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REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS622/R.

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WORKING PROCEDURES OF THE PANEL

Adopted on 6 June 2025

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these Working Procedures and adopt additional procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information submitted to the Panel that the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it, and if possible within 10 days of receiving the request.

(4) Parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel concerning Business Confidential Information.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel with the parties, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

(5) Each party is encouraged to be succinct in its submissions in the interest of efficient dispute settlement.

Preliminary rulings

4. (1) If the European Union considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

   a. The European Union shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Indonesia shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

   b. The Panel may issue a preliminary ruling on the issues raised before, during or after the first substantive meeting, or the Panel may defer any ruling until it issues its Report.

   c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel will provide reasons for the ruling either at the time that the ruling is made, or subsequently in its Report.

   d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on the third parties. The Panel may provide the third parties with an opportunity to provide comments on any such request, either in their written submission, as provided for in the timetable, or in a separate submission. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with the third parties.

   (2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for responses to questions or comments on responses provided by the other party. Additional exceptions may be granted upon a showing of good cause.

   (2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

   (2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission that contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Indonesia should be numbered IDN-1, IDN-2, etc. Exhibits submitted by the European Union should be numbered EU-1, EU-2, etc. If the last exhibit in connection with a submission was numbered IDN-5, the first exhibit in connection with the next submission thus would be numbered IDN-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate "exhibit withdrawn" or

"exhibit intentionally left blank" on the cover page that contains the number of the exhibit concerned.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the Editorial Guide (which is available in the Help & Resources section of the Disputes Online Registry Application (DORA)).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

   a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.

   b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.

11. The parties shall be present at the meetings only when invited by the Panel to appear before it. As a general matter, the Panel intends to conduct such meetings in person but may provide for remote participation as appropriate.

12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

    (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and of the submissions of the parties and third parties.

13. Each party shall provide the list of members of its delegation who will attend the meeting no later than 5:00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.

14. A request by a party for interpretation from one WTO working language to another should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

15. The first substantive meeting of the Panel with the parties shall be conducted as follows:

   a. The Panel shall invite Indonesia to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its opening statement. Before each party takes the floor, it shall provide the Panel and other participants at the

meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.

b. Each party should limit the duration of its opening statement to not more than 75 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least three working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

d. The Panel may subsequently pose questions to the parties.

e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Indonesia presenting its statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement as delivered no later than 5:00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting of the Panel with the parties.

ii. Each party shall send in writing, within the timeframe confirmed by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe confirmed by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the timeframe established by the Panel.

16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the European Union shall be given the opportunity to present its oral statement first. The party that presented its opening statement first shall present its closing statement first.

Third-party session

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session three weeks before this session.

19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and of the submissions of the parties and third parties.

(3) Each third party shall provide the list of members of its delegation who will attend the third-party session no later than 5:00 p.m. (Geneva time) three working days before the third-party session.

20. To ensure the availability of interpreters, the third parties shall also indicate at least three weeks before the third-party session whether they intend to make their statement in a WTO working language other than English and whether they require interpretation from English to any other WTO working language.

21. The third-party session shall be conducted as follows:

    a. All parties and third parties may be present during the entirety of this session.

    b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants at the session with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.

    c. Each third party should limit the duration of its statement to 15 minutes. If a third party considers that it requires more time for its oral statement, it should inform the Panel and the parties at least seven working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.

    d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions, through the Panel, to any third party for clarification on any matter raised in that third party's submission or statement.

    e. The Panel may subsequently pose questions to any third party.

    f. Following the third-party session:

        i. Each third party shall submit the final written version of its oral statement as delivered, no later than 5:00 p.m. (Geneva time) on the first working day following the meeting.

        ii. Each party may send in writing, within the timeframe to be confirmed by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

        iii. The Panel may send in writing, within the timeframe to be confirmed by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.

        iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within the timeframe established by the Panel.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel Report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the Report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the matter.

23. Each party shall submit one integrated executive summary. This integrated executive summary shall summarize the facts and arguments as presented to the Panel. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

24. Each integrated executive summary shall not exceed 30 pages.

25. Each third party shall submit an integrated executive summary of its arguments as presented to the Panel. The executive summary to be provided by each third party shall not exceed

six pages. If a third party wishes for one of its submissions which does not exceed six pages to serve as its executive summary, it shall so indicate. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

Interim review

26. Following issuance of the Interim Report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

27. If no meeting is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such written comments shall be limited to the other party's written request for review.

28. If a meeting is requested, the Panel shall consult with the parties on the timing of the meeting and any further written comments.

Interim and Final Reports

29. The Interim Report, as well as the Final Report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:

    a. Unless otherwise requested by the Panel, the Panel Secretary or the DS Registry, all communications with the Panel shall take place via the Disputes On-Line Registry Application (DORA) https://dora.wto.org. All submissions shall be uploaded to the Documents tab by 5:00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded to DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document to DORA shall constitute electronic service on the Panel, the other party, and the third parties.

    b. The DS Registry is available to assist parties and third parties with DORA, including managing their DORA accounts and filing and downloading documents. The DS Registry is located in Room 2047 of the CWR building and is open from 9.30 a.m. to 12.30 p.m. and 2.30 p.m. to 5:00 p.m. The Registry can be reached at 022 739 5644 and via email at DSRegistry@wto.org. A DORA User Guide for Members is available in the Help & Resources section of DORA.

    c. If a document is in a format that cannot be submitted electronically, then the party or third party shall complete the Notice of Manual Filing (available in the Help & Resources section of DORA) and upload that Notice to DORA by 5:00 p.m. on the due date established by the Panel. The party or third party shall bring the physical document to the DS Registry by 5:00 p.m. (Geneva time) the next working day along with the documents described in subparagraph e.

    d. The parties and third parties should upload submissions in both Microsoft Word and PDF formats. Exhibits may be submitted either in PDF, Word or Excel formats. To the extent possible, all documents in PDF format, including exhibits, should be searchable.

    e. Each party and third party shall make an appointment with the DS Registry to file one paper copy of all documents it submits to the Panel, including the exhibits. The DS Registry shall stamp the documents with the date and time of the submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format only. In this case, the cover page that contains the number of the exhibit concerned should indicate that the exhibit is only available in electronic format.

f. The Panel shall provide the parties with the Draft Descriptive Part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.

g. If any party or third party is unable to meet a deadline set by the Panel because of technical difficulties in uploading any document to DORA that it cannot resolve with the assistance of the DS Registry, it shall submit the document(s) via email without delay and no later than by 6:00 p.m. on the due date. Any such email shall be addressed to the DS Registry, the Panel Secretary, the other party and, if appropriate, the third parties.

h. In case any party or third party is unable to access a document submitted via DORA because of technical difficulties, it shall promptly, upon becoming aware of the problem, inform the DS Registry, the Panel Secretary, and the party or third party that submitted the document, of the problem. The party or third party that submitted the document(s) shall promptly provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry and the Panel Secretary.

Correction of clerical errors in submissions

31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected and should be made promptly following the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 6 June 2025

1. For the purpose of this proceeding, business confidential information (BCI) is defined as any information that has been designated as such by a party submitting the information to the Panel. The parties shall only designate as BCI, information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the European Commission as confidential in the course of the anti-dumping proceeding at issue in this dispute.

2. Subject to paragraphs 3 and 4, no person may have access to BCI except a Panelist, a member of the Secretariat assisting the Panel, an employee of a party or a third party, or an outside advisor to a party or a third party for the purposes of this dispute. However, an outside advisor is not permitted to access BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the proceeding**[**s**]** at issue in this dispute, or an officer or employee of an association of such enterprises.

3. When third parties receive written submissions pursuant to the Working Procedures, the third parties shall receive a version of such written submissions and any exhibits with BCI redacted. The BCI-redacted versions of written submissions and exhibits received by third parties shall be sufficient to convey a reasonable understanding of the substance of the information at issue. Written submissions and exhibits, and their BCI-redacted versions, shall be submitted at the same time.

4. A third party may request access to the BCI version of a BCI-redacted written submission or exhibit received pursuant to the Working Procedures. Any such request shall include a list of the third party's representatives and outside advisors who would like to review the BCI and specify how they would like to access the BCI. A party requested by a third party to provide that third party with access to BCI must provide such access promptly.

5. A person having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

6. When a party or third party includes BCI in a submission, the cover and/or first page of the document containing BCI, and each page of the document, shall be marked to indicate the presence of such information. The specific information in question shall be placed between double square brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. BCI presented in the form of, or as part of, an exhibit shall be marked to indicate, in addition to the above, that it contains BCI by putting "BCI" next to the exhibit number (e.g. Exhibit [MEMBER SYMBOL]-1 (BCI)).

7. When BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, when BCI is submitted: (a) in electronic format using the Disputes Online Registry Application (DORA), the level of confidentiality shall be selected as BCI; and (b) on a storage medium, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

8. At any of the meetings of the Panel with the parties, including the third-party session, if a party or third party intends to refer to BCI, it shall inform the Panel before doing so, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

9. When a party or third party submits a document containing BCI to the Panel, the other party and third parties, when referring to that BCI in its documents, including written submissions, and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 6.

10. If a party considers that information submitted by the other party or a third party should have been designated as BCI and objects to such submission without BCI designation, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. Similarly, if a party considers that the other party or a third party submitted information designated as BCI, information which should not be so designated, it shall promptly bring this objection to the attention of the Panel and the other party or third party, together with the reasons for the objection. The Panel shall decide, after consulting with the party which submitted the information subject to an objection, whether that information will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 1.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body, or arbitrators adjudicating an appeal arbitration under Article 25 of the DSU in line with any agreed appeal arbitration procedures, in the event of an appeal of the Panel's Report.

ANNEX A-3

INTERIM REVIEW

1 INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the arguments made at the interim review stage. We have revised, where appropriate, certain aspects of the Report in light of the parties' comments. In addition, we have made certain changes of an editorial nature to improve the clarity and accuracy of the Report, or to correct typographical and non-substantive errors, including those suggested by the parties. Due to the changes made in the Report, the footnote numbers in the Final Report have changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY INDONESIA

2.1 Indonesia's claims concerning the withdrawal of the written application

2.1.1 Paragraph 7.7

2.1. Indonesia requests us to modify this paragraph to more accurately reflect Indonesia's position.[1]

2.2. The European Union does not comment on this request.

2.3. Paragraph 7.7 provides a general introduction to Indonesia's claims under Article X:3(a) of the GATT 1994 and Article 5.6 of the Anti-Dumping Agreement. Paragraphs 7.8 and 7.25 provide a more specific introduction to each of these two sets of claims. The modification requested by Indonesia concerns its claims under Article X:3(a), and is already reflected in paragraph 7.25. We thus decline to make the specific modification requested by Indonesia in paragraph 7.7 of the Interim Report.

2.1.2 Section 7.2.1.2

2.4. Indonesia requests us to clarify, in our summary of the European Union's argument in paragraph 7.17, that the European Union did not address the importance of the condition of "special circumstances" in Article 5.6, offered no interpretation of that condition, and offered no position on whether the withdrawal of a written application could, as such, constitute special circumstances.[2]

2.5. The European Union does not comment on this request.

2.6. In the Interim Report we concluded that Article 5.6 did not apply in the present dispute, and thus the European Commission was not required to make a determination regarding the existence of "special circumstances". We see no need to emphasize arguments that were *not* made by the European Union in this regard. We thus decline Indonesia's request to amend paragraph 7.17 of the Interim Report.

2.1.3 Paragraph 7.44

2.7. Indonesia requests that we reflect, in the Final Report, the European Commission's statements in previous countervailing duty investigations, which Indonesia presented as evidence in Exhibit IDN-54.[3] The European Commission stated in each of these previous investigations that the injury, causation, and Union interest analyses performed in the countervailing duty investigation and a parallel anti-dumping investigation were *mutatis mutandis* identical because the definition of the

[1] Indonesia's request for interim review, para. 3.
[2] Indonesia's request for interim review, para. 4.
[3] Indonesia's request for interim review, para. 5.

domestic industry, the sampled EU producers, and the investigation period were the same.[4] Indonesia also requests us to include its argument, based on this evidence, that the European Union's own prior practice confirms the close connection between what Indonesia considers were parallel anti-dumping and countervailing duty investigations.[5]

2.8. The European Union does not comment on this request.

2.9. We have reflected Indonesia's submissions in this regard, but in paragraphs 7.49 and 7.60 of the Final Report.

2.1.4 Paragraph 7.45

2.10. Noting our statement that notwithstanding certain clarifications regarding its position, Indonesia continued to argue that the European Commission did not enjoy absolute discretion to continue or terminate an investigation, Indonesia contends that without further context, this statement mischaracterizes Indonesia's argument.[6] Indonesia emphasizes that its argument was that the European Commission does not enjoy absolute discretion to continue or terminate the investigation because continuation may not occur if it is proven that there is no dumping or resulting injury or Union interest in imposing measures. Therefore, Indonesia submits that, in defining when termination may not occur, Article 9(1) of the EU Basic Anti-Dumping Regulation also identifies the condition for continuation.[7] Indonesia requests us to modify this paragraph to accurately reflect its argument.[8]

2.11. The European Union does not comment on Indonesia's request.

2.12. Paragraph 7.45 reflects the tension we found in Indonesia's submissions in these proceedings. On one hand, Indonesia clarified that it was not contesting the existence of the Union interest test under the relevant EU legislation because that was a matter of EU law, or contending that the European Commission was required to immediately terminate the anti-dumping investigation upon the withdrawal of a written application. On the other hand, Indonesia continued to argue that the European Commission did not enjoy absolute discretion to continue or terminate the investigation under EU law.

2.13. Indonesia's comments on the Interim Report, or the additions it requests, do not address this tension, or explain why the tension we found does not exist. Nevertheless, we note that in paragraph 7.46 of the Report, we responded to Indonesia's argument based on the scope of discretion granted to the European Commission under Article 9(1) of the EU Basic Anti-Dumping Regulation and Article 14(1) of the EU Basic Anti-Subsidy Regulation, which are the provisions of EU law whose administration Indonesia challenged under Article X:3(a) of the GATT 1994.[9] Hence, we decline to modify this paragraph in the manner requested by Indonesia.

2.1.5 Paragraph 7.46

2.14. Indonesia requests us to modify the second sentence of this paragraph to better reflect Indonesia's position.[10]

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[4] Indonesia's request for interim review, para. 5.

[5] Indonesia's request for interim review, para. 5 (referring to Extracts from final determinations of previous EU countervailing duty investigations (Exhibit IDN-54)).

[6] Indonesia's request for interim review, para. 6.

[7] Indonesia's request for interim review, para. 6.

[8] Indonesia's request for interim review, para. 6.

[9] We note that Union interest is also referenced in other provisions of the European Union's dumping and subsidy regulations, such as Article 9(4) of the EU Basic Anti-Dumping Regulation and Article 15(1) of the EU Basic Anti-Subsidy Regulation. Article 9(4) of the EU Basic Anti-Dumping Regulation provides in this regard that "[w]here the facts as finally established show that there is dumping, and injury caused thereby, and the Union interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Commission acting in accordance with the examination procedure referred to in Article 15(3)." (EU Basic Anti-Dumping Regulation (Exhibit IDN-1)). Article 15(1) of the EU Basic Anti-Subsidy Regulation provides similar wording in the context of imposition of countervailing duties. (EU Basic Anti-Subsidy Regulation (Exhibit EU-1)) We note that the administration of these provisions are not at issue in this dispute.

[10] Indonesia's request for interim review, para. 7.

2.15. The European Union does not comment on this request.

2.16. The second sentence of this paragraph reflects our analysis and finding, rather than Indonesia's arguments or position. Hence, we decline to make this modification.

2.1.6 Paragraph 7.49

2.17. Indonesia requests us to reflect in the Final Report its submission that the underlying anti-dumping investigation, and the countervailing duty investigation were closely related because they concerned (a) the same product, investigation period and period considered, exporting producers and domestic producers; and (b) were initiated by the same complainant.[11]

2.18. The European Union does not comment on this request.

2.19. We have added the elements requested by Indonesia in paragraph 7.49 of the Final Report.

2.1.7 Paragraph 7.52

2.20. To more accurately reflect its claim, Indonesia requests us to revise this paragraph to refer to the European Commission's decision to impose anti-dumping duties while terminating the parallel countervailing duty investigation following the withdrawal of the written application in both investigations.[12]

2.21. The European Union does not comment on this request.

2.22. We have made the modification requested by Indonesia in paragraph 7.52 of the Final Report.

2.1.8 Paragraphs 7.53-7.54 and 7.58

2.23. Indonesia requests us to further explain our assessment as to why the circumstances of the underlying anti-dumping investigation and the countervailing duty investigation were similar.[13] In Indonesia's view, these paragraphs refer to the general differences between the investigations but do not address the specific factual circumstances on which Indonesia relied, including that the investigations concerned the same product, the same investigation period and period considered, the same producers of the product concerned and the same domestic producers; were initiated by the same applicant; proceeded in parallel; and involved withdrawal of the written applications.[14] Indonesia recalls that, based on the European Commission's statements in previous parallel investigations, the European Union accepts that injury, causation, and Union interest analyses in parallel investigations are *mutatis mutandis* identical where the Union industry, sampled EU producers, and investigation period are the same.[15]

2.24. The European Union does not comment on this request.

2.25. While we consider that the Interim Report already sets out the basis for rejecting this claim, we have nonetheless elaborated on our reasoning in paragraph 7.54 of the Final Report for rejecting Indonesia's claim.

2.1.9 Paragraph 7.54

2.26. Indonesia requests us to revise this paragraph to accurately reflect the factors on which Indonesia relied to show that the investigations were closely related.[16]

2.27. The European Union does not comment on this request.

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[11] Indonesia's request for interim review, para. 8
[12] Indonesia's request for interim review, para. 9.
[13] Indonesia's request for interim review, para. 10.
[14] Indonesia's request for interim review, para. 10.
[15] Indonesia's request for interim review, para. 10.
[16] Indonesia's request for interim review, para. 11.

2.28. While we have elaborated on our reasoning in paragraph 7.54, taking into account Indonesia's comments, we do not consider Indonesia's specific drafting modification accurately reflects our findings. We thus decline to make the specific drafting modification requested by Indonesia.

2.1.10 Paragraph 7.56

2.29. Indonesia requests us to further explain our statement that there is "no basis in Article X:3(a) to require a 'determination' from an authority justifying and explaining the divergent courses of the two investigations".[17] Indonesia emphasizes that its argument was not that Article X:3(a) contains a self-standing obligation to provide a reasoned explanation in any and all circumstances. Rather, Indonesia argued, relying on previous panel reports, that the absence of sufficient support or explanation for different decisions in the specific circumstances of the current dispute resulted in non-uniform and unreasonable administration under Article X:3(a).[18]

2.30. The European Union does not comment on this request.

2.31. As noted in paragraph 7.49 of the Interim Report, Indonesia contended that the European Union failed to administer its regulations in a uniform manner because, *inter alia*, it did not make a determination justifying and explaining the opposite application of those provisions, in "similar, if not identical" circumstances, despite its prior practice of terminating anti-dumping and countervailing duty investigations in case of withdrawal of the written application. Considering that we found that the factual circumstances of the two investigations were not similar, the premise for Indonesia's contention does not hold. Paragraphs 7.56 and 7.58 clearly set out the basis for our finding in this regard. We thus decline Indonesia's request.

2.1.11 Section 7.2.2.7

2.32. Indonesia requests us to address its arguments and evidence concerning the European Commission's prior practice following withdrawal of the written applications.[19] Indonesia considers that the Interim Report mischaracterized its argument. In particular, Indonesia submits that its argument was not that prior practice itself imposed an obligation to provide an explanation[20] or that the European Union violated Article X:3(a) because the European Commission departed from its prior practice of terminating investigations following the withdrawal of the written application.[21] Instead, Indonesia explained that its list of previous EU decisions to terminate investigations (submitted as Exhibit IDN-53) formed part of the "factual circumstances relevant to [its] Article X:3(a) claims" and rebutted the European Union's arguments concerning the timing, procedural stage, and reasons for withdrawal.[22] Indonesia requests us to reflect its submission that Exhibit IDN-53 demonstrates "the European Union's prior practice of terminating […] investigations in all cases of withdrawal of the [written application]"[23], and to explain in the Final Report how we took into account the evidence presented in Exhibit IDN-53.[24]

2.33. The European Union does not comment on this request.

2.34. Regarding Indonesia's comment that the Interim Report mischaracterized its argument, we expressly stated in paragraph 7.62 of the Report that Indonesia's claim under Article X:3(a) is not premised upon the European Commission's compliance with its own practices. Paragraph 7.47 also expressly noted Indonesia's clarification in this regard.

2.35. On Indonesia's point that its arguments and evidence were not addressed, Indonesia did not establish the relevance of Exhibit IDN-53 to its case. First, Indonesia did not argue that the

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[17] Indonesia's request for interim review, para. 12.
[18] Indonesia's second written submission, paras. 44-45; first written submission, para. 119; response to Panel question No. 8, para. 33, and question No. 11, para. 52. Panel Reports, *China – Raw Materials*, paras. 7.745-7.746; *Dominican Republic – Import and Sale of Cigarettes*, para. 7.388.
[19] Indonesia's request for interim review, para. 13.
[20] Indonesia's request for interim review, para. 13.
[21] Indonesia's response to Panel question No. 13, para. 58.
[22] Indonesia's response to Panel questions Nos. 53-54, para. 35.
[23] Indonesia's response to Panel questions Nos. 53-54, para. 36.
[24] Indonesia's request for interim review, para. 13.

European Commission's violation was due to its departure from this prior practice, as noted in paragraph 7.47 of the Interim Report. Second, in response to our questions Nos. 53 and 54, which probed the relevance of the evidence presented in Exhibit IDN-53 to Indonesia's claims under Article X:3(a), Indonesia explained that whether the administration meets the standards of Article X:3(a) entails a consideration of factual circumstances specific to each case, and explained that in this case, the factual circumstances of the parallel, closely related investigations were "similar, if not identical".[25] We disagreed, for the reasons set out in the Report, that the two investigations were similar. Indonesia's argument in these proceedings was not that an authority is required to provide an explanation or make a determination explaining its conduct in two investigations that are not similar.

2.36. Thus, we do not find it necessary to make any modifications to this section of the Report, which sets out the basis for our conclusions.

2.2 Indonesia's claims concerning the European Commission's alleged methodologies for constructing the normal value

2.2.1 Paragraph 7.78(b)

2.37. Indonesia requests us to include in the Final Report that the European Union has not contested Indonesia's description of the operation of the OASYS programme, namely that it is used in every anti-dumping investigation and that it uses a consistent format and methodology. According to Indonesia, the European Union confirmed that the OASYS programme, which it later described as a "calculator" or "calculation software", "computes the data entered into it in accordance with *the equations (formulas) built into* the system".[26]

2.38. The European Union does not comment on this request.

2.39. Paragraph 7.105 of the Interim Report notes the European Union's acknowledgment that certain aspects of the OASYS programme were standard, and not case specific. We do not consider the additional reference to the European Union's position to be necessary, and thus decline Indonesia's request.

