EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM ARGENTINA

(DS473)

EXECUTIVE SUMMARY OF
THE UNITED STATES OF AMERICA

April 9, 2015

Executive Summary of U.S. Third Party Submission

I. Argentina's Claims Regarding The Interpretation of Article 2 of the AD Agreement

A. "As Such" Inconsistency Requires Examination of Whether the Measure Necessarily Requires WTO-Inconsistent Action or Precludes WTO-Consistent Action

1. The United States agrees that a complainant may allege that another Member's legislation or regulation is inconsistent with a covered agreement "as such" or "independently from the application of that legislation in specific instances." To prove an "as such" claim, the complainant must demonstrate that the identified measure requires the responding party to act in a WTO-inconsistent manner or precludes that party from acting in a WTO consistent manner. In this context, the EU emphasizes the express *discretion* of the investigating authorities under Article 2(5) of the Basic Regulation to adjust costs. In particular, the European Union observes that: (i) text of paragraph one of Article 2(5) *does not require* that investigating authorities depart from exporter or producer cost data, and (ii) the "rest of the evidence" (*e.g.*, judgments of the General Court of the European Union and determinations in other investigations) does not demonstrate that the investigating authorities are *mandated* to act in a particular manner.

2. The United States considers the Appellate Body's recent analysis in *US – Carbon Steel (India)* informative. The Appellate Body report in *US – Carbon Steel (India)* reviewed whether the text of the measure "reveals its discretionary nature," or identifies "elements requiring an investigating authority to engage in conduct inconsistent with" the relevant WTO agreement. The Appellate Body ultimately concluded that these materials did not "establish conclusively that the measure requires an investigating authority to consistently" act contrary to the relevant WTO obligation.

B. The Panel's Analysis of Article 2.2.1.1 of the AD Agreement Should Be Informed by the Text and Context of the AD Agreement

3. Both Argentina's "as such" and "as applied" claims are dependent on the interpretation and meaning of Article 2.2.1.1 of the AD Agreement. As explained below, the United States considers that Article 2.2.1.1 requires an investigating authority to "normally" rely on producers' or exporters' books and records, but, as permitted by the text of the provision, the authority may look beyond these records in limited circumstances.

1. Investigating Authorities Shall Normally Calculate Costs on the Basis of Records Kept by Producers or Exporters

4. As a preliminary matter, the United States considers that Article 2.2.1.1 requires an investigating authority to normally calculate costs on the basis of records kept by an exporter's or producer's books, provided that (i) the books and records are in accordance with the GAAP of the exporting country, and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration. This view was adopted by panel in *China – Broiler Products*. Thus, in situations where books and records are kept in accordance with GAAP and

reasonably reflect the costs associated with the production and sale of the product under consideration, the investigating authority is normally obligated to use those records pursuant to Article 2.2.1.1.

5. The qualification to the obligation in Article 2.2.1.1 is reinforced by the use of the term "normally," which is defined as "in the usual way" or "as a rule." Thus, the term "normally" in conjunction with the two conditions ("provided that") in Article 2.2.1.1 indicates that use of a producer's or exporter's books or records is not necessary in every case and the investigating authority has the ability to consider other available evidence in limited instances. To that end, as the *China – Broiler Products* panel report noted, if the investigating authority finds that the books and records do not meet the stated conditions, the authority is "bound to explain why it departed from the norm and declined to use a respondent's books and records."

2. Article 2.2.1.1: "Costs"

6. With respect to the interpretation of the second condition, "reasonably reflect the costs associated with the production and sale of the product under consideration," the parties attribute a number of differing meanings to these terms. Argentina fails to explain how the use of "costs" over an analogous term, like "prices," implies that "costs" must then refer exclusively to the "charges or expenses that have been actually incurred by producer." Moreover, the panel in *EC – Salmon (Norway)* did not find any meaningful distinction between "costs" and "prices" when it defined "cost of production" as the "price to be paid for the act of producing." In the context of Article 2, the United States considers the difference between "cost" and "price" to be a matter of perspective, and not one of substance.

