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

REPORT OF THE PANEL

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Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015, DSR 2015:II, p. 579
Canada – Welded Pipe	Panel Report, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/DS482/R and Add.1, adopted 25 January 2017, DSR 2017:I, p. 7
China – HP-SSST (Japan) / China – HP-SSST (EU)	Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R, DSR 2015:IX, p. 4789
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, p. 1269
EC – Fasteners (China) (Article 21.5 – China)	Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/RW and Add.1, adopted 12 February 2016, as modified by Appellate Body Report WT/DS397/AB/RW, DSR 2016:I, p. 195
EC – Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Selected Customs Matters	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX, p. 3915
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC – Tube or Pipe Fittings	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Korea – Pneumatic Valves (Japan)	Panel Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WT/DS504/R and Add.1, adopted 30 September 2019, as modified by Appellate Body Report WT/DS504/AB/R, DSR 2019:XI, p. 5935

Short Title	Full Case Title and Citation
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207
Pakistan – BOPP Film (UAE)	Panel Report, *Pakistan – Anti-Dumping Measures on Biaxially Oriented Polypropylene Film from the United Arab Emirates*, WT/DS538/R and Add.1, circulated to WTO Members 18 January 2021, appealed 22 February 2021
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
US – Anti-Dumping and Countervailing Duties (Korea)	Panel Report, *United States – Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available*, WT/DS539/R and Add.1, circulated to WTO Members 21 January 2021, appealed 19 March 2021
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, p. 10127
US – Anti-Dumping Methodologies (China)	Appellate Body Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/AB/R and Add.1, adopted 22 May 2017, DSR 2017:III, p. 1423
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Corrosion-Resistant Steel Sunset Review	Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WT/DS244/AB/R, DSR 2004:I, p. 85
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – OCTG (Korea)	Panel Report, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WT/DS488/R and Add.1, adopted 12 January 2018, DSR 2018:I, p. 7
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Softwood Lumber V	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Stainless Steel (Korea)	Panel Report, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, DSR 2001:IV, p. 1295
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11
US – Underwear	Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R, DSR 1997:I, p. 31
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title (if any)	Description/Long title
EU-1	EU Basic Anti-Subsidy Regulation	Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, Official Journal of the European Union, L Series, No. 176 (30 June 2016), p. 55, as amended
EU-5 (BCI)	Musim Mas final disclosure document on dumping calculations	Explanatory document on the dumping calculations and the methodology used, attached as annex 2 to the specific final disclosure to Musim Mas in the fatty acid anti-dumping investigation
EU-8 (BCI)	EU producer's study and engineering agreement	Study and engineering agreement between a sampled EU producer and an engineering company, submitted as a verification exhibit in the fatty acid anti-dumping investigation
EU-9 (BCI)	EU producer's study and engineering agreement and annex	Study and engineering agreement between a sampled EU producer and an engineering company including an annex, submitted as a verification exhibit in the fatty acid anti-dumping investigation
EU-10 (BCI)	EU producer's audit report (extract)	Extract of a sampled EU producer's audit report regarding its investments, submitted as a verification exhibit in the fatty acid anti-dumping investigation
EU-11 (BCI)	EU producer's investment plan presentation	A sampled EU producer's presentation slides on its investment plan, submitted as a verification exhibit in the fatty acid anti-dumping investigation
EU-12 (BCI)	Verification report of an EU producer	Verification report of a sampled EU producer in the fatty acid anti-dumping investigation (confidential version)
EU-13 (BCI)	Questionnaire response of a sampled producer	A sampled EU producer's response to the questionnaire for EU producers in the fatty acid anti-dumping investigation
IDN-1	EU Basic Anti-Dumping Regulation	Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, Official Journal of the European Union, L Series, No. 176 (30 June 2016), p. 21, as amended
IDN-2	Anti-dumping written application	CUTFA's written application to request the European Commission to initiate an anti-dumping investigation on imports of fatty acid from Indonesia
IDN-3	Notice of initiation of the anti-dumping investigation on fatty acid	Notice of initiation of an anti-dumping proceeding concerning imports of fatty acid originating in Indonesia, Official Journal of the European Union, C Series, No. 482/05 (30 November 2021)
IDN-4	Final anti-dumping determination on fatty acid	Commission Implementing Regulation (EU) No. 2023/111 of 18 January 2023 imposing a definitive anti-dumping duty on imports of fatty acid originating in Indonesia, Official Journal of the European Union, L Series, No. 18/1 (19 January 2023)
IDN-9	KLK's letter to the European Commission	Letter dated 19 August 2022 from KLK to the European Commission opposing the imposition of anti-dumping measures against imports of fatty acids from Indonesia
IDN-10	Withdrawal of the anti-dumping written application	Letter dated 24 August 2022 from CUTFA to the European Commission withdrawing its anti-dumping written application on imports of fatty acid from Indonesia
IDN-11	Anti-dumping final disclosure	General disclosure document in the fatty acid anti-dumping investigation (1 August 2022)
IDN-14	Note to the file dated 24 August 2022	Note to the file dated 24 August 2022 in the fatty acid anti-dumping investigation concerning CUTFA's withdrawal of the written application
IDN-17	Philips Lighting Poland SA and Philips Lighting BV v. Council of the European Union	General Court, Case T 469/07, Philips Lighting Poland SA and Philips Lighting BV v. Council of the European Union (2013) (ECLI:EU: T:2013:370)
IDN-19	Withdrawal of the countervailing duty written application	Letter dated 3 October 2022 from CUTFA to the European Commission withdrawing its countervailing duty written application on imports of fatty acid from Indonesia
IDN-20	Countervailing duty final disclosure	General disclosure document in the fatty acid countervailing duty investigation (21 December 2022)

Exhibit	Short Title (if any)	Description/Long title
IDN-21	Countervailing duty investigation termination decision	Commission Implementing Decision (EU) 2023/617 of 17 March 2023 terminating the anti-subsidy proceeding concerning imports of fatty acid originating in Indonesia, Official Journal of the European Union, L Series, No. 80/99 (20 March 2023)
IDN-38 (BCI)	Musim Mas OASYS programme file	MS Excel file used for the dumping margin calculations contained in the specific additional final disclosure to Musim Mas in the fatty acid anti-dumping investigation
IDN-40 (BCI)	ICOF Europe sheet	MS Excel sheet contained in the specific final disclosure to Musim Mas in the fatty acid anti-dumping investigation
IDN-50	Information sheet for questionnaire response	Sheet accompanying the anti-dumping questionnaire for exporters explaining requested information for export transactions
IDN-52	Indonesia's list of previous EU anti-dumping investigations	Indonesia's "Updated list of regulations showing the use of the two methodologies for constructing normal value" accompanying its second written submission, containing excerpts from the determinations in the European Commission's anti-dumping investigations from 2012 to 2025
IDN-53	Indonesia's list of previous EU decisions to terminate investigations	Indonesia's "Overview of the Commission's practice regarding the consequences of a withdrawal of a complaint in anti-dumping and anti-subsidy investigations" accompanying its second written submission, containing excerpts from the European Commission's previous decisions to terminate anti-dumping or countervailing duty investigations
IDN-54	Extracts from final determinations of previous EU countervailing duty investigations	Extracts from the European Commission's previous countervailing duty final determinations referring to parallel anti-dumping investigations
IDN-62 (BCI)	Exchange rate sheet	Sheet contained in an MS Excel file attached to the anti-dumping questionnaire for exporters setting out the applicable exchange rate per one euro for each currency and period
IDN-63	Excerpt from OECD report *Transfer Pricing Guidance on Financial Transactions*	Organization for Economic Cooperation and Development (OECD), *Transfer Pricing Guidance on Financial Transactions: Inclusive Framework on BEPS: Actions 4, 8-10* (Paris, February 2020), pp. 1-5 and 29-34

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	business confidential information
CUTFA	Coalition against Unfair Trade in Fatty Acid
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
ICOF Europe	ICOF Europe GmbH
KLK	KLK Emmerich GmbH
OECD	Organization for Economic Cooperation and Development
PCN	product control number
POI	period of investigation
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SG&A	selling, general, and administrative
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Indonesia

1.1. On 7 February 2024, Indonesia requested consultations with the European Union pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 22 April 2024.

1.2 Panel establishment and composition

1.3. On 14 November 2024, Indonesia requested the establishment of a panel pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the Anti-Dumping Agreement.[2] At its meeting on 18 December 2024, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Indonesia in document WT/DS622/2, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in document WT/DS622/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 11 April 2025, the parties agreed that the panel would be composed as follows:

Chairperson:	Mr David UNTERHALTER
Members:	Mr Luis M. CATIBAYAN Ms Yomna EL-SHABRAWY

1.6. Australia, Brazil, Canada, China, Japan, the Russian Federation, Singapore, Türkiye, Ukraine, the United Kingdom, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, the Panel adopted a partial timetable on 28 May 2025, its Working Procedures[5] and Additional Working Procedures concerning Business Confidential Information (BCI)[6] on 6 June 2025. The Panel subsequently revised the timetable on 3 June 2025, 13 October 2025, and 27 November 2025.

1.8. The Panel held a first substantive meeting with the parties on 14 and 15 October 2025. A session with the third parties took place on 15 October 2025. The Panel held a second substantive meeting with the parties on 3 and 4 February 2026. On 7 April 2026, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 4 May 2026. The Panel issued its Final Report to the parties on 15 June 2026.

[1] Request for consultations by Indonesia, WT/DS622/1 (Indonesia's consultation request).
[2] Request for the establishment of a panel by Indonesia, WT/DS622/2 (Indonesia's panel request).
[3] DSB, Minutes of the meeting held on 18 December 2024, WT/DSB/M/496, para. 2.4.
[4] Constitution note of the Panel, WT/DS622/3.
[5] Working Procedures of the Panel (Annex A-1).
[6] Additional Working Procedures of the Panel concerning Business Confidential Information (Annex A-2).

2 THE MEASURES AT ISSUE

2.1. In its panel request, Indonesia identified the measures at issue as the definitive anti-dumping measures imposed by the European Union on imports of fatty acid originating in Indonesia, and the investigation leading to the imposition of those measures, including any amendments, supplements, reviews, replacements, renewals, extensions, implementing measures, and any other related measures taken by the European Union in relation to the investigation or the anti-dumping measures at issue; as well as the European Union's decision to terminate the countervailing duty investigation on imports of fatty acid originating in Indonesia.[7]

2.2. Indonesia also identifies as a specific measure at issue an alleged unwritten measure concerning the use of two different methodologies for constructing normal value for product control numbers (PCNs) sold in insufficient quantities on the domestic market of the exporting country as well as the methodology for constructing normal value based on PCN-specific costs and profit data.[8]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Indonesia requests that the Panel find that the specific measures at issue are inconsistent with the European Union's obligations under Articles 1, 2.2, 2.2.2, 2.4.1, 3.1, 3.4, 5.6, 9.2, and 9.3 of the Anti-Dumping Agreement, and Articles VI, VI:2, and X:3(a) of the GATT 1994.[9] Indonesia further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the European Union bring its measures into conformity with its WTO obligations.[10]

3.2. The European Union requests that the Panel reject Indonesia's claims in this dispute in their entirety.[11]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Canada, Japan, the Russian Federation, Ukraine, and the United States are reflected in their executive summaries, provided in accordance with paragraph 25 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5 and C-6). Brazil, China, Singapore, Türkiye, and the United Kingdom did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 18 May 2026, Indonesia and the European Union each submitted written requests for the review of precise aspects of the Interim Report. On 1 June 2026, both parties submitted comments on each other's requests for review. Neither party requested an interim review meeting. The Panel's discussion and disposition of the parties' submissions related to the interim review are set out in Annex A-3.

[7] Indonesia's panel request, p. 4.
[8] Indonesia's panel request, p. 4.
[9] Indonesia's first written submission, paras. 370-371. Indonesia informed the Panel that it would no longer pursue its claim under Article 5.4 of the Anti-Dumping Agreement. (Indonesia's opening statement at the first meeting of the Panel, para. 4). Indonesia presented claims under Articles 5.3 and 5.8 of the Anti-Dumping Agreement in its panel request but did not pursue these claims in its first written submission.
[10] Indonesia's first written submission, para. 372.
[11] European Union's first written submission, para. 305.

7 FINDINGS

7.1 General principles regarding treaty interpretation, standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that such customary rules include those codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[12]

7.2. Article 17.6(ii) of the Anti-Dumping Agreement directs the Panel to the same customary rules of treaty interpretation, but also provides for a specific approach in certain circumstances:

> [T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where 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.

7.1.2 Standard of review

7.3. Article 11 of the DSU sets out a general standard of review for panels. It provides, in relevant part, that:

> [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[.]

7.4. In addition to Article 11 of the DSU, Article 17.6(i) of the Anti-Dumping Agreement provides that in disputes under the Anti-Dumping Agreement:

> [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned[.]