2.2.2 Paragraphs 7.84 and 7.90

2.40. Indonesia requests that we add a description of its position on the relevance of the European Commission's ordinary-course-of-trade test based on price, and revise our statement that Indonesia has not rebutted the European Union's assertion regarding this test.[27] The description at issue pertains to Indonesia's position that this test is not relevant to Indonesia's claim because what matters in respect of this claim is whether the authority is using sales of only a specific PCN and not sales of all PCNs forming the like product.[28] Therefore, according to Indonesia, the matter is not whether the authority uses all profitable sales, or in case more than 80% sales are profitable, all sales of a given PCN.[29]

2.41. The European Union does not comment on this request.

2.42. In paragraph 7.90 we examined whether Indonesia's own description of the measure was supported by the evidence it presented. In describing the CNV PCN methodology, Indonesia submitted that the methodology relies on the weighted average of the "profitable domestic sales of the PCN only". However, we found that the evidence that it presented, and which was discussed in this paragraph, did not support Indonesia's description.

2.43. Indonesia considers that the matter is not whether the European Commission used only the data of profitable sales of a given PCN, and this matter is not relevant to its claim. But having characterized the CNV PCN methodology as one that uses the weighted average of the "profitable

[25] Indonesia's response to Panel question Nos. 53-54, paras. 36-37.
[26] Indonesia's request for interim review, para. 14. (quoting European Union's response to Panel question No. 69(b)(iii), para. 35. (emphasis added by Indonesia))
[27] Indonesia's request for interim review, paras. 17-19.
[28] Indonesia's request for interim review, para. 17.
[29] Indonesia's request for interim review, para. 17.

domestic sales of the PCN only", Indonesia had the burden of showing that the evidence supported this description of the measure. Indonesia did not meet its burden.

2.44. Moreover, Indonesia did not demonstrate that the European Union's assertion supported by evidence, that if more than 80% of the sales of a PCN are profitable, the European Commission uses both profitable and non-profitable sales, was incorrect. In the absence of evidence presented by Indonesia showing that the European Union's assertion was incorrect, we see no basis to revisit our conclusion that Indonesia has not rebutted the European Union's factual assertion. We thus decline Indonesia's request.

2.2.3 Paragraph 7.99

2.45. Indonesia contends that what it challenged "as such" in these proceedings is a specific scenario. The scenario is that where the representativity test is determined not to be met for certain PCNs, the European Commission consistently, and predictably, resorts to one of the two constructed normal value methodologies, regardless of the product or the country of export.[30] Indonesia submits that the representativity test and the two methodologies, i.e. the CNV Company and CNV PCN methodologies, are applied through the formulas embedded in the OASYS programme and this is why "the latter has been used to demonstrate the existence of the challenged unwritten measure".[31]

2.46. Indonesia objects in this regard to our statements that (a) the exclusion of certain sales that are outside the ordinary course of trade from the input data fed into the OASYS programme supports the European Union's view that the programme is one part of the overall methodology applied by the European Commission in making its profit calculation; and that (b) the OASYS programme only shows one step of the alleged EU methodologies.[32] Indonesia comments that the overall methodology applied by the European Commission in making its profit calculation is not the measure challenged by Indonesia.[33] Instead, "it is what happens in the OASYS programme that demonstrates the existence of the measures challenged by Indonesia."[34]

2.47. The European Union does not comment on this request.

2.48. We note that paragraph 7.76 of the Interim Report set out the alleged unwritten measure, as described by Indonesia in these proceedings. Our assessment of Indonesia's "as such" claims in the Interim Report is based on this description of the unwritten measure. Having set out Indonesia's description of the measure in paragraph 7.76, we noted that Indonesia had the burden of establishing the precise content of the rule or norm "as described by it" based on evidence, and proceeded in the subsequent paragraphs to examine whether Indonesia had met its burden. Thus, our reference to the "overall methodology applied by the European Commission in making its profit calculation" was meant to be a reference to the measure as described in paragraph 7.76.

2.49. With respect to Indonesia's objections, Indonesia did not define the alleged measure that we described in paragraph 7.76 based on only the steps undertaken as part of the OASYS programme. In particular, Indonesia's statement that "it is what happens in the OASYS programme that demonstrates the existence of the measures challenged by Indonesia" suggests that Indonesia is now taking the position that while we described the OASYS programme as a step of the overall methodology, this step is, in fact, the whole measure challenged by Indonesia. This position however is not consistent with its submissions in these proceedings.

2.50. First, Indonesia's description of the measure itself, as set out in paragraph 7.76, does not contain any reference to the OASYS programme that could suggest that the measure is in fact what happens in the OASYS programme alone.

2.51. Second, Indonesia now argues that the representativity test and the two methodologies, i.e. the CNV Company and CNV PCN methodologies, are applied through the formulas embedded in the OASYS programme and this is why "the latter has been used to demonstrate the existence of the challenged unwritten measure". However, as noted in our Report, Indonesia relied on (a) the

[30] Indonesia's request for interim review, para. 21.
[31] Indonesia's request for interim review, para. 21.
[32] Indonesia's request for interim review, para. 22.
[33] Indonesia's request for interim review, para. 22.
[34] Indonesia's request for interim review, para. 23.

European Commission's description of the methodologies in previous investigations to show how the CNV PCN and CNV Company methodologies were applied by the European Commission since 2012; and (b) the OASYS programme file.[35] Indonesia contended that "once the data is fed into the OASYS program", the only relevant criterion for deciding which of the two methodologies applies is the presence of profitable sales.[36] However, the alleged measure as described by Indonesia was not the European Commission's treatment of the data once it was "fed into the OASYS program". Thus, Indonesia's request for interim review narrows the scope of the measure it described in its submissions. We accordingly decline Indonesia's request.

2.2.4 Paragraph 7.100

2.52. Indonesia contends that we did not take into account the explanations it provided in response to Panel questions Nos. 62-64 in concluding that we are not persuaded that the OASYS programme file shows that the European Commission did not actually select transactions based on whether they were in the ordinary course of trade.[37] Indonesia requests us to review its responses again and revise this paragraph.[38]

2.53. The European Union does not comment on this request.

2.54. We find no basis to revisit our findings, and accordingly reject Indonesia's request.

2.2.5 Paragraph 7.115

2.55. Indonesia requests us to modify this paragraph to accurately reflect its argument, particularly its reliance on the panel report in *EC – Tube or Pipe Fittings*, and explain how our findings in the present dispute can be compared with the findings in that report.[39]

2.56. The European Union does not comment on this request.

2.57. We do not find it necessary to reflect here Indonesia's arguments based on its reading of a previous panel report, or the European Union's submissions on why Indonesia's argument are based on a wrong reading of this panel report. Nonetheless, we have added a new footnote (169) to paragraph 7.128 of the Final Report clarifying our views regarding the interpretation set forth in this panel report.

2.2.6 Paragraph 7.116

2.58. Indonesia requests us to modify this paragraph to accurately reflect its arguments.[40]

2.59. The European Union does not comment on this request.

2.60. We have made the modifications requested by Indonesia.

2.2.7 Paragraph 7.121

2.61. Indonesia contends that it has never argued that data pertaining to domestic sales that are made in low volumes must or should be excluded from a determination of SG&A costs and profit for the purpose of constructing normal value.[41] Instead, it has consistently argued that this data must be included together with data of other PCNs forming the like product and sold in the ordinary course

[35] Panel Report, para. 7.78 (referring to Indonesia's response to panel question No. 65, para. 105). See also e.g. Indonesia's first written submission, para. 320.
[36] Indonesia's comments on the European Union's response to Panel question No. 68, para. 21.
[37] Indonesia's request for interim review, para. 25.
[38] Indonesia's request for interim review, para. 25.
[39] Indonesia's request for interim review, paras. 26-27.
[40] Indonesia's request for interim review, para. 28.
[41] Indonesia's request for interim review, para. 29.

of trade.[42] Indonesia argues that our reasoning in paragraph 7.121 engages with an argument that Indonesia never made.[43]

2.62. The European Union does not comment on this request.

2.63. The arguments referred by Indonesia are already reflected in paragraph 7.116 of the Final Report, and, as noted above, we have modified this paragraph to more accurately reflect its arguments. Our interpretation of the *chapeau* of Article 2.2.2, set out in paragraphs 7.120-7.127 of the Report, led us to reject them. Moreover, paragraph 7.121 presents our analysis, and does not attribute to Indonesia an argument that data pertaining to domestic sales that are made in low volumes must or should be excluded from a determination of SG&A costs and profit for the purpose of constructing normal value. Therefore, we reject Indonesia's request.

2.2.8 Paragraphs 7.125-7.126

2.64. Indonesia submits that our analysis fails to take into account the fundamental difference between a situation where normal value is determined based on domestic sales prices, and a situation where a normal value cannot be determined on that basis and must be constructed.[44] Instead, according to Indonesia, our approach equates these two situations and disregards the exceptional nature of constructed normal value.[45] Referring to its previous submissions in these proceedings, Indonesia requests us to revise our reasoning and accurately reflect Indonesia's arguments.[46]

2.65. The European Union does not comment on this request.

2.66. First, while Indonesia requests us to accurately reflect Indonesia's arguments in these paragraphs, it does not point to any part of these paragraphs that inaccurately reflect its arguments. Thus, we reject this part of Indonesia's request.

2.67. Second, we refer particularly in this regard to paragraph 7.121, which explains why the *chapeau* of Article 2.2.2 does not limit an authority's use of data derived from domestic sales made in low volumes within the meaning of Article 2.2, when it constructs the normal value, and our reasoning set out in paragraph 7.125. Thus, we see no basis to revisit our reasoning in paragraphs 7.125-7.126 as requested by Indonesia.

2.2.9 Paragraph 7.127

2.68. Indonesia requests us to include a reference to paragraph 108 of its second written submission, which explains why it disagrees with the European Union that comparing an export price based on PCN-specific data and normal value that reflects the data of all PCNs leads to an asymmetry.[47]

2.69. The European Union does not comment on this request.

2.70. Paragraph 7.127 of the Interim Report explained why, in our view, such a comparison would potentially lead to an asymmetry. We are not persuaded by Indonesia's explanation at paragraph 108 of its second written submission. In particular, Indonesia's submission in paragraph 108 of its second written submission was that where "reliable" domestic sales data does not exist for a PCN, an authority must resort to data other than unreliable PCN-specific data to construct the normal value, and doing so helps to comply with Article 2.4 by ensuring a reliable proxy for the comparison required under this provision. Indonesia's submission here is predicated

[42] Indonesia's request for interim review, para. 29.
[43] Indonesia's request for interim review, para. 29.
[44] Indonesia's request for interim review, para. 31.
[45] Indonesia's request for interim review, para. 31.
[46] Indonesia's request for interim review, paras. 32-36 (quoting Indonesia's responses to Panel question No. 19, para. 100, and No. 21, paras. 107-108 and 110; and second written submission, paras. 96 and 100-102).
[47] Indonesia's request for interim review, para. 37.

on its view that data from low volume sales are "unreliable", but, for the reasons set out in the Interim Report, we have found no textual basis for that view. We thus decline Indonesia's request.

2.3 Indonesia's claims concerning the European Commission's alleged currency conversion[48]

2.3.1 Paragraphs 7.163-7.167

2.71. Indonesia requests that we reflect (a) the European Union's argument that the calculation error of which the European Commission was unaware during the investigation was not a "fact on the record" and could therefore not be reviewed by us; and (b) the fact that Indonesia responded that the relevant information necessary to identify and correct the error was before the European Commission and formed part of the record.

2.72. The European Union does not comment on this request.

2.73. The parties' positions were adequately reflected in the Interim Report. We do not consider it necessary to reflect this argument of the European Union and Indonesia's response in our Final Report. Therefore, we decline Indonesia's request.

2.3.2 Paragraph 7.176

2.74. Indonesia requests us to modify this paragraph to more accurately reflect Indonesia's position.[49]

2.75. The European Union does not comment on this request.

2.76. We have made the modification in paragraph 7.176 of the Final Report.

2.3.3 Paragraph 7.179

2.77. Indonesia suggests the inclusion of the heading of the relevant column where the value of "1.00" is used to give full context to the European Union's position.[50]

2.78. The European Union notes that Indonesia seeks to amend the summary of the European Union's position by introducing elements that did not form part of that position. Therefore, the European Union asks us to reject Indonesia's request.[51]

2.79. We note that Indonesia requests us to modify our summary of the European Union's arguments in a manner that does not accurately reflect what the European Union actually stated in its first written submission. Hence, we decline to make this modification.

2.3.4 Paragraph 7.182

2.80. Indonesia requests that we include the quote from the European Union's response to our question that "the data submitted by the producer was not in the currency of calculation and had to be converted for the purposes of comparison" because per Indonesia, this is directly relevant to the question assessed in paragraph 7.181 of the Interim Report.[52]

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[48] Indonesia submitted an annotated version of the Interim Report with proposed modifications. Two of these modifications are not of a purely editorial nature and Indonesia did not explain why we should make these modifications. We thus decline to make the modifications that Indonesia proposed in paragraphs 7.157 and 7.183 of the Interim Report.

[49] Indonesia's request for interim review, para. 40.

[50] Indonesia's request for interim review, para. 41.

[51] European Union's comments on Indonesia's request for interim review, para. 2.

[52] Indonesia's request for interim review, para. 42.

2.81. The European Union requests us to reject Indonesia's request because the additions it proposes take out of context the European Union's response to our question.[53] In the alternative, the European Union requests us to provide the full explanation set out in this response.[54]

2.82. In paragraph 7.184 of the Interim Report we found that currency conversion using applicable exchange rates would have been required for the 11 transactions at issue. We do not consider that the quote from the European Union's response in paragraph 7.182 is necessary to address the question that we set out in paragraph 7.181. Instead, the inclusion of this quote affects the clarity of this part of our analysis. Hence, we decline to make this modification.

2.4 Indonesia's claims concerning the European Commission's injury determination

2.4.1 Paragraph 7.218

2.83. Indonesia requests us to modify this paragraph to accurately reflect its position as well as that of the European Union.[55] Indonesia also takes issue with our statement that there was no alternative, and more industry-specific data, that the European Commission could rely upon to compare the profitability of the domestic industry.[56] Indonesia contends in this regard that the European Commission did not look for any alternative industry-specific data or adjust its benchmark to reflect the specificities of the fatty acids industry, and notes that it is for the investigating authority to ensure that the proxy it uses is appropriate for the specific industry.[57]

2.84. The European Union submits that Indonesia's proposed additions imply that the European Commission failed to address an issue that was never raised in the investigation, and thus the proposed additions are misleading.[58]

2.85. Our summary of the parties' arguments on this issue adequately reflects the positions of the parties. The basis of our findings is also adequately explained in our Report. We thus decline Indonesia's request.

2.4.2 Paragraph 7.228

2.86. Indonesia submits that we did not address Indonesia's argument that the European Commission's statement that other investments to increase capacity had not gone ahead as planned was not supported by evidence or explanation.[59] Indonesia requests us to modify this paragraph to reflect its argument.[60]

2.87. The European Union does not comment on this request.

2.88. Paragraph 7.226 of the Interim Report adequately reflects Indonesia's argument in this regard, and thus we do not find it necessary to repeat it in paragraph 7.228. We also find no basis to modify our findings, which were reached after consideration of Indonesia's argument including those referred by Indonesia. Therefore, we decline to make this modification.

2.4.3 Paragraphs 7.241 and 7.248

2.89. Indonesia submits that it addressed the text of the European Commission's definitive findings and new evidence submitted by the European Union in these proceedings, which were not part of the public record of the fatty acids investigation.[61] Indonesia requests us to reflect its arguments

[53] European Union's comments on Indonesia's request for interim review, para. 3.
[54] European Union's comments on Indonesia's request for interim review, para. 4.
[55] Indonesia's request for interim review, para. 43.
[56] Indonesia's request for interim review, para. 44.
[57] Indonesia's request for interim review, para. 44 (referring to European Union's response to Panel question No. 43, para. 69 and No. 44, para. 72).
[58] European Union's comments on Indonesia's request for interim review, para. 6.
[59] Indonesia's request for interim review, para. 45. In its request for interim review, Indonesia relies on its arguments presented in paragraph 269 of its first written submission, which it comments we did not address.
[60] Indonesia's request for interim review, para. 45.
[61] Indonesia's request for interim review, para. 46.

regarding this new evidence.[62] In this regard, Indonesia takes the view that the Interim Report ultimately accepted the European Commission's findings on the basis of a single piece of evidence pertaining to a domestic producer even though we referred to the need to assess the evidence as a whole.[63]

2.90. The European Union does not comment on this request.

2.91. The Report adequately reflects our assessment of the evidence provided by Indonesia as well as its arguments. We thus decline to make the modifications proposed by Indonesia in our description of its arguments.

2.4.4 Paragraph 7.270

2.92. Indonesia requests us to delete the sentence which notes that Indonesia did not explain in the course of the proceedings which specific intervening trends, or positive trends during the POI, the European Commission did not explain.[64] Indonesia submits that, as we noted in paragraph 7.269, the positive trends in labour costs related to the positive developments towards the end of the injury period.[65] In the view of Indonesia, the figures in the European Commission's finding shows that the labour costs changed or improved from 2020 to the POI.[66]

2.93. The European Union does not comment on this request.

2.94. We have deleted the sentence contested by Indonesia in paragraph 7.270 and clarified our reasoning in this regard.

2.4.5 Paragraph 7.271

2.95. Indonesia submits that its claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement are two-fold.[67] The second element is not consequential to the first.[68] Indonesia requests certain modifications to this paragraph to make its position clear.[69]

2.96. The European Union does not comment on this request.

2.97. We note that the Interim Report did not treat the second aspect of Indonesia's injury claim (the European Commission's overall assessment of the existence of injury) as purely consequential to the first (shortcomings in the assessment of individual injury factors). However, Indonesia relied on the first part of its claim to advance the second part of the claim[70], and thus our findings on the first part affect the second. Thus, our Report correctly reflects Indonesia's position in this regard, and we do not consider the additions proposed by Indonesia to be necessary. Therefore, we decline Indonesia's request.

2.4.6 Paragraph 7.272

2.98. Indonesia requests us to modify this paragraph to more accurately reflect its position with respect to the second aspect of its claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.[71]

2.99. The European Union does not comment on this request.

2.100. We consider that the Interim Report correctly and adequately reflects Indonesia's position in this dispute. Therefore, we decline to modify this paragraph in the manner proposed by Indonesia.

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[62] Indonesia's request for interim review, para. 47.
[63] Indonesia's request for interim review, para. 48.
[64] Indonesia's request for interim review, para. 49.
[65] Indonesia's request for interim review, para. 49.
[66] Indonesia's request for interim review, para. 49.
[67] Indonesia's request for interim review, para. 50.
[68] Indonesia's request for interim review, para. 50.
[69] Indonesia's request for interim review, para. 50.
[70] See e.g. Indonesia's first written submission, para. 276.
[71] Indonesia's request for interim review, para. 51.

2.4.7 Paragraph 7.276

2.101. Indonesia comments on our statement that Indonesia did not substantiate its submission by explaining how the European Commission failed to comply with Articles 3.1 and 3.4 by rejecting KLK's submissions for the reasons that it did.[72] Indonesia submits that the letter from KLK referred in this paragraph, along with the number of injury factors showing positive trends, required the European Commission to explain why the domestic industry was nevertheless injured. On the value of KLK's letter, Indonesia also submits that the Interim Report "accepted that a single statement in that company's questionnaire response was sufficient for making industry-wide conclusion regarding the alleged inability to raise capital".[73] Indonesia requests us to reconsider the language in this paragraph in light of its comments.

2.102. The European Union does not comment on this request.

2.103. Indonesia reiterates the arguments it made over the course of the proceedings, and which we have already considered in reaching our conclusions. We accordingly decline to reconsider the language in this paragraph in light of Indonesia's comments.

2.5 Indonesia's consequential claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

2.104. Indonesia submits that its claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 are consequential to, *inter alia*, its claims under Article 2.4.1 and Article 9.3 of the Anti-Dumping Agreement. Since we found a violation of these provisions[74], Indonesia requests us to revise our assessment of Indonesia's consequential claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994[75] in paragraphs 7.278 and 7.279 of our Report.

2.105. The European Union does not comment on this request.

2.106. In the "[l]egal analysis" section of Indonesia's first written submission[76] Indonesia stated that it had (a) "demonstrated that the European Union's measures at issue has violated several provisions of the Anti-Dumping Agreement, specifically Articles 2.2, 2.2.2, 3.1, 3.4, 5.4, 5.6, 9.2 and 9.3 of the Anti-Dumping Agreement", (b) "[a]ccordingly" asked us to find a violation under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. We have nevertheless revised our finding following Indonesia's comments because Indonesia's formulation of the basis of its claims in the "Introduction" section of the claims and request for findings is broad enough to cover its claim under Article 2.4.1 of the Anti-Dumping Agreement and related claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

3 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE EUROPEAN UNION

3.1. The European Union raises five specific concerns on certain paragraphs of the Interim Report, and in addition makes certain comments in an annotated version of our Interim Report. The European Union accordingly requests us to revisit section 7.4.3 and address its principal argument as articulated in paragraphs 57, 62, 63 and 71 of the European Union's response to Panel questions Nos. 75 and 76(c).[77]

3.1 The European Union's concerns regarding section 7.4.3

3.2. First, the European Union submits that paragraph 7.170 of the Interim Report and the surrounding analysis of section 7.4.3 relies on the contextual explanation it offered "on its earlier reply to Question No. 44".[78] However, the Report does not engage with the European Union's principal argument set out in paragraph 57 of its response to Panel

[72] Indonesia's request for interim review, para. 52.
[73] Indonesia's request for interim review, para. 52 (referring to Interim Report, paras. 7.244-7.246).
[74] Indonesia's request for interim review, para. 54.
[75] Indonesia's request for interim review, paras. 53-54.
[76] Indonesia's first written submission, section G.3.
[77] European Union's request for interim review, para. 15.
[78] European Union's request for interim review, para. 10.

question No. 75.[79] Therefore, according to the European Union, the Interim Report addresses "a case-specific observation" while not addressing the European Union's main argument.

3.3. Second, the European Union argues that the summary of the European Union's position in paragraph 7.170 of the Interim Report does not reflect its actual reasoning.[80] This reasoning is that, as explained by the European Union in paragraph 63 of its response to Panel question No. 75, (a) the facts were "placed beyond dispute" because at the conclusion of the submission, deficiency, verification, and disclosure processes, the producer did not dispute the facts so established; and (b) as it is "uncontested" that the procedure was duly followed and sufficient time was afforded to the producer, Indonesia failed to establish that this establishment was "incorrect or improper".[81]

3.4. Third, the European Union submits that it did not advance the view that the Panel's competence under Article 17.6(i) is confined to ensuring procedural conformity, or that compliance with domestic procedures immunizes an authority from review of substantive Anti-Dumping Agreement violations.[82] According to the European Union, it stated the opposite in its response to Panel question No. 76(c), explaining that the authority is not absolved of its obligation to properly establish facts and that "an investigation authority must ensure, through the proper design and execution of its domestic procedures, that the facts 'made available [to it] in conformity with appropriate domestic procedures' are 'correctly' 'placed beyond dispute'".

