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EUROPEAN UNION – ANTI-DUMPING MEASURES ON BIODIESEL FROM INDONESIA

REQUEST FOR CONSULTATIONS BY INDONESIA

The following communication, dated 10 June 2014, from the delegation of Indonesia to the delegation of the European Union and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

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My authorities have instructed me to request consultations with the European Union in accordance with Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ["DSU"], Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ["GATT 1994"], and Articles 17.2 and 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ["the Anti-Dumping Agreement"], with respect to the following measures, including any subsequent amendments, replacements, related measures and implementing measures, which the Government of the Republic of Indonesia ["Indonesia"] considers to be inconsistent with the obligations of the European Union under the relevant provisions of the WTO Agreements:

I. Article 2(5) and Article 2(6)(b) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ["Basic AD Regulation"][1] as well as any subsequent amendments, replacements, implementing measures and related instruments or practices.

II. The anti-dumping measures imposed by the European Union on imports of biodiesel originating in, *inter alia*, Indonesia,[2] and the underlying investigation.

I. Claims concerning the Basic AD Regulation[3]

A. The second paragraph of Article 2(5) of the Basic AD Regulation provides that "[i]f costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets." Indonesia considers that Article 2(5) of the Basic AD Regulation is

[1] Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), OJ L 343, 22.12.2009, p. 51 and corrigendum to Council Regulation (EC) No 1225/2009, OJ L 7, 12.1.2010, p. 22, as amended, including by Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012, OJ L 237, 3.9.2012, p.1; Regulation (EU) No 1168/2012 of the European Parliament and of the Council of 12 December 2012, OJ L 344, 14.12.2012, p.1 and Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014, OJ L18, 21.1.2014, p.1.

[2] Commission Regulation (EU) No 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, OJ L 141, 28.5.2013, p. 6 and Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, 26.11.2013, p. 2.

[3] Including any subsequent amendments, replacements, implementing measures and related instruments or practices.

inconsistent as such with, inter alia, the following provisions of the Anti-Dumping Agreement, the GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement"):

1. Article 2.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, because these provisions do not permit the adjustment or establishment of the cost of production on the basis of data or information other than that pertaining to the production in the country of origin.

2. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because these provisions require that the costs be calculated on the basis of the records kept by the producers under investigation when such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration and do not permit the adjustment or replacement of the costs actually incurred by the producers under investigation by other costs, simply because they are considered to be artificially low, depressed or distorted; and because these provisions require that the costs used be associated with the production and sale of the product under consideration.

3. Article 9.3 of the Anti-Dumping Agreement since, by failing to construct normal values in accordance with Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement, the amount of the anti-dumping duty to be imposed exceeds the margin of dumping if correctly calculated on the basis of the rules included in Article 2 of the Anti-Dumping Agreement.

4. Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement, insofar as the European Union has not taken all steps to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the GATT 1994 and of the Anti-Dumping Agreement.

B. Article 2(6)(b) of the Basic AD Regulation provides that if the amounts for selling, for general and administrative costs and for profits cannot be determined on the basis of the actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation, these amounts may be determined on the basis of the "*actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin*." Indonesia considers that Article 2(6)(b) of the Basic AD Regulation is inconsistent as such with, *inter alia*, the following provisions of the Anti-Dumping Agreement and the Marrakesh Agreement:

1. Article 2.2.2(i) of the Anti-Dumping Agreement because this provision does not require that the actual amounts incurred and realized in respect of production and sales of the same general category of products by the exporter or producer in question in the domestic market of the country of origin pertain to sales in the ordinary course of trade in order to be used for the determination of the amounts for administrative, selling and general costs and profits.

2. Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement, insofar as the European Union has not taken all steps to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Agreement.