7.5. Thus Article 17.6(i) is explicit that in carrying out its objective assessment, the Panel is barred from conducting a *de novo* review of the facts. Instead, the Panel must "determine whether the authorities' establishment of the facts was proper", and "whether their evaluation of those facts was unbiased and objective."

7.1.3 Burden of proof

7.6. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO agreement must assert and prove its claim.[13] As such, Indonesia bears the burden of demonstrating that the challenged measures are inconsistent with the GATT 1994 and the Anti-Dumping Agreement. A complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[14] Each party asserting a fact should provide proof thereof.[15]

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[12] See e.g. Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10, section D.
[13] See e.g. Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[14] Appellate Body Report, *EC – Hormones*, para. 104.
[15] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

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

7.7. Indonesia's claims under Article X:3(a) of the GATT 1994 and Article 5.6 of the Anti-Dumping Agreement concern the European Commission's decision to continue the underlying anti-dumping investigation despite the applicant's withdrawal of its written application.

7.2.1 Indonesia's claim under Article 5.6 of the Anti-Dumping Agreement concerning the withdrawal of the written application

7.8. Where an investigating authority initiates an anti-dumping investigation based on a written application filed by, or on behalf of, the domestic industry, and this application is withdrawn in the course of the investigation, in Indonesia's view, Article 5.6 of the Anti-Dumping Agreement requires the investigating authority to make a "determination" regarding the (a) existence of "special circumstances"; and (b) evidence of dumping, injury, and causal link before continuing with the investigation. [16] Indonesia argues that the European Commission violated Article 5.6 of the Anti-Dumping Agreement because it continued its investigation despite the withdrawal of the written application without first making a separate determination that the conditions in Article 5.6 were met.[17]

7.2.1.1 Legal standard

7.9. Articles 5.1 and 5.6 provide the two bases for the initiation of an investigation, namely: (a) upon a written application by, or on behalf of, the domestic industry; or (b) in "special circumstances", through self-initiation by the investigating authorities.

7.10. Article 5.1 of the Anti-Dumping Agreement provides as follows:

> Except 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.

7.11. Article 5.6 of the Anti-Dumping Agreement provides as follows:

> If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed 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.

7.12. The Anti-Dumping Agreement does not define the term "special circumstances" in this Article.

7.2.1.2 Whether the European Commission acted inconsistently with Article 5.6 of the Anti-Dumping Agreement

7.13. Indonesia acknowledges that no provision of the Anti-Dumping Agreement expressly addresses the situation where an investigating authority has initiated an investigation following a written application by or on behalf of the domestic industry and continues that investigation, even though the written application has been withdrawn in the course of the investigation.[18] However, Indonesia submits that once the written application, upon which an investigating authority initiated an investigation, is withdrawn in the course of the investigation, and thus "ceases to exist", Article 5.6 of the Anti-Dumping Agreement permits an investigating authority to proceed with the investigation only after making a "determination" that the conditions set out in Article 5.6 are met.[19] If those conditions are not met, the investigation must be terminated pursuant to Article 5.8 because the evidence contained in the written application is no longer supported by the domestic industry

[16] Indonesia's first written submission, para. 163.
[17] Indonesia's first written submission, para. 161.
[18] Indonesia's first written submission, para. 126.
[19] Indonesia's second written submission, paras. 61-62.

and thus the authority can no longer be satisfied that sufficient evidence is available to justify "proceeding" with the case within the meaning of Article 5.8.[20]

7.14. To support this view, Indonesia contends that the title of Article 5 ("Initiation and Subsequent Investigation") demonstrates that this Article governs both the initiation and continuation of investigations. Indonesia also argues that Articles 5.1 and 5.6 must be read together to mean that (a) there are only two alternative bases for an investigation with distinct conditions for each; and (b) an investigation must be based on one of these bases "at all times".[21]

7.15. Moreover, Indonesia submits that Article 5.6 requires the investigating authority to make "an additional and separate determination"[22], which should be notified to the interested parties under Article 12 of the Anti-Dumping Agreement[23], regarding:

a. why the change in factual conditions and specifically the withdrawal of the written application did not materially affect the investigating authority's analysis on dumping, injury, and causal link[24]; and

b. why the investigating authority considers there are "special circumstances" within the meaning of Article 5.6 justifying the continuation of the investigation in the absence of industry support.[25]

7.16. The European Union agrees with Indonesia that Articles 5.1 and 5.6 provide two distinct bases for initiating an investigation.[26] However, the European Union submits that the withdrawal of a written application does not extinguish the legal basis for the investigation.[27] Furthermore, the European Union contends that Articles 5.1 and 5.6 apply exclusively to the initiation stage of an investigation, and that Article 5 does not require the investigating authority to reopen this matter following the withdrawal of the application in the course of the investigation.[28]

7.17. The European Union argues that the title of Article 5 simply reflects that this Article contains provisions addressing different phases of an investigation and does not alter or expand the scope of Article 5.6, which is expressly limited to initiation.[29] Thus, the European Union rejects, due to a lack of textual foundation, Indonesia's assertion that an investigation must "at all times" rest on one of these two bases.[30] The European Union interprets the provisions to mean that the relevance of a written application is confined to initiation[31], and that Article 5.1 and related provisions such as Articles 5.3 and 5.4 establish one-off, rather than continuing obligations.[32] According to the European Union, Indonesia's interpretation would oblige an investigating authority to reassess the basic conditions for initiating a case when it has already positively established and disclosed evidence of dumping, injury, and causation following a thorough inquiry.[33] The European Union also rejects

[20] Indonesia's second written submission, para. 69; response to Panel question No. 7, para. 16; and opening statement at the first meeting of the Panel, paras. 64-66. We note in this regard that Indonesia does not make a claim under Article 5.8 of the Anti-Dumping Agreement, and in response to the Panel's questions clarified that in its view, Article 5.8 is not the only provision of the Anti-Dumping Agreement that imposes obligations on an authority in a scenario where an authority continues the investigation despite the withdrawal of the application. Instead, according to Indonesia, other paragraphs of Article 5 may be triggered as well, and this includes Article 5.6. (Indonesia's response to Panel question No. 7, paras. 17-18).

[21] Indonesia's response to Panel question No. 5, para. 10; second written submission, paras. 62 and 66.

[22] Indonesia's first written submission, para. 149. See also ibid. para. 167.

[23] Indonesia's first written submission, para. 168.

[24] Indonesia's first written submission, para. 169.

[25] Indonesia's first written submission, para. 169.

[26] European Union's second written submission, para. 15.

[27] European Union's second written submission, para. 21.

[28] European Union's second written submission, paras. 13 and 15; response to Panel question No. 6, para. 7.

[29] European Union's second written submission, para. 18 (referring to European Union's first written submission, para. 125).

[30] European Union's second written submission, para. 15.

[31] European Union's second written submission, paras. 16-17 (referring to Panel Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.36; *US – Softwood Lumber V*, para. 7.137; and *Mexico – Steel Pipes and Tubes*, para. 7.347).

[32] European Union's response to Panel question No. 6, para. 7.

[33] European Union's second written submission, para. 26. In this regard, Indonesia contends that the finding makes it easier for the investigating authority to satisfy its obligation of meeting some conditions of

Indonesia's argument that the investigating authority is required to notify its "determination" to proceed with the investigation to the interested parties, noting in this regard that Article 12 of the Anti-Dumping Agreement does not require such a notification.[34]

7.18. Australia, Canada, Japan, and the United States, as third parties, support the European Union's view that Article 5.6 does not impose requirements that must be fulfilled to continue with the investigation in the event of withdrawal in the course of the investigation, nor impose a continuing obligation resting upon an investigating authority to assess the sufficiency of evidence in the written application after the investigation has been initiated.[35]

7.19. The question we need to examine is whether, in circumstances where an investigation has been initiated upon a written application by or on behalf of the domestic industry, the withdrawal of that application requires an investigating authority to terminate the investigation unless the authority makes a new determination, and finds that the conditions under Article 5.6 are satisfied so as to permit the *continuation* of that investigation. To answer this question, we must decide whether Article 5.6 governs only the initiation of an investigation, or whether it also applies to the continuation of the investigation, following the withdrawal of the written application in the course of an investigation initiated under Article 5.1.

7.20. The wording of Article 5.6 itself provides that this Article applies "[i]f … the authorities concerned decide to initiate an investigation without having received a written application". The text specifically refers to the authorities' decision to initiate an investigation without having received a written application, and does not, on its face, set out rules governing the authority's power once the investigation has been initiated. However, as noted above, Indonesia contends that Article 5.6 must be read together with Article 5.1, and, when both are read together, it becomes clear that the intention of the drafters was that there are only two bases for initiating an anti-dumping investigation[36], and if one basis falls away, the investigation can only continue if the other basis permits of this. Moreover, noting that the title of Article 5 is "Initiation and Subsequent Investigation", Indonesia submits that this title shows that Article 5 applies not just to initiation but also to the continuation of investigations.[37]

7.21. Starting with Indonesia's reference to Article 5.1 as context for its interpretation of Article 5.6, on a plain reading, Article 5.1 applies to investigations initiated following the filing of a written application by or on behalf of the domestic industry, while Article 5.6 applies in the absence of such an application. Therefore, a reading of Articles 5.1 and 5.6 together shows that an anti-dumping investigation can be initiated in one of two ways: (a) on the basis of a written application, as provided in Article 5.1 (and subject to rules set out in Articles 5.3 and 5.4 governing the authority's examination of the application); or (b) self-initiation by the authority under Article 5.6. These provisions do not permit of an interpretation that Article 5.6 applies beyond the initiation of an investigation.

7.22. Regarding Indonesia's reliance on the reference to "Initiation and Subsequent Investigation" in the title of Article 5, this title can be explained by the fact that certain paragraphs of this Article pertain to initiation (Articles 5.1, 5.3, 5.4, 5.5, and 5.6), some to the investigation following initiation (Article 5.10), and some to both (Articles 5.7 and 5.8). The title of Article 5 is simply referencing the different content of these provisions and does not indicate that every one of these provisions concerns both initiation and subsequent investigation. In this case, the title of Article 5 does not support Indonesia's understanding that Article 5.6 applies not just to initiation but also to continuation of investigations because the text of Article 5.6 gives no such indication.

7.23. We note that the text of Article 5 does not contain any reference to the withdrawal of a written application; nor does it suggest that such withdrawal, in the course of an investigation, would bar the investigating authority from continuing with the investigation. Moreover, the absence of any

Article 5.6 but does not affect the requirement for an investigating authority under Article 5.6 to also assess "special circumstances". (Indonesia's second written submission, para. 72).

[34] European Union's first written submission, paras. 140-141.

[35] Australia's third-party response to Panel question No. 1, paras. 2-3; Canada's third-party response to Panel question No. 1, paras. 2-3; Japan's third-party submission, paras. 23 and 25; Japan's third-party response to Panel question No. 1, para. 1; United States' third-party submission, paras. 13-14; and United States' third-party response to Panel question No. 1, para. 1.

[36] Indonesia's response to Panel question No. 5, para. 10.

[37] Indonesia's second written submission, para. 62.

language in Article 5.6 requiring termination of an investigation upon withdrawal of an application, or otherwise specifying that this provision applies in the course of the investigation, may be contrasted with (a) Article 5.8, which specifically sets out certain grounds that require rejection of a written application or termination of an investigation when the conditions set out in that provision are met; and (b) Article 5.7, which sets out certain rules that must be followed as part of the decision to initiate, as well as in the course of the investigation. Therefore, in our view, this contrast indicates that Article 5.6 applies only to the initiation of an investigation and does not set out rules of application in the course of the investigation. It follows that where an investigation has been initiated upon a written application by or on behalf of the domestic industry, the withdrawal of that application does not require an investigating authority to make a new determination that the conditions under Article 5.6 are satisfied, in order to continue the investigation.

7.24. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with Article 5.6 of the Anti-Dumping Agreement by continuing with the investigation without making a determination on the conditions under this Article following the withdrawal of the written application.

7.2.2 Indonesia's claims under Article X:3(a) of the GATT 1994 concerning the withdrawal of the written application

7.25. Indonesia contends that the European Commission acted inconsistently with Article X:3(a) of the GATT 1994 because it failed to administer Article 9(1) of the EU Basic Anti-Dumping Regulation[38] and Article 14(1) of the EU Basic Anti-Subsidy Regulation[39] in a uniform or reasonable manner. Indonesia's claims relate to the European Commission's decision to continue the anti-dumping investigation while terminating the "parallel, closely related" countervailing duty investigation despite the applicant withdrawing its written applications in both investigations, and the circumstances of these two investigations being "similar, if not identical".[40]

7.2.2.1 Legal standard

7.26. Article X:3(a) of the GATT 1994 provides as follows:

> Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

7.27. "[L]aws, regulations, decisions and rulings of the kind" set out in Article X:1 of the GATT 1994 are:

> Law, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use.