3.5. Fourth, the European Union submits that the Interim Report appears, in substance, to follow Indonesia's reading of Article 17.6(i), focusing the inquiry on whether the facts themselves were correct when cross-checked against other facts on the record, but does not address the European Union's central objection that this approach "effectively reads the 'establishment' element out of the standard and focuses the inquiry on whether the facts themselves were 'proper'".[83] The European Union submits that, while the Interim Report accepts that any error occurred in the *establishment* of the values for the transactions at issue, "it then examines the propriety of those values rather than the propriety of their establishment".[84] The European Union contends that this reflects a *de novo* assessment of established facts, which is contrary to Article 17.6(i).[85]

3.6. Fifth, the European Union submits that our statement that the European Union's reliance on the Appellate Body report in *Thailand – H-Beams* is "inapposite" mischaracterizes how it relied on that report.[86] In particular, the European Union submits that it did not rely on *Thailand – H-Beams* for any proposition concerning undisclosed or non-discernible facts.[87] Instead, it relied on it for the ordinary meaning of the terms "establishment" and "proper" in Article 17.6(i) of the Anti-Dumping Agreement, and this interpretation of Article 17.6(i) appeared to be a common ground between the parties.[88] The European Union considers that the dispositive interpretive point in *Thailand – H-Beams* is therefore central, not "inapposite", to the present dispute.

3.7. Indonesia submits that it is not necessary to make the changes suggested by the European Union.[89] Furthermore, Indonesia considers that the annotated version of the Interim Report submitted by the European Union does not suggest any specific textual changes and should be rejected.[90] If we decide to implement any changes suggested by the European Union, Indonesia requests us to ensure that the Final Report also includes the corresponding rebuttal arguments presented by Indonesia.[91]

[79] European Union's request for interim review, para. 10.
[80] European Union's request for interim review, para. 11.
[81] European Union's request for interim review, para. 11.
[82] European Union's request for interim review, para. 12.
[83] European Union's request for interim review, para. 13.
[84] European Union's request for interim review, para. 13.
[85] European Union's request for interim review, para. 13.
[86] European Union's request for interim review, para. 14.
[87] European Union's request for interim review, para. 14.
[88] European Union's request for interim review, para. 14.
[89] Indonesia's comments on the European Union's request for interim review, para. 3.
[90] Indonesia's comments on the European Union's request for interim review, para. 10.
[91] Indonesia's comments on the European Union's request for interim review, para. 11.

3.8. Indonesia considers in this regard that the Interim Report adequately sets out and addresses the European Union's arguments.[92] Moreover, Indonesia submits that the Interim Report sufficiently addresses the European Union's position based on the Panel report in *Thailand – H-Beams*.[93]

3.1.1 The Panel's response to the European Union's concerns

3.9. First, regarding the European Union's concern that we did not address its principal argument, as set out paragraph 57 of its response to question No. 75, we note that in this paragraph the European Union took the position "more generally" and "outside the specific facts of the present case" that the Panel may (a) assess whether the domestic procedures through which the facts were made available led to the proper establishment of the facts, but (b) not assess whether the facts so established were themselves "proper".[94] The European Union took this view based on its submission that the term "proper" in Article 17.6(i) qualifies the "establishment" of the facts, and not the facts themselves.[95] The European Union submitted in this regard that (a) where the propriety of the domestic procedure followed to establish the facts is not contested, and (b) that procedure was in fact followed, the Panel should find that the authority's establishment of the facts was proper.[96]

3.10. Section 7.4.3 of the Interim Report adequately reflects our consideration of this argument. While we have modified paragraph 7.170 to reflect the European Union's response in response to panel question No. 75 and clarified our reasoning in paragraph 7.171, we do not find any further modifications to paragraph 7.170 or other paragraphs to be necessary.[97]

3.11. Second, on the European Union's concern that paragraph 7.170 of the Interim Report does not reflect the European Union's actual reasoning, as set out in paragraph 63 of its response to Panel question No. 75, we note that the last sentence of paragraph 7.170 of the Interim Report referred to the reasoning set out in paragraph 63 of the European Union's response to Panel question No. 75. Nonetheless, we have made some modifications to more accurately reflect the European Union's position in this regard.

3.12. Third, we note the European Union's submission that it did not advance the view that the Panel's competence under Article 17.6(i) is confined to ensuring procedural conformity, or that domestic procedural compliance immunises an authority from review of substantive Anti-Dumping Agreement violations.[98] In its response to Panel question No. 33, as well as its second written submission, the European Union stated that if the Panel finds that a fact was established "in conformity with the appropriate domestic procedures", the Panel should find that the authorities' establishment of the facts was proper.[99] In providing its response to our question No. 76(c) following the second meeting, the European Union did not abandon its earlier position. Instead, it added that an investigating authority must ensure, through the proper design and execution of its domestic procedures, that the facts "made available [to it] in conformity with appropriate domestic procedures" are "correctly" "placed beyond dispute". Our Interim Report addressed the European Union's response to our question No. 76(c) as well as the position articulated by the European Union in its earlier response. We have, as noted above, made some modifications to more accurately reflect the European Union's arguments. Considering we have addressed the position advanced by the European Union in these proceedings, we see no basis for the European Union's concern.

3.13. Fourth, the comments presented by the European Union reflect its characterization and opinion on our Report, and not a request to review precise aspects of the Report. We accordingly make no modifications in the Final Report in light of those comments.

3.14. Fifth, the European Union comments that our statement that the European Union's reliance on the Appellate Body report in *Thailand – H-Beams* is "inapposite" mischaracterizes how it relied

[92] Indonesia's comments on the European Union's request for interim review, paras. 4-8.
[93] Indonesia's comments on the European Union's request for interim review, para. 9.
[94] European Union's response to Panel question No. 75, paras. 55 and 57.
[95] European Union's response to Panel question No. 75, para. 57.
[96] European Union's response to Panel question No. 75, para. 56.
[97] We clarify that because Question No. 44 pertains to Indonesia's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, rather than Article 2.4.1 of the Anti-Dumping Agreement, our analysis is not based on the European Union's response to question No. 44, and the Interim Report did not cite it.
[98] European Union's request for interim review, para. 12.
[99] European Union's response to Panel question No. 33, para. 44; second written submission, para. 177.

on that report, because it relied on the Appellate Body report for the ordinary meaning of the terms "establishment" and "proper" in Article 17.6(i) of the Anti-Dumping Agreement. We note that the ordinary dictionary meanings of "establishment" and "proper" were not in dispute in these proceedings. However, we were not persuaded that these dictionary meanings could lead to the conclusion that where the propriety of the domestic procedure followed to establish the facts is not contested, and the procedure was in fact followed, the Panel should find that the authorities' establishment of the facts was proper. We were also not persuaded that the Appellate Body report provided any basis for reaching this conclusion. The basis of our view is adequately set out in section 7.4.3.

3.15. Based on the above, while we have made some modifications in this section, we consider that the Interim Report adequately addresses the principal arguments presented by the European Union, and do not consider any additional modifications to be necessary.

3.1.2 Paragraph 7.165[100]

3.16. The European Union requests us to modify this paragraph to more accurately reflect its argument.

3.17. Indonesia opposes this request on the ground that the current version of this paragraph accurately reflects the European Union's position expressed in paragraph 63 of the European Union's response to Panel question No. 75.[101]

3.18. We have modified paragraph 7.165 of the Final Report to more accurately reflect the European Union's argument.

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[100] The European Union also makes additional comments in its annotated version of the Interim Report, which relate to the concerns raised in its request for interim review, and which we have addressed above.

[101] Indonesia's comments on the European Union's request for interim review, fn 6.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INDONESIA'S ARGUMENTS REGARDING THE SCOPE OF THE DISPUTE AND THE MEASURES AT ISSUE

1. The measures at issue include the definitive anti-dumping measures imposed on imports of fatty acid originating in Indonesia, the investigation leading to their imposition, the European Union's decision to terminate the parallel anti-subsidy investigation and the EU methodology for constructing normal value based on PCN-specific costs and profit data as well as the use of two different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country.

2. In respect of Indonesia's claims under Article X:3(a) of the GATT 1994 in respect of the withdrawal of the complaints, those claims focus on the European Union's administration of Article 9(1) of the Basic Anti-Dumping Regulation and Article 14(1) of the Basic Anti-Subsidy Regulation, by imposing anti-dumping duties while terminating the parallel countervailing investigation following the withdrawal of the complaints in the fatty acid anti-dumping and anti-subsidy investigations.

3. The European Union objects that the termination decision is not a challengeable measure and has not resulted in nullification or impairment. This objection is misplaced. Nullification or impairment is not a threshold requirement and does not preclude a Member from bringing a claim. Moreover, the Panel may proceed to examine the merits of the claims before drawing conclusions on nullification or impairment. In addition, Article 17.4 of the Anti-Dumping Agreement, raised by the European Union, does not limit the nature of claims that may be brought under the GATT 1994 and does not preclude the Panel from examining Indonesia's claims. In any event, the European Union accepts that the termination decision constitutes a factual circumstance relevant to the assessment of Indonesia's claims.

4. Indonesia also rejects the European Union's assertion that its claims concern compliance with EU law. Indonesia does not challenge the WTO-consistency of the Basic Anti-Dumping or Anti-Subsidy Regulations. Nor does it argue that, as a matter of EU law, the Commission was required to terminate the anti-dumping investigation following the withdrawal of the complaint. Instead, Indonesia's claims under Article X:3(a) of the GATT 1994 concern whether the European Union administered Article 9(1) of the Basic Anti-Dumping Regulation and Article 14(1) of the Basic Anti-Subsidy Regulation in a uniform and reasonable manner. References to EU law and past practice serve to establish the existence and meaning of those regulations and to provide factual context supporting its claims of non-uniform and unreasonable administration.

5. Finally, Indonesia has demonstrated the existence of the challenged methodologies for constructing normal value. The European Union's objection concerning the absence of a written legal basis is misplaced, because unwritten measures may be established through consistent and repeated application. The evidence presented by Indonesia, including Exhibit IDN-45 which compiles the Commission's regulations across multiple anti-dumping investigations, demonstrates the systematic and consistent application of the two methodologies for constructing normal value in cases where the representativity test is not met for certain PCNs. These methodologies have been applied across multiple sectors, products and exporting countries over more than a decade, and in a defined scenario in which the Commission has consistently resorted to one of the two methodologies regardless of the product or country of export. The recurrence of this approach across numerous investigations shows that it reflects a norm of general and prospective application, rather than case-by-case discretion. The European Union has not meaningfully rebutted this evidence.

6. These methodologies, namely CNV PCN and CNV Company, are also evidenced by the operation of the Commission's OASYS program, used in each EU anti-dumping investigation. That program automatically applies the formulas embedded in the program, including the two methodologies, CNV PCN and CNV Company. In responding to the Panel's questions, the

European Union acknowledged the existence of the general methodology as a constant feature of the OASYS program. The European Union has not been able to identify any instance of non-application of the two methodologies. It has confirmed that no alternative methodology has been applied where the representativity test is not met, thereby supporting Indonesia's claim that the methodologies are of general and prospective application beyond the specific anti-dumping investigation at issue.

II. INDONESIA'S CLAIMS RELATING TO THE WITHDRAWAL OF THE COMPLAINTS

A. The European Union violated Article X:3(a) of the GATT 1994 by failing to administer the provisions governing the withdrawal of complaints in the Basic Anti-Dumping Regulation and the Basic Anti-Subsidy Regulation in a uniform and reasonable manner

7. The European Union violated Article X:3(a) of the GATT 1994 by failing, in the fatty acid anti-dumping and anti-subsidy investigations, to administer in a uniform and reasonable manner the identical provisions governing the withdrawal of complaints in the Basic Anti-Dumping Regulation and the Basic Anti-Subsidy Regulation. Article 9(1) of the Basic Anti-Dumping Regulation and Article 14(1) of the Basic Anti-Subsidy Regulation are identical and were put into practical effect in parallel, closely related anti-dumping and anti-subsidy investigations concerning the same product, the same investigation period and period concerned, the same complainant, and the same interested parties.

8. In bringing these claims, Indonesia does not contest the existence of the Union interest test or the discretion of the European Commission under EU law.

9. The European Union has not contested the first and second elements of Indonesia's claims, namely that (i) the Basic Anti-Dumping Regulation and the Basic Anti-Subsidy Regulation are legal instruments of the kind described in Article X:1 and that (ii) those legal instruments, and specifically their provisions governing the withdrawal of complaints, were administered, in the sense of being put into practical effect, in the parallel, closely related fatty acid anti-dumping and anti-subsidy investigations. The disagreement between the parties focuses on whether the administration was not uniform and unreasonable.

10. The evidence shows that the Commission has accepted in other cases that, in parallel, closely related anti-dumping and anti-subsidy investigations, the injury, causation and Union interest analyses are mutatis mutandis identical. In this dispute, in both parallel, closely related fatty acid investigations, the complaints were withdrawn, no interested party supported continuation, and all comments received supported termination. The withdrawal of the anti-dumping complaint on 24 August 2022 and of the anti-subsidy complaint on 3 October 2022 followed letters from KLK, one of the largest sampled Union producers, opposing the imposition of measures. In addition, several users and producers of fatty acid supported termination, emphasising that the imposition of measures would not be in the Union interest and would lead to supply shortages, higher prices, and harm to downstream users and consumers. No interested party supported continuing either investigation.

11. Despite these similar, if not identical, factual circumstances, the Commission decided to continue the anti-dumping investigation and impose definitive anti-dumping duties, while terminating the parallel anti-subsidy investigation.

12. Indonesia claims that it is not uniform administration to (i) apply the identical provisions in Article 9(1) of the Basic Anti-Dumping Regulation and Article 14(1) of the Basic Anti-Subsidy Regulation governing the withdrawal of a complaint and reach two opposite decisions in similar, if not identical, circumstances, taking into account the European Union's prior practice of terminating anti-dumping and anti-subsidy investigations in case of withdrawal of the complaint; and (ii) not making a determination justifying and explaining the opposite application of those provisions in similar, if not identical, circumstances, taking into account the European Union's prior practice of terminating anti-dumping and anti-subsidy investigations in case of withdrawal of the complaint.

13. The European Union is wrong to argue that the investigations were not similar. At the time of the withdrawal of the complaint in the anti-subsidy investigation, questionnaires had been sent,

replies had been received, and evidence had been collected. Almost five months had passed since initiation, and the General Disclosure Document followed shortly thereafter. By the time that the Definitive Anti-Dumping Regulation was adopted, the Commission had already effectively reached the conclusion to terminate the anti-subsidy investigation. Thus, the continuation of the anti-dumping investigation and the termination of the anti-subsidy investigation occurred with full knowledge of one another.

14. The European Union has not rebutted the evidence of prior practice presented by Indonesia. Exhibit IDN-53 contains an overview of the Commission's practice regarding the consequences of a withdrawal of a complaint in anti-dumping and anti-subsidy investigations. It demonstrates the European Commission's practice of terminating investigations following withdrawal, including investigations at advanced stages, including where questionnaires had been sent, replies received, and verification visits carried out, as well as investigations in which provisional anti-dumping duties had already been imposed. The exhibit further shows that termination occurred even where withdrawal requests were filed after considerable time had passed since initiation, and in circumstances where only one EU producer withdrew the complaint, but the investigation was nevertheless terminated because the complaint would not have been supported by a major proportion of EU producers. The European Union has not provided evidence of any investigation, other than the anti-dumping investigation at issue, where it continued an investigation and imposed duties after withdrawal of the complaint, nor of any case where it continued an investigation where all comments supported termination and none supported continuation. This exhibit comprises evidence of relevant factual circumstances which must be considered by the Panel in assessing Indonesia's Article X:3(a) claims. Together with other evidence showing how traders were responding to the withdrawal of the complaints in light of the past practice of the Commission, it demonstrates the uncertainty facing traders.

15. Indonesia also claims that it is not reasonable administration to (i) offer no explanation for reaching different decisions regarding the continuation or termination in the parallel, closely related anti-dumping and anti-subsidy investigations after the withdrawal of the written applications based on the application of identical provisions in Article 9(1) of the Basic Anti-Dumping Regulation and Article 14(1) of the Basic Anti-Subsidy Regulation and (ii) to continue an anti-dumping investigation where a written application is withdrawn, the domestic industry no longer supports the investigation, interested parties support termination, and in similar, if not identical circumstances, the Commission terminates the parallel, closely related anti-subsidy investigation.

16. In the specific circumstances at issue, Article X:3(a) requires a justification and explanation for reaching different decisions regarding continuation and termination in the parallel investigations. Indonesia does not argue that a reasoned explanation is required in all circumstances. However, in circumstances where identical provisions were applied in parallel, closely related investigations, and where prior practice showed consistent termination following withdrawal, reasonable and uniform administration requires an explanation sufficient to place traders in a position where they could understand the objective factors underlying the different decisions.

17. The explanations relied on by the European Union do not meet that standard. Recital 68 of the Definitive Anti-Dumping Regulation addresses withdrawal of anti-dumping complaints in general, and the final sentences merely state that the Commission carried out an injury analysis and that a simple statement in a letter from one Union producer, without supporting evidence, did not contradict the Commission's findings. It does not explain why the Commission continued the anti-dumping investigation while applying the identical provision in the anti-subsidy investigation differently, despite similar, if not identical, circumstances and prior practice. Nor does it engage with the comments on the withdrawal received from interested parties. The same applies to recital 422, which makes no mention of the Commission's intention to terminate the anti-subsidy investigation, even though that intention had already been announced in the General Disclosure Document. The recital infers from the phrase "due to the influence from stakeholders" that this was the only reason for withdrawal and that this reason had no bearing on whether termination would be in the Union interest. The European Union has not substantiated why, as a matter of WTO law, the reason for withdrawal matters to the decision whether to continue or terminate an investigation. Recital 422 does not engage with the substance of the comments received, while the comments in support of termination were given different value in the anti-dumping and anti-subsidy investigations.

18. Recitals 10 and 11 of the termination decision also do not provide a justification and explanation of the opposite application of the provisions and merely restate the legal test and the

conclusion. They do not explain why, despite continuing the parallel anti-dumping investigation, the Commission decided to terminate the anti-subsidy investigation.

19. Finally, the European Union's argument that it could not have formed a definitive conclusion before the deadline for comments does not rebut Indonesia's claim that, in the anti-subsidy investigation, an explanation should have been provided in the termination decision, and that, in the anti-dumping investigation, it should have been offered at the time of deciding to continue the investigation.

20. On 21 December 2022, following the withdrawal on 3 October 2022, the Commission informed parties of its intention to terminate the anti-subsidy investigation. However, no reason was given for continuing the anti-dumping investigation while terminating the anti-subsidy investigation, despite the investigating authority indicating that it would provide such a reason. The European Union's reliance on Regulation 182/2011, to argue that it could not modify the Definitive Anti-Dumping Regulation after the positive Trade Defence Committee vote does not remedy that absence of an explanation. Invoking domestic law cannot be used to avoid compliance with the obligations under Article X:3(a), nor justify the absence of an explanation, particularly as the Commission could have explained, in the termination decision, the reasons for applying identical provisions differently in similar, if not identical, circumstances.

B. The European Union violated Article 5.6 of the Anti-Dumping Agreement, because it proceeded with its investigation following the withdrawal of the complaint, without a prior determination that, at the time of deciding to proceed, there are special circumstances and there exists sufficient evidence of dumping, injury, and a causal link

21. The European Union violated Article 5.6, read together with Article 5.1, of the Anti-Dumping Agreement by proceeding with its anti-dumping investigation following the withdrawal of the complaint, without a prior determination that, at the time of deciding to proceed, the conditions of Article 5.6 were met.

22. Indonesia does not contest the right of an authority to initiate of its own motion an anti-dumping investigation. Nor does it argue that the withdrawal of the complaint automatically requires termination. However, once the written complaint was withdrawn, the investigation could no longer proceed on that basis and could proceed only, if at all, if the conditions of Article 5.6 were met.

23. No WTO panel or Appellate Body report has addressed the question raised by Indonesia's Article 5.6 claim. Disputes such as Mexico – Steel Pipes and Tubes (Guatemala) and US – Softwood Lumber concerned (i) investigations based on a written application that was not withdrawn; (ii) where there was therefore no change in the basis for the investigations; and (iii) the question of whether there was an ongoing obligation to monitor domestic industry, in those circumstances. In response to that specific question, panels in those reports concluded there was no such an ongoing obligation. Moreover, there is nothing in those reports to indicate that an investigating authority may proceed with an investigation and eventually impose anti-dumping duties without any of the two bases as recognised in Article 5 of the Anti-Dumping Agreement.

24. Articles 5.1 to 5.6 make clear that the drafters envisaged that an anti-dumping investigation is to be based on either a written complaint or a decision of self-initiation, subject to the conditions for either basis. Article 5 governs both initiation and the subsequent investigation. Articles 5.1 to 5.5 concern the initiation of an investigation based on a written complaint and the steps that an authority must undertake before initiating that investigation. Article 5.6 addresses the decision to initiate an investigation without a written application and the steps to be undertaken after that decision, taken in special circumstances, but before proceeding with the investigation. Indonesia submits that, when the written complaint is removed as a basis for initiation, the conditions for using the only alternative basis, namely self-initiation, must be satisfied.

25. In this regard, Article 5.3 requires a "determination", that is, a decision by the authority on whether the evidence justifies an investigation. Article 5.6 likewise requires an affirmative and separate determination. That determination must address both the existence of "special circumstances" and the existence of sufficient evidence of dumping, injury, and a causal link.

Indonesia submits that "special circumstances" refers to exceptional, unusual, out of the ordinary circumstances, and that this condition must be given meaning and effect.

26. The withdrawal of the complaint signifies a change in the facts that originally formed the basis for the authority's decision to initiate the investigation. In the anti-dumping investigation at issue, the factual conditions materially changed because a significant portion of the domestic industry, including the largest sampled Union producer, KLK, made clear that it no longer supported the investigation and the imposition of duties, and considered that it could compete and stay profitable in light of imports from Indonesia. On 24 August 2022, CUTFA withdrew its anti-dumping complaint and interested parties requested the Commission to terminate the investigation in light of the lack of Union interest as well as the lack of injury to the Union industry as apparent from the withdrawal of the complaint and industry's letters.

27. Moreover, Article 5.8 calls for prompt termination as soon as the authorities are satisfied that there is not sufficient evidence of dumping or injury to justify proceeding with the case. Accordingly, where there is a material change in the factual basis, such as withdrawal of the complaint, the authority must make a new determination as to whether continuation is justified. Indonesia's position is that, unless the authority determines the conditions of Article 5.6 to be met, the authority may no longer be satisfied that there is sufficient evidence of either dumping or of injury to justify proceeding with the case. Article 5.8 therefore does not displace Article 5.6; rather, if the investigation is not terminated, Article 5.6 must be respected.

28. Indonesia asks the Panel to reject an interpretation that would result in reading out of Article 5.6 especially the condition of "special circumstances" and would allow investigations to proceed, and anti-dumping duties to be imposed, based on a fictional basis, that is, the pretence of the existence of a written application as the basis for the investigation. The negotiating history confirms the drafters' intention to specify two separate bases for justifying the initiation of an anti-dumping investigation and the exceptional character of the basis now found in Article 5.6.