7. Argentina's argument that "costs" relates only to expenses "actually" incurred by producers is undermined by adjacent text in Article 2. The drafters of the AD Agreement chose to utilize an express limitation – to amounts actually incurred by the producer – elsewhere in Article 2. For instance, Article 2.2.2(i) references "the actual amounts incurred and realized by the exporter or producer in question." Further, Articles 2.2.2(i) and 2.2.2(ii) both pertain to the determination of "general costs." According to Argentina, the term "costs" is inherently specific to expenses "actually incurred by the producer." Argentina's interpretation would therefore render superfluous the "actually incurred and realized" by the "exporter or producer" language utilized in Articles 2.2.2(i) and 2.2.2(ii).

8. For these reasons, the United States does not consider the use of the term "costs" in the context of Article 2.2.1.1 to be indicative of a limitation with respect to the "actual amount incurred" as reflected by the producer's own books and records.

3. Article 2.2.1.1: "Reasonably" in Relation to "Costs"

9. In Argentina's view, Article 2.2.1.1 requires the use of an exporter's or producer's records whenever that exporter or producer transposes, within reason, its actual expenses to its records. Argentina's argument is contrary to the ordinary meaning of Article 2.2.1.1. The plain language provides that the "costs" used for the calculating normal value shall "normally" be based on the exporter's or producer's records, but that the costs need not be used if they do not

reasonably reflect the costs associated with the production and sale of the product under consideration. The panel report in *Egypt – Rebar* supports this interpretation.

10. Argentina's argument also would seem to render redundant the first and second conditions in Article 2.2.1.1. Specifically, the first condition of Article 2.2.1.1 permits costs to be rejected based on books and records not in accordance with GAAP. However, under Argentina's interpretation, the second condition would establish yet another requirement that producer records faithfully reflect the costs incurred by producers. Although GAAP may serve as an indicia that costs are reasonable, because accounting principles typically ensure costs are properly sourced and recorded, this may not in all instances be sufficient. Further, the United States does not understand Article 2.2.1.1 to solely refer to "cost allocation" issues. The first sentence of Article 2.2.1.1 refers to costs "calculated," rather than "allocated." That "allocated" is explicitly mentioned elsewhere in the text, but not in the first sentence of 2.2.1.1, contradicts Argentina's argument.

11. When read together with other terms in Article 2.2.1.1 – and in particular "reflect the costs associated with" – the term "reasonably" can be understood to establish a substantive reasonableness standard for the costs reflected in the producer's or exporter's records. The United States notes that the language of Article 2.2.1.1 leaves open what costs may be "unreasonable" such that the records do not reasonably reflect the costs associated with the production and sale of the product. The panel reports in *China – Broiler Parts* and *US – Softwood Lumber V* do not provide further guidance on this issue. Further, in *US – Softwood Lumber V* the panel found that Article 2.2.1.1 did not *obligate* the investigating authority to reject unreasonable costs, or to use producer cost data, as reflected in their books and records, if demonstrated to be unreasonable. In fact, the panel noted that "Article 2.2.1.1 does not require that any particular methodology be used by an investigating authority to assess whether records 'reasonably reflect the costs associated with the production and sale of the product under consideration.'"

12. As demonstrated by *US - Softwood Lumber V*, it is clear that, on an individual-respondent basis, adjustments are permitted to account for "unreasonable" costs, the recordation of which nonetheless complies with GAAP. For instance, inputs purchased from a related or affiliated supplier that do not reasonably reflect a respondent's costs may require an adjustment to the cost as recorded in the exporter or producer's books and records. This adjustment – to ensure that the data reasonably reflect the costs associated with production or sale of the product – is typically based on record evidence including sales to the first non-affiliated party, costs incurred by other exporters or producers, or other evidence of the appropriate costs.

