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

(AB-2017-1 / DS442)

THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES OF AMERICA

June 19, 2017

Mr. Chairman, members of the Division:

1. The arguments raised by the European Union ("EU") and Indonesia concern fundamental questions of interpretation regarding the task of panels and the Appellate Body under the DSU.[1]

2. As an initial matter, the United States sympathizes with the EU's frustration that dispute settlement proceedings have continued even though both parties appear to agree that, for all practical purposes, the dispute between them has been resolved. It is the responsibility of WTO Members to take steps so that the system operates as efficiently and effectively as possible. Burdening other Members and the system with unnecessary proceedings only hinders this objective.

3. We therefore continue to encourage the parties to resolve their remaining issues outside of this formal process, including perhaps through suspension of this appellate process while preserving the parties' rights. But frustration with this dispute is no basis to ignore the text and undermine the structure of the DSU. Rather, resolution of the legal issues raised must be accomplished consistent with the provisions of the DSU as agreed by Members – and not by inventing approaches that do not respect the explicit text of those provisions.

4. The EU's claims that the Panel erred in making a recommendation because the antidumping duty expired in the course of the panel proceedings cannot be sustained under DSU Article 15.[2] The EU argues that the factual basis for such a result can be found in an email sent

[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").
[2] *See* EU's Other Appellant Submission, paras. 21, 23.

from the EU to the Secretariat nearly two months after the Panel concluded its interim review, and just one month before circulation of the public report.[3] Under Article 15, this is far too late for evidence to be submitted and evaluated in a panel proceeding, as numerous panels and the Appellate Body have previously found.[4] The alleged expiry of the EU measure is not, therefore, a "fact" forming part of the record in these panel proceedings, and there can be no error by the Panel in relation to that non-"fact". The Appellate Body's evaluation of claims of error under DSU Articles 3 and 19.1 can and must end there.

5. For completeness, we note that, in addition to its untimeliness, the evidence submitted by the EU is also not relevant to "the matter" that the DSB has established the Panel to examine. Under DSU Articles 7.1 and 6.2, the task of a panel is to determine whether the measure at issue is consistent with the relevant obligations "at the time of establishment of the Panel", as previous panels and the Appellate Body have repeatedly found.[5]

6. In suggesting that the Panel was required to reassess the status of the challenged measure at the conclusion of the panel proceedings, the EU attempts to alter the Panel's terms of reference – not only to include a later-in-time measure, but also to include an examination of whether the EU's WTO-inconsistent action *continued* after panel establishment. This was not the task of the Panel. The Panel's terms of reference were to examine "the matter" – that is, the

[3] *See* EU's Other Appellant Submission, para. 3; Panel Report, pg. 1.
[4] *See, e.g.*, *EC – Sardines (AB)*, para. 301; *EC – Approval and Marketing of Biotech Products*, para. 6.134; *EC – Bananas III (Article 21.5 – US) (Panel)*, para. 6.16; *China – GOES (Article 21.5)*, paras. 6.20-6.22; *China – Auto Parts (Panel)*, paras. 6.36-6.37; *EC – IT Products*, para. 6.48; *EC – Large Civil Aircraft (Panel)*, para. 6.311; *US – Offset Act (Byrd Amendment) (AB)*, para. 222; *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 171.
[5] *EC – Selected Customs Matters (AB)*, paras. 187, 259; *see also EC – Chicken Cuts (AB)*, para. 156; *EC – Approval and Marketing of Biotech Products*, para. 7.456; *EC – Large Civil Aircraft (Panel)*, para. 7.680.

measures and claims – identified in Indonesia's panel request, as they existed at the time the DSB established the Panel. Any actions taken after that time may become relevant in later actions to resolve the dispute, such as in consultations between the parties or compliance proceedings under DSU Article 21.5, but they may not serve to alter the matter as challenged by the complainant.

7. The DSU also contradicts the EU's argument that a panel may not make a recommendation with respect to a measure that expires in the course of the panel's examination. Where a panel finds that a challenged measure within its terms of reference is inconsistent with a covered agreement, DSU Article 19.1 provides, in mandatory terms, that the panel "*shall recommend* that the Member concerned bring the measure into conformity with that agreement." Just as the expiry of a measure after the time of panel establishment cannot alter the scope of the panel's terms of reference, it also cannot alter the mandate given by Members to a panel under Article 19.1 to make a recommendation.

8. Limiting a panel's review to the measures as they existed at the time of panel establishment and requiring that a panel make a recommendation with respect to any such measure found to be WTO-inconsistent not only satisfies the text of the DSU, it preserves the balance of rights and obligations between the parties. A responding party avoids the burden of defending itself against continually evolving claims of inconsistency, but cannot evade liability by changing its measures after panel establishment. In the same way, by obtaining a recommendation that permits review of the WTO-consistency of any measure taken to comply after the time of panel establishment, a complaining party avoids the need to initiate new

proceedings every time the respondent modifies a challenged measure that is found to be WTO-inconsistent. Failure to make the required recommendation would ignore the plain language of Article 19.1 and alter the rights and obligations of the parties. Regrettably, the interpretations suggested by the EU in this appeal risk undermining the efficacy and efficiency of the dispute settlement system agreed to by WTO Members and therefore risk undermining Members' support for that system.

9. We thank the Division for its attention to these important issues.