EUROPEAN UNION – COST ADJUSTMENT METHODOLOGIES AND CERTAIN ANTI-DUMPING MEASURES ON IMPORTS FROM RUSSIA (SECOND COMPLAINT)

(DS494)

THIRD PARTY EXECUTIVE SUMMARY
OF THE UNITED STATES OF AMERICA

September 30, 2019

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. Interpretation of Article 2 of the Anti-Dumping Agreement

A. Russia's Claim that the EU Basic Regulation Providing That Constructed Normal Value Use "Representative" Prices Is "As Such" Inconsistent With Article 2.2 of the Anti-Dumping Agreement

1. Russia argues that Article 2.2 of the Anti-Dumping Agreement does not permit investigating authorities to evaluate the "representativeness" of costs of production in the country of origin because requiring that costs be "representative" – i.e., unaffected by government-created distortions – imposes a requirement absent from the text of Article 2.2 of the Anti-Dumping Agreement. To the extent the Panel finds it necessary to evaluate the merits of Russia's claim, the United States comments on the proper interpretation of Article 2.2 of the Anti-Dumping Agreement.

2. Article 2.2 of the Anti-Dumping Agreement specifies that alternatives to domestic market prices may be used to determine normal value when, because of a "particular market situation" or a "low volume of … sales in the domestic market of the exporting country," the domestic prices "do not permit a proper comparison." Article 2.2 prescribes two alternative data sources that may provide for a "proper comparison" whenever domestic market sales price data cannot be used to calculate normal value: (1) "a comparable price" for the like product when exported to an "appropriate" third country, provided the price is representative; or (2) the cost of production in the country of origin plus a reasonable amount for administrative, selling, and general costs and for profits. A key phrase in Article 2.2 is "proper comparison," and the placement of this phrase in Article 2.2 reinforces that normal value must be based on prices (or costs) that "permit a *proper comparison.*" Article VI:1 of the GATT 1994 establishes that the dumping comparison requires comparable prices or costs. Article VI:1(a) establishes that dumping occurs when the price of an exported product "is less than the *comparable* price, *in the ordinary course of trade*, for the like product" in the home market. This suggests that "determining price comparability" under Article VI:1 refers first to determining whether there *is* such a "comparable price, in the ordinary course of trade." Without a "comparable price, in the ordinary course of trade," or suitable proxy, no dumping comparison can be made. This applies to domestic prices, third-country export prices, and costs of production (which include prices between input suppliers and the exporter or producer under investigation).

3. The Anti-Dumping Agreement is, as its title suggests, an agreement on the application of Article VI of the GATT 1994 and, through Article 2, implements the principle of comparability set forth in Article VI:1. For example, Article 2.1 of the Anti-Dumping Agreement establishes that "a product is to be considered as being dumped, *i.e.* introduced into the commerce of another country at less than its normal value, if the export price of the product being exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." This text is nearly identical to Article VI:1 (specifically, the second sentence and subparagraph (a)). Article 2.1 thus retains the key elements from Article VI:1 for domestic prices or costs to be used to calculate normal value. Specifically, there must be a "comparable price, in the ordinary course of trade". Therefore, the "proper comparison" text of Article 2.2 of the Anti-Dumping Agreement reflects that

establishing normal value requires a "comparable price, in the ordinary course of trade," and cannot be interpreted as preventing an investigating authority from evaluating evidence that government interference affects the "proper comparison" of prices or costs. Several examples demonstrate that domestic price, third-country export price, and cost of production may be considered not "a comparable price, in the ordinary course of trade," when the evidence of record indicates they do not reflect normal commercial principles:

- a price for a sale may not reflect the criteria of the marketplace;
- a price for a sale might not reflect normal commercial practices, such as in relation to other terms and conditions of sale;
- a price for a sale might be one established between related parties, rather than a transaction between economically independent entities at market prices, and thus not reflect normal commercial principles; or
- a price for the sale of an input used in the production of the product under consideration may not be consistent with an arm's-length transaction price or reflect normal commercial principles.