7.28. To establish a violation of Article X:3(a), the following requirements must be met:

a. the Member administers the legal instruments of the kind described in Article X:1; and

b. such administration is non-uniform, partial or unreasonable.

7.29. Article X:3(a) applies to the administration of the laws, regulations, decisions and rulings of the kind falling within the scope of Article X:1, but *not* to such laws and regulations *themselves*.[41] The term "administer" in Article X:3(a) refers to "putting into practical effect, or applying, a legal

[38] EU Basic Anti-Dumping Regulation (Exhibit IDN-1).
[39] EU Basic Anti-Subsidy Regulation (Exhibit EU-1).
[40] Indonesia's second written submission, paras. 19, 21, and 56.
[41] Appellate Body Reports, *EC – Bananas III*, para. 200; *EC – Poultry*, para. 115.

instrument of the kind described in Article X:1".[42] However, Article X:3(a) does not test whether a Member has acted in compliance with its own laws (that is, within the powers conferred upon it by such laws) but rather whether it has administered its laws in a uniform, impartial or reasonable manner.

7.30. The three requirements of uniformity, impartiality and reasonableness are legally independent[43] and Members are obliged to comply with all three requirements. Indonesia's claims relate to the requirements of uniformity and reasonableness.

7.31. "Uniform administration" has been interpreted in previous disputes to require that Members ensure that their laws are applied consistently and predictably.[44] Furthermore, this requirement has also been understood to mean "uniformity of treatment in respect of persons similarly situated".[45] The panel in *US – Stainless Steel (Korea)* explained in this regard that "[the requirement of uniform administration] cannot be understood to require identical results where relevant facts differ"[46], which means that Article X:3(a) does not preclude an agency from adopting a different approach when the relevant facts are different.

7.32. Regarding reasonableness, the term "reasonable" has been interpreted in a previous dispute to be "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".[47] Furthermore, the panel in *US – Stainless Steel (Korea)* did not consider that "the requirement of reasonable administration of laws and regulations [would be] violated merely because, in the administration of those laws and regulations, different conclusions were reached based upon differences in the relevant facts".[48]

7.33. We agree with the interpretations of Article X:3(a) set out in these panel reports, and adopt them.

7.2.2.2 The investigations at issue

7.34. The anti-dumping written application was filed by three members of the Coalition against Unfair Trade in Fatty Acid (CUTFA) on 18 October 2021.[49] The European Commission initiated the anti-dumping investigation on 30 November 2021 based on this application.[50] On 1 August 2022, the European Commission issued its final disclosure document to the interested parties.[51]

7.35. On 24 August 2022, CUTFA sent a letter to the European Commission to withdraw the anti-dumping written application "due to the influence from stakeholders".[52] On the same day, the European Commission published a note to the file taking note of the withdrawal letter and informing "all interested parties that the investigation will continue according to the normal rules and procedures until a formal decision is taken by the [European Commission] on the proceeding and is formally disclosed to the parties according to the applicable rules".[53] On 18 January 2023, the

[42] Appellate Body Report, *EC – Selected Customs Matters*, para. 224 (referring to Panel Report, *EC – Selected Customs Matters*, para. 7.104). (emphasis omitted)
[43] Panel Report, *Argentina – Hides and Leather*, para. 11.86.
[44] Panel Report, *Argentina – Hides and Leather*, para. 11.83.
[45] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.
[46] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.
[47] Panel Reports, *US – COOL*, para. 7.850 (referring to Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385, in turn quoting the *Shorter Oxford English Dictionary*, 5th edn (Oxford University Press, 2002), Vol. 2, p. 2482). The panel also noted that "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", and that assessment of reasonableness requires the "examination of the features of the administrative act at issue in the light of its objective, cause or the rationale behind it". (Panel Reports, *US – COOL*, para. 7.851).
[48] Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.
[49] Anti-dumping written application (Exhibit IDN-2).
[50] Notice of initiation of the anti-dumping investigation on fatty acid (Exhibit IDN-3).
[51] Anti-dumping final disclosure (Exhibit IDN-11).
[52] Withdrawal of the anti-dumping written application (Exhibit IDN-10).
[53] Note to the file dated 24 August 2022 (Exhibit IDN-14).

European Commission adopted the final anti-dumping determination imposing definitive duties on imports of fatty acid from Indonesia.[54]

7.36. The countervailing duty written application was filed by CUTFA on 31 March 2022. The European Commission initiated the countervailing duty investigation on 13 May 2022.[55] The product under investigation was the same as that in the anti-dumping investigation.

7.37. On 3 October 2022, CUTFA sent a letter to withdraw the countervailing duty written application not specifying the reason for withdrawal.[56] Concluding that "[t]he investigation had not brought to light any considerations demonstrating that such termination would not be in the Union interest", the European Commission published the decision to terminate the countervailing duty investigation on 20 March 2023.[57]

7.2.2.3 The administration of legal instruments subject to Article X:3(a) of the GATT 1994

7.38. The European Union does not dispute that the EU Basic Anti-Dumping Regulation and the EU Basic Anti-Subsidy Regulation are laws and regulations of general application under Article X:1 of the GATT 1994. The European Union also does not dispute that these EU laws were administered in the underlying anti-dumping investigation and the countervailing duty investigation. However, at the second meeting, the European Union contended, relying on two panel reports, that for a Member's action to violate Article X:3(a) that action should have a significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question.[58] Because this dispute concerns the administration of EU law in a single case, and does not demonstrate any impact on the overall administration of the EU's dumping and subsidy regulations, the European Union contends that Indonesia's claims fail to meet this standard.[59]

7.39. We are not persuaded that these reports support the European Union's view. In particular, the European Union has not substantiated, based on the text of Article X:3(a), why we are precluded from addressing Indonesia's claims in this dispute, unless it can demonstrate a significant impact on the overall administration of EU law.[60] Nothing in the text of Article X:3(a) indicates that the

[54] Final anti-dumping determination on fatty acid (Exhibit IDN-4).
[55] Countervailing duty final disclosure (Exhibit IDN-20), paras. 1-2.
[56] Withdrawal of the countervailing duty written application (Exhibit IDN-19).
[57] Countervailing duty investigation termination decision (Exhibit IDN-21), recitals 11-12.
[58] European Union's opening statement at the second meeting of the Panel, paras. 51-53 (referring to Panel Reports, *US – Hot-Rolled Steel*, para. 7.268; *US – Corrosion-Resistant Steel Sunset Review*, para. 7.307).
[59] European Union's opening statement at the second meeting of the Panel, para. 53.
[60] The European Union argues, relying on the panel reports in *US – Hot-Rolled Steel* and *US – Corrosion-Resistant Steel Sunset Review* that for a Member's action to violate Article X:3(a), that action should have a significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question. The European Union's argument is based on a partial reading of these reports.
In *US – Hot-Rolled Steel*, the panel's statements were made in the context of its enquiry of whether the "final anti-dumping measure" of the authorities could be considered a measure of "general application". (Panel Report, *US – Hot-Rolled Steel*, para. 7.268). We note in this regard that Article X:3(a) only applies to laws, regulations, judicial decisions and administrative rulings "of general application", as set out in Article X:1. However, the issue before us is not whether the underlying final anti-dumping measure or the countervailing duty investigation termination decision are "measures of general application". The issue is about the administration of EU provisions concerning withdrawal of the written application. Moreover, the panel's understanding of the requirements under Article X:3(a) was derived from the Appellate Body report in *EC – Poultry*. (Panel Report, *US – Hot-Rolled Steel*, para. 7.266).
In *EC – Poultry*, the Appellate Body considered that a measure, such as an administrative order, would be a measure of general application to the extent it affected an unidentified number of economic operators, and conversely particular treatment accorded to each individual shipment (as was the case there) would not be a measure of general application. (Appellate Body Report, *EC – Poultry*, para. 113 (quoting Panel Report, *US – Underwear*, para. 7.65, and referring to Appellate Body Report, *US – Underwear*, p. 21)). However, the issue before us is whether the EU laws at issue (which are not disputed to have general application) were administered in a manner consistent with Article X:3(a). The panel in *US – Corrosion-Resistant Steel Sunset Review* relied on this understanding of the Appellate Body, and the panel in *US – Hot-Rolled Steel* in addressing a complaint where the thrust of the claims concerned the alleged inconsistency of certain domestic law provisions with WTO law, with the Article X:3(a) "as applied" claims derived from these main claims. (Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.308). Thus, these cases do not support the view that for a Member's action to violate Article X:3(a), that action should have a significant impact on the overall administration of that Member's law.

obligation upon a Member is only triggered when the *administration* of its laws has significant systemic effects. Therefore, we reject the European Union's argument and proceed to address Indonesia's submissions on their merits.

7.2.2.4 EU laws whose administration is at issue

7.40. Article 9(1) of the EU Basic Anti-Dumping Regulation, which is worded identically to Article 14(1) of the EU Basic Anti-Subsidy Regulation, reads as follows:

> Where the complaint is withdrawn, proceedings *may* be terminated unless such termination would not be in the Union's interest.[61]

7.41. The text shows that, if the applicant withdraws its complaint, i.e. the written application, the European Commission has the discretion to terminate the investigation, but this discretion may not be exercised when termination would not be in the Union's interest. The European Union's General Court interpreted this provision in this manner, noting that where a written application is withdrawn, the institutions "*have the option – but not the obligation – to terminate* the procedure, although they *may* not do so if it would be contrary to the Community interest".[62] Therefore, we find that the European Commission has the discretion to terminate the investigation, unless such termination would not be in the Union's interest.

7.2.2.5 The bases of Indonesia's submissions under Article X:3(a) of the GATT 1994

7.42. In the course of the dispute, Indonesia clarified the bases of its claims. Indonesia contends that the European Commission failed to administer the European Union's dumping and subsidy regulations in a *uniform manner* because[63]:

a. The European Commission applied identical provisions in Article 9(1) of the EU Basic Anti-Dumping Regulation and Article 14(1) of the EU Basic Anti-Subsidy Regulation governing the withdrawal of an application, but reached opposite decisions 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.

b. The European Commission 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.

7.43. Indonesia contends that the European Commission failed to administer the European Union's dumping and subsidy regulations in a *reasonable manner* because[64]:

a. The European Commission offered no explanation for reaching different decisions in the "parallel, closely related" anti-dumping and countervailing duty investigations following withdrawal of the written applications based on the application of identical provisions of EU law.

b. The European Commission continued the anti-dumping investigation, even though the written application was withdrawn, the domestic industry no longer supported the investigation, the interested parties supported termination, and in "similar, if not identical" circumstances the European Commission terminated the "parallel, closely related" countervailing duty investigation.

7.44. Indonesia has consistently formulated the basis of its claims in the manner set out above. This formulation suggests that at the heart of Indonesia's case is its view that the European Commission adopted *different approaches* in the underlying anti-dumping investigation

[61] Emphasis added.
[62] Philips Lighting Poland SA and Philips Lighting BV v. Council of the European Union (Exhibit IDN-17), para. 87. (emphasis added)
[63] Indonesia's response to Panel question No. 8, para. 31; second written submission, para. 21; and response to Panel question No. 49, para. 13.
[64] Indonesia's second written submission, para. 56; response to Panel question No. 49, para. 16.

and a parallel countervailing duty investigation. Indeed, Indonesia clarifies that its claim is not that the decision to continue the anti-dumping investigation is *per se* inconsistent with Article X:3(a), but rather that there has been the "administration of identical legal provisions of measures having general application in two parallel, closely related investigations, and the fact that those provisions were applied differently in similar, if not identical, circumstances".[65]

7.45. Moreover, Indonesia clarifies that (a) it is not contesting the existence of the Union interest test under the aforementioned provisions of the European Union's dumping and subsidy regulations, as those are a matter of EU substantive law; or (b) contending that the European Commission is required to immediately terminate the investigation following the withdrawal of a written application in all circumstances.[66] However, notwithstanding these clarifications, Indonesia continued to argue throughout these proceedings, and as late as the second meeting, that the European Commission does not "enjoy absolute discretion to continue or terminate an investigation" under EU law.[67] Indonesia also argued that the "Union's interest is relevant to the decision to continue as well as the decision to terminate, even if a formal Union interest test is required only when the Commission intends to terminate".[68]

7.46. We note our factual findings in this regard set out in paragraph 7.41. Article 9(1) of the EU Basic Anti-Dumping Regulation and Article 14(1) of the EU Basic Anti-Subsidy Regulation do not provide that, when the European Commission intends to continue an investigation following the withdrawal of the written application, such continuation is subject to the consideration of the Union's interest. Therefore, Indonesia's submission that the Union's interest has relevance when the European Commission intends to continue the investigation does not hold as a matter of EU law. In particular, the European Commission was not required under its law to make a decision explaining why it continued the investigation in the light of the Union's interest, and hence there is nothing with which to compare the discretion of the European Commission to terminate the countervailing duty investigation. In addition, insofar as Indonesia's contention is predicated upon the proposition that the European Commission failed to act within the scope of the discretion conferred upon it under EU law, such a contention does not fall within the scope of our review of the claim under Article X:3(a) because Article X:3(a) does not test whether a Member has acted in compliance with its own laws.