13. The United States further notes that the context provided by the language of Article 2.2 supports the understanding that market conditions may lead to records reflecting "unreasonable" costs. Article 2.2 provides that where there exists a "low volume of the sales in the domestic market of the exporting country" or a "particular market situation," sales in the domestic market do not permit a proper comparison. The text of Article 2.2 therefore contemplates circumstances where some peculiarity, structure, distortion, or other occurrence of the domestic market makes a direct comparison to home market prices impossible.

14. The United States understands Article 2.2.1.1 to permit investigating authorities to consider whether a particular cost is unreasonable, and whether it may be adjusted, so long as the investigating authority sufficiently explains its determination.

4. Article 2.2.1.1: "Associated with the Production and Sale of the Product Under Consideration"

15. Finally, it is revealing that, rather than modify "reasonably reflects costs" with the phrases "actually incurred" or "by the exporter or producer in question," Article 2.2.1.1 references costs "*associated with* the production and sale of the product under consideration." The term "associated with" suggests a more general connection between the relevant costs and the production or sale of the product. Further, the use of the term "associated with" conveys a conception of costs more general than just those borne by the specific respondent.

16. Prior panel reports support this view. For instance in *Egypt – Rebar*, the panel described the analysis of "costs associated with the production and sale of the product under consideration" as "hing[ing] on whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question *in that case*." The second condition of the first sentence of Article 2.2.1.1 is not simply a reformulation of the requirement that records be GAAP compliant. Specifically, the United States understands that Article 2.2.1.1 does not require the use of a particular respondent's records where the costs documented in those records are determined to be "unreasonable" or otherwise unrelated to the production of the product under review. While the United States takes no position on the facts underlying this dispute, it does consider there to be a range of reasons related to individual respondents, as well as larger market conditions, which may render particular costs to be unreasonable. Pursuant to Article 2 of the AD Agreement, with adequate supporting record evidence and explanation regarding its departure from the exporter or producer's records, an investigating authority may address that cost when determining a reasonable normal value.

C. Article 2.4 of the AD Agreement Addresses Issues of Price Comparability and Not the Proper Determination of Normal Value

17. Argentina argues that the EU did not establish the existence of a margin of dumping for the respondents on the basis of a fair comparison between the export price and the normal value. Argentina's claim under Article 2.4 is intended to address the "clear difference between normal value and export price." The United States considers the issue of the calculation of a proper normal value a matter for claims under Article 2.2.1.1, while issues related to the comparison between normal value and export prices should be considered under Article 2.4.

18. It is clear that Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. However, the text of Article 2.4 presupposes that the appropriate normal value has been identified. The United States in this context agrees in principle with both complainant and respondent, that the use of constructed normal value does not preclude the need for due allowances or adjustments where necessary. However, the United States submits that the Panel should consider: first, whether there is a relevant difference between the constructed value

and the export value, and second, whether such a difference has an effect on "price comparability."

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. DISCUSSION OF EXAMINATION OF ARTICLE 2.2.1.1 OF THE AD AGREEMENT

A. Interpretive Approach to the "Reasonably Reflects the Costs" Analysis

19. The United States would like to highlight its concerns with the interpretive approach to Article 2.2.1.1's "reasonably reflect" clause suggested by Argentina and some of the third parties. Nothing in the text of Article 2.2.1.1 limits the various possible rationales or reasons why, in exceptional circumstances and when warranted by record evidence, an investigating authority may find that the costs set out in a producer's or exporter's records do not reasonably reflect the costs associated with the production and sale of the product under consideration. Thus, the United States understands that the proper way to apply the "reasonably reflect" clause – and indeed the only way consistent with the text of the provision – is to examine, on a case-by-case basis, the rationale provided by an administering authority when it makes a determination that the costs set out in the records of the producer or exporter do not reasonably reflect the costs associated with production and sale.

