, the specific factual circumstances involving Argentina's tax scheme and the EU's investigation of that scheme support the EU's rejection of the costs of soy recorded in the books of Argentine biodiesel producers.

III. ARTICLE 2.2 OF THE ANTIDUMPING AGREEMENT

12. Turning to Article 2.2, the Panel's conclusion that Article 2.2 precludes the EU's reliance on certain Argentine export data indicative of world market prices for soy lacks any grounding in

the text of Article 2. Specifically, the text of Article 2.2 does not proscribe the use of out-of-country data to evaluate recorded costs or, where appropriate, to adjust or replace recorded costs. As the Panel itself correctly acknowledged, Article 2.2 does not "limit the sources of information that may be used in establishing the costs of production."[1] Nor does Article 2.2.1.1 prevent an investigating authority from considering evidence external to the country of origin. Once the EU authority determined that producers' records did not reasonably reflect the costs associated with the production and sale of biodiesel, it was entirely appropriate and permissible under Article 2.2 for the authority to resort to external data that was both undistorted by Argentina's export tax and reflective of costs "in the country of origin."

IV. CONCLUSION

13. Mr. Chairman, thank you for your attention, and we look forward to participating in the discussion over the next two days.

[1] Panel Report, para. 171.