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

(DS442)

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

January 11, 2016

I. U.S. VIEWS ON THE EUROPEAN UNION'S PRELIMINARY RULING REQUEST

1. While sympathetic to certain practical concerns expressed by the European Union, the United States respectfully disagrees with the understanding of Article 12.12 that underlies the European Union's PRR. The United States submits that the European Union wrongly interprets the relevant terms of Article 12.12, including its interpretation of "panel," and what it means in the context of this provision for a panel to "suspend" its "work."

2. Pursuant to DSU Article 11, the Panel's "function" is to assist the DSB by making an objective assessment of the matter before it, including the applicability of and conformity with the relevant covered agreements. DSU Article 3.2 establishes that such an assessment of the existing provisions of those covered agreements shall be made in accordance with customary rules of interpretation of public international law.

3. The ordinary meaning of "panel" (or "the panel") is not in dispute by either party. The United States agrees with the European Union that there is no express limitation imposed in the text of the DSU on the meaning of the term "panel," and that in some instances, "panel" may refer to a panel that has been composed and in others, it may refer to a panel that has been established but not composed. The United States also agrees with Indonesia, however, that it is precisely because "panel" refers to both circumstances in various places in the DSU that interpretation of "panel" as used in Article 12.12 does not end with a facial inquiry into the ordinary meaning of the term.

4. The last sentence of Article 12.12 describes a circumstance in which the work of the panel "has been suspended for more than 12 months." The first sentence sets out how such a suspension may arise: "at the request of the complaining party for a period not to exceed 12 months." The request is made to, and would be acted upon in its discretion, by the panel ("[t]he panel may suspend its work"). The second sentence confirms the "suspension" is one the panel decides upon at the complaining party's request ("[i]n the event of *such a* suspension"). Thus, 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.

5. The context of Article 12 as a whole also is instructive. The articles of the DSU proceed sequentially from the initial phases of the dispute settlement process to the final stages of that process. Depending on the stage of the process and the content of the relevant rules, the term "panel" in the various provisions may be interpreted differently.

6. Article 6, for example, governs the "establishment of panels," including the timing of their establishment and the method by which their establishment must be requested. As a matter of both timing and logic, these actions necessarily would precede the composition of a panel and therefore would refer to an uncomposed panel. Article 7, on the other hand, may refer to both composed and uncomposed panels when it describes the "terms of reference of panels." For example, Article 7.1 states that "[p]anels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel." Therefore, whether or not a panel has been composed, within 20 days of establishment the terms of reference are determined and govern thereafter the scope of the dispute for purposes of any

panel that has been "established," including one that has subsequently been composed. Article 7.2, however, provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." By requiring panels to "address" certain provisions of the covered agreements, the use of the term "panel" in Article 7.2 necessarily refers to a panel that has been composed, for the obvious reason that a panel that has been established only cannot "address" anything.

7. With respect to the interpretation of "panel" in Article 12 as well, both the stage of the process and the specific rules it provides assist in interpreting the terms contained in Article 12.12. Article 8, for example, which deals with panel composition, precedes Article 12, which deals with panel procedures. Therefore, given where it is situated in the DSU, Article 12 contemplates that, in the normal course, a panel already would have been composed when the "panel procedures" would apply. For example, Article 12.1 establishes that a panel shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties; a panel could neither "follow" those Procedures nor decide otherwise nor consult if it has not been composed. Article 12.3 even more explicitly refers to "panelists" when it describes a process and schedule for fixing the timetable during the panel process. Logically, there would be no "panelists" fixing the timetable if the panel had not yet been composed.

8. Based on the above, the "work" of the panel in the context of Article 12.12 refers to the examination by the panel, once composed, of the matter referred to it by the DSB under the procedures established in Article 12. 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*" pursuant to Article 12.12. Nothing in the text of the DSU, or in the email correspondence from Indonesia to the Secretariat, supports the European Union's position to the contrary.

9. The European Union also raises a contextual argument regarding the interpretation of the term "panel" in Article 12.12 based on its relationship with Article 12.9. To bolster its argument that reference to the "panel" in Article 12.12 means only a panel that has been established, not necessarily composed, the European Union notes that Article 12.9 (governing timeframes to submit the panel report) and 12.12 both refer to the "establishment," not composition, of a panel. Because "composition" is used elsewhere in the DSU, the European Union argues, the use of "establishment" alone is significant.

10. The United States agrees that use of the term "establishment" in Article 12.12 is meaningful. Because a panel is established by the DSB (Article 6.1) to assist the DSB in discharging its responsibilities to make recommendations (Articles 7.1, 11, 19.1) through issuance of findings in a written report (Article 15), to terminate a panel's authority to undertake that work, the DSU removes the legal basis for the panel's establishment. That this legal authority relates to whether a panel is established does not imply that a panel that has not been composed may undertake any "work," much less "suspend" that work.