7.47. We also note Indonesia's clarification that it does not argue that the European Commission violated Article X:3(a) because it departed from its "past practice of terminating anti-dumping and [countervailing duty] investigations following the withdrawal of [an application]."[69]

7.48. We are guided by these clarifications in our review of Indonesia's claims, and accordingly will address the claims based on Indonesia's consistent formulation of their bases, set out in paragraphs 7.42(a)-(b) and 7.43(a)-(b) above.

7.2.2.6 Whether the European Commission failed to administer EU laws in a uniform manner

7.49. Indonesia's claim under Article X:3(a) that the European Commission failed to administer the European Union's dumping and subsidy regulations in a uniform manner has two underlying bases, as we noted in paragraph 7.42 above. Both bases of Indonesia's claim are premised upon the contention that the circumstances of the underlying anti-dumping investigation and the countervailing duty investigation were similar, if not identical. Indeed, Indonesia contends that the "existence of similar, if not identical circumstances is an essential fact that informs [its] claims".[70] Indonesia clarifies that its argument is not that Article X:3(a) requires uniform and reasonable administration of the same provision in two investigations in circumstances where there is no connection whatsoever between those investigations.[71] According to Indonesia, a close connection existed between the underlying anti-dumping investigation and the countervailing duty investigation. In particular, Indonesia argues that these investigations were closely related because

[65] Indonesia's response to Panel question No. 56, para. 41.
[66] Indonesia's opening statement at the first meeting of the Panel, para. 69.
[67] Indonesia's response to Panel question No. 55, para. 40.
[68] Indonesia's response to Panel question No. 55, para. 39.
[69] Indonesia's response to Panel question No. 13(a)-(c), para. 58.
[70] Indonesia's response to Panel question No. 52, para. 32.
[71] Indonesia's response to Panel question No. 52, para. 32.

they concerned (a) the same product, investigation period, period considered, exporting producers and domestic producers; and (b) were initiated by the same applicant.[72] Indonesia also references the European Commission's previous countervailing duty investigations where, in the context of those investigations, the European Commission stated 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 Union industry, the sampled EU producers and the investigation period were the same in both investigations.[73]

7.50. The European Union contends that the factual assumption underlying Indonesia's claims, which is that the circumstances involving the anti-dumping and countervailing duty investigations were similar, is fundamentally flawed.[74] The European Union considers that these investigations are "objectively different not only in light of their legal framework, but also because of their very different factual situation".[75] Therefore, the European Union asks us to reject Indonesia's claim.

7.51. Before turning to examine whether the circumstances of these two investigations were similar, we recall that the Anti-Dumping Agreement does not oblige an investigating authority to terminate an investigation when a written application is withdrawn. Moreover, Article 9.1 of the Anti-Dumping Agreement provides that the decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision of whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping, are decisions to be made by the authorities of the importing Member. Therefore, this provision gives discretion to the authorities not to impose anti-dumping measures when the requirements for the imposition of the measures are met. Article 19.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) contains a similar requirement in the context of countervailing measures.

7.52. Indonesia's arguments under Article X:3(a), which challenge the European Commission's decision to impose anti-dumping duties while terminating a parallel countervailing duty investigation following the withdrawal of the written application in both investigations, would restrict the discretion expressly granted under the Anti-Dumping Agreement and the SCM Agreement in this regard. Article X:3(a) may well be of application where discretion is exercised in a manner contrary to the requirements of this provision. However, Article X:3(a) neither limits an authority's discretion under its domestic legislation to terminate an investigation just because it has decided to continue a separate investigation under fundamentally different circumstances, nor obliges the authority to exercise its discretion to terminate that separate investigation.

7.53. Turning to the question of whether the circumstances of the underlying anti-dumping investigation and the countervailing duty investigation were similar, we note that the investigations are governed by separate domestic legal instruments (as well as separate WTO Agreements). The underlying anti-dumping investigation was concerned with protecting the domestic industry from injury caused by *dumped* imports. The countervailing duty investigation was concerned with protecting the domestic industry from *subsidized* imports.

7.54. These substantive differences in the nature and scope of these investigations mean that the factual enquiry and the evidence relevant in determining whether to terminate or continue an investigation are also different, with one requiring evidence of dumping and the other subsidization. The legal requirements that an authority must meet under both domestic law and the Anti-Dumping Agreement before an authority is permitted to imposes an anti-dumping duty are also fundamentally different from what the authority must meet before it is permitted to impose a countervailing duty under domestic law and the SCM Agreement. These fundamental differences do not disappear because there is some overlap in the substantive consideration or procedural aspects of the two investigations, including that both anti-dumping measures and countervailing measures seek to protect the domestic industry from material injury, or because of the reasons alluded by Indonesia and discussed in paragraph 7.49 above, including that the investigations were conducted

[72] Indonesia's first written submission, para. 102; second written submission, para. 26.
[73] Indonesia's response to Panel question No. 48, para. 9; Extracts from final determinations of previous EU countervailing duty investigations (Exhibit IDN-54).
[74] European Union's second written submission, para. 31.
[75] European Union's response to Panel question No. 47, para. 4. (emphasis omitted)

in "parallel", concerned the same applicants and exporters, or that the written application was withdrawn in both investigations.

7.55. Considering the evidence and factual foundation required to impose anti-dumping measures and countervailing measures, the factual circumstances of the underlying anti-dumping investigation and the countervailing duty investigation cannot be said to be similar. We note that the European Commission imposed the anti-dumping measures in the underlying investigation after finding, based on the record evidence, that dumped imports were causing material injury to the domestic industry. Nothing in EU law or the Anti-Dumping Agreement precluded the European Commission from imposing anti-dumping measures in this case. In contrast, at the time the European Commission terminated the countervailing duty investigation, it had not established based on the record evidence the existence of subsidies, or that subsidized imports were causing material injury to the domestic industry. Nothing in EU law or the SCM Agreement precluded the European Commission from terminating the investigation in this case.

7.56. We have concerns that Indonesia's approach under Article X:3(a) would require an investigating authority to give consideration to (i) terminate the anti-dumping investigation even when the conditions for the imposition of an anti-dumping measure are met, or (ii) continue a "parallel" countervailing duty investigation and engage in all the investigative steps even when it is inclined, and indeed has the discretion under WTO law, to terminate that countervailing duty investigation. We disagree that Article X:3(a) provides any basis for this requirement. It follows that we also see no basis in Article X:3(a) to require a "determination" from an authority justifying and explaining the divergent courses of the two investigations pursuant to different legislations in these fundamentally different circumstances.

7.57. Considering the discretion granted under EU law, Article 9.1 of the Anti-Dumping Agreement, and Article 19.2 of the SCM Agreement, we do not consider that Article X:3(a) obliged the European Commission to terminate the anti-dumping investigation when the conditions for the imposition of anti-dumping measures were met just because it terminated the countervailing duty investigation. We similarly do not consider that Article X:3(a) obliged the European Commission to continue with the countervailing duty investigation just because it decided to proceed with the anti-dumping investigation.

7.58. Because the factual circumstances of the underlying anti-dumping investigation and the countervailing duty investigation were not similar, Indonesia has not established that the European Commission failed to administer Article 9(1) of the EU Basic Anti-Dumping Regulation and Article 14(1) of the EU Basic Anti-Subsidy Regulation in a uniform manner because it (a) reached opposite decisions in "similar, if not identical" circumstances, despite its prior practice of terminating anti-dumping and countervailing duty investigations in case of withdrawal of the application; or (b) 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 application.

7.59. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with the requirement of uniform administration under Article X:3(a) of the GATT 1994.

7.2.2.7 Whether the European Commission failed to administer EU laws in a reasonable manner

7.60. Indonesia's claim under Article X:3(a) that the European Commission failed to administer the European Union's dumping and subsidy regulations in a reasonable manner has two underlying bases, as we noted in paragraph 7.43 above. Like its contention regarding the European Commission's alleged failure to administer EU laws in a uniform manner, Indonesia contends that the "existence of similar, if not identical circumstances is an essential fact that informs [its] claims" on the European Commission's alleged failure to administer EU laws in a reasonable manner.[76] Indonesia's clarification on the alleged close connection between the underlying anti-dumping investigation and the countervailing duty investigation is detailed in paragraph 7.49.

[76] Indonesia's response to Panel question No. 52, para. 32.

7.61. We have already found in paragraph 7.58 above that the factual circumstances of the underlying anti-dumping investigation and the countervailing duty investigation were not similar. As Indonesia's claim rests upon the similarity of the two investigations, once, as we have found, there is no such similarity, the basis of Indonesia's claim as described in paragraph 7.43 no longer stands.

7.62. Moreover, we disagree with Indonesia that the European Commission was required to explain pursuant to Article X:3(a) the divergent courses of the two investigations. This type of explanation requires the authority to explain its conclusion in one investigation by reference to its conclusion in another investigation. We note that Indonesia has not shown that either domestic EU law or the European Union's "prior practice"[77] imposes an obligation to provide this type of explanation. In any case, Indonesia's claim under Article X:3(a) is not premised upon the European Commission's compliance with its own practices.

7.63. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with the requirement of reasonable administration under Article X:3(a) of the GATT 1994.

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

7.64. In this dispute, Indonesia makes "as such" and "as applied" claims under Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994, against alleged methodologies applied by the European Commission for constructing the normal value of certain models (or PCNs) in anti-dumping investigations. In making its "as such" claims, Indonesia contends that these methodologies are an unwritten measure in the form of rule or norm of general and prospective application.

7.65. We find it appropriate to begin our analysis by first examining Indonesia's claim in respect of the alleged unwritten measure before moving on to examine the application of the alleged methodology in the underlying investigation.

7.3.1 Indonesia's "as such" claims under Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994

7.66. Indonesia challenges the methodological approach used by the European Commission for constructing normal value based on PCN-specific cost 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.[78] Indonesia's challenge concerns their use in original investigations and excludes situations where the European Commission finds "significant distortions" in the exporting country pursuant to EU domestic law.[79]

7.67. Indonesia characterizes the methodologies as an unwritten measure of the European Union in the form of a rule or norm of general and prospective application.[80] Indonesia asks the Panel to find that this unwritten measure is "as such" inconsistent with Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994.

7.3.1.1 Establishing the existence of an unwritten measure

7.68. Past dispute settlement reports have noted that where a measure is not found in written form, as is the case here, its very existence may be uncertain.[81] In the light of its obligations under Article 11 of the DSU, a panel must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document.[82] The specific measure at issue and how it is described, characterized, and

[77] Indonesia's list of previous EU decisions to terminate investigations (Exhibit IDN-53).
[78] Indonesia's first written submission, para. 61.
[79] Indonesia's opening statement at the first meeting of the Panel, para. 38.
[80] Indonesia's first written submission, para. 343.
[81] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, appealed 19 March 2021, para. 7.608; Appellate Body Report, *US – Zeroing (EC)*, para. 197.
[82] Appellate Body Report, *US – Zeroing (EC)*, para. 196.

challenged by a complainant will inform the kind of evidence the complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged.[83]

7.69. In challenging what the complainant contends is an unwritten rule or norm of general and prospective application, the parties agree[84] that the complainant must clearly establish by way of supporting evidence the following:

a. the precise content of the rule or norm in question;

b. that the rule or norm is attributable to the respondent Member; and

c. that the rule or norm has general and prospective application, in that:

   i. the rule or norm is considered to have *general* application to the extent it affects an unidentified number of economic operators[85]; and

   ii. the rule or norm is considered to have *prospective* application to the extent it applies in the future.[86]

7.70. Specifically on prospective application, a rule or norm has prospective application to the extent that it applies in the future.[87] However, complainants in WTO panel proceedings are not required to show with certainty that a given measure will necessarily apply in all future situations. The rationale for such an approach is that a complainant may not be able to make such a showing because a measure, written or unwritten, may be modified, withdrawn or no longer applied.[88] In previous disputes, panels and the Appellate Body have relied on different types of evidence to show prospective application, and these disputes thus offer some guidance on how a complainant may be able to establish that a rule or norm has prospective application. However, as the Appellate Body recognized in *US – Anti-Dumping Methodologies (China)*, any examination of whether or not a rule or norm has prospective application may vary from case to case.[89]

7.71. We share these views and are guided by them in our evaluation. Therefore, to prevail in its "as such" claims, Indonesia will need to demonstrate the precise content of the alleged rule or norm, its attributability to the European Union, and that it has general and prospective application. If Indonesia can establish that the unwritten measure exists, it will then have to establish that this measure is inconsistent with Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994. We will examine these two questions in turn.