III. INDONESIA'S CLAIMS RELATING TO THE EU FATTY ACID ANTI-DUMPING INVESTIGATION AND DUTIES AT ISSUE

A. The European Union violated Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement by constructing the normal value on the basis of unreasonable amounts for SG&A costs and for profit which were not based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation

29. The European Union violated Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement by constructing the normal value on the basis of unreasonable amounts for SG&A costs and for profit which were not based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. In particular, Indonesia challenges the application of the EU methodology for constructing the normal value of two PCNs that were sold in non-representative quantities during the investigation period based exclusively on the data relating to those two PCNs.

30. Pursuant to Article 2.2, where domestic sales do not permit a proper comparison, the normal value must be constructed on the basis of the cost of production plus a reasonable amount for SG&A costs and for profits. Article 2.2.2 specifies that, as a general rule, those amounts must be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. Only where such data cannot be determined on that basis may an investigating authority resort to alternative methods. Where such actual data exist, the investigating authority is obliged to use them and may not instead rely on a different or narrower data set.

31. The European Union constructed normal value for seven PCNs, using company-wide data for five PCNs but relying only on PCN-specific SG&A and profit data for two PCNs, thereby excluding data from other PCNs sold in the ordinary course of trade. Indonesia submits that the European Union failed to comply with the Anti-Dumping Agreement requirements by using only the data relating to the two PCNs, rather than the data relating to all PCNs sold in the ordinary course of trade. According to Indonesia, the reference in Article 2.2.2 to "actual data … of the like product"

requires the use of data relating to the like product as a whole, and does not permit the use of a limited subset of data relating to only certain product types. In this respect, Indonesia relies on prior panel findings that the chapeau of Article 2.2.2 requires the use of actual data from all relevant sales of the like product and does not allow the exclusion of data relating to certain product types falling within that definition.

32. The disagreement between the parties relates to the interpretation of Article 2.2.2 and in particular the scope of the "actual data" under the chapeau of that provision. Indonesia submits that "actual data" includes the data of all PCNs forming the like product and sold in the ordinary course of trade. This position follows from the wording of Article 2.2.2 referring to "actual data … of the like product". The use of PCNs does not alter that concept, but merely serves as an analytical tool. Accordingly, while the Commission could determine that certain PCNs required a constructed normal value, it was not permitted to rely exclusively on the data of those PCNs.

33. The notion of "like product" is defined in Article 2.6 and applies throughout the Agreement. The use of PCNs does not alter the concept of the like product, but merely reflects an analytical subdivision of that product to facilitate the investigating authority's analysis. This interpretation is confirmed by the European Union's own determination that all PCNs share the same basic physical, chemical and technical characteristics and uses, and therefore constitute a single like product within the meaning of Article 2.6. This reinforces that the data relevant under Article 2.2.2 must relate to the like product as a whole and cannot be limited to PCN-specific data.

34. Although the Commission was entitled to construct normal value for PCNs sold in non-representative quantities, it was not entitled to rely exclusively on the SG&A costs and profit of those PCNs. All sales of the like product in the ordinary course of trade, including low-volume sales, must be taken into account in determining the amounts for SG&A costs and profit. That position is consistent with the Panel's findings in EC – Salmon (Norway), which confirm that Article 2.2.2 does not permit the exclusion of data relating to low-volume sales, except where such sales are outside the ordinary course of trade. Indonesia does not challenge the inclusion of such sales in the determination of SG&A costs and profit. Rather, Indonesia challenges the Commission's reliance exclusively on data from low-volume sales of the two PCNs. Article 2.2.2 requires that all sales of the like product in the ordinary course of trade, including low-volume sales, be taken into account, such that the resulting amounts reflect a weighted average of all relevant data rather than a limited subset.

35. Moreover, the European Union's approach leads to unreasonable results. By relying exclusively on data from very low-volume domestic sales, the Commission applied unusually high profit margins, and in one instance produced a constructed normal value that was identical to the average domestic sales price that had been rejected for not permitting a proper comparison. This outcome is inconsistent with the purpose of constructing normal value, which is to approximate a normal price under representative conditions and not to replicate unreliable domestic prices.

36. In that regard, the reason why the investigating authority needs to construct the normal value on the basis of data broader than the PCN-specific SG&A costs and profit is precisely because the investigating authority has previously determined that the sales prices of the specific PCN cannot be used to determine its normal value. By using exclusively the SG&A cost and profit of the specific PCN (which determine the sales prices of that PCN), the investigating authority would effectively reconstruct the rejected sales price. This result goes against the very logic of resorting to a constructed normal value.

37. Interpreting the chapeau of Article 2.2.2 as requiring the use of the SG&A costs and profit data of all PCNs sold in the ordinary course of trade (rather than only the PCN-specific data) avoids the situation where the values rejected due to the circumstances set out in Article 2.2 are being used as the constructed normal values. This interpretation is consistent with the language of Article 2.2.2 and its context. It also preserves the object and purpose of the provisions relating to the constructed normal value.

38. The European Union's approach resulted in profit margins that were significantly higher than what the Commission itself considered to be a reasonable level of profit in the same investigation. While Article 2.2 does not define what constitutes a "reasonable" amount, a profit margin determined consistently with Article 2.2.2 would be considered reasonable, whereas a profit margin that does

not comply with that provision cannot be considered reasonable. Moreover, the European Union's reliance on PCN-specific data reflects an incorrect understanding of the relationship between Articles 2.2, 2.2.2 and 2.4. While PCNs may be used to facilitate the comparison between normal value and export price under Article 2.4, they do not determine the data set to be used for constructing PCN-specific normal value under Article 2.2.2. The determination of normal value and the fair comparison required under Article 2.4 are distinct steps governed by different provisions and the establishment of the normal value necessarily precedes any comparison under Article 2.4. Importantly, Article 2.4 allows for adjustments for differences affecting price comparability between the normal value and the export price. The mere difference in the level of profit made on the domestic and export sales does not constitute a difference affecting price comparability within the meaning of Article 2.4.

39. Finally, the error in constructing PCN-specific normal values cannot be remedied by aggregating the resulting dumping margins. PCN-specific normal values are intermediate steps, and an error in their construction necessarily affects the final result. The obligation under Article 2.2.2 to base SG&A costs and profit on actual data of the like product applies at the stage of constructing those intermediate normal values.

B. The European Union violated Article 2.4.1 of the Anti-Dumping Agreement by using an incorrect exchange rate for currency conversion and, as a consequence, violated Articles 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by applying an anti-dumping duty which exceeds the (correct) margin of dumping established under Article 2 of the Anti-Dumping Agreement

40. The European Union violated Article 2.4.1 of the Anti-Dumping Agreement by using an incorrect exchange rate to convert the net invoice value and CIF value of certain transactions of an Indonesian producer, which led to the incorrect calculation of the dumping margin. As a consequence, the European Union also violated Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by applying an anti-dumping duty which exceeds the margin of dumping.

41. Article 2.4.1 provides that currency conversions must be made using the rate of exchange on the date of sale, and that currency conversions are permitted only where they are required in order to effect a comparison between the export price and the normal value. Where prices are already in the same currency, no conversion is required. Article 9.3 and Article VI:2 establish that the amount of the anti-dumping duty cannot exceed the margin of dumping as established under Article 2.

42. Indonesia's claim relates to the treatment of some of the transactions reported by a related trader of an Indonesian producer. While most sales reported by that trader were made in its accounting currency of EUR, 11 transactions were made in USD but were converted into EUR for reporting purposes, as required by the Commission. For the purpose of its dumping calculation, the Commission converted the reported EUR values into USD, but for the 11 transactions at issue it used an exchange rate of 1.00, mistakenly treating the values as already being in USD. It is undisputed that the Commission was aware of the fact that the invoice currency of the 11 transactions at issue was USD while the trader's accounting currency was EUR, and that the company had correctly converted the original USD values into EUR. As a result, the Commission artificially decreased the net invoice value and CIF value of those transactions by using the incorrect exchange rate, leading to a lower total sales value and an inflated dumping margin. Had the correct exchange rates been used or the original USD values been relied upon, the dumping margin of the Indonesian producer would have been lower.

43. As a result, the Commission's use of an incorrect exchange rate to convert the net invoice values and the CIF values of the 11 transactions concerned led to the imposition of an anti-dumping duty exceeding the correct margin of dumping, in violation of Articles 2.4.1 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

44. The European Union wrongly argues that no currency conversion occurred. The evidence on the record shows that the relevant column was expressly labelled as an "exchange rate for conversion" and that the value of 1.00 was used in that column for the 11 transactions. A conversion was required in this case, given that the company reported transactions in EUR while the Commission

conducted its calculations in USD, and the European Union itself acknowledges that the figures used were incorrect and that the dumping margin was affected.

45. Indonesia also rejects the argument that the authority's error may not be reviewed because it was not raised during the investigation or because the authority was unaware of it. An investigating authority's awareness of its own error resulting in a WTO violation has no bearing on the Panel's assessment of whether the European Union respected its obligations under Articles 2.4.1 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Nor is the fact that an investigating authority becomes aware of its own error (that puts it in breach of WTO obligations) after the conclusion of the investigation a new "fact" and therefore outside the investigation record and the Panel's review.

46. Article 17.6(i) of the Anti-Dumping Agreement requires the Panel to assess whether the authority's establishment of the facts was proper and whether its evaluation was unbiased and objective, based on the record before it. The European Union's position in this case would undermine the function of dispute settlement by placing errors outside the Panel's review simply because the authority was unaware of them. Indonesia also rejects the European Union's contention that compliance with domestic procedures gives rise to a presumption of WTO-consistency: Article 17.6(i), read together with Article 17.5(ii), requires a proper and objective assessment of the facts on the record. In this case, the relevant information was on the record, and the error arises from the Commission's assessment of that information, including the manual replacement of the applicable exchange rate with a value of 1.00 for the 11 transactions.

47. An investigating authority has an independent obligation to ensure the accuracy of the information and the fairness of the comparison. This obligation is not diminished by any alleged failure of an interested party to identify an error. Indonesia further submits that Articles 17.5(ii) and 17.6(i) do not limit the Panel's review to issues raised during the investigation and do not prevent the Panel from examining errors in the authority's assessment of facts on the record. The Panel's task under Article 17.6(i) is to determine whether the authority's establishment was proper and its evaluation of those facts was unbiased and objective. An error in the authority's calculation based on record evidence falls squarely within that scope of review, regardless of whether it was identified during the investigation.

C. The European Union violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement because it failed to make an objective and unbiased examination of the injury factors and erroneously found the existence of material injury to the Union industry

48. The European Union violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement because it failed to make an objective and unbiased examination of the injury factors and, as a consequence, erred in finding the existence of material injury to the Union industry. First, the European Union failed to make an objective examination of several injury factors, among others by failing to take into account positive trends displayed by those factors. Second, in addition to the shortcomings in assessing the individual injury factors, the European Union's overall assessment of the existence of injury violates Articles 3.1 and 3.4, because it failed to give appropriate weight to factors displaying a positive trend in that overall assessment.

49. Article 3.1 requires that a determination of injury be based on positive evidence and involve an objective examination of the volume of dumped imports, the effect of dumped imports on prices, and the consequent impact of these imports on domestic producers. Article 3.4 asks for an evaluation of all relevant economic factors and indices having a bearing on the state of the industry. An objective examination involves that the relevant factors be investigated in an unbiased manner, that conflicting evidence be taken into account, and that the authority explain how the evidence supported its conclusions. In addition, Article 3.4 calls for an analysis and interpretation of the data relating to the injury factors, and an assessment of the role, relevance and relative weight of each factor in the particular investigation. While not every factor must show a negative trend, positive movements in certain factors require a compelling explanation of why and how, in light of those positive trends, the domestic industry is nevertheless injured. The European Union agrees with the standard of injury assessment presented by Indonesia.

50. The Commission concluded that the Union industry suffered material injury, stating that injury consisted mainly of price and performance indicators such as profitability and ability to raise capital, while also referring to declines in production, capacity, capacity utilisation, sales volume, market share, employment and productivity. At the same time, the Commission recognised that stocks and captive use showed improvement, and acknowledged that some other indicators, such as sales prices, profitability, return on investment and investment, showed an apparently positive trend during the period considered.

51. First, the Commission failed to evaluate, let alone do so objectively, the ability to raise capital. The Commission merely stated that investments of the Union industry were threatened by a decreasing ability to raise capital, without any evidence supporting that statement. The Commission failed to provide a reasoned and adequate explanation as to what evidence supported its conclusion, even though it identified that factor as one of the main reasons for its finding of material injury. The recitals of the Definitive Anti-Dumping Regulation invoked by the European Union during the panel proceedings simply repeat that conclusion, but do not explain how and why the Union industry allegedly had a reduced ability to raise capital nor how that, in turn, affected investments.

52. The new evidence relied on by the European Union during the panel proceedings also does not support the Commission's industry-wide conclusion in respect of the alleged inability to raise capital. At best, that evidence shows that one smaller sampled Union producer did not proceed with part of a planned investment and that a bank requested a parental guarantee from headquarters for loan for another Union producer. This evidence does not establish that the companies were unable to obtain financing generally. Nor does it support an industry-wide conclusion. Moreover, this evidence was not examined in the Definitive Anti-Dumping Regulation and cannot cure the lack of reasoning in that Regulation.

53. Second, the Commission failed to carry out an objective examination of several injury factors by omitting to take into account conflicting evidence showing a positive trend in those factors. Profitability, sales prices, investments, return on investments and stocks showed a clear positive trend. The investigation period ("IP") was the most profitable period for the Union industry, with profitability increasing from -2.1 in 2020 to 2.5 in the IP. The Commission dismissed this positive trend by arguing that profitability was nevertheless too low, using as a benchmark the 6% target profit set out in Article 7(2c) of the Basic Anti-Dumping Regulation and the profitability of the broader EU chemical industry. However, that benchmark does not reflect the specificity of the fatty acid industry, as confirmed by the European Union during the panel proceedings. Given that margins of profitability are industry-specific, and that the Commission did not explain how and why the general 6% profit was appropriate in this investigation, the Commission's examination of profitability did not meet the standard of Articles 3.1 and 3.4.

54. Third, the Commission dismissed the 25% increase in sales prices by stating that it was due to the increase in costs of production, more specifically raw material costs, but failed to objectively assess that injury factor. Even if the increase in prices was partly due to raw material costs, this injury factor exhibited a clear positive trend and did not support the finding of injury. The Commission was required to explain how the increase in prices supported its conclusion about the negative state of the Union industry and why that price development was nevertheless consistent with a finding of material injury.

55. Fourth, the Commission recognised that stocks of the sampled Union producers decreased by 23% over the period considered, indicating an increase in sales, but dismissed this factor as being of lesser importance in the overall injury analysis. Even accepting that stocks in the fatty acid industry are generally kept at a low level, the significant decrease in stocks supported a positive trend in sales. By simply dismissing this positive trend, the Commission failed to make an objective examination.

56. Fifth, investments and return on investments displayed an overall positive trend, but the Commission dismissed the relevance of those factors. With respect to investments, the Commission acknowledged that the sampled Union producers continued to invest during the period considered but added that investments were mainly made to make efficiency gains and maintain existing facilities and that other investments to increase capacity had not gone ahead as planned during the period considered. The Commission failed, however, to provide any supporting evidence or explanation. It also failed to adequately address conflicting evidence, including the statement of one of the main EU producers, KLK, that it had invested and would continue to invest in process

efficiencies, cost improvements and downstream integration, and that it was able to stay competitive and profitable with Indonesian imports.

57. With respect to return on investments, the Commission merely explained how it was established, observed that it fell in 2019 and 2020 and then increased during the investigation period, and concluded that the inadequate level of return on investments jeopardised the future ability of the Union industry to raise capital. Indonesia argues that the Commission did not explain why it considered the level achieved during the investigation period to be inadequate, did not provide any benchmark showing what it considered to be an adequate level of return on investment, and ignored the significant increase from -4.4 in 2020 to 12.1 during the IP as well as the overall increase between 2018 and the investigation period.

58. Moreover, several factors such as production, production capacity and cash flow showed a positive trend towards the end of the period considered, that is, during the investigation period in comparison with 2020. These positive developments should have been given appropriate weight, but the Commission instead focused on an end-point-to-end-point analysis and mostly looked at the situation in 2018 as compared to the investigation period. By doing so, the Commission failed to appreciate the positive trends that occurred between 2020 and the investigation period, even though the more recent data are more likely to be relevant to current injury. By ignoring these recent positive trends the Commission failed to make an objective assessment of the injury factors and the existence of injury.

59. An error in the assessment of one injury factor is sufficient for the Panel to find a violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

60. Finally, the European Union erred in its overall assessment of the existence of injury. Only three of the 15 injury factors listed in Article 3.4 displayed a clear negative trend, while other factors remained stable or improved over the period considered and therefore did not support the finding of injury. In those circumstances, the Commission was required to provide a reasoned and compelling explanation of why and how, in light of the apparent positive trends, it nevertheless concluded that the Union industry was suffering material injury. The notion of a compelling explanation derives from the obligation of objective examination and objective evaluation of all injury factors. Where several injury factors demonstrate positive trends indicating improvement in the condition of the domestic industry, the investigating authority must provide a more detailed and persuasive rationale explaining how, despite those positive developments, the industry nevertheless suffered material injury.

61. The Commission failed to provide such an explanation. While it tried to dismiss or undermine the positive trends in various injury factors, it did not provide a reasoned and compelling explanation of how the negative trends in the other factors outweighed the positive developments. Indonesia also points to KLK's letter and the withdrawal of the complaint as further confirmation of the absence of material injury.

62. The European Union may not justify the absence of sufficient reasoning supporting its injury determination by shifting the burden to interested parties or by relying on previously undisclosed documents in these proceedings. As confirmed by the case law, the entire rationale for the investigating authority's decision must be set out in the written report of the determination, and the lack of explanation in the Definitive Anti-Dumping Regulation cannot be cured by *ex post* explanations. What matters is the explanation provided in that Regulation and supporting documents and the Panel cannot be asked to reconstruct the Commission's reasoning during these panel proceedings.

D. The European Union violated Articles 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, because the amount of the anti-dumping duty imposed by the European Union exceeds the margin of dumping as established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994

63. The European Union violated Articles 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because the anti-dumping duties imposed exceed the margin of dumping that should have been established in accordance with Article 2.

64. Anti-dumping duties may not exceed the margin of dumping. They must be collected in "appropriate amounts", meaning amounts that are proper and limited to offsetting dumping. A duty exceeding the correctly established dumping margin is, by definition, not appropriate and is inconsistent with both Articles 9.2 and 9.3 of the Anti-Dumping Agreement, as well as Article VI:2 of the GATT 1994.

65. The European Union failed to determine the dumping margin in accordance with Article 2. In particular, the European Union violated Articles 2.2 and 2.2.2, when constructing normal value by adding unreasonable amounts for SG&A costs and profit that were not based on actual data pertaining to production and sales of the like product, when constructing the normal value of PCNs sold in insufficient quantities.

66. As a result, because the normal value was incorrectly constructed, the resulting dumping margin is inflated. Had the Commission complied with Article 2, the dumping margin for the relevant Indonesian producer would have been lower.

67. Indonesia therefore submits that the duties imposed, which are directly based on that incorrect dumping margin, exceed the margin of dumping that should have been established under Article 2.

E. The European Union violated Article X:3(a) of the GATT 1994, in conducting its investigation and applying anti-dumping duties on imports of fatty acid from Indonesia, because by applying different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country, depending on the existence of profitable sales of those PCNs, the European Union failed to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner

68. The European Union violated Article X:3(a) of the GATT 1994 in conducting its investigation and applying anti-dumping duties on imports of fatty acid from Indonesia, because by applying two different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country, depending on the existence of profitable sales of those PCNs, the European Union failed to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner.

69. Article 2(6), which mirrors Article 2.2.2 of the Anti-Dumping Agreement, requires that SG&A costs and profit be based on actual data relating to production and sales of the like product in the ordinary course of trade. This refers to data covering all PCNs forming the like product and does not provide any basis for applying different methodologies depending on the existence of profitable sales for specific PCNs.

70. In the investigation at issue, the Commission constructed normal value for seven PCNs, namely five PCNs with no domestic sales and two PCNs with too few domestic sales that failed the representativity test. For the five PCNs with no domestic sales, the Commission applied CNV Company which uses the data of all PCNs. For the two PCNs with some domestic sales, given that those sales were profitable, the Commission applied CNV PCN which uses exclusively the data of a specific PCN.

71. These seven PCNs are similarly situated because they all required constructed normal value due to insufficient domestic sales. Applying different methodologies to the same category of PCNs results in non-uniform administration, as comparable situations are treated differently. It follows that by applying two different methodologies to the same category of PCNs (namely, PCNs which were not sold in representative quantities on the domestic market), the European Union failed to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform manner.

72. Moreover, by applying these two methodologies based on an arbitrary criterion of profitable sales whereby PCNs with some profitable domestic sales are subject to CNV PCN whereas PCNs with no profitable domestic sales are subject to CNV Company, the European Union also administered Article 2(6) of the Basic Anti-Dumping Regulation in an unreasonable manner.

73. The European Union's position that the relevant distinction is whether sales are in the ordinary course of trade must be rejected. This is not the operative criterion in the investigation, as the issue

concerns PCNs with insufficient domestic sales, including cases where there are no sales at all (and thus, where the ordinary course of trade test cannot be applied). Here, the Commission effectively subdivided this category based on the existence of profitable sales and then applied different methodologies without any basis in the Anti-Dumping Agreement or the Basic Anti-Dumping Regulation.

F. The European Union violated Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

74. As a consequence of the violations identified under multiple provisions of the Anti-Dumping Agreement, the European Union also acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

75. Article 1 requires that anti-dumping measures be applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations conducted in accordance with the Anti-Dumping Agreement. Where a Member imposes anti-dumping duties inconsistently with other provisions of the Anti-Dumping Agreement, this necessarily establishes a breach of Article 1.

76. The European Union imposed anti-dumping duties while acting inconsistently with several provisions of the Anti-Dumping Agreement, including Articles 2.2, 2.2.2, 2.4.1, 3.1, 3.4, 5.6, 9.2 and 9.3. As a result, the investigation was not conducted in accordance with the Anti-Dumping Agreement and the resulting measures do not meet the conditions required under Article VI of the GATT 1994. Accordingly, Indonesia asks the Panel to find that the European Union acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

IV. INDONESIA'S CLAIMS CONCERNING THE EU METHODOLOGIES FOR CONSTRUCTING NORMAL VALUE

A. The existence of the challenged measures

77. Indonesia challenges "as such" the EU methodology for constructing normal value based on PCN-specific SG&A and profit as well as the use of two methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country.

78. Indonesia defines the measures at issue as the two methodologies used by the Commission when domestic sales of certain PCNs are not representative. Where a PCN has no profitable sales during the investigation period, the Commission uses "CNV Company", whereby SG&A and profit are based on the data of sales of all PCNs forming the like product. Where a PCN has some profitable sales, even if very minor, the Commission uses "CNV PCN", whereby SG&A and profit are based only on the data of sales of that specific PCN. These methodologies are evidenced by the Commission's determinations in numerous anti-dumping investigations since 2012 dealing with various products originating in different countries, by the standard language used in those determinations, and by the OASYS program, used by the Commission in all anti-dumping investigations, and in particular the table in "Annex 2.7 Scenario" which explicitly refers to CNV PCN and CNV Company.

