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

(DS494)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE THIRD-PARTY SESSION OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

September 12, 2019

Ms. Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute.

2. Our statement today will focus on three key parts of the text of Article 2.2 of the Anti-Dumping Agreement: the phrase "particular market situation";[1] the phrase "proper comparison"; and the modifiers in the first sentence of Article 2.2.1.1 that dictate when "normal value" should not be calculated based on the costs reported in the records kept by the exporter or producer under investigation. The language and context of this text underscore that investigating authorities ***are not*** forced to rely on recorded costs absent further consideration, such as whether government interference in the market of the exporting country prevents a "proper comparison".

I. The Phrase "Particular Market Situation" in Article 2.2 of the Anti-Dumping Agreement

3. The phrase "particular market situation" as it appears in Article 2.2 of the Anti-Dumping Agreement addresses a specific condition or set of circumstances taking place in the domestic market. Russia argues that a "particular market situation" must only mean a circumstance which "concerns the country's market as a whole" and that "artificially low prices" cannot constitute such a circumstance.[2] This interpretation conceives requirements that neither Article 2.2 nor Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") support.

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement").

[2] Russia First Written Submission, para. 156.

4. A "particular market situation" may exist with respect to the market as a whole. For example, a "particular market situation" may exist where the evidence demonstrates that the government controls pricing to such an extent that the price for the like product in the domestic market cannot be considered competitively set.

5. Equally, a "particular market situation" may exist with respect to a limited number of market participants or a single market participant. For example, a "particular market situation" may exist where a market participant has engaged in significant barter trade. If other market participants do not also engage in significant barter trade, such a "particular market situation" would not exist with respect to these other market participants.

6. The text of Article 2.2 contains no language to suggest that "particular market situation" is limited to a single situation which affects the entirety of a country's market. Article 2.2 does not define the term "particular market situation;" the text simply refers to "the particular market situation" that prevents a proper comparison. Accordingly, the existence of a particular market situation will depend on whether the record evidence evinces a market condition that is distinct – namely, a condition that is particular rather than general.

7. The common element is that a "particular market situation" has created domestic market conditions that differ materially from market-based conditions and may not be capable of generating a "comparable price, in the ordinary course of trade," as that term is used in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

8. Just as one could "envis[ion] many reasons for which transactions might *not* be 'in the ordinary course of trade',"[3] it is possible to envision many reasons for which transactions might not permit a proper comparison because of a "particular market situation". An investigating authority would therefore on a case-by-case basis need to determine, based on the facts and circumstances before it, whether domestic market conditions constitute a "particular market situation".

9. If those facts and circumstances indicate that government interference in the marketplace creates a "particular market situation", nothing in the WTO agreements requires the investigating authority to ignore this situation and find that the sales of the like product subject to the "particular market situation" do, contrary to the evidence of record, permit a proper comparison. If government interference causes domestic market conditions to differ materially from market-based conditions (such as those reflecting normal commercial principles), this situation could generate artificial sales prices of the like product that are not fit for a proper comparison.

10. The text of GATT 1994 Article VI and the second *Ad Note* confirm this interpretation. As explained in the U.S. third-party submission,[4] neither provision suggests that a particular market situation under Article 2.2 of the Anti-Dumping Agreement is limited to one fact pattern. For example, the second *Ad Note* identifies the circumstance "where all domestic prices are fixed by the State" as an ***exemplar*** of where "special difficulties may exist in determining price comparability." Nothing in the text suggests that this exemplar is the ***unique*** case in which

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[3] *US – Hot-Rolled Steel (AB)*, para. 141 (italics added).

[4] U.S. Third-Party Submission, paras. 22-24.

investigating authorities may evaluate record evidence that "special difficulties may exist" with respect to price comparability.

II. The Phrase "Proper Comparison" in Article 2.2 of the Anti-Dumping Agreement

11. Furthermore, in constructing normal value, Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement do not preclude an investigating authority from looking to sources outside the country of origin for information or evidence about costs associated with the production of the product under consideration, or from using such information or evidence to determine a respondent's cost of production in the country of origin. Russia interprets Article 2.2 to forbid investigating authorities from using "information from other representative markets" in deriving normal value.[5]

12. Article 2.2 contains no such proscription. To the contrary, once an investigating authority determines that a respondent's records do not reasonably reflect the costs associated with the production and sale of a manufacturing input, it is entirely appropriate under Articles 2.2 and 2.2.1.1 for the authority to resort to external data that reflects real, market-based costs "in the country of origin".