11. Second, with respect to the contention that the time limit in Article 12.9 would be rendered meaningless were the twelve month limitation in 12.12 read to apply only to composed panels, the United States observes that the language regarding the time limit imposed in Article 12.9 is precatory, not binding, providing that in no case "should" the proceedings exceed nine

months. Therefore, the premise for the European Union's arguments in this respect – that in no case may the proceedings, including any 12 month suspension, exceed 21 months – fails. It is simply not the case that such a mandatory time limit is imposed by the DSU on panel proceedings.

12. For these reasons, the situation described in the last sentence in DSU Article 12.12 arises only once a panel has been composed, the complaining party makes a request to the panel to suspend its work, and the panel decides to exercise its discretion to accept that request and suspends its work accordingly.

13. The European Union raises several policy concerns which it considers support its interpretation of Article 12.12, including considerations relating to the reputational consequences of unresolved proceedings for a responding Member and the limited resources both Members and the Secretariat have to dedicate to a given dispute. While such policy considerations cannot lead to a different interpretation and application of DSU Article 12.12, the United States nonetheless considers that the proper interpretation and application of Article 12.12 lead to a desirable policy outcome.

14. There does not seem to be any serious cause for concern about a "reputational stain" somehow adhering to a responding Member as a result of a dispute brought before the WTO. If Members have not, through consultations or other means, managed to resolve a trade issue between them, parties regularly request the establishment of panels in an effort to achieve formal resolution of the dispute. Not all of these disputes proceed to the circulation of a final panel report. Often, disputes are successfully resolved only after the establishment of a panel. Therefore, the European Union's suggestion that in all cases it would be in a responding party's interest to expedite the panel process so that accusations against it can be resolved does not reflect the nature of dispute settlement under the DSU.

15. Regarding resource constraints and the burden imposed on Members and the Secretariat to devote resources indefinitely to a dispute, the United States understands the dilemma to which the European Union refers. However, we do not consider that dissolving the panel process would address these concerns. To the contrary, the likelihood that the same issue might be raised multiple times as formally "new" disputes would seem to risk exacerbating the strains on limited WTO resources rather than easing them. And should the European Union believe it is prejudiced by the length of time taken to compose a panel, the United States respectfully suggests that an adequate remedy may be found under the DSU. Pursuant to Article 12.4, the European Union could explain those circumstances to the Panel and, in light of those circumstances, the Panel must provide the parties with sufficient time to prepare their written submissions to the panel.

16. Finally, the United States considers that reading into Article 12.12 a limitation on the ability of a complaining party to pause in its use of dispute settlement procedures would undermine the aim of the dispute settlement system to secure a positive solution to the dispute (Article 3.7). Where a party may be actively engaged in trying to resolve a dispute through alternative means, even after panel establishment, such action would be consistent with the preference expressed under the DSU. Indeed, under DSU Article 11, a panel is charged with giving the parties an adequate opportunity to develop a mutually satisfactory solution. The

understanding of Article 12.12 proposed in the PRR would rather appear to limit such opportunities.

II. INDONESIA'S CLAIMS REGARDING ARTICLE 2 OF THE AD AGREEMENT

17. Indonesia claims that the European Union acted inconsistently with Article 2.4 of the AD Agreement by failing to make allowances for differences affecting price comparability – namely, by subtracting sales commissions from the constructed export price for one of the participating producers.

18. Article 2.4 of the AD Agreement requires investigating authorities to conduct a comparison between the export price and normal value. As Indonesia correctly observes, such comparison "is typically made at the ex-factory level…a practice envisaged explicitly by Article 2.4." It appears that both the European Union and Indonesia share the U.S. view that the essential requirement for any adjustment under Article 2.4 is that a factor must affect price comparability. Thus, under Article 2.4, making a "fair comparison" requires a consideration of how differences in conditions and terms of sale, taxation, levels of trade, quantities, and physical characteristics impact price comparability.

19. In this respect, the Appellate Body has stated that under Article 2.4, the obligation to ensure fair comparison lies on the investigating authorities, and not the exporters. Although the investigating authority has the burden to ensure a fair comparison, the interested parties also have the burden to substantiate any requested adjustments for differences that affect price comparability. As the Appellate Body has found, an investigating authority does not have to accept a request for an adjustment that is unsubstantiated.

20. Indonesia and the European Union appear to agree that a sales commission can affect price comparability within the meaning of Article 2.4 because it may reflect a difference in conditions and terms of sale. However, the parties disagree on whether it is necessary to determine that a single economic entity ("SEE") does not exist in order to make a downward adjustment to export price for sales commissions.

21. While the United States agrees with the European Union that an analysis of whether an SEE exists is not required under Article 2.4, it may sometimes be relevant to consider the relationship between two entities as part of an evaluation of price comparability. In this respect, it would not be inappropriate to consider the various factors discussed by the panel in *Korea – Certain Paper* and referenced by the Appellate Body in *EC-Fasteners (China)*. While we recognize that, as stated by the European Union, the analyses in those cases arose in a different context – *i.e.*, for purposes of determining whether related companies should be assigned a single dumping margin – these factors may nonetheless be relevant to determining what, if any, adjustment should be made under Article 2.4.