79. The methodologies are attributable to the European Union because, as the evidence before the Panel shows, they have been developed and consistently applied by the Commission in its anti-dumping investigations. They are measures of general and prospective application because they affect an unidentified number of economic operators and have been consistently and systematically applied over an extended period of time whenever certain PCNs do not meet the representativity test and are embedded in the program used by the Commission in all its investigations. During these Panel proceedings, the European Union has not identified any instance of non-application in the relevant circumstances. In fact, the European Union has admitted that it has been unable to find any such case. Finally, Indonesia is not required to show with certainty that the methodologies will continue to apply in the future and that the mere possibility that these methodologies may be modified or withdrawn does not remove the prospective character of that measure.

B. The European Union violated Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement because by requiring the use of the SG&A and profit data relating exclusively to a specific PCN sold in insufficient quantities on the domestic market of the exporting country, the second methodology (CNV PCN) uses amounts for SG&A costs and for profit which are not reasonable and are not based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation

80. The European Union's CNV PCN methodology is, as such, inconsistent with the chapeau of Article 2.2.2 and, as a consequence, with Article 2.2. Article 2.2.2 requires that the amounts for SG&A and profit be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. Once the like product is defined, and because the chapeau refers to the "like product" and only allows the exclusion of sales not made in the ordinary course of trade, the investigating authority may not exclude profitable sales of other PCNs that form part of the like product.

81. By relying exclusively on data relating to a specific PCN and ignoring the data relating to other PCNs sold in the ordinary course of trade, the CNV PCN methodology does not permit the establishment of constructed normal value based on actual data pertaining to production and sales in the ordinary course of trade of the like product. By requiring the use of SG&A and profit data relating only to a specific PCN sold in insufficient quantities on the domestic market, CNV PCN disregards the actual data of other PCNs that form part of the like product. This is inconsistent with the text of Article 2.2.2, which refers to the like product as a whole and does not permit the use of a limited subset of PCN-specific data while excluding other relevant sales of the like product.

82. The European Union's arguments about the use of non-profitable transactions or the 80% test do not rebut its claim. Indonesia has not argued that the European Union is always using only profitable sales for constructing normal value. Rather what Indonesia has challenged is that in case a PCN sold in insufficient quantities has some profitable sales (even if very minor), it is subject to a CNV PCN methodology which ignores the data relating to other PCNs. In other words, the fundamental problem resulting in a violation of Articles 2.2 and 2.2.2 is that the Commission uses only the data of the specific PCN and disregards the data of other PCNs forming the like product when constructing PCN-specific normal value.

83. Because CNV PCN is inconsistent with the chapeau of Article 2.2.2, it necessarily also leads to a violation of Article 2.2, because amounts for SG&A and profit that are not established consistently with Article 2.2.2 may not be regarded as "reasonable" under Article 2.2.

C. The European Union violated Article X:3(a) of the GATT 1994 because by applying different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country, depending on the existence of profitable sales of those PCNs, the European Union fails to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner

84. The European Union violated Article X:3(a) of the GATT 1994 because, by applying two different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country, depending on the existence of profitable sales of those PCNs, it failed to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner.

85. Article 2(6) of the Basic Anti-Dumping Regulation, which mirrors Article 2.2.2 of the Anti-Dumping Agreement, requires that amounts for SG&A costs and for profit be based on actual data pertaining to production and sales in the ordinary course of trade of the like product. In Indonesia's view, "actual data" relating to the like product means data relating to all PCNs sold in the ordinary course of trade. Neither Article 2(6) nor any other provision in the Basic Anti-Dumping Regulation provides a basis for using two different methodologies, one based only on PCN-specific data and one based on data relating to all PCNs sold by a company in the ordinary course of trade, depending on the existence of profitable sales of those PCNs.

86. Where the representativity test is not met, the Commission consistently applies two different methodologies. If a PCN has no profitable sales, the Commission applies CNV Company and bases SG&A and profit on the weighted average of all sales of the like product. If a PCN has some profitable sales, even if very minor, the Commission applies CNV PCN and bases SG&A and profit only on the sales of that specific PCN. This distinction, based on the existence of profitable sales, is not provided for in the Basic Anti-Dumping Regulation.

87. Article 2(6) of the Basic Anti-Dumping Regulation is a law or regulation within the meaning of Article X:1 of the GATT 1994 that it is administered whenever the Commission constructs normal value in the circumstances provided for in Article 2.3, including for sales in non-representative quantities. As a result, the Commission administers Article 2(6) by putting it into practical effect through the use of these two methodologies. This is not contested by the European Union.

88. The European Union failed to administer Article 2(6) in a uniform manner because it applies two different methodologies to the same category of PCNs, namely PCNs sold in non-representative quantities on the domestic market. PCNs with some profitable sales are subject to a PCN-specific calculation (CNV PCN), while PCNs with no profitable sales are subject to a calculation based on the data of all PCNs sold in the ordinary course of trade (CNV Company). These PCNs are similarly situated because they all fail the representativity test and require constructed normal value. By treating them differently, the European Union failed to ensure uniform administration.

89. The European Union also failed to administer Article 2(6) in a reasonable manner. The criterion used to divide PCNs into two sub-categories, namely the existence of profitable sales, is arbitrary and is not provided for in the Basic Anti-Dumping Regulation or the Anti-Dumping Agreement. The Commission thus splits a single category of PCNs requiring constructed normal value into two sub-categories and applies different methodologies for determining SG&A and profit without any basis in the text of Article 2(6). This is not appropriate for the circumstances and is not based on rationality.

90. Article 2(6) requires the use of actual data for all PCNs within the like product. There is no basis in the Basic Anti-Dumping Regulation or the Anti-Dumping Agreement for dividing PCNs on the basis of profitable sales.

91. The relevant criterion used to decide which methodology to apply is not the ordinary course of trade. In fact, as confirmed by the European Union itself, once the data is fed into the OASYS program, the only relevant criterion for deciding which of the two methodologies, CNV PCN or CNV Company, applies is the presence of profitable sales. This is because sales which are not in the ordinary course of trade for other reasons, such as sales to related parties, are excluded from the input data and are not entered into the OASYS program.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. INTRODUCTION

1. The European Union's investigating authority – the European Commission ("the Commission") – found that the Indonesian imports of fatty acid were dumped and caused material injury to the domestic industry in the European Union. Based on these findings the Commission decided to impose anti-dumping duties by means of Commission Implementing Regulation (EU) 2023/111, as published on 19 January 2023 (the "Definitive Anti-Dumping Regulation").

2. The measure at issue in this dispute are (1) the definitive anti-dumping measures imposed by the European Union on imports of fatty acid originating in Indonesia (i.e. the Definitive Anti-Dumping Regulation), including the investigation leading to the imposition of those measures; (2) the European Union's decision to terminate the anti-subsidy investigation on imports of fatty acid originating in Indonesia, as published on 20 March 2023 (Commission Implementing Decision (EU) 2023/617, or the "anti-subsidy termination decision"); and (3) the methodology for constructing normal value based on PCN-specific costs and profit data as well as the use of two different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country.

3. For the reasons set out below, the European Union requests the Panel to find that the European Union acted consistently with all its obligations under the Anti-Dumping Agreement and the GATT 1994.

2. PRELIMINARY OBSERVATIONS ON THE SCOPE OF THE DISPUTE

4. In the present dispute, Indonesia challenges the definitive anti-dumping duties imposed by the European Union on imports of fatty acid from Indonesia (including the investigation leading to the imposition of those duties), the decision terminating the parallel anti-subsidy investigation, as well as the EU methodologies for constructing normal value.

5. At the outset, the European Union makes the following preliminary observations on the scope of the measures brought by Indonesia in the present dispute.

6. First, the European Union considers that the decision to terminate the parallel anti-subsidy investigation on imports of fatty acid originating in Indonesia is not a challengeable measure on which the Panel can make findings on its own. Such a decision, at most, is context or a fact which may be considered as part of Indonesia's claims under Article X:3(a) of the GATT 1994 against the EU's anti-dumping duties on imports of fatty acid originating in Indonesia. Simply put, the decision terminating the anti-subsidy investigation is a fact which may be of relevance in order for the Panel to ascertain the exact progression of events leading to the present dispute.

7. In particular, Indonesia has not suffered any nullification or impairment of its WTO benefits within the meaning of Article 3.8 of the DSU from the decision to terminate the anti-subsidy investigation, as no countervailing duties were imposed. Whilst there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, in this case the European Union submits that the decision to terminate the anti-subsidy investigation did not have an adverse impact on Indonesia. What had such an impact, as alleged by Indonesia, was the Commission's decision to *continue* the anti-dumping investigation on imports of fatty acid originating in Indonesia. This is the source of the alleged impairment by Indonesia.

8. Moreover, the European Union notes that Article 19 of the DSU provides that "[w]here a panel … concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement". The European Union wonders how it could bring the decision to terminate the anti-subsidy investigation into conformity with the covered agreements, other than re-opening such investigation and, eventually, imposing countervailing duties.

9. Thus, the European Union requests the Panel to clarify that the decision to terminate the parallel anti-subsidy investigation on imports of fatty acid originating in Indonesia is not a measure subject to this dispute, but part of the matter brought by Indonesia in the context of its claim under Article X:3(a) of the GATT 1994 against the Commission's decision to continue the anti-dumping investigation after the withdrawal of both complaints.

10. Second, leaving aside that the alleged rule described by Indonesia in its First Written Submission does not exist, the European Union submits that the evidence put forward to support the existence of such an unwritten rule is manifestly insufficient. In essence, Indonesia relies on similar wording in a limited number of past determinations and on the calculations of a single exporter in one case to infer the existence of a rule or norm of general and prospective application. The European Union argues that such repetition of language does not, in itself, establish a general and prospective measure, especially without detailed information on the specific circumstances of each case, which are essential given that each determination is fact specific. Absent that context, no meaningful inference can be drawn. Likewise, the routine disclosure of dumping calculations based on the OASYS system, which covers only part of the overall dumping determination, does not demonstrate the consistent application of a single methodology, and Indonesia's claim to that effect is unsupported by evidence.

11. The Appellate Body has noted that, where prospective application is not sufficiently clear from the constitutive elements of a rule or norm, it may be demonstrated by a number of factors. These include: the existence of an underlying policy that is implemented by the rule or norm; the systematic application of the challenged rule or norm; the design, architecture, and structure of the rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future.

12. Indonesia has failed to bring any evidence which would support the conclusion that the alleged practice has prospective application. There is no evidence of any underlying policy. The application in 14 anti-dumping determinations as of 2012 is not relevant when the European Union has made hundreds of anti-dumping determinations since. Indonesia does not dispute the Commission's discretion on this point, as the alleged method is not mandated by the Basic Anti-Dumping Regulation. Moreover, given that each case turns on the specific facts of the investigation, economic operators cannot rely on any legitimate expectations. Instead, they bring claims, as in the present case, which themselves demonstrate that the alleged rule neither exists nor is perceived to exist.

13. In sum, the European Union considers that the Panel should reject Indonesia's claims concerning the European Union's methodologies for constructing normal value on the basis that Indonesia has failed to properly identify the rule and then failed to show the existence of the alleged rule or norm of general and prospective application.

3. CLAIMS RELATING TO THE WITHDRAWAL OF THE COMPLAINTS

3.1. Alleged failure to administer the provisions governing the withdrawal of complaints in the Basic Anti-Dumping Regulation and the Basic Anti-Subsidy Regulation in a uniform and reasonable manner (violation of Article X:3(a) of the GATT 1994)

14. Indonesia essentially argues that by reaching contradictory decisions with respect to the anti-dumping and the anti-subsidy investigations in the same factual circumstances and contrary to its prior practice, and without offering any justification or reasoning explaining its opposite application of the Union interest test in those investigations, taking into account the relevant facts, the European Union has failed to administer Article 9(1) of the Basic

Anti-Dumping Regulation and Article 14(1) of the Basic Anti-Subsidy Regulation in a uniform and reasonable manner, thereby violating Article X:3(a) of the GATT 1994.

15. As a preliminary remark, the European Union maintains that Article X:3(a) of the GATT 1994 finds no application in the case at hand.

16. First, past panels have indicated that, in order for an action under Article X:3(a) of the GATT 1994 to be successful, there must be a significant impact on the overall administration of a Member's law and not simply on the outcome of the single case in question. Indonesia's claim manifestly fails to meet this standard. This dispute concerns only the administration of provisions in question in the single case at hand. Indonesia has neither demonstrated nor alleged any impact on the overall administration of the EU's relevant anti-dumping and anti-subsidy provisions.

17. Second, a contextual reading of the WTO Anti-Dumping Agreement makes clear that the uniformity obligation of Article X:3(a) cannot be invoked in areas where the investigating authority has discretion under the Anti-Dumping Agreement, or areas which are not explicitly regulated by the said agreement. The withdrawal of a complaint and the decision whether or not to impose measures are precisely such areas where the investigating authority has discretion.

18. More specifically, under Article 9.1 of the Anti-Dumping Agreement and Article 19.2 of the SCM Agreement, investigating authorities have discretion to decide whether or not to impose measures, even if all legal requirements are met. Accordingly, if an investigating authority considers that anti-dumping duties are warranted while countervailing duties are not, the text of the above-mentioned provisions grants full discretion to do so.

19. In relation to Indonesia's claim alleging the lack of "uniformity" and "reasonableness" in the administration of the above-mentioned relevant provisions of EU legislation, the European Union has submitted the following rebuttals.

20. First, the European Union takes the view that Article X:3(a) cannot be understood to require identical results where relevant facts differ. In this respect, Indonesia errs in arguing that the anti-dumping and anti-subsidy investigations at stake are "identical" or "closely-related". The European Union underscores that, in the anti-dumping investigation, the withdrawal of the complaint occurred after the Commission had established and disclosed its findings on injurious dumping. By contrast, in the anti-subsidy investigation, the withdrawal of the complaint took place at a stage where key investigative steps had not yet been undertaken – including the issuance of deficiency letters, verification visits, and any provisional or definitive findings of subsidisation.

21. Second, the European Union disagrees with Indonesia's attempt to demonstrate the existence and relevance of an alleged previous decision-making practice of the Commission in relation to termination following withdrawal of the complaint as being relevant for a finding of non-uniform and unreasonable administration. The European Union submits that every withdrawal request is assessed on its own merits. Regardless, Indonesia has failed to point to a single instance in which, following withdrawal of the complaint, the Commission terminated an investigation despite having already issued (like in the case at hand) its definitive disclosure on the existence of injurious dumping/subsidization.

22. Third, Indonesia's claim is based on a partial presentation of the facts underpinning the anti-dumping investigation at stake.

23. In the first place, Indonesia fails to consider that by withdrawing the complaint in the anti-dumping investigation, the complainant never conceded that it was no longer injured, nor that the imposition of measures was clearly not in the Union interest. The withdrawal was only due to an unspecified "influence from stakeholders".

24. In the second place, Indonesia over-relies on the evidentiary value of KLK's letters of 15 and 19 August 2022, as well as on the opposition of interested parties (largely users) to the imposition of the measures on the ground that they were not in the Union interest.

25. Insofar KLK is concerned, none of the statements reported in its letters is supported by even the remotest piece of evidence.

26. Insofar the allegations put forward by users are concerned, the European Union has explained why the Commission was not strictly obliged to carry out a Union interest assessment in the context of Article 9(1) of the Basic Anti-Dumping Regulation since it had decided to continue the anti-dumping investigation. Regardless, the Commission thoroughly explained the reasons why it considered that users would have not been disproportionately affected by anti-dumping measures.

27. Fourth, the European Union disagrees with Indonesia's allegation according to which a violation of Article X:3(a) could be found on the ground that the Commission failed to provide adequate justification or reasoning explaining its opposite determinations in the separate anti-dumping and anti-subsidy investigations.

28. From a legal standpoint, contrary to what Indonesia suggests, the text of Article X:3(a) of the GATT 1994 does not refer to a requirement for investigating authorities to provide explanations or reasons for their decisions. It only requires the administration of certain matters in a uniform, impartial and reasonable manner.

29. The precedents invoked by Indonesia in this respect do not support the conclusion that a violation of the reasonableness obligation of Article X:3(a) could arise in instances in which the investigating authority allegedly does not provide reasons for its different decisions in two separate and different proceedings, even more so in an area – such as the withdrawal of the complaint – which is a matter exclusively of municipal law.

30. Furthermore, the European Union submits that Indonesia's allegations are factually flawed.

31. In the first place, it was impossible for the Commission to address, in the Definitive Anti-Dumping Regulation (adopted on 18 January 2023 and published on 19 January 2023), the reasons for a potential future inconsistency with a subsequent legal act, namely the termination decision in the anti-subsidy investigation published on 20 March 2023.

32. In the second place, in recitals (68) and (422) of the Definitive Anti-Dumping Regulation, the Commission provided details of the reasons behind its decision to continue the anti-dumping investigation. In the case of recital (68), this explanation was provided in response to comments from interested parties. In the case of recital (422), this justification was provided for the sake of completeness (despite not being legally required), in the framework of the Union interest assessment under Article 21 of the Basic Anti-Dumping Regulation. It is apparent from both recitals that the Commission supported the continuation of the investigation in view of, most notably, the definitive findings on the existence of significant injurious dumping. Conversely, these definitive findings had not been reached in the anti-subsidy investigation. Accordingly, the Commission was perfectly entitled, in recitals (10) and (11) of the decision terminating the anti-subsidy investigation, to explain the reasons for that termination uniquely by recalling the relevant legal standard. Given such patent differences, no further reference to the opposite findings in the separate final determinations was required, regardless of the impossibility of doing so due to the sequence of events.

33. In the third place, the record of the investigations does not in any way confirm that traders were put in a position where they could not understand why, despite the withdrawal in both investigations, the anti-dumping investigation was continued but the anti-subsidy investigation was terminated.

34. In view of the foregoing, none of the elements invoked by Indonesia is capable of demonstrating the existence of a violation of the uniformity and reasonableness requirements enshrined in Article X:3(a) of the GATT 1994.

3.2. Alleged error when continuing with the investigation following the withdrawal of the complaint, without a prior determination that, at the time of deciding to proceed, there are special circumstances and there exists sufficient evidence of dumping, injury, and a causal link (violation of Article 5.6 of the Anti-Dumping Agreement)

35. The European Union disagrees with Indonesia's interpretation of Article 5.6 of the Anti-Dumping Agreement. Contrarily to what Indonesia suggests, the Commission could continue the investigation following the withdrawal of the complaint, without a separate determination that the conditions Article 5.6 were satisfied.

36. First, Indonesia's assertion that an investigation must at all times rest on either Article 5.1 or Article 5.6 of the Anti-Dumping Agreement finds no textual or contextual foundation. Past panels have indicated that the text of Article 5.6 gives no indication that its evidentiary standards apply to anything but the self-initiation of investigations. In other words, Article 5.6 applies solely in the context of initiation of proceedings. Accordingly, Indonesia's interpretation improperly imports initiation-specific requirements from Article 5.6 into later stages of the investigation.

37. Second, Indonesia's position is untenable in view of the fact that (i) in the case at hand, despite the withdrawal of the application, the applicant never conceded that it was no longer injured; and (ii) it would lead to absurd results, as it would oblige an investigating authority to be called to re-assess the basic conditions for starting a case when it has already positively established, and disclosed, dumping, injury and causation following a thorough inquiry and thus pursuant to a higher evidentiary standard.

4. CLAIMS RELATING TO THE EU FATTY ACID ANTI-DUMPING INVESTIGATION AND DUTIES AT ISSUE

4.1. Alleged failure to reject the application or terminate the investigation because of a lack of standing of the domestic industry (violation of Article 5.4 of the Anti-Dumping Agreement)

38. The European Union notes that at the first substantive meeting with the parties, Indonesia informed the Panel of the decision to no longer pursue its claim under Article 5.4 of the Anti-Dumping Agreement. The claim therefore does not need to be adjudicated.

4.2. Alleged error by constructing the normal value on the basis of unreasonable amounts for SG&A costs and for profit which were not based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation (violation of Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement)

39. Indonesia argues that for groupings of product types (or PCNs) sold in insufficient quantities on the domestic market, the Commission constructed the normal value using unreasonable profit amounts in violation of Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement. In particular, Indonesia contends that where a PCN has some (even minimal) sales in the ordinary course of trade, the Commission used PCN-specific profit data (CNV PCN), whereas for PCNs with no sales at all in the ordinary course of trade, the Commission used the average profit across all PCNs (CNV company). According to Indonesia, the Commission should have used the average profit across all PCNs in both cases.

40. The European Union respectfully submitted that the Panel should reject Indonesia's claim. The European Commission applied a single coherent approach fully consistent with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement. Under the chapeau of Article 2.2.2, an investigating authority is obliged to use "actual data pertaining to production and sales in the ordinary course of trade" when determining amounts for SG&A and profits. Only "[w]hen such amounts cannot be determined on this basis" may an investigating authority employ one of the alternative methods provided in sub-paragraphs (i)–(iii). Accordingly, where a PCN had actual sales data in the ordinary course of trade, that data had to be used to determine the PCN-specific profit margin; only where there was absolutely no sales data in the ordinary course of trade for a given PCN did the Commission use the average profit across all PCNs.

41. The Appellate Body in *EC – Tube or Pipe Fittings* confirmed that Article 2.2.2 does not permit a 'low-volume' exception, finding that "[t]he absence of any qualifying language related to low volumes in Article 2.2.2 implies that an exception for low-volume sales should not be read into Article 2.2.2." The panel in *EC – Salmon* further confirmed that the obligation to use actual profit data pertaining to sales made in the ordinary course of trade applies even if it leads to using values which are identical to prices that were disregarded under Article 2.2 of the Anti-Dumping Agreement due to insufficient quantities.

42. The European Union notes that Indonesia's position is internally incoherent with respect to the notion of "like product" across Article 2 of the Anti-Dumping Agreement. Indonesia accepts that the Commission may, as part of intermediate dumping calculations, determine the normal value on a PCN-by-PCN basis – applying the representativity test under Article 2.2 at the PCN level – and that the cost of production may be assessed at the PCN level. In other words, Indonesia accepts that the "like product" in Articles 2.2 and 2.2.1 can refer to individual PCNs. Yet, at the next step, Indonesia insists that the reference to the "like product" in Article 2.2.2 must refer to all PCNs taken together, so that profit for the non-representative PCNs should be calculated across all sales of the like product.

43. Throughout these proceedings Indonesia has offered no coherent textual justification for treating the term "like product" differently in Article 2.2.2 than in the immediately preceding provisions of the same Article. The only concrete argument Indonesia puts forward for this differential reading is that the construction of normal value should "remedy" the deficiency identified by the representativity test – an argument that directly contradicts the Appellate Body's finding in *EC – Tube or Pipe Fittings* that a low-volume exception should not be read into Article 2.2.2.