7.3.1.2 Precise content of the alleged rule or norm

7.72. We commence our analysis by reviewing Indonesia's description of the alleged rule or norm in its panel request, before moving on to examine Indonesia's submissions and the evidence before the Panel.

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[83] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.123.

[84] Indonesia's first written submission, paras. 318 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.110) and 343 (referring to Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, paras. 5.130, 5.132, 5.142, and 5.147). See also Appellate Body Reports, *US – Zeroing (EC)*, para. 198; *US – Anti-Dumping Methodologies (China)*, para. 5.127.

The European Union does not disagree with this standard but contends that Indonesia has not provided sufficient evidence to show that the methodologies in question are an unwritten measure of general and prospective application. Specifically, the European Union argues that Indonesia has not established the precise content of the alleged rule or norm, or that the rule or norm has prospective application. (European Union's first written submission, paras. 33 and 39-43)

[85] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.130.

[86] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132. See also Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172 and 187; *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

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

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

[89] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.133.

7.3.1.2.1 Description of the alleged rule or norm in Indonesia's panel request

7.73. In describing the specific measure at issue in its panel request, Indonesia stated that:

> [T]he claims identified in this panel request pertain to the methodology for constructing normal value based on PCN-specific costs and profit data (referred to as the "second methodology" in Section I.B. [of the panel request] above) 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.[90]

7.74. In section I.B. of the panel request, Indonesia described the measure as follows:

> In circumstances where the domestic sales volume of certain PCNs constitutes less than 5% of the total volume of the same PCNs sold to the European Union, the European Union uses different methodologies for constructing the normal value of those PCNs depending on whether a PCN has no or some profitable sales during the investigation period:
>
> - when a PCN has no profitable sales during the entire investigation period, the amounts for SG&A and for profit used to construct the normal value of that PCN are based on weighted average of all profitable domestic sales of the exporting producer (first methodology) [referred to as "CNV Company methodology" in this Report];
>
> - when a PCN has some profitable sales (even very minor) during the investigation period, the amounts for SG&A and for profit used to construct the normal value of that PCN are based on weighted average of the profitable domestic sales of that PCN only (second methodology) [referred to as "CNV PCN methodology" in this Report].
>
> The second methodology, whereby the [European] Commission exclusively uses the data relating to the specific PCN, is consistently applied by the [European] Commission in its anti-dumping investigations, including the fatty acid anti-dumping investigation, when a PCN has some profitable sales (even very minor) during the investigation period. It is evidenced by the findings of previous investigations and is also reflected in the OASYS calculation file, included in the company-specific disclosure files in each EU anti-dumping investigation, which shows the different steps followed by the [European] Commission when calculating normal value.[91]

7.75. In its panel request and in its submissions to the Panel, Indonesia claims that the second methodology, i.e. the CNV PCN methodology, is inconsistent with Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement.[92] Indonesia also claims that the use of two different methodologies, the CNV PCN and CNV Company methodologies, depending on the existence of profitable sales, is inconsistent with Article X:3(a) of the GATT 1994.

7.3.1.2.2 Description of the content of the alleged rule or norm in Indonesia's submissions to the Panel

7.3.1.2.2.1 Indonesia's description of the alleged rule or norm in its submissions

7.76. Indonesia explains that it "challenges the EU methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country".[93] Specifically, as in its panel request, Indonesia states that "in circumstances where the domestic sales volume of certain PCNs constitutes less than 5% of the total volume of the same PCNs sold to the European Union, the European Union uses two different methodologies for constructing the normal value of those PCNs" and the "applicable methodology depends on whether a PCN has no or some

[90] Indonesia's panel request, p. 4.
[91] Indonesia's panel request, p. 4. (emphasis omitted)
[92] Indonesia's first written submission, para. 348.
[93] Indonesia's first written submission, para. 319.

profitable sales during the investigation period".[94] Indonesia describes these alleged two different methodologies, i.e. the CNV Company and CNV PCN methodologies, and the criteria for their application as follows:

> [W]hen a PCN has no profitable sales during the entire investigation period, the amounts for SG&A and for profit used to construct the normal value of that PCN are based on the weighted average of *all* profitable domestic sales of the like product (meaning all PCNs) of the exporting producer (first methodology or "CNV Company")
>
> [W]hen a PCN has some profitable sales (even if very minor) during the investigation period, the amounts for SG&A and for profit used to construct the normal value of that PCN are based on weighted average of the profitable domestic sales of *that PCN only* (second methodology or "CNV PCN").[95]

7.77. We note that the burden of proof rests upon Indonesia to establish the precise content of the rule or norm, as described by it, based on evidence.

7.3.1.2.2.2 Evidence presented by Indonesia to establish the precise content of the rule or norm

7.78. Indonesia relies on the following evidence to establish the precise content of the rule or norm, which, it contends[96], must be read together:

a. The European Commission's description of the methodologies, set out in previous investigations concerning imports of various products from multiple countries between 2012 and 2025 contained in the list prepared by Indonesia[97], as well as findings in the underlying investigation.[98]

b. The European Commission's OASYS programme[99] that Indonesia contends is used by the European Commission in *every* anti-dumping investigation.[100] Indonesia presents calculations from the OASYS programme file that the European Commission disclosed to Musim Mas, an Indonesian producer, as part of the additional final disclosure. Indonesia submits that the OASYS programme file uses a consistent format and methodology[101], and that the content of this file reflects the European Commission's approach not just in the underlying investigation but across all original investigations.

7.79. In particular, Indonesia submits that "[a]t least in the last decade" disclosures of the dumping margin calculations provided to cooperating exporters came from the OASYS programme.[102] Indonesia relies specifically on the following parts of those calculations[103]:

a. Musim Mas's dumping margin calculations in the underlying investigation, as disclosed by the European Commission, contained in the OASYS programme file[104], including those contained in the sheets titled "Annex 2.7 Scenario" and "Annex 2.5 OCOT test".

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[94] Indonesia's first written submission, para. 319.
[95] Indonesia's first written submission, para. 319; response to Panel question No. 22, para. 118. (italics original; underlining added)
[96] Indonesia's response to panel question No. 65, para. 105.
[97] Indonesia's list of previous EU anti-dumping investigations (Exhibit IDN-52).
[98] Indonesia's opening statement at the second meeting of the Panel, para. 81; first written submission, para. 321.
[99] According to the parties' submissions, the "OASYS programme" is a computer programme used by the European Commission in the calculation of dumping margins. The calculations carried out by the OASYS programme are set out in an MS Excel file containing figures and formulae across multiple sheets, which is disclosed to respective subject exporters. In this Report, we use the term "OASYS programme file" to refer to this MS Excel file. See e.g. Indonesia's first written submission, paras. 324 and 341; European Union's response to Panel question No. 69(b)(iii), para. 35.
[100] Indonesia's opening statement at the second meeting of the Panel, para. 81.
[101] Indonesia's first written submission, para. 324.
[102] Indonesia's first written submission, para. 324.
[103] Indonesia's opening statement at the second meeting of the Panel, para. 81.
[104] Musim Mas OASYS programme file (Exhibit IDN-38 (BCI)).

b. Explanation of the dumping margin calculations in narrative form contained in a final disclosure document to Musim Mas.[105]

7.3.1.2.3 Whether Indonesia has established the precise content of the rule or norm based on evidence

7.80. We draw attention to the specific features of the alleged unwritten rule or norm as described by Indonesia.

a. Indonesia describes the CNV PCN methodology as a methodology "where the European Commission exclusively uses the data relating to the specific PCN" "when a PCN has some profitable sales (even very minor) during the investigation period" and that in applying this methodology, the European Commission calculates the amounts for selling, general, and administrative (SG&A) costs and for profit used to construct the normal value of that PCN based on a "weighted average of the profitable domestic sales of that PCN only".

b. Indonesia describes the criterion applied by the European Commission in selecting between the CNV PCN and CNV Company methodologies to be "whether a PCN has no or some profitable sales during the investigation period". Indonesia also describes the CNV Company methodology as the methodology that the European Commission adopts where there are "no profitable sales". In particular, according to Indonesia, the European Commission applies this methodology where[106]:

   i. PCNs that are not sold in representative quantities in the domestic market have no profitable sales.

   ii. PCNs are not sold at all in the domestic market.

7.81. The European Union disagrees with Indonesia's description of the alleged rule or norm.

7.82. First, the European Union challenges Indonesia's submission that the European Commission applies two separate methodologies, i.e. the CNV PCN and CNV Company methodologies, and contends that the European Commission adopts a single approach in its assessment of SG&A costs and profit.[107] In particular, in line with the Appellate Body's interpretation of Article 2.2.2 of the Anti-Dumping Agreement in *EC – Tube or Pipe Fittings*, the European Commission first seeks to use actual data pertaining to production and sales in the ordinary course of trade to determine SG&A costs and profit.[108] Where such data exist for the exporter and the like product under investigation, the European Commission uses these data in constructing the normal value.[109] If such data are not available at the PCN level, the European Commission "zooms-out" and resorts to aggregating data across all PCNs as the most reasonable alternative.[110]

7.83. Second, the European Union rejects Indonesia's contention that the CNV PCN methodology is "triggered by the mere existence of 'some profitable sales (even if very minor)'".[111] The European Union notes in this regard Indonesia's acknowledgement that the European Commission excludes certain sales within a PCN as not being in the ordinary course of trade and does so regardless of whether those sales are profitable.[112] It follows, in the European Union's view, that a particular PCN may include "profitable sales (even if very minor)", which will nevertheless not be used to calculate PCN-level profit if those sales are not made in the ordinary course of trade, in which case the European Commission may still rely on the CNV Company methodology rather than the CNV PCN methodology to calculate profit.[113] Therefore, according to

[105] Musim Mas final disclosure document on dumping calculations (Exhibit EU-5 (BCI)).
[106] Indonesia's response to Panel question Nos. 62-64, paras. 80-81; response to Panel question No. 23, para. 125.
[107] European Union's first written submission, paras. 287-289.
[108] European Union's first written submission, para. 289.
[109] European Union's first written submission, para. 289.
[110] European Union's first written submission, para. 289.
[111] European Union's response to Panel question No. 68, para. 25.
[112] European Union's comments on Indonesia's response to Panel question Nos. 62-64, para. 63.
[113] European Union's comments on Indonesia's response to Panel question Nos. 62-64, para. 63.

the European Union, Indonesia's assertion that the European Commission uses the CNV PCN methodology when there are some "profitable sales (even if very minor)" is factually inaccurate.

7.84. In addition, the European Union challenges the factual accuracy of Indonesia's submission that when applying the CNV PCN methodology, the European Commission calculates profits based on the weighted average of the "profitable domestic sales of that PCN only". The European Union asserts that if "more than 80%" of the sales transactions in a PCN are profitable, the European Commission would normally use the profit rate derived from all transactions, both profitable and non-profitable.[114] If "less than 80%" are profitable, the European Commission would normally use the profit rate derived from all profitable transactions.[115] The European Union submits that the European Commission adopts this approach as part of a "single coherent approach" in which it uses transactions that are in the ordinary course of trade.[116] Therefore, according to the European Union, the European Commission does not necessarily use only profitable sales of that PCN when applying the CNV PCN methodology.

7.85. We now turn to a consideration of the evidence as to whether the alleged rule or norm was applied in the underlying investigation as well as in past investigations, as set out in Indonesia's list of previous EU anti-dumping investigations (Exhibit IDN-52).

7.3.1.2.3.1 Evidence from past investigations

7.86. Indonesia relies[117] as evidence on the following description in the underlying investigation (the European Commission refers here to PCNs as "product types"):

> *For the product types not sold in representative quantities on the domestic market*, the average SG&A expenses and profit of transactions made in the ordinary course of trade on the domestic market for those types were added [which Indonesia describes as CNV PCN]. *For the product types not sold at all on the domestic market*, the weighted average SG&A expenses and profit of all transactions made in the ordinary course of trade on the domestic market were added [which Indonesia describes as CNV Company].[118]

7.87. Indonesia submits that the excerpts included in its list of previous EU anti-dumping investigations (Exhibit IDN-52) contain language similar to its descriptions of the methodologies quoted above.[119] We note that while the language used by the European Commission in some of the previous findings quoted in the list to describe its approach is identical to that used in the underlying investigation, there are some variations in the language used in some of the other findings quoted in the list. Some of those findings provide the following description, which is broader (the additional language in these findings is emphasized in the text below):

> For the product types not sold in representative quantities on the domestic market, the average SG&A expenses and profit of transactions made in the ordinary course of trade on the domestic market for those types were added. For the product types not sold at all on the domestic market, *or where no sales were found in the ordinary course of trade*, the weighted average SG&A expenses and profit of all transactions made in the ordinary course of trade on the domestic market were added.[120]

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[114] European Union's second written submission, para. 169.
[115] European Union's second written submission, para. 169.
[116] European Union's second written submission, para. 170.
[117] Indonesia's first written submission, para. 321.
[118] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 140. (emphasis added)
[119] Indonesia's response to Panel question No. 65, para. 105.
[120] See e.g. Indonesia's list of previous EU anti-dumping investigations (Exhibit IDN-52), item 2, "Commission Implementing Regulation (EU) 2025/670 of 4 April 2025 imposing a provisional anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Egypt, Japan and Vietnam", recital 90 (highlighting omitted; italics added). Indonesia notes in this exhibit that the methodology was confirmed in the final determination, highlighting recital 57 of "Commission Implementing Regulation (EU) 2025/1919 of 25 September 2025 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Egypt, Japan and Vietnam, and terminating the investigation on imports thereof originating in India".