B. Claims Regarding the Phrase "Particular Market Situation" in Article 2.2 of the Anti-Dumping Agreement

4. Russia argues that "the particular market situation" in Article 2.2 of the Anti-Dumping Agreement is limited to "only one circumstance . . . which concerns the country's market as a whole" rather than a "particular market situation for the product concerned". "Artificially low prices" cannot provide a basis for a particular market situation finding, in Russia's view, because Article 2.2 of the Anti-Dumping Agreement contains no language regarding "artificially low prices" or a comparison to "world-market prices or prices in other representative markets". However, Article 2.2 of the Anti-Dumping Agreement, as noted above, establishes certain alternatives for determining normal value when, "because of the particular market situation … such sales do not permit a proper comparison." Article 2.2, which includes the phrase "proper comparison", links back to the dumping definition in Article 2.1. If a particular market situation affects price comparability, e.g., if a particular market situation indicates that sale prices of the like product do not reflect market-based conditions (such as those reflecting normal commercial principles), such sale prices need not be used as a basis for normal value because they would not "permit a proper comparison". Although Article 2.2 of the Anti-Dumping Agreement does not define the term "the particular market situation," the definitions of the individual words that form the phrase "particular market situation" elucidate its meaning – i.e., that it addresses a specific condition or set of circumstances in the domestic market. For example, the word "market" is defined as a "place or group with a demand for a commodity or service", and the word "situation" is defined broadly as the "condition or state of a thing." These definitions indicate that what constitutes a "particular market situation" will depend on the particular facts at issue and thus should be evaluated on a case-by-case basis.

5. Russia is incorrect that Article 2.2 of the Anti-Dumping Agreement prohibits an analysis of whether "the government regulation of the price concerned, including its inputs, nor the effect

of such regulation" amount to a particular market situation. An investigating authority may find that a "particular market situation" exists when the evidence of record demonstrates that a specific condition or set of circumstances renders the comparable price, in the ordinary course of trade, for the like product, unfit as a proper comparison. Nothing in the text of Article 2.2 suggests that the meaning of the phrase "particular market situation" is limited by the second *Ad Note*, which identifies one situation in which "special difficulties may exist in determining price comparability." The situation identified is "in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State." That is, the text does not limit the determination that there is no "comparable price, in the ordinary course of trade" to this one situation. The recognition by Members of a "case" creating special difficulties ("It is recognized that, in the case …") does not logically imply that there could be no other "case".

6. Moreover, the history of the second Supplementary Provision to Article VI:1 does not support the extra-textual particular market situation conditions posited by Russia. As Russia notes, the Working Party Sub-Group in 1955 rejected Czechoslovakia's proposal to amend subparagraph 1(b) of Article VI of the GATT 1947 "to deal with the special problem of finding comparable prices for the application of that subparagraph to the case of a country all, or substantially all, of whose trade is operated by a state monopoly." However, the Sub-Group did not consider an amendment to Article VI:1 would be necessary to find that home market prices were not useable for purposes of the dumping comparison. Instead, the Sub-Group recommended adoption of an "interpretative note" nearly identical to what is now the Second Note. The Sub-Group's 1955 activity thus also supports the U.S. interpretation of GATT 1994 Article VI.

C. Claims that EU Basic Regulation Article 2(5) and the "Cost Adjustment Methodology" Are Inconsistent with Articles 2.2.1.1, 2.2, and 2.2.1 of the Anti-Dumping Agreement

7. Russia argues that the EU applies an unwritten measure – i.e., a "cost adjustment methodology" – as a "measure that has certain characteristics and will be applied or is likely to be applied in the future." To evaluate Russia's claim, the Panel should consider: whether the rule or norm embodied in that measure is attributable to the responding Member; the precise content of the measure; and whether the measure has general and prospective application. In examining an unwritten measure, the Appellate Body has noted that "[p]articular rigour is required . . . to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document." Accordingly, a panel "must not lightly assume the existence of a 'rule or norm'" because in doing so "would act inconsistently with its obligations" to "'make an objective assessment of the matter before it.'"