44. The European Union also notes that Indonesia has confused the purpose and mechanics of two distinct concepts and their corresponding tests. The representativity test under Article 2.2 of the Anti-Dumping Agreement is a relative test: its outcome does not depend solely on the volume of domestic sales but also on the relative volume of exports. Therefore, any conclusions regarding the quality or reliability of the domestic sales data based solely on the outcome of the representativity test are misguided. Indonesia nevertheless asserts that sales below the representativity threshold present "a high risk of profit manipulation" and are "not reflective of normal market conditions". As demonstrated by the European Union based on an example, if a company had exactly the same volume of domestic sales in two consecutive years but increased its export volumes by only 5 per cent – a circumstance entirely unrelated to conditions in the domestic market – those same domestic sales that previously passed the representativity test could, according to Indonesia, suddenly be considered "not reflective of normal market conditions". This proposition cannot be accepted and illustrates Indonesia's confusion between the purposes of the representativity test under Article 2.2 (a quantitative, relative threshold) and the ordinary course of trade test under Article 2.2.1.

45. The European Union also argues that Indonesia's approach would create an asymmetry between the export price and the normal value for PCNs that do not pass the representativity test. While the export price would be based on PCN-specific data, Indonesia proposes constructing the normal value using an average profit across all PCNs, disregarding existing type-specific profit data in the ordinary course of trade. This asymmetry in the source of profit would distort the comparison between the export price and the normal value and, absent correction, breach the obligation of fair comparison under Article 2.4 of the Anti-Dumping Agreement. Restoring symmetry would require adjusting the average profit used to construct the normal value to the profit specific to the PCN concerned observed in the ordinary course of trade.

46. Finally, the European Union submits that the approach proposed by Indonesia would distort the normal value and the outcome of dumping calculation. By replacing the PCN-specific actual profit data with the average profit, Indonesia's method would double-count the profit of PCNs whose domestic prices passed the representativity test – capturing it once in the price-based normal value and again in the average used in the construction. Replacing the actual profit of PCNs that did not pass the representativity test with an average profit would inevitably alter the overall average profit of the entire "like product", unduly inflating or

deflating it. This would in turn either inflate or deflate the normal value and – ultimately – the dumping margin.

47. The EU demonstrated this with a concrete numerical example in its Second Written Submission, showing that under the Commission's approach (PCN-specific profit) the weighted average normal value remains constant regardless of whether high or low profit PCNs fail the representativity test, matching the result obtained when the like product is treated as a whole. By contrast, under Indonesia's approach (average profit), the average normal value fluctuates significantly depending on whether high or low profit PCNs happen to fail the representativity test – a result wholly disconnected from the underlying economic reality of the like product. Such approach, if accepted, would introduce distortions into the dumping analysis and obscure the central issue of price discrimination between markets.

48. In light of the foregoing, the European Union submits that Indonesia has failed to demonstrate a violation of Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement. The amounts for SG&A costs and profit used by the Commission were based on actual data pertaining to production and sales in the ordinary course of trade of the like product, and the approach adopted was consistent with Article 2.2.2 as interpreted by the Appellate Body and WTO panels.

4.3. Alleged error by using an incorrect exchange rate for currency conversion and, as a consequence, violated Articles 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by applying an anti-dumping duty which exceeds the (correct) margin of dumping established under Article 2 of the Anti-Dumping Agreement (violation of Article 2.4.1 of the Anti-Dumping Agreement)

49. Indonesia argues that the Commission used an incorrect exchange rate when converting certain transaction values of a cooperating producer from EUR to USD for the purpose of the dumping calculation, resulting in an overstated dumping margin in violation of Article 2.4.1 of the Anti-Dumping Agreement. The EU estimates the impact of the alleged error at approximately 0.3 percentage points on a dumping margin of 46.4%.

50. As a preliminary matter, the European Union notes that the nature of the alleged error does not actually engage Article 2.4.1. That provision governs "currency conversion" in the context of the comparison between the export price and the normal value. In the present case, the Commission used the value "1" in the relevant conversion column for those transactions that it believed were already denominated in USD. Multiplying a value by "1" is not an exchange rate: it does not change the value and is not meant to "exchange" one currency for another. Rather, it is a calculation device intended precisely not to convert a value that is already believed to be in the accounting currency of the dumping calculation (USD). By contrast, values in EUR were converted through an actual exchange rate into USD. The alleged error therefore does not consist of the Commission applying an incorrect exchange rate, but rather of the Commission not applying any exchange rate at all because it was not aware that the values had been converted by the producer into EUR. This distinction is important: what Indonesia characterises as a violation of the rules governing currency conversion is, at best, a clerical error in the underlying data.

51. Turning to the standard of review, the European Union's primary position is that the alleged error falls outside the Panel's scope of review pursuant to Articles 17.5(ii) and 17.6(i) of the Anti-Dumping Agreement. Article 17.5(ii) provides that the Panel shall examine "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". Article 17.6(i) provides that "the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.". There is a clear connection between these two provisions: the Appellate Body in *Thailand – H-Beams* explained that "[t]he facts of the matter referred to in Article 17.6(i) are 'the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member' under Article 17.5(ii)."

52. Critically, Article 17.6(i) draws a clear distinction between the establishment of facts and the evaluation of those facts. The facts must first be properly established, and only thereafter must they be evaluated in an unbiased and objective manner. The establishment of facts

must be "proper"; the evaluation of those established facts must be "unbiased and objective". As noted by the Appellate Body in *US – Hot-Rolled Steel*, "panels must assess if the establishment of the facts by the investigating authorities was proper and if the evaluation of those facts by those authorities was unbiased and objective."

53. Throughout these proceedings, Indonesia has conflated these two distinct elements and confused the panel's tasks in assessing them. Indonesia first argued that Article 17.6(i) requires a panel to examine whether the investigating authority demonstrated that "its factual findings were accurate and supported by reasoned explanations", in other words whether the established facts themselves were "proper". Then, in its Second Written Submission Indonesia argued that the standard requires a "'proper' assessment of the facts". Neither interpretation is correct: Article 17.6(i) does not require the facts as established or the assessment of these facts to be "proper" (that is, accurate or correct), but rather that the evaluation of those facts be unbiased and objective. The word "proper" in Article 17.6(i) qualifies the "establishment" of the facts, not the facts themselves or their "evaluation". It is not for the Panel to conduct a *de novo* review of the evidence or substitute its own assessment for that of the authority. This is exactly what Indonesia, through its interpretation of the scope of review in Article 17(6)(i), invited the Panel to do.

54. Indonesia's misunderstanding of the scope of review under Articles 17.5(ii) and 17.6(i) is further illustrated by the manner in which it characterises the deficiency process during which the alleged clerical error was made. The deficiency process is a standard domestic procedure whereby the Commission completes or corrects data that cooperating producers have failed to provide or have provided in incomplete form, ensuring that the necessary data requested pursuant to Article 6.1 of the Anti-Dumping Agreement are made available to the Commission and limiting the need to rely on facts available under Article 6.8. Together with verification and disclosure, the deficiency process forms part of the domestic procedures through which facts (including sales data) are made available to the Commission within the meaning of Article 17.5(ii). In principle, Indonesia does not effectively contest this.

55. Instead, Indonesia contends that the values completed during the deficiency process were part of the Commission's "assessment" rather than the "establishment" of facts. This is contradicted by the record: the relevant figures were requested as part of the overall sales dataset, were not provided by the producer, were completed during the deficiency process, and were disclosed as "Changes and Corrections Made to the Raw Data" – they were thus presented and understood by the cooperating producer as changes to raw data, not as part of any assessment. The establishment of a fact cannot simultaneously constitute both its establishment and its assessment.

56. In this case, the cooperating producer failed to fill in required fields in its questionnaire reply, specifically the net invoice value and CIF value in the currency of the exporting country (USD). The Commission completed those missing fields using the data that had been provided. The completed calculations were disclosed to the exporter on two separate occasions – in the Final Disclosure and the Additional Final Disclosure – accompanied by a document referring to the changes as "Changes and Corrections Made to the Raw Data". The cooperating producer had ample time to review the accuracy of the data and identify any errors. When presented with an opportunity to do so, the producer in question did not challenge the changes made, including those at issue, nor their characterisation as changes and corrections to the raw data.

57. Since the alleged error was never raised during the investigation, it was not "made available in conformity with appropriate domestic procedures to the authorities of the importing Member" and therefore constitutes a new fact outside the factual record subject to Panel review.

58. The European Union further notes that Indonesia's restrictive interpretation of "facts made available to the authorities" – which would exclude data completed by the authority during the deficiency process – should be rejected. Article 17.5(ii) refers to "facts made available in conformity with appropriate domestic procedures", not to "facts submitted to the authorities". Members are free to design their domestic procedures for making facts available, provided that those procedures lead to the proper establishment of the facts, within the meaning of Article 17.6(i). Indonesia itself acknowledges the connection between

Articles 17.5(ii) and 17.6(i) yet, in the same response, asks the Panel to reject the European Union's reading of that connection. These two positions cannot be reconciled.

59. The European Union submits that allowing WTO Members to raise alleged mistakes for the first time only after the investigation is concluded would be contrary to the careful architecture of the Anti-Dumping Agreement, where the responsibility of establishing the facts is not left alone with the authority. It would mean that anti-dumping investigations are never truly closed, that 'final determinations' referred to in Article 6.9 are never 'final', and that procedural deadlines designed to ensure that investigations proceed "expeditiously" within the meaning of Article 6.14 of the Anti-dumping Agreement are rendered meaningless. It would also allow cooperating producers to introduce and hide minor errors in order to have final determinations overturned at the WTO.

60. Finally, throughout these proceedings the European Union demonstrated that the Commission's establishment of the facts was "proper" within the meaning of Article 17.6(i). The Commission followed appropriate domestic procedures. The missing data was completed during the deficiency process, disclosed for verification, and ultimately confirmed by the absence of any comments. Notably, Indonesia does not contest that these procedures "correctly" placed the relevant facts "beyond dispute". Accordingly, Indonesia does not effectively contest that those procedures led to the proper establishment of the facts.

61. Article 17.6(i) does not require investigating authorities to be infallible. It requires that they follow domestic procedures that lead to the proper establishment of the facts and assess those facts in an unbiased and objective manner. Indonesia has merely asserted that the values in question appear to be incorrect when cross-checked against other values, but has not demonstrated that the establishment of the facts was improper, nor that the evaluation of those facts was biased or not objective.

4.4. Alleged failure to make an objective and unbiased examination of the injury factors and erroneously found the existence of material injury to the Union industry (violation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement)

62. The European Union maintains that Indonesia's claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement has to be rejected. In the investigation at stake, the Commission assessed all injury elements correctly and in line with the provisions of the Anti-Dumping Agreement.

63. According to Article 3.1 of the Anti-Dumping Agreement, a determination of injury shall be based on positive evidence and shall involve an objective examination of the volume of the dumped imports and the effect of the dumped imports on prices in the Union market for like products; and the consequent impact of those imports on the Union industry.

64. The Commission's injury assessment in the Definitive Anti-Dumping Regulation is thoroughly documented in recitals (180) to (286). The Commission's analysis was based on all relevant microeconomic and macroeconomic indicators, and addressed in full the comments received by interested parties following disclosure.

65. The injury suffered by the Union industry consisted mainly of price and performance indicators, such as profitability and ability to raise capital. Despite a positive trend, the Union's industry profitability remained very low throughout the period considered. Profitability did not exceed a 2.5% profit margin and the Union industry was lossmaking in 2019 and 2020. Therefore, such profitability level was found insufficient to ensure the Union industry's viability in the medium and long term.

66. More specifically, low profitability, when seen together with the trends in sales prices and costs of production was a clear demonstration of price suppression. In particular, throughout the period considered, when the dumped imports remained at increased levels and low prices, the Union industry was unable to raise prices to a level that would allow it to cover its costs and reach a conceivable profit margin of 6%.

67. The injury further materialised in the form of a decline of 5% in market share during the period considered. Importantly, this decline coincided with the increased market penetration by the dumped imports.

68. Negative trends manifested themselves in production, capacity, capacity utilisation and sales volume. Moreover, declines were also seen in employment and productivity, which were related to the lower levels of production and sales volume.

69. While some indicators, such as sales prices, profitability, return on investment and investment, showed a slight positive trend during the period considered, such trends were insufficient to tip the balance in favour of a finding of non-injury.

70. The Commission compellingly explained that the investigation showed that the positive development of sales prices was related to the development in raw material prices, which significantly increased in that period. The modest improvement in profitability and return on investment remained at a level that was inadequate to ensure the viability of the Union industry in the medium and long-term.

71. While an examination must lead to the finding that the injury to the Union industry being material, it is not necessary for all the relevant economic factors and indices to show a negative trend.

72. The European Union submits that the Commission's injury determination is supported by positive evidence, which was documented during the present proceedings, and fully consistent with the rules of the Anti-Dumping Agreement.

4.5. Consequential claim: alleged violation of Articles 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because the amount of the anti-dumping duty imposed by the European Union exceeds the margin of dumping as established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994)

73. The consequential claim under Articles 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 – that the anti-dumping duty exceeds the margin of dumping – is entirely dependent on Indonesia's primary claims. In particular, it depends on the claim under Articles 2.2, 2.2.2 and 2.4.1 concerning. Since the European Union submits that these primary claims must fail for the reasons set out above, this consequential claim must fail as well.

4.6. Alleged failure in conducting its investigation and applying anti-dumping duties on imports of fatty acid from Indonesia, because by applying different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country, depending on the existence of profitable sales of those PCNs, the European Union failed to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner (violation of Article X:3(a) of the GATT 1994)

74. Indonesia claims that the Commission administered Article 2(6) of the Basic Anti-Dumping Regulation in a non-uniform and unreasonable manner by applying two different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market, depending on whether those PCNs had any profitable sales. The European Union contests both this characterisation and the underlying legal claim.

75. At the outset, the European Union notes that Indonesia's Article X:3(a) claim rests on the premise that all PCNs sold in insufficient quantities on the domestic market are in a "similarly situated" position. Indonesia itself acknowledges that, for PCNs with no sales in the ordinary course of trade, no product-specific profit margin can be derived, whereas for the remaining PCNs such data do exist. Yet, despite this fundamental difference between the two situations – particularly in view of the wording of Article 2.2.2 and its interpretation by the Appellate Body in *EC – Tube or Pipe Fittings* – Indonesia still claims that all such PCNs are "similarly situated". That claim is untenable: it recognises that there is PCN-specific data

for one group of PCNs whereas there is no PCN-specific data for the other, yet it groups them together. Indonesia further seeks to dismiss the relevant sales as 'barely existent', in direct disregard of the Appellate Body's finding that "[t]he absence of any qualifying language related to low volumes in Article 2.2.2 implies that an exception for low-volume sales should not be read into Article 2.2.2.".

76. The European Union maintains that the Commission did not apply two different methodologies based on an arbitrary criterion of "profitable sales". Rather, the Commission applied a single methodology consistently: where there existed actual data pertaining to PCN-specific sales in the ordinary course of trade, that data was used in accordance with the chapeau of Article 2.2.2; where no such data existed for a given PCN, the Commission relied on aggregate data for all PCNs. This distinction follows directly from the text of Article 2.2.2 of the Anti-Dumping Agreement and Article 2(6) of the Basic Anti-Dumping Regulation, which mandate the use of "actual data pertaining to production and sales in the ordinary course of trade". The Appellate Body confirmed in *EC – Tube or Pipe Fittings* that where actual SG&A cost and profit data from sales in the ordinary course of trade exist, the authority is obliged to use them when constructing normal value and cannot switch to alternative datasets.

77. The two categories of PCNs (those with and those without ordinary course of trade sales) are fundamentally different. The ordinary course of trade test can only be applied if there is "trade": it cannot be applied if there are no sales on the domestic market. This is a fundamental distinction which does not make the approach arbitrary but rather directly prescribed by Article 2.2.2. As explained in Section 4.2 above, Indonesia's assertion that this distinction is arbitrary further contradicts the Appellate Body's finding that a low-volume exception should not be read into Article 2.2.2.

78. Indonesia's own statements during the proceedings confirm that the alleged "triggering criterion" is not "profitable sales" as originally described in Indonesia's First Written Submission, but rather the existence of sales in the ordinary course of trade. Indonesia itself acknowledges that profitable sales to related parties (i.e. sales not in the ordinary course of trade) are excluded from the calculation regardless of their profitability. It follows that even where "profitable sales (even if very minor)" exist, if those sales are not in the ordinary course of trade, the Commission may still rely on aggregate data rather than PCN-specific data – contradicting Indonesia's original description of the rule. What determines which data source is used is the existence of domestic sales in the ordinary course of trade; whether such sales are profitable is irrelevant, provided that they are in the ordinary course of trade.

79. Moreover, Indonesia's position is contradictory on its own terms. Indonesia acknowledges that, in the present case, certain sales were excluded irrespective of their profitability because they were made to a related entity (i.e. not in the ordinary course of trade). It follows that Indonesia itself accepts that a particular PCN may include "profitable sales (even if very minor)" which nevertheless will not be used in calculating profit because they are not made in the ordinary course of trade. In such circumstances, the Commission may still rely on "CNV company" rather than "CNV PCN", in direct contradiction to Indonesia's claim that "[i]f a PCN has some profitable sales, the Commission resorts to CNV PCN".

80. Indonesia's explanation in its replies to the Panel's second set of questions constitutes an *ex post* rationalisation inconsistent with its original claim, which argued that the two methodologies are applied "based on an arbitrary criterion of profitable sales which is not provided for in the Basic Anti-Dumping Regulation or the Anti-Dumping Agreement". Indonesia was clearly not referring to the criterion of the ordinary course of trade, which is neither arbitrary nor absent from the Agreement or the Regulation.

81. As to the distortive effect of Indonesia's proposed approach, incoherent interpretation of "like product" and the confusion between purposes of the representativity test and the ordinary course of trade test, the European Union refers to its submissions under Section 4.2 above. Therein, the European Union demonstrated that Indonesia's approach is incoherent, would distort the normal value and that Indonesia confuses the purposes of two distinct tests under Article 2 of the Anti-Dumping Agreement.

82. Article X:3(a) cannot require identical treatment in different factual situations. The European Union has demonstrated that the two categories of PCNs at issue are in objectively different situations, and that the approach followed by the Commission is mandated by Article 2.2.2 as interpreted by the Appellate Body. Indonesia has therefore failed to demonstrate a violation of Article X:3(a) of the GATT 1994 in relation to the administration of Article 2(6) of the Basic Anti-Dumping Regulation.

4.7. Consequential claim: alleged violation of Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

83. The consequential claim under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 depends entirely on the 'as applied' claims under Sections 4.2 and 4.6 above. Since the European Union submits that those primary claims must fail, this consequential claim must fail as well.

5. CLAIMS CONCERNING THE EUROPEAN UNION'S METHODOLOGIES FOR CONSTRUCTING NORMAL VALUE

5.1. Introduction

84. In Section VII of its First Written Submission, Indonesia argues that the alleged two methodologies used by the Commission for constructing normal value are rules or norms of general and prospective application, in violation of Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994. The European Union considers that Indonesia has failed to establish the existence of any such rule or norm.

85. The burden of proof for an 'as such' claim against an unwritten measure is particularly high. Panels are well advised not to lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application when it is not expressed in the form of a written document. A panel "must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such". In this case, Indonesia concedes that the Basic Anti-Dumping Regulation mirrors the text of Articles 2.2 and 2.2.2 and contains no prescribed dual methodology. Rather, Indonesia challenges the existence of an unwritten rule or norm having general and prospective application. The European Union considers that the evidence is manifestly insufficient and the alleged rule itself is mischaracterised.

5.2. Alleged error because, by requiring the use of the SG&A and profit data relating exclusively to a specific PCN sold in insufficient quantities on the domestic market of the exporting country, the second methodology uses amounts for SG&A costs and for profit which are not reasonable and are not based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation (violation of Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement)

86. To support its claim Indonesia relies on 14 anti-dumping determinations since 2012 and the OASYS calculation file for one exporter in the fatty acid case to demonstrate the existence of an unwritten rule of general and prospective application. This evidence is insufficient. Each determination revolves around the specific facts of each exporting producer, and without the specific information on the circumstances of each case, the Panel cannot draw any inferences from the similar language used in those 14 determinations. The fact that the same language is included in those determinations does not show per se the existence of a general and prospective measure.

87. Indonesia has also failed to bring any evidence which would support the conclusion that the alleged practice has prospective application. There is no evidence of any underlying policy. The application in 14 anti-dumping determinations since 2012 is not relevant when the European Union has made hundreds of anti-dumping determinations since. Indonesia does not dispute the Commission's discretion on this point since the alleged method is not mandated by the Basic Anti-Dumping Regulation.

88. Furthermore, the European Union submits that Indonesia has fundamentally mischaracterised the alleged rule or norm, in two critical respects.

89. First, as explained under Section 4.6 above, the alleged "triggering criterion" is not the presence or absence of "profitable sales" as originally claimed by Indonesia, but rather the existence of sales in the ordinary course of trade. Indonesia's own replies to the Panel's second set of questions effectively acknowledge this, constituting an *ex-post* rationalisation that is clearly inconsistent with its original claim.

90. Second, and more fundamentally, Indonesia's characterisation of the alleged rule focuses exclusively on the OASYS calculation – that is, on the mechanical step where profit is computed. In doing so, Indonesia ignores what happens before and after that calculation.

91. The approach adopted by the European Union to determine the profit data used in the construction of normal value for a particular product type can be explained in three steps. First, the Commission removes from the dataset all sales that are obviously not made in the ordinary course of trade, whether profitable or not – including, as Indonesia itself confirmed, sales to related entities irrespective of their profitability. This step does not involve any use of MS Excel formulas in OASYS, on the basis of which Indonesia seeks to build its case. Second, the remaining sales are subjected to the ordinary course of trade test implemented through the OASYS calculation software, applying the 80 per cent profitability threshold set out in Article 2.2.1. Third, if the Commission were presented with evidence that the data for a particular PCN in the ordinary course of trade would not lead to the determination of "reasonable amounts" for SG&A costs and profits within the meaning of Article 2.2, that data would not be used. The Commission's willingness to examine such arguments on their merits is illustrated by recitals (163) and (164) of the Definitive Anti-Dumping Regulation.

92. Indonesia's approach of focusing solely on the OASYS formulas is analogous to asserting that everyone in the world who fills in a tax declaration and uses a calculator to determine tax deductions applies the same rule simply because the calculator follows the rules of arithmetic – focusing on the mechanical act of calculation while ignoring the legal rules that determine what data enter the calculation in the first place.

93. The fact that the Commission engaged with and rejected on the merits the arguments concerning the profit amounts used in the construction of normal value – rather than declining to engage on the basis of any fixed rule – itself demonstrates that no such rule or norm exists. If the alleged methodology existed and was known to exist, there would have been no comments and no need to engage with them, as the outcome would have been mechanically dictated by that methodology and therefore not open to discussion. This equally demonstrates that there are no expectations among economic operators that the alleged rule will be applied in the future. The European Union submits that Indonesia's 'as such' claims under Articles 2.2 and 2.2.2 must therefore be rejected.

5.3. Alleged error because by applying different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country, depending on the existence of profitable sales of those PCNs, the European Union fails to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner (violation of Article X:3(a) of the GATT 1994)

94. The 'as such' claim under Article X:3(a) must fail for the same reasons as the 'as applied' claim under Article X:3(a) in Section 4.6 above: the European Union has not applied two different methodologies based on an arbitrary criterion. Moreover, Indonesia has failed to demonstrate the existence of any unwritten rule or norm of general and prospective application for the reasons set out in Section 5.2 above. As a consequence, the basis for the 'as such' claim under Article X:3(a) is not established.