II. Claims concerning the anti-dumping measures imposed on imports of Indonesian biodiesel[4] and the underlying investigation

Indonesia considers that the anti-dumping measures imposed by the European Union on imports of biodiesel originating in, *inter alia*, Indonesia and the underlying investigation are inconsistent with the following provisions of the Anti-Dumping Agreement and of the GATT 1994:

1. Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement because the European Union incorrectly determined the existence of a particular market situation as regards the cost of a raw material used in the production of biodiesel by the Indonesian producers under investigation, as a basis to adjust the cost of production of biodiesel.

[4] Including any amendments thereof.

2. Articles 2.1, 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because in constructing the normal value for the Indonesian producers under investigation, the European Union did not calculate the cost of production of biodiesel on the basis of the records kept by these producers, and because the European Union therefore failed to properly calculate the cost of production and properly construct the normal value for these producers.

3. Articles 2.1 and 2.2 of the Anti-Dumping Agreement because the European Union failed to construct the normal value for the Indonesian producers under investigation on the basis of the cost of production of biodiesel in the country of origin, *i.e.* Indonesia.

4. Articles 2.1, 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 because when constructing the normal value for the Indonesian producers under investigation, the European Union included costs that do not reasonably reflect the costs associated with the production and sale of biodiesel in Indonesia; and the methodology used by the European Union for the adjustment of the actual cost of production was not reasonable and did not result in the cost of production of biodiesel being reasonably reflected since, among others, for some producers the adjustment was based on a feedstock that they did not actually use in the production of biodiesel. The European Union therefore failed to properly calculate the cost of production and to properly construct the normal value for these producers.

Indonesia also considers that Article 2(5) of the Basic AD Regulation as applied in the investigation underlying the anti-dumping measures is inconsistent with Articles 2.1, 2.2 and 2.2.1.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 as set forth in claims 2-4 above.

5. Articles 2.1, 2.2, 2.2.2 and 2.2.2(iii) of the Anti-Dumping Agreement because when constructing the normal value for the Indonesian producers under investigation, the European Union did not establish a cap for the profits as required by Article 2.2.2(iii); the amount for profits established was not determined by the European Union on the basis of a reasonable method; and the European Union improperly refused to base the amount for profits for some Indonesian producers on the actual amounts incurred and realized in respect of production and sales in Indonesia of the same general category of products. The European Union therefore failed to properly construct the normal value for these producers.

6. Article 2.4 of the Anti-Dumping Agreement because when comparing the normal value and the export price, the European Union failed to make due allowances for differences affecting price comparability including differences in taxation thereby precluding a fair comparison between the export price and normal value on account of *inter alia*, the following:

(i) by comparing a constructed normal value that included a cost of production based on reference prices of a raw material -- which are in turn based on international prices that include the export tax on that raw material -- with export prices that reflected the actual costs of the raw material incurred by the Indonesian producers under investigation;

(ii) by deducting alleged commissions or mark-up on export sales to the European Union that were made by an Indonesian producer via related companies located in a third country;

(iii) by making an allowance for profits accruing to the Indonesian exporters' related importers in the European Union on a basis other than the actual profits that accrued to the related importers in the European Union in the investigation period; by rejecting the actual profits accrued; and by rejecting the positive evidence provided by certain Indonesian producers with regard to the level of the notional profit margins of the European Union importers of biodiesel.

7. Articles 2.3 and 2.4 of the Anti-Dumping Agreement because the European did not construct the export price for one Indonesian producer under investigation on the basis of the price at which the imported biodiesel was first resold to independent buyers in the European Union or because the European Union failed to make an adjustment to the export price for the premium received for "double-counting" biodiesel by this Indonesian producer.

8. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because the European Union imposed and collected anti-dumping duties in excess of the margin of dumping that should have been established in accordance with Article 2 of the Anti-Dumping Agreement.