8. Turning to the substance of Russia's claims, the phrase "[f]or the purpose of paragraph 2" indicates that Article 2.2.1.1 should be read together with Article 2.2. The costs calculated pursuant to Article 2.2 must be capable of generating "an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when the normal value cannot be determined on the basis of domestic sales." Given that the use of costs under Article 2.2.1.1 must be capable of generating an appropriate proxy to allow for a proper comparison, the term "cost" refers to costs that reflect normal commercial principles

associated with producing the product in the exporting country and not simply the "cost" reflected, for example, in an invoice price. That the costs are "*associated with* the production and sale of the product under consideration" also supports a commercial conception of costs, because the term "associated with" suggests a substantive connection between real economic costs and the production or sale of the product under consideration. The Anti-Dumping Agreement in other circumstances similarly indicates that an investigating authority should be concerned with real, economically meaningful data.

9. The Appellate Body in *EU – Biodiesel (Argentina)* recognized that investigating authorities have leeway under Article 2.2.1.1 to reject or adjust recorded costs under certain situations. It specifically rejected the argument that "'no matter how unreasonable the production (or sale) costs in the records kept by the investigated firm would be when compared to a proxy or benchmark consistent with a normal market situation, there is nothing an investigating authority can do.'" A non-arm's-length sale illustrates one type of transaction where an investigating authority may look beyond the four corners of a respondent's records and determine whether the transaction does not "reasonably reflect" all costs incurred in respect of the production and sale of the product, because the reported price may fail to accurately and reliably reflect the interaction between independent buyers and sellers. When the normal value cannot be determined on the basis of domestic sales, the costs calculated pursuant to Article 2.2.1.1 must be capable of generating an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country. Therefore, like the situation in which parties to a transaction are related, where a State intervenes in the marketplace to interfere with the ability of buyers and sellers to enter into transactions according to their own commercial interests, "there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace". The Working Party Report on Russia's accession to the WTO highlights the understanding that if there is sufficient evidence of the possible absence of normal commercial conditions (e.g., because of State interference), an investigating authority should be able to examine under the second condition of Article 2.2.1.1 the records kept by an investigated firm.

10. The United States recalls that nothing in the text of Article 2.2 proscribes the use of out-of-country information to evaluate recorded costs, or to adjust or replace recorded costs when formulating the appropriate cost for an individual producer. Indeed, the Appellate Body in *EU – Biodiesel (Argentina)* did not exclude the possibility that an investigating authority may use information and evidence outside the country of origin to determine the prices in the country of origin. As the Appellate Body explained, when an investigating authority rejects cost data under the second condition of Article 2.2.1.1, information from out-of-country sources could be used to arrive at the cost of production in the country of origin.

11. Article 2.2.1 of the Anti-Dumping Agreement describes a methodology for determining whether below-cost sales may be treated as not being made in the ordinary course of trade. The "rules for calculating the costs used in the determination of whether below-cost sales may be treated as not being made in the ordinary course of trade by reason of price are found in Article 2.2.1.1." If an unbiased and objective investigating authority found an appropriate evidentiary basis to reject or adjust a cost that does not reflect normal commercial principles under Article 2.2.1.1, and provided a reasoned and adequate explanation for doing so, the investigating

authority would not nonetheless be required to use the cost information it already rejected in performing the test under Article 2.2.1.

II. INTERPRETATION OF ARTICLE 18.3 OF THE ANTI-DUMPING AGREEMENT

12. Article 18.3 of the Anti-Dumping Agreement may implicate Russia's claims involving determinations issued before Russia's 2012 WTO accession. Under Article 18.3, the Anti-Dumping Agreement applies to investigations and reviews of "existing measures" that were "initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement." Accordingly, the Anti-Dumping Agreement does not apply to investigations or reviews that predate "the date of entry into force for a Member of the WTO Agreement." In *US – DRAMS* the panel observed that Article 18.3 did not indicate that the Anti-Dumping Agreement applies to "all aspects" of a "pre-WTO measure simply because parts of that measure are under post-WTO review." Furthermore, the Appellate Body has identified the parallel provision of the SCM Agreement, Article 32.3, as a "transitional rule" with the implication that it expresses "an explicit intention to draw the line of application of the new *WTO Agreement* to [] investigations and reviews at a different point in time from that for other general measures" and applies where a proceeding "was underway at the time of entry into force of the *WTO Agreement*." Moreover, "the situation of a prospective Member of the WTO, which accedes" to the WTO "is different from that of former contracting parties to the GATT 1947 or signatories to the *Tokyo Round* [] because those agreements did not apply previously to its trading relations with other states."