95. The European Union submits that Indonesia failed to demonstrate that the Commission did not administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner.

6. CONCLUSIONS

96. In light of the foregoing, the European Union requests the Panel to reject all claims raised by Indonesia in the present dispute.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. EXECUTIVE SUMMARY OF AUSTRALIA'S WRITTEN SUBMISSION

A. "As Such" Challenges of Unwritten Measures

1. "As such" challenges against an unwritten measure are serious.[1] In satisfying a Panel as to whether an unwritten measure can be subject to an "as such" challenge, "a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application."[2] This is a "high threshold"[3] in that each element must be sufficiently demonstrated by the evidence.

2. Previous Panels have found that an unwritten measure can be determined from secondary sources of evidence.[4] It is open to a panel to consider the collective weight of a complainant's evidence in establishing the existence and content of the unwritten measure.

3. Turning to whether an alleged unwritten measure has "general and prospective application", this may be found if the measure reflects a deliberate policy, going beyond the mere repetition of the application of the measure in specific instances.[5] Relevant evidence may include proof of the measure's "systematic application".[6]

4. As the Appellate Body has identified, "the extent to which a particular rule or norm provides administrative guidance for future conduct and the expectations it creates among economic operators that it will be applied in the future, are also relevant in establishing the prospective nature of that rule or norm."[7]

5. The Panel could consider whether the instances identified by Indonesia have the required frequency, consistency and extended repetition.[8]

6. A limited number of specific applications may not have sufficient probative value to demonstrate either the precise content of a measure, or that it has general and prospective application.[9]

B. Standing

7. Once an investigating authority is satisfied of the adequacy and accuracy[10] of the information forming the basis for the standing determination, the investigation should proceed without reconsideration of the determination – even if the support justifying the initiation subsequently falls below the requisite numerical benchmark.

8. Article 5.4 of the Anti-Dumping Agreement pertains exclusively to initiation – there is no on-going obligation to monitor domestic industry support once an investigation has been initiated

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[1] European Union's first written submission, para. 36; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.

[2] Appellate Body Report, *US – Zeroing (EC)*, para. 198.

[3] Appellate Body Report, *US – Zeroing (EC),* para. 198.

[4] Panel Report, *Argentina – Import Measures*, para. 6.43; see also Appellate Body Report, *Argentina – Import Measures,* paras. 5.51-5.52; Appellate Body Report, *US – Zeroing (EC),* para. 202; Panel Report, *US – Anti-Dumping Methodologies (China)*, paras. 7.309-7.311.

[5] Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.34.

[6] Appellate Body Report, *US – Anti-Dumping Methodologies (China),* para. 5.132 citing Appellate Body Report, US – Zeroing (EC), para. 198.

[7] Appellate Body Report, *US – Anti-Dumping Methodologies (China),* para. 5.132 citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

[8] See Appellate Body Report, *US – Anti-Dumping Methodologies (China),* para. 5.132.

[9] See Award of the Arbitrators, *China – IPRs Enforcement (EU),* para. 4.41.

[10] See Article 5.3 of the Anti-Dumping Agreement.

under the Anti-Dumping Agreement.[11] To impose an obligation on the investigating authority to revisit standing after initiation of the investigation would undermine its ability to focus on completing a proper investigation without unnecessary delay.

II. EXECUTIVE SUMMARY OF AUSTRALIA'S ORAL STATEMENT

A. Article X:3(a) of the GATT

9. Article X:3(a) of the GATT requires the Panel to exercise a balanced judgment between the fundamental right of traders to procedural fairness and the sovereign right afforded to Members to manage how they administer their laws and regulations.[12] Non-uniformity or differences in administrative processes do not, by themselves, constitute a violation of Article X:3(a) of the GATT.[13]

10. The requirement of uniform administration of laws and regulations has been understood to mean "uniformity of treatment in respect of persons similarly situated".[14] "Uniform" administration under Article X:3(a) requires that laws be applied in a consistent and predictable manner.[15] "Reasonable" has been interpreted to mean "not irrational or absurd", "proportionate", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".[16]

11. Whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails "a consideration of factual circumstances specific to each case".[17] However, uniform and reasonable administration does not require an investigating authority to reach identical results where the circumstances are different.[18]

B. Withdrawal of a complaint

12. Article 5.6 of the Anti-Dumping Agreement gives no indication that its evidentiary standards apply to anything but self-initiation of investigations.[19]

13. Once an investigation has been initiated based on sufficient evidence, the application has served its purpose. While there is a continuing obligation to terminate an investigation under Article 5.8 where an investigating authority is satisfied that there is not sufficient evidence of dumping and injury to justify proceeding, that must be based on an assessment of the overall state of the evidence.[20]

14. In Australia's view, the mere withdrawal of the complaint – in and of itself – did not affect the state of evidence before the investigating authority and therefore did not require the Commission to terminate the investigation under Article 5.8.

15. There is no obligation on an investigating authority to satisfy the requirements of Article 5.6 of the Anti-Dumping Agreement after it has already satisfied the requirements to initiate the investigation based on an application by or on behalf of domestic industry under Articles 5.2, 5.3 and 5.4. That remains the case even if the application is withdrawn.

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[11] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.347.
[12] Panel Report, *Thailand – Cigarettes (Philippines)* para. 7.874.
[13] Appellate Body Report, *EC – Selected Customs Matters*, para. 224.
[14] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.
[15] Panel Reports, *US – COOL*, para. 7.876; *Argentina – Hides and Leather*, para. 11.83.
[16] Panel Report, *US – COOL*, para. 7.850.
[17] Panel Report, *US – COOL*, para. 7.851.
[18] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.
[19] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.36.
[20] Panel Report, *US – Softwood Lumber V*, para. 7.137.

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. CHALLENGE OF UNWRITTEN MEASURES UNDER THE DSU

A. "PRACTICE" AS A TYPE OF MEASURE SUBJECT TO DISPUTE SETTLEMENT

1. Canada disagrees with the United States that a Member's practice cannot constitute a measure challengeable under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) as such measures "would have to have independent legal effect".[1] Such views find no basis in the text of the DSU or any of the covered agreements.

2. The scope of measures that can be challenged under the DSU is broad and, in principle, can include "any act or omission attributable to a WTO Member".[2] The provisions of the *Agreement on Implementation of Article VI of the GATT 1994* (Anti-Dumping Agreement) similarly reflect a broad legal basis for the type of matters that can be referred to consultation, and thus dispute settlement. Article 17.3 establishes that when a complaining Member considers that its benefits are being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may request consultations. This language underlines that <u>any</u> act or omission attributable to a Member, including a "practice", may be subject to dispute settlement. As the Appellate Body rightly observes, "there is no threshold requirement […] that the measure in question be of a certain type".[3]

3. There is no basis, either in the text or practice of the *General Agreement on Tariffs and Trade 1994* (GATT 1994), the DSU, the Anti-Dumping Agreement, or the WTO generally, that precludes "a practice" attributable to a Member from being considered as a measure that can be challenged in dispute settlement proceedings. This is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to "preserve [their] rights and obligations […] under the covered agreements, and to clarify the existing provisions of those agreements".[4]

4. That said, although the existence of a legal mandate requiring an investigating authority to act in a particular manner may be a relevant factor for determining the constituent elements of an alleged measure, the <u>absence</u> of such a mandate and the fact that a Member retains discretion to act in a WTO-consistent manner does not mean that a Member's recurring act or omission cannot be considered a measure challengeable under the DSU on a basis broader than "as applied". Indeed, if a Member's practice constituted a measure that was found to be inconsistent with its WTO obligations, that Member would be required to bring such a measure into conformity with its obligations by ceasing or altering that practice.

B. ESTABLISHING THE EXISTENCE OF AN UNWRITTEN MEASURE

5. In order to challenge a measure, whether written or unwritten, a complaining Member must establish the measure's precise content, and attribute the measure to the responding Member.[5] The additional elements that may need to be substantiated will depend on the nature of the measure being challenged, and "how it is described, characterized, and challenged by a complainant".[6]

6. The Appellate Body and panels have used various analytical tools over the years to facilitate the understanding of certain unwritten measures – whether characterized as rules or norms of

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[1] United States' third party written submission, para. 60.

[2] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. See also GATT 1994 Article XXIII:1.

[3] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*. para 86.

[4] Article 3.2 of the DSU.

[5] Appellate Body Report, *Argentina – Import Measures*, paras. 5.104 and 5.108.

[6] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para.5.123 (referring to Appellate Body Reports, *Argentina – Import Measures*, paras.5.108 and 5.110). See also Appellate Body Report, *US – Supercalendered Paper*, fn. 65.

general and prospective application,[7] ongoing conduct,[8] concerted action or practice,[9] or a measure of systematic application.[10] While these analytical tools may assist the Panel in determining the existence of a measure, the Appellate Body held in *US – Anti-Dumping Methodologies (China)* that measures need not be compartmentalized into these categories in order to be challenged in WTO dispute settlement.[11] As the Appellate Body has explained in *Argentina – Import Measures*, these analytical tools do not constitute rigid legal standards or criteria.[12]

7. The Appellate body articulated a useful analytical framework when a Member brings a challenge based on an alleged rule or norm. Specifically, in addition to establishing its precise content and attribution, there must be sufficient evidence demonstrating that the measure has both general and prospective application.[13] While the existence of a legal basis mandating a particular action of a Member may be dispositive of the likelihood a measure will be applied in the future, it is not the only factor that may be considered. The likelihood of prospective application of a measure could be clear from the constituent elements of the measure, or may be demonstrated through factors such as: the existence of an underlying policy that is implemented by the measure; the systematic and repeated application of the measure; the design, architecture, and structure of the measure; the extent to which the measure provides administrative guidance for future conduct; or the expectations it creates among economic operators that the measure will be applied in the future.[14]

8. The evidentiary threshold for establishing these constituent elements may be high.[15] The Panel should thus carefully assess the evidence presented by Indonesia against these factors to determine both the existence of an unwritten measure, and its consistency with the EU's obligations under the Anti-Dumping Agreement.

II. CLAIMS RELATING TO ARTICLE 5.4 AND 5.6 OF THE ANTI-DUMPING AGREEMENT

9. Articles 5.1 to 5.4 of the Anti-Dumping Agreement stipulate the legal obligations and evidentiary standards that must be met for an investigating authority to initiate an investigation based on an application by or on behalf of the domestic industry. Article 5.6, as cross-referenced in Article 5.1, provides an exception, under "special circumstances", for an investigating authority to self-initiate an investigation without having received a written application by or on behalf of a domestic industry. None of these provisions impose a continuing obligation for an investigating authority to assess the sufficiency of the information in an application once an investigation has been properly initiated.[16]

10. Rather, Article 5.8 of the Anti-Dumping Agreement sets out the exclusive bases under which an investigating authority is obligated to terminate an investigation. Article 5.8 imposes no obligation to terminate an investigation based on a withdrawal of an application. An obligation to terminate an investigation arises only when an investigating authority is satisfied that there is "not sufficient evidence of either dumping or of injury to justify proceeding with the case". That assessment must be based on the overall evidence before an investigating authority, not based on a withdrawal of domestic industry support or the continued sufficiency of the information in the application.[17]

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[7] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

[8] Appellate Body Report, *US – Continued Zeroing*, paras. 181 and 183; Panel Report, *US – Supercalendered Paper,* para. 7.332.

[9] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794.

[10] Appellate Body Report, *Argentina – Import Measures*, paras. 5.119-5.146.

[11] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.125.

[12] Appellate Body Report, *Argentina – Import Measures*, para. 5.110.

[13] Appellate Body Report, *US – Zeroing (EC)*, para. 198.

[14] European Union first written submission, para. 41 (citing Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, paras. 5.132 and 5.157).

[15] Appellate Body Report, *US – Zeroing*, para. 198.

[16] See Panel Reports, *US – Corrosion-Resistant Steel Sunset Review,* para. 7.36; *Mexico – Steel Pipes and Tubes*, para. 7.347. See also Article 1, footnote 1 of the Anti-Dumping Agreement. The language of this footnote clarifies that the evidentiary standard set out in Articles 5.1, 5.2 and 5.6 only applies to the commencement of an investigation. It does not apply beyond the initiation phase of the investigation.

[17] See Panel Report, *US – Softwood Lumber V*, para. 7.137.

III. CLAIMS RELATING TO ARTICLE 2.2.2 OF THE ANTI-DUMPING AGREEMENT

11. The chapeau of Article 2.2.2 of the Anti-Dumping Agreement imposes general obligations on an investigating authority to use "actual data pertaining to production and sales in the ordinary course of trade of the like product" "for the purpose" of determining the "reasonable amount" for administrative, selling and general (SG&A) costs and profits when constructing normal values under Article 2.2.[18] Only when SG&A costs and profits cannot be determined on such basis may an investigating authority employ one of the other three methods provided in subparagraphs (i) to (iii).[19]

12. Article 2.2.2 does not specify a particular methodology to determine SG&A costs and profits when using "actual data" pertaining to production and sales of like products in the ordinary course of trade.[20] Investigating authorities thus have a certain level of discretion to determine the most appropriate way to use the actual data on record to calculate SG&A costs and profits. This does not preclude the possibility, when constructing normal value based on product types or models, of using actual SG&A costs and profit margins for that product type or model, to the extent that such data is available.

13. That said, regardless of the method an investigating authority uses, it must adhere to the requirements of Article 2.2 to determine SG&A costs and profits in "reasonable amounts".[21] The cross-reference to Article 2.2 in the chapeau of Article 2.2.2 establishes this basic principle.[22] Canada does not dismiss the possibility that low-volume sales resulting in unusually high (or low) profit margins for certain product types or model may still be "reasonable" depending on the factual circumstances of the case.

14. Companies are generally not set up so that they have segregated SG&A costs and profits for individual product types or models, in which case the actual data could reasonably lead the investigating authority to determine SG&A amounts for the product as a whole. Therefore, careful consideration may need to be given as to how the SG&A costs and profits for one product type or model are derived by an investigating authority, and whether the allocated amounts are "reasonable" considering all available evidence on record.

15. Canada also considers that calculating SG&A costs and profits based on actual data pertaining to the like product as a whole, including data from low volume sales, is consistent with the view of the panel in *EC – Salmon (Norway)* and the Appellate Body's findings in *EC – Tube or Pipe Fittings*.[23] The use of such data, including low volume sales, is consistent with the obligations under Article 2.2.2 to not disregard such sales from the calculation of SG&A costs and profits.[24]

IV. CLAIMS RELATING TO ARTICLE X:3(A) OF GATT 1994

16. The scope of administration that is subject to a challenge under Article X:3(a) includes both "the manner in which the legal instruments of the kind falling under Article X:1 are applied or implemented in particular cases as well as a legal instrument that regulates such application or implementation".[25] An exercise of discretion to carry out or terminate an investigation, to the extent permitted by the domestic instruments of a Member, is an act of administration within the meaning of Article X:3(a). In this regard, however, Canada concurs with the findings of the panel in *US – Stainless Steel* that "the requirement of uniform administration of laws and regulations must be

[18] Appellate Body Reports, *EC – Tube or Pipe Fittings*, para. 97; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.25. See also Panel Report, *Thailand – H-Beams*, para. 7.121.

[19] See Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.46.

[20] See Panel Reports, *US – Softwood Lumber V*, para. 7.263; *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.46.

[21] Ibid.

[22] Panel Report, *Thailand – H-Beams*, para. 7.121.

[23] See Appellate Body Report, *EC – Tube or Pipe Fittings,* paras. 98-99, 101.

[24] Appellate Body Report, *EC – Tube or Pipe Fittings,* para. 101.

[25] Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.873. See also Appellate Body Report, *EC – Selected Customs Matters*, paras. 224. See also Panel Reports, *US – COOL*, para. 7.821; *China – Raw Materials*, para. 7.689.

understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ".[26]

17. Article X:3(a) does not itself impose any specific procedural obligations on an investigating authority in its conduct of an anti-dumping investigation. Therefore, an assessment of whether a Member has violated the obligations of uniformity, impartiality or reasonableness under Article X:3(a) in its administration of an anti-dumping investigation must be made in reference to that Member's domestic legal instrument "regulating the application or implementation" of its obligations under the Anti-Dumping Agreement and GATT 1994.

18. In Canada's view, unless the relevant domestic legal instruments require that Member to adopt a specific action in the administration of an anti-dumping investigation that goes beyond what is required under the Anti-Dumping Agreement or GATT 1994 – i.e., to provide a reasoned explanation of its decision to continue an investigation in the event of a withdrawal – there would be no basis for imposing such an obligation pursuant to Article X:3(a). Reading in such an obligation otherwise would be in violation of Articles 3.2 and 19.2 of the DSU that a panel's findings "cannot add to or diminish the rights and obligations provided in the covered agreements".

[26] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. Constructing Normal Value

A. Multiple Averaging

1. In anti-dumping investigations, it is common for an investigating authority to divide the product under investigation into product types or models based on their characteristics, uses or price ranges, and to calculate a weighted average normal value and a weighted average export price for the transactions involving each product type or model. This practice is referred to as "multiple averaging."

2. The Appellate Body has confirmed that multiple averaging is not prohibited under Article 2.2 or Article 2.4.2 of the Anti-Dumping Agreement.[1] The panel and Appellate Body in *US – Softwood Lumber V* also confirmed the practice of constructing normal value only for a particular product group, as part of multiple averaging.[2]

B. Consideration of "All Available Evidence"

3. Article 2.2.2 provides that "the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales […] of the like product." Although Article 2.2.2 does not provide guidance on what constitutes "actual data" in the case of multiple averaging, the context of Article 2.2 clarifies that the function of Article 2.2.2 is to ensure the calculation of "reasonable" amounts for administrative, selling and general ("SG&A") costs and profits. Further, in *Egypt – Steel Rebar*, the panel noted that Articles 2.2.1.1 and 2.2.2 share the same concept, as follows:

> [Both] emphasize two elements, first, that cost of production is to be calculated based on the actual books and records maintained by the company in question so long as these are in keeping with generally accepted accounting principles but that second, the costs to be included are those that reasonably reflect the costs *associated with* the production and sale of the product under consideration.[3]

4. In constructing normal value for specific product types or models, an investigating authority may use the data on SG&A costs and profits for those specific types or models as the "actual data" if it considers "all available evidence" and concludes that the data "reasonably reflect the costs associated with the production and sale" of that model. While the "available evidence" may vary case-by-case, the authority must examine evidence or factual issues that become available during the investigation and that may affect the reasonableness, accuracy and representativeness of the calculated amounts for the SG&A costs and profits. In addition, where the evidence indicates that there may be more than one appropriate calculation method, the investigating authority may be required to "reflect on" and "weigh the merits of" the alternative methods, particularly if the evidence suggests that the use of one of them is likely to result in an unreasonable amount.[4]

C. Low-Volume Sales

5. As the Appellate Body has found, Article 2.2.2 excludes the use of data that are outside the ordinary course of trade, but it does not exclude the use of data from low-volume sales.[5] In addition,

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[1] Appellate Body Report, *US – Softwood Lumber V*, paras. 80-81; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 104.

[2] Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.62; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 104.

[3] Panel Report, *Egypt – Steel Rebar*, para. 7.393 (emphasis original).

[4] In this regard, although the context differs, it is also relevant to note that the Appellate Body in US – Softwood Lumber V, para. 138 addressed the obligation to consider all available evidence related to the proper allocation of costs under Article 2.2.1.1.

[5] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 101.

panels have found that, as long as transactions are in the ordinary course of trade, Article 2.2.2 does not permit an investigating authority to disregard other evidence, such as data relating to low-volume sales.[6]

6. However, low-volume sales may be atypical, resulting in unusually high prices and profit margins. If certain Product Control Numbers ("PCNs") show unusually high margins, this may reflect the atypical nature of low-volume sales, such that the calculated amounts may not be "reasonable" in light of other evidence on the record. In such cases, the investigating authority should consider all available evidence to ensure a reasonable reflection of those costs.

7. In this dispute, whether the EU duly considered all available evidence and compared all available calculation methodologies to ensure the reasonableness of the calculated amounts may depend on such factors as the magnitude of the difference between the profit margin of the PCNs with only low-volume sales and the profit margins of other PCNs; and whether the interested parties pointed out the issues related to the Commission's calculation method during the investigation in a timely manner.

D. Calculation Error

8. A panel may review a "calculation error" even if it was not raised before the investigating authority. This applies not only to simple computational errors but also to more complex cases—e.g., where an authority constructs a normal value based on certain PCN cost data, but a review of all available evidence yields a different outcome. In such cases, the fact that the interested party did not identify the error during the investigation may constitute a factor for the panel to consider in assessing the "available evidence" at hand. However, even in such cases, the panel can still review whether the authority's evaluation was, based on the evidence available at that time, unbiased and objective.

E. Due Allowance

9. Article 2.4 provides that due allowance shall be made for factors affecting price comparability, but it does not provide "any specific rules governing the methodology to be applied by an investigating authority in calculating adjustments".[7] Thus, the calculation of amounts for SG&A costs and profits based on the like product as a whole does not *per se* warrant an adjustment to export price for price comparability under Article 2.4. However, in determining whether an adjustment is warranted, "[a]n investigating authority must act in an unbiased, even-handed manner and must not exercise its discretion in an arbitrary manner",[8] as confirmed by the panel in *EC – Tube or Pipe Fittings*.

II. Article 3.4 of the Anti-Dumping Agreement

10. Article 3.4 provides that "[t]he examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry", and then lists fifteen factors. Further, the examination must respect the "overarching principles set out in Article 3.1, requiring the investigating authorities to conduct an objective examination based on positive evidence."[9] The investigating authority's evaluation of the relevant factors and indices must then provide a "meaningful basis" for the determination of injury.[10] In particular, if some economic indices show positive trends, "such positive movements [...] would require a compelling explanation of why and how, in light of such apparent

[6] Panel Report, *EC – Salmon (Norway)*, paras. 7.298, 7.304 and 7.309.
[7] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.178.
[8] Ibid.
[9] Appellate Body Reports, *China – HP SSST (Japan) / China – HP SSST (EU)*, para. 5.203 (citing Appellate Body Report, *US – Hot-Rolled Steel*, paras. 196-197).
[10] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.211.

positive trends, the domestic industry was, or remained, injured."[11] Finally, the evaluation must be apparent in the final determination.[12]

11. The consistency of the Commission's evaluation with Articles 3.1 and 3.4 will depend on the Panel's assessment of whether the analyses provide a "compelling explanation" of why and how, in light of the positive trends of some economic factors, the domestic industry was, or remained, injured. The evaluation must be clearly articulated in the final determination and cannot be supplemented by submissions in this panel proceeding.

III. Article 5.6 of the Anti-Dumping Agreement

12. Article 5.6 states that "[i]f […] the authorities concerned decide to initiate an investigation without having received a written application […] they shall proceed only if they have sufficient evidence […] to justify the initiation of an investigation". Article 5.6 only addresses the legal standard to be satisfied at the time of initiation of the investigation; it does not establish a continuing obligation after initiation to assess the sufficiency of the evidence of dumping. Rather, Article 5.8, which explicitly refers to the conditions where "an investigation shall be terminated, " is the relevant provision addressing an authority's continuing obligation to assess the sufficiency of the evidence.