22. In reviewing the investigating authority's determination, the Panel may wish to consider whether the evidence and explanation provided – regardless of the specific methodology applied – supports a finding that the sales entity did not form part of a single entity with PTMM and that, therefore, an adjustment was necessary to ensure a fair comparison under Article 2.4. If the Panel concludes that the facts support a finding that the producer and the trading company are

not affiliated, there is no dispute that an adjustment for a commission paid to the trader was appropriate.

23. Finally, the United States considers that it is permissible for an investigating authority to make a price adjustment to address circumstances of sale, if the facts on the record support it. An investigating authority must ensure price comparability regardless of whether affiliated or non-affiliated parties are involved. As explained earlier, a comparison between normal value and export price is usually made at the ex factory level. If, for example, the producer sells in the home market directly to its customers, but sells through a trading company (affiliated or not) to its export market, the differences in the circumstances of sale may warrant an adjustment to ensure that comparison is made at the ex-factory level in both markets.

24. The views expressed by the United States in relation to Indonesia's claims under Article 2.4 are relevant to the substance of Indonesia's Article 2.3 claim. The United States agrees with the European Union that Indonesia's Article 2.3 claim is purely a consequential claim.

III. INDONESIA'S CLAIMS REGARDING ARTICLE 3 OF THE AD AGREEMENT

25. The third sentence of Article 3.5 provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. As the Appellate Body has found, if a known factor other than dumped imports is a cause of injury, the third sentence requires the authority to engage in a non-attribution analysis to ensure that the effects of that other factor are not attributed to the dumped imports.

26. The Appellate Body has further stated that the AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis. In this regard, the United States disagrees with Indonesia that only a particular kind of analysis – e.g., quantitative analysis – meets the requirements of Article 3.5. The question of whether an investigating authority's analysis is consistent with Article 3 should turn on whether the authority has in fact evaluated these factors and whether its evaluation is supported by positive evidence and reflects an objective examination, as required by Article 3.1.

27. Article 3.5 further requires that "[t]he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." Hence, the authorities are obliged to consider all relevant evidence in the record. While the United States does not take a view on the weight the European Union gave to certain evidence, the European Union must demonstrate that it examined these factors in its analysis. Whether or not, as Indonesia claims, the European Union was required specifically to consider these factors under the third sentence of Article 3.5 would depend on whether these factors were known to the investigating authority and whether they were in fact contributing at the same time as the imports to any difficulties experienced by the domestic industry.

28. Thus, the panel must determine if the investigating authority demonstrated that it examined other "known factors" within the meaning of Article 3.5 of the AD Agreement, and based its causation analysis on an examination of all relevant evidence.

IV. INDONESIA'S CLAIM UNDER ARTICLE 6 OF THE AD AGREEMENT

29. Article 6.7 of the AD agreement requires investigating authorities conducting verification to "make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9 to the firms which they pertain and may make such results available to the applicants." Article 6.9 in turn provides that an investigating authority "shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." The United States agrees with both Indonesia and the European Union that under its ordinary meaning, the term "results" in Article 6.7 refers to "outcomes" of the verification process. The United States agrees with the European Union that Articles 6.7, 6.8, and 6.9 form a continuum of obligations under Article 6, and that each obligation is grounded in the context of the specific provision.

30. While the United States does not believe that trivial or immaterial aspects of what occurred at the verification must be included in the report, at a minimum the report should include discussion of information that was verified, not verified, or corrected with respect to essential facts referenced in Article 6.9. The United States agrees with the European Union that the text of Article 6.7 contains no requirements on form or format. Articles 6.7 and 6.9 do require disclosure of verification "results" and the "essential facts under consideration." To the extent the European Union characterizes the lack of disclosure of results and essential facts as a question of form, not substance, the United States disagrees with that characterization. For example (without opining on the factual issues presented in this dispute), the United States believes that the term "essential facts," as defined in Article 6.9, relates necessarily to the determination of normal value and export prices, *as well as* to the data underlying those determinations. Accordingly, the United States believes that information verified or corrected at verification relating to these "essential facts" should be disclosed pursuant to Article 6.7 and Article 6.9.

31. These provisions of the AD Agreement promote transparency and procedural fairness by ensuring that "disclosure…take[s] place in sufficient time for the parties to defend their interests." Failure to provide such disclosure could prevent an interested party from effectively defending its interests in the proceeding, and potentially, before national courts. In this respect, the United States agrees with the panel in *Korea – Certain Paper*, which noted that disclosing both verified and unverified information could "be relevant to the presentation of the interested parties' cases."

32. Similarly, a basic tenet of the AD Agreement, as reflected in Article 6, is that the investigating authority "must provide timely opportunities for all interested parties to see all information … relevant to the presentation of their cases that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation," and "shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests…[and these opportunities] must take account of the need for confidentiality." Articles 6.4 and 6.2 have specific obligations which may apply to the disclosure of verification results. Therefore, bearing in mind the obligations of Article 6.5, the United States agrees with Indonesia that failing to disclose information under Article 6.7, particularly as it relates to the "essential facts" of an investigation under Article 6.9, would deprive parties of the full opportunity to defend their interests.