III. CLAIMS REGARDING PRICE UNDERCUTTING ANALYSIS

13. The investigating authority's obligations in a likelihood-of-injury determination stem not from Article 3 but from Article 11.3 of the Anti-Dumping Agreement. Article 11.3 obligates investigating authorities "to determine" whether the expiry of the duty would be likely to lead to a continuation or recurrence of injury in a "review". In *US - Corrosion Resistant Steel Sunset Review*, the Appellate Body stated that the ordinary meaning of "determine" is to decide or settle, and that the ordinary meaning of a "review" is an examination or a reconsideration of some subject. Based on this language, the Appellate Body found that the investigating authority must reach a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and re-examination." Further, the Appellate Body agreed with the panel that "[an] investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence" of injury. It emphasized, however, that the necessary reasoned conclusion as to the likelihood of injury need not in every case be satisfied through a particular methodology or the consideration of particular factors. The necessity of conducting such an analysis in a given case arises from the Article 11.3 requirement that a likelihood-of-injury determination rest on a "sufficient factual basis" permitting the agency to draw "reasoned and adequate conclusions", and not on the requirements of Article 3.

14. To the extent the Panel finds it necessary to evaluate the merits of Russia's price undercutting analysis claims, the Panel should evaluate whether the investigating authority acted in accordance with Article 11.3 of the Anti-Dumping Agreement such that it had a sufficient

factual basis, on the basis of information gathered as part of the process of reconsideration and re-examination, to draw reasoned and adequate conclusions concerning the likelihood of injury.

IV. CLAIMS REGARDING SAMPLING OF DOMESTIC INDUSTRY

15. Russia argues that in its 2014 expiry review of Russian ammonium nitrate the EU authorities used a non-representative sample of domestic producers, contrary to Articles 3.1, 3.4, 4.1, and 11.3 of the Anti-Dumping Agreement. To determine whether revocation of the ammonium nitrate ("AN") order was likely to result in recurrence of injury to those producers, the EU sampled domestic producers, inviting those not included in the provisional sample to volunteer for inclusion.

16. Article 11.3 of the Anti-Dumping Agreement provides for investigating authorities to review whether "expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury" to the "domestic industry". In conducting the expiry review, including the likelihood-of-injury analysis, the overarching requirements reflected in Article 3.1 that an injury determination be based on positive evidence and an objective examination would also be relevant to likelihood-of-injury determinations under Article 11.3. Here, given the limited number of producers in the domestic industry, the Panel should assess whether the sampling of the domestic industry introduced a material risk of distortion and resulted in a distorted definition of the domestic industry, thereby preventing an objective examination. Such distortion, if any, could unreasonably favor a petitioner in a manner inconsistent with the objectivity requirements of the Anti-Dumping Agreement.

17. In *EC – Fasteners*, the Appellate body considered whether an investigating authority could, consistent with the objectivity requirement, define the domestic industry by publishing a notice inviting domestic producers to volunteer for inclusion in the domestic industry definition. There, the EU had published a notice inviting domestic producers to identify themselves and volunteer for inclusion in a sample of the domestic industry. The EU then defined the domestic industry to include only producers that responded to the notice and volunteered for inclusion in the sample. The Appellate Body found that "by defining the domestic industry on the basis of willingness to be included in the sample, the {EU's} approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion", in a manner inconsistent with Article 3.1 of the Anti-Dumping Agreement.

18. The Panel should therefore examine whether the EU authorities (1) allowed companies to self-select and (2) in so doing introduced a material risk of distortion, contrary to Article 3.1 of the Anti-Dumping Agreement.