7.88. The excerpts show that for "product types not sold in representative quantities on the domestic market" the European Commission constructed the normal value on the basis of PCN-level SG&A costs and profit of transactions *made in the ordinary course of trade*. In contrast, where there were no sales of that PCN in the domestic market, or the sales were not found to be in the ordinary course of trade, the weighted average of SG&A costs and profit of *all transactions made in the ordinary course of trade in the domestic market* was used. This language does not, on its face, align with Indonesia's description of the alleged measure in paragraph 7.76 above.

7.89. The criterion for applying the CNV PCN methodology set out in Indonesia's description in paragraph 7.76 above is "when a PCN has some profitable sales (even if very minor) during the investigation period", in which case, per Indonesia, the European Commission relies on the "weighted average of the profitable domestic sales of that PCN only". However, the European Commission does not specify in the excerpts set out above that it applies the CNV PCN methodology where there are "some profitable sales", and thus, on its face, these excerpts do not support Indonesia's description.

7.90. Moreover, the excerpts quoted by Indonesia do not show that when the investigating authority applies the CNV PCN methodology, it uses the weighted average of the "profitable domestic sales of that PCN only". Instead, the European Commission relies on SG&A costs and profit of all transactions of the PCN "made in the ordinary course of trade on the domestic market". We find these descriptions to be consistent with the European Union's assertion, supported by the evidence on the record, that if more than 80% of the sales transaction in a PCN are profitable, the European Commission would normally use the profit rate derived from all transactions, both profitable and non-profitable (reflecting the rules under Article 2.2.1 of the Anti-Dumping Agreement, which sets out when non-profitable sales transactions may be treated as outside the ordinary course of trade by reason of price). This assertion, which Indonesia has not rebutted, undermines Indonesia's characterization of the CNV PCN methodology as a methodology under which the European Commission allegedly uses, as part of the CNV PCN methodology, the "weighted average of the profitable domestic sales of that PCN only".

7.91. The criterion for applying the CNV Company methodology set out in Indonesia's description in paragraph 7.76 above is "when a PCN has no profitable sales during the entire investigation period", which also does not align with the European Commission's description of its methodological approach. The European Commission describes the criterion for applying the CNV Company methodology to be (a) when the PCNs were not sold at all on the domestic market, or (b) where it did not find any sales of the PCN in the ordinary course of trade. The concept of "ordinary course of trade" is broader than the issue of below-cost sales, i.e. non-profitable transactions, as Indonesia acknowledges.[121] Therefore, we do not see the European Commission's reference to the absence of domestic sales at all, or in the ordinary course of trade, to suggest that the European Commission applies the CNV Company methodology when there are no profitable sales.

7.92. Thus, the European Commission's description of its methodological approach in the underlying investigation and in the findings contained in Indonesia's list of previous EU anti-dumping investigations (Exhibit IDN-52) does not establish the precise content of the alleged rule or norm as described by Indonesia, including the content of the CNV PCN methodology or the criterion adopted to choose between the CNV PCN and CNV Company methodologies. In response to our questions at the second meeting, Indonesia stated that (a) the European Commission's findings in its previous investigations and in the underlying investigation "explain, in a general manner" the methodologies the European Commission uses to construct normal value at the PCN level; and (b) these findings must be read together with the other evidence presented by Indonesia showing the existence and precise content of the CNV PCN and CNV Company methodologies.[122]

7.93. We accordingly turn to the other evidence presented by Indonesia in this regard, which are the OASYS programme file used in the underlying investigation and the explanations provided by the European Commission regarding the dumping margin calculations.

[121] Indonesia's response to Panel question Nos. 62-64, para. 77.
[122] Indonesia's response to Panel question No. 65, para. 105.

7.3.1.2.3.2 The OASYS programme file

7.94. Indonesia contends that the OASYS programme file shows that the rule or norm described by it exists. Indonesia argues that while the excerpts from the European Commission's previous findings, discussed above, typically use the term "ordinary course of trade" or its abbreviation OCOT or OCT, "in practice, to determine whether to use CNV Company or CNV PCN, the European Commission only checks (in the context of the OCOT test) whether a given PCN (with non-representative domestic sales) has *any* profitable sales".[123]

7.95. In particular, "in practice", the European Commission excludes from the input data fed into the OASYS programme those sales that are outside the ordinary course of trade for reasons other than the fact that they are not profitable.[124] Once the data are fed into this programme, the only relevant criterion in deciding whether the European Commission will apply the CNV Company or CNV PCN methodology is the existence of profitable sales.[125] For this reason, according to Indonesia, the concept of ordinary course of trade used in the European Commission's "calculations" is limited to the issue of profitable sales.

7.96. To prove that this is the case, Indonesia relies on the formulae and data aggregation in the OASYS programme file disclosed to Musim Mas.[126] In particular, Indonesia submits that the file shows that where "none" of the sales transactions are profitable, the European Commission applies the CNV Company methodology, whereas if there are "some" profitable sales, the European Commission applies the CNV PCN methodology.[127] Therefore, according to Indonesia, the existence of profitable sales is the "sole element" that determines whether the European Commission shall apply the CNV Company or CNV PCN methodology to construct the normal value of PCNs with insufficient domestic sales.[128] Indonesia also submits in this regard that the European Commission's explanations for the calculations provided in the final disclosure document on dumping calculation show that it applies the CNV Company methodology when PCNs are not sold in the domestic market or when no profitable sales are found for the PCN in question.[129]

7.97. The European Union rejects Indonesia's reliance on the OASYS programme file to establish the precise content of the alleged rule or norm. The European Union asserts in this regard that Indonesia seeks to establish the existence of a rule or norm by describing only part of the overall methodology, that is, the part where the calculations are performed under the OASYS programme.[130] In doing so, Indonesia ignores what happens before these calculations, where the transactions may be removed from the dataset for not being in the ordinary course of trade.[131]

7.98. Moreover, the European Union submits that the OASYS programme follows the approach in Article 2.2.1 of the Anti-Dumping Agreement, which calculates profits based on all sales transactions,

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[123] Indonesia's response to Panel question Nos. 62-64, paras. 79 and 84. (emphasis original)
[124] Indonesia's comments on the European Union's response to Panel question No. 68, para. 21.
[125] Indonesia's comments on the European Union's response to Panel question No. 68, para. 21.
[126] Indonesia's response to Panel question Nos. 62-64, paras. 83-84, 86, 88, 91, 93 and 100-103; Musim Mas OASYS programme file (Exhibit IDN-38 (BCI)).
[127] Indonesia's response to Panel question Nos. 62-64, para. 93.
[128] Indonesia's response to Panel question Nos. 62-64, para. 83.
[129] Indonesia's response to Panel question Nos. 62-64, paras. 100-103 (referring to Musim Mas final disclosure document on dumping calculations (Exhibit EU-5 (BCI))).
[130] European Union's comments on Indonesia's response to Panel question Nos. 62-64, para. 65.
[131] European Union's comments on Indonesia's response to Panel question Nos. 62-64, para. 65. The European Union also argues that Indonesia's arguments ignore what happens after the application of the OASYS programme because the European Commission is willing to engage on the substance with arguments that the use of data in the ordinary course of trade may not lead to reasonable amounts for profit within the meaning of Article 2.2.2 of the Anti-Dumping Agreement. (European Union's comments on Indonesia's response to Panel question Nos. 62-64, para. 65 (referring to Final anti-dumping determination on fatty acid (Exhibit IDN-4), recitals 163-164)). We note that the European Commission rejected Musim Mas's arguments on the profit amount by stating, *inter alia*, that it "cannot disregard the profit margin of the domestic sales made in the ordinary course of trade". (Final anti-dumping determination on fatty acid (Exhibit IDN-4), recitals 163-164). The European Commission's response that it cannot disregard profits based on sales in the ordinary course of trade undermines the argument that it will consider whether profits based on sales data in the ordinary course of trade are reasonable. The European Union has not presented any other evidence to support this submission, and we accordingly do not consider it as part of our analysis.

including non-profitable ones, when more than 80% of the sales transactions are profitable.[132] When this threshold is not met, only profitable sales are considered to be in the ordinary course of trade.[133] Therefore, according to the European Union, the European Commission's data selection under the OASYS programme is based on the ordinary course of trade test.

7.99. We note in this regard that it is not disputed that sales outside the ordinary course of trade for reasons other than the fact that they are not profitable may be excluded from the input data fed into the OASYS programme. In our view, this exclusion shows that a subset of the overall transactions is fed into OASYS programme, which, in turn, supports the European Union's view that the OASYS programme is one part of the overall methodology applied by the European Commission in making its profit calculation. Thus, while Indonesia "challenges the EU methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country" the OASYS programme only shows one step of the alleged EU methodologies. This limits the probative value of the OASYS programme file in showing the overall workings of the methodologies alleged by Indonesia.

7.100. Moreover, with respect to Indonesia's specific submissions concerning the OCOT test contained in the OASYS programme file, we are not persuaded that this file shows that the European Commission does not actually select transactions based on whether they are in the ordinary course of trade. Our review of the programme file leads us to agree with the European Union that this test under the OASYS programme calculates profits based on all sales transactions, including non-profitable ones, when more than 80% of the sales transactions are profitable. When this threshold is not met, only profitable sales are in the ordinary course of trade. Indonesia does not dispute this aspect of the OCOT test.[134]

7.101. Indonesia's contention instead is that when "none" of the sales are profitable the OASYS programme is designed to apply the CNV Company methodology, and therefore the criterion under the OASYS programme for using the CNV Company methodology is the absence of profitable sales.[135] However, it is not argued by Indonesia that such non-profitable sales are in the ordinary course of trade, and thus we do not consider that the European Commission's use of the CNV Company methodology suggests that the European Commission applies a criterion based on profitable sales, rather than the ordinary course of trade. Therefore, the OASYS programme file also does not prove the precise content of the alleged rule or norm described by Indonesia.

7.3.1.2.3.3 Conclusion on precise content of the alleged rule or norm

7.102. We have reviewed all the evidence presented by Indonesia. The European Commission's findings in past investigations do not show that it applied the methodologies described by Indonesia. Indonesia nevertheless invited us to consider these findings in the light of other evidence, specifically the dumping margin calculations contained in the OASYS programme file.

7.103. The calculations performed in the OASYS programme file are simply a step in the European Commission's PCN-specific normal value calculation, and thus do not reflect the overall methodological approach of the European Commission in calculating PCN-specific SG&A costs and profit. Moreover, neither the European Commission's findings in previous investigations nor the OASYS programme file show that the European Commission applies a criterion based on the presence or absence of profitable sales, rather than a criterion based on whether sales are in the ordinary course of trade. We find that the OASYS programme file by itself, or when read in conjunction with the European Commission's description of its methodological approach set out in the underlying investigation and past investigations, does not prove the precise content of the alleged rule or norm as described by Indonesia in its claim. Therefore, Indonesia has not proved that the unwritten measure that it challenges does indeed exist.

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[132] European Union's comments on Indonesia's response to Panel question Nos. 62-64, para. 57; first written submission, paras. 291-292.

[133] European Union's comments on Indonesia's response to Panel question Nos. 62-64, para. 57; first written submission, paras. 291-292.

[134] See e.g. Indonesia's response to Panel question Nos. 62-64, para. 91. Indonesia provides a similar description regarding the operation of the methodologies.

[135] See e.g. Indonesia's response to Panel question Nos. 62-64, paras. 93-99.

7.3.1.3 Attribution, and general and prospective nature of the rule or norm

7.104. Having concluded that Indonesia has not proved the existence of the unwritten measure, there is no measure that can be attributed to the European Union or that can have general application.