13. The panel in *US – Softwood Lumber V* touched upon the difference between the standard at the time of initiation of an investigation and the continuing obligation to assess the evidence gathered during the proceeding for purposes of determining whether termination of the investigation is appropriate, which we believe is consistent with this understanding:

> Once an investigation has been initiated on the basis of sufficient evidence of dumping, the application has served its purpose. Logically, the continuing obligation to terminate an investigation where an investigating authority is satisfied that there is not sufficient evidence to justify proceeding must be based on an assessment of the overall state of the evidence deduced before it in the investigation, not on an assessment of the continuing sufficiency of the information in the application.[13]

IV. Article X:3(a) of the GATT 1994

A. Exercise of Discretion

14. Article X:3(a) covers "all […] laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article." Paragraph 1 includes laws or regulations pertaining to rates of duty.[14] Therefore, domestic laws pertaining to anti-dumping or anti-subsidy investigations appear to be subject to Article X:3(a) as laws or regulations pertaining to rates of duty. Thus, an investigating authority shall exercise its discretion to continue or terminate investigations, pursuant to such laws, "in a uniform, impartial and reasonable manner" under Article X:3(a).

15. However, Japan also notes the panel's finding in *US – Stainless Steel (Korea)* that Article X:3(a) "was not [...] intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system".[15]

B. Explanation of Reasoning

16. Article X:3(a) obliges Members to "administer in a uniform, impartial and reasonable manner" their domestic "laws, regulations, decisions and rulings of the kind described in" Article X:1.

17. The reasoning provided by an investigating authority may serve as evidence that the administration of its laws and regulations was "uniform" and "reasonable." As the panel in

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[11] Panel Report, *Thailand – H-Beams*, para. 7.249. See also Panel Report, *China – X-Ray Equipment,* para. 7.195.

[12] Panel Report, *EC – Bed Linen*, para. 6.162. See also Panel Report, *Guatemala – Cement II*, para. 8.283.

[13] Panel Report, *US – Softwood Lumber V*, para. 7.137.

[14] Panel Report, *US – Stainless Steel (Korea)*, para. 6.49 and n. 62.

[15] Panel Report, *US – Stainless Steel (Korea)*, para. 6.50.

US – Stainless Steel (Korea) noted, "uniform" and "reasonable" administration cannot be understood to require identical results where relevant facts differ.[16] When an authority terminates a countervailing duty investigation but continues an anti-dumping investigation on the same products, whether its decisions were administered in a "uniform" and "reasonable" manner will depend on such factors as the legal basis for each investigation, procedural similarities, and the overlap of products and parties between the two investigation. Clear explanations of these factors may serve to demonstrate that the authority's decisions were consistent with Article X:3(a).

[16] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1. The Russian Federation would like to thank the Panel for the opportunity to present this Oral Statement as a Third Party in the current proceedings. In this statement the Russian Federation will focus on the legal interpretation of Article 17.6(ii) of the Anti-Dumping Agreement and address some observations made in this regard. Making these comments Russia takes no view on the factual aspects of this dispute.

2. Specifically, Russia would like to react to what the US suggests in paragraph 8 of its Third party submission. The US states there that "the question under Article 17.6(ii) is whether an investigating authority's interpretation of the Anti-Dumping Agreement is based on a permissible interpretation." According to the US, "'permissible' means just that: a meaning that *could be* reached under the *Vienna Convention on the Law of Treaties*". Based on that the US concludes that "where an investigating authority has relied on one such interpretation, a panel must find the measure to be in conformity with the Anti-Dumping Agreement." Overall, it appears that the US suggests that the permissible interpretation is something that *could* be determined by the investigating authority, and subsequently accepted by the Panel. In other words, there is something like a "menu" of interpretations from which to choose. More than that, the US proceeds from the premise that all provisions of the Anti-Dumping Agreement admit more than one permissible interpretation.

3. Russia strongly disagrees. There are at least two reasons that make the US position legally void.

4. First, contrary to the US allegations, it is the panel's authority under Article 3.2 of the DSU, and what is really its direct responsibility, to interpret the provisions of the covered agreements, including the Anti-Dumping Agreement, in order to clarify their meaning.

5. Article 17.6(ii) of the Anti-Dumping Agreement in its turn contemplates a sequential analysis.[1] The first step requires a panel to apply the customary rules of interpretation to the treaty, that is the Anti-Dumping Agreement itself. Only *after* this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies.[2] Pursuant to the second sentence, it will be required to assess whether the authorities' measure rests on an interpretation determined to be permissible. In this vein, the Appellate Body explicitly stated that "[t]he structure and logic of Article 17.6(ii) therefore do not permit a panel to determine first whether an interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence."[3]

6. It shall be noted that the second sentence of Article 17.6(ii) does not refer to the investigating authority as an actor of the analysis. It refers instead to "the panel". The only context in which the investigating authority appears in the second sentence of Article 17.6(ii) is the phrase "the authorities' measure". Here, by referring to "authorities' measure" the second sentence of Article 17.6(ii) mentions it rather as an object of analysis to be held by a panel. This panel's analysis comprises the examination of whether or not the authorities' measure rests on a permissible interpretation. Such permissible interpretation shall be determined beforehand by the panel using the customary rules of interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

7. In addition, the use of the verb phrase "rests upon" instead of "rely on" emphasizes that the second sentence of Article 17.6(ii) comes into operation only after the exercise under the first sentence is completed. The meaning of the word "rests" is "to lie or be supported on; to

[1] Appellate Body Report, *US – Continued Zeroing*, para. 271.
[2] Ibid.
[3] Ibid.

be found or situated on top of."[4] Thus, the assessment of the panel should concern rather static things: the measure that is adopted by the investigating authority and the interpretation of the relevant provision that a panel should make before it starts to analyze whether the measure rests on the interpretation of the relevant provision.

8. The second reason that points to the legal inconsistency of the US position is that not all provisions of the Anti-Dumping Agreement admit more than one permissible interpretation. It clearly follows from the legal text of Article 17.6(ii) that *before* moving on to the final part of the analysis, i.e. determining whether the authorities' measure rests upon permissible interpretation, the panel must make sure that the relevant provision of the Anti-Dumping Agreement [due to its design and structure] *indeed* admits more than one permissible interpretation.

9. Therefore, the question as to whether the authorities' measure rests upon one of permissible interpretations may be considered by the panel only *after* the panel has fulfilled its legal duty to interpret the relevant provision of the Anti-Dumping Agreement based on the Vienna Convention and satisfied itself that this specific provision admits more than one permissible interpretation. If the answer to the second question is negative, the panel will proceed with the only permissible interpretation.

10. This concludes our statement.

[4] Oxford English Dictionary, entry for the word "rest", https://www.oed.com/dictionary/rest_v1?tab=meaning_and_use#25692454 (accessed October 14, 2025)

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF UKRAINE

I. INTRODUCTION

1. Dear Chair, distinguished members of the Panel good morning.

2. As a representative of Ukraine, I would like to take this opportunity to shortly express Ukraine's views as a third party in the present dispute.

3. Ukraine is intervening in this dispute because of its substantial systemic interest in the interpretation and application of the provisions of the WTO agreements discussed before this Panel and it would like to share its views on some of the legal issues relevant to this case, without taking any specific position on the particular facts presented by the parties.

4. Before addressing the legal points at issue in this dispute, Ukraine notes that the russian federation is also participating as a third party. So meanwhile all Members here work together to support multilateral trading system and maintain the WTO dispute settlement system, russia in its turn commits a blatant act of aggression against Ukraine through its brutal, unprovoked and unjustifiable military invasion which violates the fundamental principles of international peace and undermines international rules-based order.

5. Ukraine is convinced that a military aggression by one WTO Member against another WTO Member puts the multilateral trading system in an unprecedented situation. Russia's actions violate the fundamental principles of the organization.

6. We are very grateful to all Members who have expressed solidarity with the Ukrainian people and who have stood with Ukraine in these difficult and terrifying times in response to russia's war of aggression against Ukraine.

7. Returning to the issues of the case and Ukraine's views as a third participant in the present dispute, Ukraine would like to provide its views on the legal interpretation of particular provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"). Ukraine will address whether Article 5.4 requires an investigating authority to terminate investigation after withdrawing a complaint.

II. ARTICLE 5.4 OF THE ANTI-DUMPING AGREEMENT

8. In this dispute, Indonesia argues that the European Union violated Article 5.4 of the Anti-Dumping Agreement by failing to reject the application or terminate the investigation because of a lack of standing of the domestic industry.

9. For its part Article 5.4 sets the requirements for the level of domestic industry support for the written application for initiating an anti-dumping investigation. It states that an investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.

10. Ukraine agrees with the certain other third parties of this dispute that Article 5.4 concerns only the degree of support for the complaint necessary for the Commission to be able to initiate a proceeding[1]. Ukraine notes that the Panel in *Mexico – Steel Pipes and Tubes* found that "Article 5.4 pertains exclusively to initiation, and there is no on-going obligation to monitor domestic industry support once an investigation has been initiated under the Anti-Dumping Agreement".[2]

11. The requirements set out in Article 5.4, together with the requirements of Article 5.3, constitute legal grounds for initiating an investigation. It should be mentioned that Article 5.7 states that "[t]he evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the

[1] United States' First Written Submission, para. 25, Australia's First Written Submission, para. 15.
[2] Panel Report, *Mexico – Anti Dumping Duties on Steel Pipes and Tubes*, para. 7.347.

investigation…" However, it does not contain an obligation of the investigating authority of the importing country to reconsider the status of the domestic industry during the anti-dumping investigation. The Anti-Dumping Agreement is also silent regarding the obligation to terminate the anti-dumping investigation after the withdrawal of the application. This could be explained by the fact that during the investigation the competent authority has more detailed and substantial information than that received at the pre-initiation stage, and just withdrawing the complaint cannot automatically lead to the termination of the investigation.

12. Therefore, Ukraine considers that Article 5.4 does not contain any specific provisions for the investigating authority to revisit the status of the domestic industry during an anti-dumping investigation and to terminate an investigation since industry support was determined at initiation of the investigation.

III. CONCLUSION

13. Ukraine thanks the Panel for the opportunity to submit its views on the issues raised in this dispute.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. STANDARD OF REVIEW

1. Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 17.6 of the AD Agreement, with respect to disputes involving anti-dumping measures, set forth the standard of review to be applied by WTO dispute settlement panels. Thus, Article 11 of the DSU and Article 17.6 of the AD Agreement together establish the standard of review that applies to this dispute.

2. Article 11 of the DSU establishes that "[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements." As such, "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." With respect to the facts of the matter, the text of Article 17.6 of the AD Agreement sets forth a specific standard of review for a panel undertaking its objective assessment pursuant to DSU Article 11. Specifically, a panel "shall determine" whether the investigating authority reached a conclusion that an "unbiased and objective" investigating authority could have reached "even though the panel might have reached a different conclusion." Under the plain meaning of its terms, Article 17.6 imposes "limiting obligations on a panel" so as "to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."

3. Therefore, in making its objective assessment under DSU Article 11 and AD Agreement Article 17.6, a panel is not undertaking a *de novo* evidentiary review or serving as "initial trier of fact," but is instead acting as "reviewer of agency action." A complainant will prevail on its claims only where it has shown that the findings of the investigating authority are not findings that could have been reached by an objective and unbiased investigating authority. Accordingly, with respect to the facts, the Panel's task in this dispute is to assess whether the investigating authority, the European Commission (the "Commission"), properly established the facts and evaluated them in an unbiased and objective manner. The Panel's role is to determine whether an objective and unbiased investigating authority, reviewing the same evidentiary record as the Commission, could have – not would have – reached the same conclusions that the Commission reached. It would be inconsistent with the Panel's function under DSU Article 11 to exceed its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.

4. With respect to legal interpretation, the question under Article 17.6(ii) is whether an investigating authority's interpretation of the AD Agreement is based on a permissible interpretation. As the United States has explained for years, "permissible" means just that: a meaning that could be reached under the *Vienna Convention on the Law of Treaties*. Article 17.6(ii) itself confirms that provisions of the AD Agreement may "admit[] of more than one permissible interpretation." Where that is the case, and where an investigating authority has relied on one such interpretation, a panel must find the measure to be in conformity with the AD Agreement.

5. Finally, where the AD Agreement is silent, it must not be interpreted so as to add to or diminish a Member's rights and obligations. Article 3.2 of the DSU indicates that the Panel is to utilize customary rules of interpretation of public international law to discern the meaning of relevant provisions of the covered agreements. Consistent with Article 31 of the Vienna Convention, a panel must therefore interpret the agreement "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." A corollary of this customary rule of interpretation is that an "interpretation must give meaning and effect to all the terms of the treaty;" silence in the treaty on a given issue must likewise be given meaning. Such an approach serves to ensure conformity with Article 3.2 of the DSU, which provides that: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

II. CLAIMS REGARDING ARTICLE 5.6 OF THE AD AGREEMENT

6. Indonesia challenges the EU's decision to proceed with the anti-dumping investigation after the complainant withdrew its application for relief, but after the investigation had already been initiated. Indonesia argues that the EU acted in a manner inconsistent with the *ex officio* or the "self-initiation" provision of Article 5.6 of the AD Agreement by proceeding with an investigation following the withdrawal of the application without making a separate determination that special circumstances exist and that there is sufficient evidence of dumping, injury, and a causal link.

7. The EU argues that Article 5.6 does not apply in the circumstance where a complainant withdraws a complaint after initiation of an investigation and that, moreover, the AD Agreement does not provide for this circumstance. Indonesia's argument is incorrect because Article 5.6 applies only to the question of initiation and does not speak to the continuation of an ongoing investigation. By its own terms, Article 5.6 provides an evidentiary standard for an investigating authority to initiate an investigation when no "written application by or on behalf of a domestic industry" has been submitted, i.e., self-initiation or initiation *ex officio*. It does not apply to the circumstance where an investigating authority has already initiated an investigation but the written application has been, subsequently, withdrawn. Ultimately, there is no basis for Indonesia to assert that Article 5.6 applies to a determination of whether to continue an investigation following the withdrawal of an application.

8. The fact that the AD Agreement as a whole does not contemplate the withdrawal of a complaint is a crucial flaw in Indonesia's argument – a fact which Indonesia concedes when it states at paragraph 126 of its first written submission: "[n]o provision in the AD Agreement expressly addresses the situation." Where the AD Agreement is silent with respect to such a situation, it cannot be read to prohibit a Member from proceeding as the EU did here. Moreover, as provided in Article 17.6(ii), "[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." Here, the EU's determination to proceed with an already initiated investigation, despite withdrawal of the application for relief, is based on a permissible interpretation of the AD Duty Agreement where it is silent with respect to such a situation.

9. Indonesia's argument to the contrary rests on a convoluted interpretation that seeks to infer an obligation based on the "context" of Articles 5.1, 5.2, and 5.3 of the AD Agreement where no such obligation exists. Indonesia asserts that "[w]hen the written complaint is removed as a basis for initiation … the conditions for using the (only) alternative basis, namely self-initiation, must be satisfied." However, what Indonesia refers to as the "context" of Articles 5.1, 5.2, and 5.3 is nothing more than the procedures which must be followed in determining whether to initiate an investigation based on a written application. As Indonesia itself concedes, Article 5.6 is an alternative basis for initiating an investigation, and there is no interpretive basis to suggest that Articles 5.1, 5.2, and 5.3 somehow impose a requirement that an investigating authority re-initiate an investigation after a written application is withdrawn. If anything, the context provided by Articles 5.1, 5.2, and 5.3 confirms that initiation is a binary question limited to the initial decision to begin an investigation or not. Nothing in these articles speaks to an obligation to terminate an ongoing investigation.

10. Indonesia also argues that initiation under Article 5.6 is somehow implicated by Article 12 of the AD Agreement so as to require investigating authorities to issue a new notice of initiation following the withdrawal of a written complaint. But as the EU adequately explains, there is no support in Article 12 for the assertion that an administering authority must "provide a new notification after it has determined that the investigation can proceed despite the withdrawal of the complaint." For the reasons above, Indonesia's argument is not supported by the text of the AD Agreement. Furthermore, the United States disagrees with Indonesia's interpretation of Article 5.6 as requiring a situation that is "exceptional" or "out of the ordinary" for an investigating authority to initiate an investigation *ex officio* in contrast to initiation by written application provided for by Article 5.1. There is nothing in the text of Article 5.6 to suggest that initiation of an anti-dumping investigation must be subject to heightened scrutiny or a unique evidentiary threshold. This is evidenced by the text of the provision itself, which provides that investigations may be initiated by an administering authority "only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation."

11. Therefore, the standard for initiation by an investigating authority (i.e., under Article 5.6) is explicitly the same as the standard for an initiation by application under Article 5.1. Moreover, the

text of Article 5.1 provides that "[e]xcept as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry." While initiation pursuant to Article 5.6 is an exception to the initiation procedures outlined in Article 5.1, there is no further limitation on when that exception may be invoked.

12. Indonesia interprets the term "special circumstances" as used in Article 5.6 of the AD Agreement to argue that there exists a higher threshold for an *ex officio* initiation by a competent authority. But as Indonesia itself acknowledges, the AD Agreement does not explicitly state what "special circumstances" means or what such circumstances must arise, if any, in order to permit the initiation of an investigation by an administering authority. What the AD Agreement does state is that initiation under Article 5.6 is an exception to initiation under Article 5.1. Thus, the "special circumstance" included in Article 5.6, when read together with Article 5.1, is merely the recognition that an investigation is typically initiated via a written application. That is to say, an Article 5.6 initiation is the "special circumstance" in and of itself. Such an initiation *ex officio* does not require a more restrictive threshold as read into the AD Agreement by Indonesia. In the absence of any other language, Article 5.6 cannot be read to require a finding that "exceptional" or "out of the ordinary" circumstances exist in order to effect an *ex officio* initiation.

III. CLAIMS REGARDING ARTICLE 5.4 OF THE AD AGREEMENT

13. Article 5.4 describes the domestic industry support necessary for an investigating authority to initiate on the basis of written application. Article 5.4 of the AD Agreement does not create an obligation to reconsider the standing requirement after a written application has been withdrawn. The investigating authority is, however, obligated to ensure that, pursuant to Articles 4.1, 5.3, and 5.4 of the AD Agreement, industry support has been properly established prior to the initiation of an investigation. Looking to the key language, Article 5.4 specifies that "[a]n investigation shall not be *initiated* pursuant to paragraph 1 unless the authorities have determined … that the application has been made by or on behalf of the domestic industry" (emphasis added). Article 5.4 further states that "no investigation shall be *initiated* when domestic producers expressly supporting the application account for less than 25 per cent of the total production of the like product produced by the domestic industry" (emphasis added).

14. Indonesia argues "that the investigation should have been terminated at the time the Complaint was withdrawn, because the standing requirement under Article 5.4 of the AD Agreement was likely no longer met." However, nowhere in the plain language of Article 5.4 is it stated that the standing requirement of Article 5.4 applies at any time other than initiation. As noted above, the question of industry support is considered during the initiation phase of an inquiry. Further, Article 5.7 illustrates the categorical distinction between initiation of an investigation and an ongoing investigation. Article 5.7 states "[t]he evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the investigation …" Article 5.7 confirms that the AD Agreement considers that certain considerations must take place both during initiation and during the course of an investigation. As discussed above, domestic industry support is not one of those ongoing considerations. Article 5.7 thus provides further confirmation that domestic industry support is a matter for an investigating authority to consider at initiation. Therefore, under a proper interpretation of the AD Agreement, Article 5.4 does not require the investigating authority to revisit the issue of domestic industry support following its decision to initiate an investigation and after providing a reasonable opportunity for comments from interested parties during the initiation comment period. As a corollary, Article 5.4 of the AD Agreement does not contain an obligation and is, indeed, silent on whether an investigating authority must terminate an investigation once industry support has been determined at initiation of the investigation.

CLAIMS RELATING TO ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

15. The United States offers the following views on the appropriate legal interpretation of Articles 3.1 and 3.4 of the AD Agreement. Article 3.4 provides that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and lists specific economic factors that an authority must evaluate. Article 3.4 also provides that its list of factors and indices "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

16. The importance of certain factors may vary significantly from case to case, and the relative weight that an investigating authority may give to certain factors in an investigation has no bearing on their importance vis-à-vis other factors addressed in Article 3.4. Article 3.4 does not dictate the methodology that should be employed in conducting the examination of the impact of dumped imports on the domestic industry, or the manner in which the results of this examination are to be set out in the record of the investigation. A determination, through its demonstration of why the investigating authority relied on the specific factors it found to be material in the case, may disclose why other factors on which it did not make specific findings were accorded little weight or deemed irrelevant.

17. Here the role of a panel in a dispute involving a Member's application of an antidumping or countervailing duty measure is to assess "whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner" – and not, therefore, to serve an initial trier of fact. The United States observes that the Panel in the present dispute must be able to discern that the investigating authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination. To make this assessment, the Panel must determine whether an "unbiased and objective" investigating authority could have reached the same conclusion as the Commission and not whether the Panel would have reached the same conclusion.

CLAIMS RELATING TO ARTICLE X:3 OF THE GATT 1994

18. Each of Indonesia's GATT 1994 Article X:3(a) claims appears to be based on an incorrect interpretation of the text as applied or as otherwise relevant to the challenged or alleged measures. In this regard, paragraph 1 of Article X, titled "Publication and Administration of Trade Regulations," describes "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party," and requires these to "be published promptly in such a manner as to enable governments and traders to become acquainted with them."

19. Despite Indonesia's arguments to the contrary that "[t]he Commission's practice in past … proceedings indicates that an investigation will typically be terminated" and that "a review of the Commission's practice reveals that in virtually all previous cases … the Commission invariably decided to terminate the proceedings," the task of a panel is to review the consistency of a Member's actions with the Agreement and not with that Member's domestic laws, regulations or practices. Consistency is an important feature of a transparent AD procedure. Consistency with prior cases is a laudable goal, to the extent the actions taken in such cases were themselves consistent with the AD Agreement. However, a "uniform, impartial and reasonable" system is not necessarily one in which each decision looks like the one before. The benefits of consistency do not always outweigh the need of investigating authorities to allow their policies to evolve to suit new factual scenarios. This understanding of Article X:3 is reinforced by the fact that the disputes in which panels applied that provision relate to situations in which the overall administration of some program was alleged to be arbitrary or biased in its administration writ large. Thus, Indonesia's emphasis on the EU's alleged departure from "the Commission's practice relating to the withdrawal of complaints in past anti-dumping and anti-subsidy investigations" is not compelling with respect to the application of GATT 1994 Article X:3(a).

20. Second, with respect to Indonesia's claim that the EU acted in a manner inconsistent with GATT 1994 Article X:3(a) by using two different methodologies for calculating PCNs, depending on profitability, the EU explains that the two different approaches are based on whether or not there are sales in the ordinary course of trade, a "distinction [which] is entirely consistent with Article 2.2 of the Anti-Dumping Agreement." Without opining on the facts of the EU approach, it appears that Indonesia's argument turns on the adequacy of the EU's justification for the distinction it has made and not whether the EU administered its trade regulations in a "uniform, impartial and reasonable manner." In this regard, the premise of Indonesia's Article X:3(a) claim may be unable to support a conclusion under that provision.

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