20. In contrast, Argentina and some of the third parties to this dispute are advocating the position that Article 2.2.1.1 must be interpreted to include various proposed *a priori* limitations. That is, regardless of any record evidence that may demonstrate that a producer's records do not reflect costs associated with production and sale, and prior to any finding by an investigating authority, Argentina suggests Article 2.2.1.1 imposes certain limitations on the investigating authority's analysis. In the following paragraphs, the United States will examine some of these proposed *a priori* limitations, and explain how they cannot be supported under the rules of interpretation applicable to the WTO Agreement.

21. First, Argentina argues that the text of Article 2.2.1.1 restricts the investigating authority's "reasonably reflect" analysis to the books of the exporter or producer directly involved in the anti-dumping investigation. That is, the analysis is limited to expenses that have been "actually incurred by the producer." This argument, however, has no basis in the text of Article 2.2.1.1. The language "associated with" in the "reasonably reflects" clause similarly implies a less rigid connection between the relevant costs and the parties to the investigation than suggested by Argentina and several third parties.

22. Further, the AD Agreement also refutes the proposed interpretation that a "reasonably reflect" determination must be based only on information related to the specific producer or exporter responding to the anti-dumping investigation. For instance, the GAAP of each WTO Member is a factual matter, to be determined based on information that is necessarily exogenous to a producer's or exporter's records.

23. In addition to the context provided by Article 2.2.1.1, other text in Article 2 is contrary to Argentina's proposed interpretation. Given the express directions as to "actual data" in Article 2.2.2 and its proximity to Article 2.2.1.1, it is difficult to conclude that the drafters intended to

include the *a priori* limitation in Article 2.2.1.1 that Argentina suggests. The United States also notes that although, in this particular dispute, the exporting Member is arguing against the use of the "reasonably reflect" clause, this may not be the case in every dispute. As was the case in *US - Softwood Lumber V*, there may well be circumstances in which an exporter or producer would argue against the use of its own books and records and in favor of an alternative source of cost information.

24. For all these reasons, a proposal to limit the information examined in a "reasonably reflect" determination cannot be supported. Neither the text of Article 2.2.1.1, nor context provided by other provisions of the AD Agreement, require an investigating authority to ignore any type of potentially relevant evidence.

25. Second and more broadly, it has been suggested that "dumping" relates exclusively to the behavior of the exporter or producer, and it is *a priori* inappropriate to consider information not directly related to the exporter's or producer's conduct. However, Article 2.2 of the AD Agreement refers to the existence of a "particular market situation" where sales in the domestic market do not permit a proper comparison. That a factor external to a specific exporter or producer – the particular market situation – governs normal value directly refutes the proposition that, as a number of third parties contends, dumping relates exclusively to the behavior of the exporter or producer. Additionally, recorded costs related to inputs purchased from related corporate enterprises are regularly viewed as potentially unreasonable.

B. Relation to other WTO Agreements

26. It has been suggested in this dispute that because the issue of recorded costs that do not "reasonably reflect" the cost of producing the product under investigation might also be addressable under other covered agreements (such as the Agreement on Subsidies and Countervailing Measures), the AD Agreement therefore does not permit departure from such recorded costs when calculating normal value. However, the fact that one covered agreement could, in theory, address a given practice does not mean that the other covered agreements cannot do so as well. Indeed, the WTO Agreement contains many instances of overlapping obligations. To the extent this argument is intended as a reference to the "double-counting" issue addressed in *US – Anti-Dumping and Countervailing Duties (China)*, the reference in fact undercuts the argument for an *a priori* limitation with respect to finding recorded costs to be unreasonable.

C. Relevance of "Input Dumping" Discussions

27. Finally, the United States does not agree that certain pre-Uruguay Round discussions of "input dumping" – a term never used in the AD Agreement – is in any way relevant to the factors that may be examined in making a "reasonably reflect" determination under Article 2.2.1.1. "Input dumping" pertains to the narrow issue of whether materials or components used in manufacturing an exported product are purchased at dumped or below cost prices. Conversely, this dispute centers on the broader issue of whether investigating authorities must *a priori* limit the factors examined in deciding whether recorded costs reasonably reflect the associated cost of production and sale of the product.