7.105. In respect of the enquiry into prospective application, Indonesia emphasized at the second meeting and in its submissions (a) the acknowledgement by the European Union, during the second meeting, that certain aspects of the calculation in the OASYS programme were standard, and not case specific; and (b) the European Union's concession that it could not identify any instance where the methodological approach described in paragraphs 7.86-7.87 was not followed.[136] As to (a), in the light of our finding that the OASYS programme is not evidence of the precise content of the alleged rule or norm described by Indonesia, the European Union's acknowledgement is not evidence of the prospective application of the rule or norm described by Indonesia. Aspects of the OASYS program may have prospective application, but that does not establish that the rule or norm described by Indonesia does so. As to (b), the methodological approach described in paragraphs 7.86-7.87 is not the methodological approach captured by the rule or norm described by Indonesia. Therefore, whether or not the European Commission has departed from this approach in any investigation cannot be probative on whether the rule or norm described by Indonesia has prospective application. Moreover, as we have concluded that Indonesia has not proved the existence of the unwritten measure, we find that there is no measure that can have prospective application.

7.3.1.4 Conclusion

7.106. For the foregoing reasons, we find that Indonesia has not proved the existence of the rule or norm it describes in paragraph 7.76 as a rule or norm of general and prospective application attributable to the European Union. Accordingly, we do not consider whether the alleged unwritten measure, which Indonesia has not established exists, is inconsistent with either Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement, or Article X:3(a) of the GATT 1994.

7.3.2 Indonesia's "as applied" claims under Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994

7.107. We have rejected Indonesia's "as such" claims because Indonesia has not proven the existence of the unwritten measure described by it. Indonesia also challenges the European Commission's methodological approach adopted in the underlying investigation, pertaining to the calculation of SG&A costs and profits, under Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994. We turn to a consideration of these "as applied" claims.

7.108. Indonesia claims that the European Union acted inconsistently with Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement in constructing the normal value of two PCNs exported by Musim Mas. Indonesia's claims concern the SG&A costs and profit component of that normal value. Indonesia also claims that the European Union violated Article X:3(a) of the GATT 1994 because by applying in the underlying investigation two different methodologies (i.e. the CNV PCN and CNV Company 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 EU Basic Anti-Dumping Regulation in a uniform and reasonable manner.[137]

7.109. In the underlying investigation, the European Commission subdivided the investigated product into several PCNs, calculated intermediate dumping margins for each PCN, and then aggregated these intermediate margins to arrive at Musim Mas's overall dumping margin. The European Commission constructed the normal value for seven of the PCNs that Musim Mas exported to the European Union.

[136] Indonesia's second written submission, para. 14.
[137] Indonesia's first written submission, para. 298.

a. Five of these PCNs were not sold in the domestic market during the period of investigation (POI).[138, 139]

   i. In constructing the PCN-specific normal value for each of these five PCNs, the European Commission used the SG&A costs and profit based on domestic sales in the ordinary course of trade for all PCNs that made up the like product.[140]

b. Two of these PCNs were sold in the domestic market in the ordinary course of trade but the European Commission did not consider them representative because their domestic sales volume was less than 5% of their export sales volume (low volumes).[141]

   i. In constructing the PCN-specific normal value for each of these two PCNs, the European Commission used their respective SG&A costs and profit based on domestic sales in the ordinary course of trade.[142]

7.110. Therefore, the SG&A cost and profit component of a PCN that was sold in low volumes (but in the ordinary course of trade) was derived from the SG&A costs and profit of that specific PCN. The SG&A cost and profit component of a PCN not sold at all was based on an aggregate SG&A costs and profit of domestic sales in the ordinary course of trade for all PCNs (i.e. for the like product as a whole).

7.3.2.1 Whether the European Commission acted inconsistently with Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement

7.3.2.1.1 Legal standard

7.111. Article 2.2 of the Anti-Dumping Agreement provides as follows:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin *plus a reasonable amount for administrative, selling and general costs and for profits*.[143]

7.112. While Article 2.2 requires authorities to use a reasonable amount for SG&A costs and profits, it does not prescribe any methodology on how such costs and profits are to be calculated. It is Article 2.2.2 which sets out the rules for ascertaining such costs and profits.

7.113. The *chapeau* of Article 2.2.2, which is at issue in this dispute, provides as follows:

> For the purpose of paragraph 2 [i.e. Article 2.2], the amounts for administrative, selling and general costs and for profits *shall 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

[138] In the European Commission's final anti-dumping determination, the period of investigation of dumping and injury (October 2020 to September 2021) is called "the investigation period", and the period covered by its injury trend assessment (January 2018 to September 2021) is called "the period considered". (Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 54). In this Report, we call the former period "POI", and the latter period as "injury period".

[139] Musim Mas OASYS programme file (Exhibit IDN-38 (BCI)), annex 2.1. See also Indonesia's first written submission, paras. 195-196; European Union's first written submission, para. 192.

[140] Indonesia's opening statement at the second meeting of the Panel, para. 58.

[141] Musim Mas OASYS programme file (Exhibit IDN-38 (BCI)), annexes 2.1 and 2.2. See also Indonesia's first written submission, para. 195; European Union's first written submission, para. 191.

[142] Indonesia's opening statement at the second meeting of the Panel, para. 58.

[143] Fn omitted; emphasis added.

> under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of …[.][144]

7.114. The *chapeau* frames the applicable rules by reference to the like product and does not expressly refer to PCNs or sub-categories of the like product. The parties' arguments raise questions of legal interpretation concerning the *chapeau*, and specifically whether the *chapeau* permits an authority constructing a PCN-specific normal value to rely on SG&A costs and profits derived from data pertaining to production and sales of that specific PCN rather than the like product as a whole.

7.3.2.1.1.1 Interpretation of the *chapeau* of Article 2.2.2

Parties and third parties' views regarding the interpretation of the *chapeau* of Article 2.2.2

7.115. Indonesia submits that Article 2.2.2 requires an investigating authority to construct the normal value on the basis of SG&A costs and profits derived from actual data pertaining to sales of the "like product", which, according to Indonesia, is the weighted average SG&A costs and profits pertaining to production and sales of all PCNs that make up the like product as a whole.[145] For Indonesia, where an authority decides to construct the normal value because of the low volume of domestic sales, the data from such sales do not provide a proper basis for calculating SG&A costs or profit because they have been found to not permit a proper comparison with the export price under Article 2.2.[146]

7.116. When responding to our questions, Indonesia distinguishes in this regard between (a) a scenario where an authority uses what is sometimes referred to as "multiple averaging" where the authority divides the like product into several PCNs, calculates intermediate margins for each PCN, and then aggregates those intermediate margins to calculate the exporter's overall dumping margin; and (b) a scenario where an authority calculates a single overall dumping margin without resorting to the use of PCNs. Indonesia considers that where an authority does not resort to PCNs, it may use data derived from low-volume sales to construct the normal value, provided that those sales are in the ordinary course of trade.[147] However, where an authority relies on PCNs, the authority, according to Indonesia, is not permitted to rely exclusively on low-volume sales of that particular PCN.[148] Indonesia justifies this distinction by stating that where an authority relies exclusively on low-volume sales of a PCN to calculate the normal value for that PCN, it effectively disregards the data of other PCNs falling within the definition of the like product.[149] In doing so, according to Indonesia, the authority violates the explicit requirement under the *chapeau* of Article 2.2.2 to use the SG&A costs and profit data for the "like product" because a PCN of the like product is not the like product itself.[150]

7.117. The European Union rejects Indonesia's arguments, contending that a PCN of the like product clearly falls within the definition of a like product.[151] Therefore, in the view of the European Union, SG&A costs and profit data for a PCN should be considered to be based on actual data pertaining to the like product.[152] In addition, the European Union notes that constructing the normal value of PCNs sold in low volume on the basis of an average of all PCNs creates a risk of distortion. The European Union submits that if the overall profitability of the like product is distorted, the profit cannot be considered to be derived from actual data pertaining to production and sales in the ordinary course of trade of the like product, as required by Article 2.2.2.[153]

7.118. Canada, in its third party submission, contends that to the extent data is available, an investigating authority's use of SG&A costs and profit derived from the PCN itself is consistent with its obligation under Article 2.2.2 to calculate SG&A costs and profits based on actual data pertaining to the like product.[154] However, Canada takes the view that irrespective of the method that an authority uses to calculate SG&A costs and profits, these costs and profits must be "reasonable"

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[144] Emphasis added.
[145] Indonesia's first written submission, para. 202.
[146] Indonesia's response to Panel question No. 59(d), para. 54.
[147] Indonesia's response to Panel question No. 59(a), para. 50.
[148] Indonesia's response to Panel question No. 59(b)-(c), para. 52.
[149] Indonesia's response to Panel question No. 59(b)-(c), para. 52.
[150] Indonesia's response to Panel question No. 59(b)-(c), para. 52; first written submission, para. 202.
[151] European Union's response to Panel question No. 17(a), para. 15.
[152] European Union's response to Panel question No. 17(a), para. 15.
[153] European Union's second written submission, para. 116.
[154] Canada's third-party response to Panel question No. 5, para. 16.

within the meaning of Article 2.2.[155] Japan takes the view that, when an investigating authority constructs the normal value for transactions involving specific PCNs, it has discretion in deciding which "actual data" and what calculation method to use as a basis for its calculation of the amounts for costs and profits.[156] However, the authority is obliged to consider "all available evidence" to ensure that the calculated amounts reasonably reflect the costs actually associated with the production and sales of the subject PCNs.[157] The United States contends that nothing in the text of Article 2.2.2 prohibits the calculation of SG&A costs and profits based on sales of PCNs sold domestically in low volumes.[158]

Our interpretation of the *chapeau* of Article 2.2.2

7.119. We note that there is no dispute between the parties that investigating authorities are permitted, as part of their dumping determination, to divide the investigated product into PCNs, calculate PCN-specific intermediate margins (based on the difference between a PCN-specific normal value and PCN-specific export price), and aggregate the intermediate margins to calculate the exporter's overall dumping margin for the product. The question before us is whether, in constructing such *PCN-specific* normal value as part of those intermediate margin calculations, an investigating authority is permitted under the *chapeau* of Article 2.2.2 exclusively to use SG&A costs and profits derived from domestic sales *of that particular PCN* that are in the ordinary course of trade, but sold in *low volumes within the meaning of Article 2.2*.

7.120. The *chapeau* of Article 2.2.2 provides that SG&A costs and profits "*shall be based*" on (a) "actual data" (b) "*pertaining* to production and sales in the ordinary course of trade" (c) "of the *like product* by the exporter or producer under investigation."[159] It is only when the SG&A costs and profits cannot be determined on this basis that an investigating authority can resort to the methods set out in the subparagraphs of Article 2.2.2. The Anti-Dumping Agreement does not define the term "actual", though the ordinary meaning of the word includes "[e]xisting in fact, real".[160] Moreover, the actual data are those pertaining to production and sales in the *ordinary course of trade* of the like product. "Pertaining to", or specifically the word "pertain", is defined as "relate or have reference to".[161] Thus, the *chapeau* of Article 2.2.2 requires SG&A costs and profits to be based on actual data relating to, or having reference to, the exporter's production and sales in the ordinary course of trade of the like product.

7.121. The requirement under the *chapeau* that the data pertain to the exporter's production and sales in the ordinary course of trade of the like product makes it clear that the data relied upon cannot be derived from domestic sales that are not in the ordinary course of trade. However, the text of the *chapeau* does not impose a similar limitation regarding data derived from domestic sales that, because of their low volumes, do not permit a proper comparison with the export price within the meaning of Article 2.2. The absence of such a reference would suggest that the authority is not required to disregard, for the purpose of calculating SG&A costs and profits, data pertaining to domestic sales that are made in low volumes but are otherwise in the ordinary course of trade. We note that several WTO panels and the Appellate Body have reached the same conclusion based on their reading of the *chapeau*.[162] Indeed, Indonesia agrees that where, unlike here, an authority does not resort to PCNs, in constructing the normal value it may use data based on low-volume sales, provided they are in the ordinary course of trade, to calculate SG&A costs and profits.[163]

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[155] Canada's third-party response to Panel question No. 5, para. 17.
[156] Japan's third-party submission, para. 11.
[157] Japan's third-party submission, para. 11.
[158] United States' third-party submission, para. 36.
[159] Emphasis added.
[160] Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.148.
[161] Panel Report, *US – Softwood Lumber V*, para. 7.265.
[162] In *EC – Tube or Pipe Fittings*, the panel and the Appellate Body contrasted the language of Article 2.2 with that of the *chapeau* of Article 2.2.2. They observed that Article 2.2 permits an investigating authority to discard sales made in low volumes or outside the ordinary course of trade to establish a normal value based on actual sales, but that Article 2.2.2, which concerns SG&A costs and profits, does not contain a similar qualifying language in relation to low volumes. The Appellate Body therefore was of the view that a requirement to exclude SG&A costs and profits pertaining to sales made in low volumes when constructing the normal value cannot be read into the text of Article 2.2.2. (Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 98. See also Panel Reports, *US – OCTG (Korea)*, para. 7.39; *EC – Salmon (Norway)*, para. 7.304.)
[163] Indonesia's response to Panel question No. 59(b)-(c), para. 51.