13. The Appellate Body recognized the correctness of this approach in *EU – Biodiesel (Argentina)*, where, under the second condition of Article 2.2.1.1, the investigating authority used out-of-country sources to arrive at the cost of production in the country of origin. In certain circumstances, the proxy chosen may need to be adapted to reflect market conditions in the country of origin.[6] That said, in doing so, the authority should not be required to adapt costs in a

[5] Russia First Written Submission, para. 229.
[6] *See EU – Biodiesel (AB)*, para. 6.70.

way that reintroduces the same distortions that led it to substitute the recorded cost in the first place.

14. Therefore, a key issue to be addressed in this dispute is whether the investigating authority's decision to use information and evidence outside the country of origin to determine the real cost for a manufacturing input in the country of origin was based on a reasoned and adequate explanation.

III. The Conditions in the First Sentence of Article 2.2.1.1 of the Anti-Dumping Agreement

15. Similarly, Russia interprets Article 2.2.1.1 of the Anti-Dumping Agreement to bar investigating authorities from evaluating whether recorded costs are "reasonable" such that they permit a proper comparison.[7] Again, the text contains no such proscription. In fact, the first sentence of Article 2.2.1.1 includes three modifiers that enable an investigating authority, following an examination of the evidence of record, to calculate costs ***not*** on the basis of the records kept by the exporter or producer under investigation.

16. One modifier, the compound subordinate conjunction "provided that", introduces two conditions with respect to the cost records kept by the exporter or producer: The records must be "in accordance with the generally accepted accounting principles of the exporting country" and they must "reasonably reflect the costs associated with the production and sale of the product under consideration."[8]

[7] Russia First Written Submission, para. 405.
[8] Anti-Dumping Agreement, Art. 2.2.1.1.

17. As explained in the U.S. third-party submission,[9] these conditions, if met, do not require an investigating authority to use the costs reported in the records with no further consideration. As the Appellate Body noted in *EU – Biodiesel (Argentina)*, an investigating authority may examine such costs to see if they "have a genuine relationship with the production and sale of the product under consideration. This is because these are the costs that, together with other elements, would otherwise form the basis for the price of the like product if it were sold in the ordinary course of trade in the domestic market."[10]

18. Another modifier is introduced by the phrase, "[f]or the purpose of paragraph 2." This phrase indicates that the first sentence of Article 2.2.1.1 must be read in conjunction with the requirements set out in Article 2.2. This phrase underscores that the duties of an investigating authority under Article 2.2 do not change under Article 2.2.1.1: The investigating authority must exclude from the calculation of normal value ***all*** costs that if included would distort what is defined as "normal value".

19. As the Appellate Body observed in *EU – Biodiesel (Argentina)*, the costs calculated under Article 2.2 of the Anti-Dumping Agreement 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

[9] U.S. Third-Party Submission, paras. 34-41.

[10] *EU – Biodiesel (AB)*, paras. 6.24 (italics added); *see also EU – Biodiesel (AB)*, para. 6.26.

sales."[11] For this reason, "[t]he costs calculated pursuant to Article 2.2.1.1 of the Anti-Dumping Agreement must be capable of generating such a proxy."[12]

20. A third modifier is introduced by the adverb "normally", which follows immediately the verb "shall". The adverb "normally" moderates the obligation established in the first sentence of Article 2.2.1.1. Specifically, "normally" directs that "under normal or ordinary conditions" costs should be calculated on the basis of the records kept by the exporter or producer under investigation, but where conditions are demonstrated to be ***not*** normal or ***not*** ordinary, costs should ***not*** be calculated on the basis of these records.[13]

21. In this way, the text of Article 2.2.1.1 confirms that the investigating authority may evaluate evidence that recorded costs are not reasonable and, therefore, would prevent a proper comparison.

IV. Conclusion

22. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of the views of the United States.

[11] *EU – Biodiesel (AB)*, para. 6.24, citing *Thailand – H-Beams (Panel)*, para. 7.112, and *US – Softwood Lumber V (Panel)*, para. 7.278.

[12] *EU – Biodiesel (AB)*, paras. 6.24.

[13] *US – Clove Cigarettes (AB)*, para. 273 (finding that the use of the term 'normally" … indicates that the rule … admits of derogation under certain circumstances").