9. Articles 3.1 and 3.2 of the Anti-Dumping Agreement because the European Union's determination of injury to the Union industry did not involve an objective examination of positive evidence regarding the volume of the allegedly dumped imports and the effect of those imports on prices in the domestic market for biodiesel and the consequent impact of these allegedly dumped imports on domestic producers of biodiesel. First, with regard to the volume of the allegedly dumped imports, the European Union failed to conduct an objective examination as it did not take into account in its analysis, *inter alia*, the large volume of the allegedly dumped imports made by the Union industry and the reversed trend in the volume of the imports at the end of the period of investigation. Second, the European Union's findings regarding the price effects of the allegedly dumped imports including price undercutting were not based on an objective examination of the evidence on the record as among others, the European Union did not ensure price comparability in terms of physical characteristics and model-matching and based its determination of undercutting on partial and unexplained sales of the sampled European Union producers.

10. Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the European Union's injury determination was not based on positive evidence and did not involve an objective examination of the consequent impact of the allegedly dumped imports on domestic producers of the like product, *inter alia*, in relation to the market share, capacity and capacity utilization of the Union industry and the European Union failed to make a proper evaluation of the overall developments and interaction among the injury factors taken together.

11. Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the European Union failed to conduct an objective examination, based on positive evidence, of the causal relationship between the allegedly dumped imports and the allegedly injury to the domestic industry as the European Union failed to make an objective determination, on the basis of all relevant evidence before it, that the allegedly dumped imports were, through the effects of dumping causing injury and also failed to conduct an objective examination, based on positive evidence, of factors other than the allegedly dumped imports which at the same time were injuring the Union industry, and thus attributed the injury caused by these other factors to the allegedly dumped imports. The other factors include, *inter alia*, the effect of the "double-counting" regimes on the domestic demand for biodiesel in the European Union, the effect of the reduction of support by the EU and its Member States for biodiesel, the overcapacity of the Union industry, the imports of biodiesel made by the Union industry, and the lack of vertical integration and access to raw materials of the Union industry.

12. Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement because first, the European Union treated certain information in the complaint and the submissions made in the course of the investigation by the complainants as confidential, in the absence of the showing of "good cause", and second, because the European Union failed to ensure the provision of sufficiently detailed non-confidential summaries permitting a reasonable understanding of the substance of the confidential information by the complainants as regards several annexes of the complaint and the macroeconomic data submitted during the course of the investigation, and of certain information in the questionnaire responses by the sampled Union producers or statements appropriately explaining the reasons why particular pieces of confidential information were not susceptible of non-confidential summarization.

13. Article 6.9 of the Anti-Dumping Agreement because the European Union failed to inform interested parties of the essential facts under consideration which formed the basis for its decision to apply definitive anti-dumping measures including essential facts underlying the determinations regarding the existence of dumping, injury and causal link, and the calculation of the margins of dumping and injury, thereby impairing the Indonesian producers' ability to defend their interests.

14. Articles 7.1, 7.2, 9.2 and 9.3 of the Anti-Dumping Agreement because the European Union incorrectly imposed on and collected from one Indonesian producer under investigation, a provisional duty in excess of the margin of dumping established and corrected for it at the provisional stage.

15. Article 15 of the Anti-Dumping Agreement because the European Union failed to explore possibilities of constructive remedies before applying anti-dumping duties on Indonesian biodiesel imports as it did not actively consider the undertakings offered by two Indonesian producers under investigation and because the European Union did not give special regard to the special situation of Indonesia's status as a developing country Member.

In view of the claims set forth above, Indonesia considers that the European Union has also acted inconsistently with Article VI of the GATT 1994 and Article 1 of the Anti-Dumping Agreement.

The European Union's measures noted above, therefore, appear to nullify or impair, directly or indirectly, benefits accruing to Indonesia under the cited Agreements.

Indonesia reserves its right to address, in the course of the consultations, additional measures and claims in respect of the above matters including any amendment, replacement, extension, implementation measures or other related issues.

Indonesia looks forward to receiving a reply from the European Union to the present request for consultations. Indonesia is ready to discuss with the European Union a mutually convenient date and modalities for organizing the consultations.

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