7.122. While Indonesia contends, as discussed in paragraph 7.116 above, that the situation is different where the authority resorts to PCNs, we disagree. Instead, we consider that the use of SG&A costs and profits derived from data pertaining to a PCN to construct that PCN's normal value is consistent with the requirement of the *chapeau* that for SG&A costs and profits the authorities shall use actual data relating to or having reference to (i.e. pertaining to) the production and sales in the ordinary course of trade of the like product. We reach this conclusion based on the reasons set out below.

7.123. In defining "like product", Article 2.6 of the Anti-Dumping Agreement states that "throughout" the Anti-Dumping Agreement, the term "shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." This definition does not preclude the possibility that the like product may consist of multiple subcategories, or PCNs.[164] When the like product is divided into several PCNs, the parties agree that the authorities are permitted to calculate intermediate margins based on PCNs as part of their overall dumping determination. The use of PCN-specific intermediate margins necessitates the calculation of a PCN-specific normal value and PCN-specific export price to calculate those intermediate margins.

7.124. We note that Indonesia agrees that where the PCN-specific normal value is based on its domestic sales prices within the meaning of Article 2.1 of the Anti-Dumping Agreement, the authority may rely on domestic sales prices of that particular PCN, rather than a weighted average selling price of all PCNs (i.e. the like product as a whole).[165] Indonesia takes this view even though normal value based on domestic selling prices is described under Article 2.1 as a "comparable price, in the ordinary course of trade, for the *like product* when destined for consumption in the exporting country"[166], and thus Article 2.1, just like Article 2.2.2, frames its rules by reference to the like product.

7.125. Indonesia justifies this distinction in its approach to the notion of like product under different provisions of the Anti-Dumping Agreement by contending that a scenario where an investigating authority constructs the normal value must be distinguished from a scenario where the authority calculates normal value based on domestic selling prices. We disagree. In particular, we disagree with Indonesia's contention that because the normal value of a PCN is constructed in the case of low-volume sales when such sales do not allow a proper comparison with the export price, an investigating authority may not construct the normal value based on data from sales that do not allow for a such a proper comparison.[167] Instead, as we noted in paragraph 7.121 above, the *chapeau* of Article 2.2.2 does not carve out an exception for low-volume sales, and thus we see no basis for interpreting like product differently under Articles 2.1 and 2.2.2 on this basis.

7.126. Moreover, where the PCN's normal value is calculated based on domestic selling prices, these prices would be expected to include that PCN's SG&A costs and profit, as Indonesia agrees.[168] However, accepting Indonesia's interpretation of the *chapeau* means that where the PCN's normal value is constructed, the SG&A cost and profit data must be derived not from the specific PCN but from aggregate costs and profits representing the costs and profits of ***all PCNs*** making up the like product, even though SG&A cost and profit data pertaining to the PCN is available for use by the authority. We see nothing in Article 2 that obliges an authority to use aggregate SG&A costs and profits for all PCNs when constructing a PCN-specific normal value but to use PCN-specific SG&A costs and profit when calculating normal value based on domestic selling prices, when, as here, it is not the case that the authority does not have the necessary data based on production and sales in the ordinary course of trade to calculate such costs and profit.

7.127. Finally, we consider that Indonesia's approach would oblige authorities to make an asymmetric comparison between a PCN-specific export price, which could include PCN-specific profits

[164] We find our views to be consistent with those of previous WTO panels that have been of the view that Article 2.6 does not preclude an investigating authority from including within the scope of the like product multiple categories that are not like each other. (See e.g. Panel Report, *EC – Salmon (Norway)*, para. 7.49). Indonesia does not take a view contrary to that set out in these disputes.

[165] Indonesia's response to Panel question No. 21(b)-(c), para. 109.

[166] Emphasis added.

[167] Indonesia's response to Panel question No. 21(b) and (c), para. 110; second written submission, para. 96.

[168] See e.g. Indonesia's response to Panel question No. 60(a), para. 55.

and SG&A costs for exports, and a constructed normal value that reflects SG&A costs and profit not specific to that PCN but reflecting aggregate SG&A costs and profits pertaining to all PCNs of the like product. This would be the case even when, as here, the authority has the necessary data based on production and sales in the ordinary course of trade to calculate such costs and profit.

7.128. Therefore, and for the reasons set out above, we do not consider that the *chapeau* of Article 2.2.2 precludes investigating authorities from constructing the normal value of a PCN using SG&A costs and profits derived from the production and sales in the ordinary course of trade of that specific PCN.[169]

7.129. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement when it constructed the normal value of each of the two PCNs using SG&A costs and profits derived from the production and sales in the ordinary course of trade of those specific PCNs. Accordingly, we also find that Indonesia has not established that the European Commission acted inconsistently with Article 2.2 of the Anti-Dumping Agreement.

7.3.2.1.2 Indonesia's consequential claims under Articles 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.130. Indonesia claims that as a consequence of its violations under Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement, the European Commission acted inconsistently with Articles 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[170]

7.131. Having rejected Indonesia's claims under Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement, we reject Indonesia's consequential claims under these provisions.

7.132. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with the Articles 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 as a consequence of violations under Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement.

7.3.2.2 Whether the alleged methodologies "as applied" are inconsistent with Article X:3(a) of the GATT 1994

7.133. Indonesia claims that the European Union acted inconsistently with Article X:3(a) of the GATT 1994 by applying two different methodologies (i.e. the CNV PCN and CNV Company methodologies) for constructing the normal value of PCNs sold in insufficient quantities on the domestic market. In so doing it failed, according to Indonesia, to administer Article 2(6) of the EU Basic Anti-Dumping Regulation in a uniform and reasonable manner.[171]

7.134. Article 2(6) of the EU Basic Anti-Dumping Regulation provides as follows:

> The amounts for selling, for general and administrative costs and for profits shall 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. When such amounts cannot be determined on that basis, the amounts may be determined on the basis of:

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[169] In reaching these findings we have noted the parties' views regarding the interpretation based on the panel report in *EC – Tube or Pipe Fittings.* This panel explained that the *chapeau* of Article 2.2.2 requires the use of "actual data from all relevant sales of the like product" and therefore, by the express terms of the *chapeau* of Article 2.2.2, "actual data from relevant transactions relating to sales of the 'like product' – as a whole – *may* be taken into account to construct normal value". (Panel Report, *EC – Tube or Pipe Fittings*, para. 7.150 (emphasis added)). The panel noted that there is no "provision to the effect that constructed normal value is to be based only on a limited subset of data relating to sales of certain selective product types falling within the definition of like product, but excluding data relating to sales of other such types". (Ibid. para. 7.150). We are not required to and thus do not reach any conclusions on whether investigating authorities *may* rely on data pertaining to relevant transactions relating to sales of the like product, as a whole, when constructing a PCN-specific normal value, as opined by this panel.

[170] Indonesia's first written submission, para. 295.

[171] Indonesia's second written submission, para. 186.

> (a) the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (b) the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin;
>
> (c) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.[172]

7.135. Article X:3(a) of GATT 1994, as we noted above, requires Members to "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article." The legal standard under Article X:3(a) is discussed in section 7.2.2.1 above and not repeated here in detail.

7.136. There is no dispute between the parties that Article 2(6) of the EU Basic Anti-Dumping Regulation is a "law" within the meaning of Article X:3(a) (and Article X:1). There is also no dispute that this law was administered in the underlying investigation. The parties disagree on whether, in the underlying investigation, the European Commission administered Article 2(6) of the EU Basic Anti-Dumping Regulation in a uniform or reasonable manner.

7.3.2.2.1 Whether the European Commission failed to administer Article 2(6) of the EU Basic Anti-Dumping Regulation in a uniform manner

7.137. Indonesia contends that (a) the five PCNs whose normal value the European Commission constructed because they were not sold domestically; and (b) the two PCNs whose normal value the European Commission constructed because they were sold in low volumes, were similarly situated because they both required construction of normal value due to "insufficient domestic sales".[173] Therefore, according to Indonesia, by applying the CNV PCN methodology for the two PCNs and the CNV Company methodology for the five PCNs, the European Commission failed to administer Article 2(6) of the EU Basic Anti-Dumping Regulation in a uniform manner. Noting that Article 2(6) mirrors the text of Article 2.2.2 of the Anti-Dumping Agreement, Indonesia contends that neither Article 2(6) nor any provision of Anti-Dumping Agreement provides any basis for using two different methodologies based on a criterion of profitable sales[174], that is, whether a PCN has any profitable sales or not. Instead, according to Indonesia, Article 2(6), like Article 2.2.2 of the Anti-Dumping Agreement, requires the use of actual data pertaining to the production and sales in the ordinary course of trade of all PCNs falling within the scope of the domestic like product.[175]

7.138. Indonesia disagrees in this regard with the European Union that the European Commission applied a criterion based on ordinary course of trade to distinguish between the two groups.[176] Indonesia asserts that because the five PCNs had no domestic sales, the relevant criterion cannot be based on ordinary course of trade.[177] Instead, according to Indonesia, the relevant criterion applied by the European Commission was whether or not a PCN had profitable sales, with the European Commission applying the CNV Company methodology when there were no profitable domestic sales (including no sales at all) and the CNV PCN methodology when there were some profitable domestic sales.[178] This criterion, Indonesia notes, is not provided for either in Article 2.2.2 of the Anti-Dumping Agreement or Article 2(6) of the EU Basic Anti-Dumping Regulation.[179]

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[172] EU Basic Anti-Dumping Regulation (Exhibit IDN-1).
[173] Indonesia's second written submission, para. 191.
[174] Indonesia's first written submission, para. 300.
[175] Indonesia's first written submission, para. 300.
[176] Indonesia's second written submission, para. 190; opening statement at the second meeting of the Panel, para. 79.
[177] Indonesia's opening statement at the first meeting of the Panel, para. 97; opening statement at the second meeting of the Panel, para. 79.
[178] Indonesia's opening statement at the second meeting of the Panel, para. 79.
[179] Indonesia's opening statement at the second meeting of the Panel, para. 79.

7.139. The European Union submits that there is a fundamental difference between (a) a situation where for a particular PCN there are no domestic sales in the ordinary course of trade; and (b) a situation where there are domestic sales in the ordinary course of trade.[180] Thus, these two situations are not "similarly situated".

7.140. The European Union also rejects Indonesia's assertion that because the five PCNs had no domestic sales, the relevant criterion could not be based on ordinary course of trade. The European Union contends that transactions in the ordinary course of trade can only occur if there is "trade", and thus where there are no domestic sales, there are no "actual data" pertaining to sales in the ordinary course of trade under Article 2.2.2.[181] Therefore, in the view of the European Union, the European Commission was justified in distinguishing between a scenario where, as in the case of the five PCNs, no actual data on sales in the ordinary course of trade were available, and a scenario where, as in the case of the two PCNs, such data were available.[182] The European Union also rejects Indonesia's submission that the European Commission applied the CNV PCN and CNV Company methodologies depending on whether or not a PCN had profitable sales, and does so by relying on the same arguments that it advanced in rejecting Indonesia's characterization of an alleged rule or norm where the European Commission applies these methodologies based on a criterion of profitable sales (discussed above).[183]

7.141. We commence by noting that Indonesia's claims under Article X:3(a) are predicated on its view that neither Article 2(6) nor any provision of Anti-Dumping Agreement provides any basis for using two different methodologies depending upon whether a PCN has any profitable sales or not.[184] We note our findings above that Indonesia has not established that the European Commission uses a criterion of profitable sales in deciding whether it will rely on SG&A costs and profit sourced exclusively from a PCN, or for the like product as a whole. We also recall our finding that Article 2.2.2 permits authorities, in constructing a PCN-specific normal value, exclusively to use actual data pertaining to the production and sales in the ordinary course of trade of a specific PCN. Therefore, we reject Indonesia's claims under Article X:3(a) to the extent they are predicated on its view that (i) Article 2(6), which "mirrors" Article 2.2.2 of the Anti-Dumping Agreement, does not permit an investigating authority exclusively to use these PCN-specific data; or that (ii) the European Commission relies on a criterion of profitable sales in deciding whether it will source data for SG&A costs and profit exclusively from a PCN or from the like product as a whole.

7.142. Moreover, we recall that the requirement of uniform administration under Article X:3(a) cannot be understood to require identical results where relevant facts differ. Therefore, Article X:3(a) does not preclude an agency from adopting a different approach when the relevant facts are different. The question is whether a scenario where a PCN is not sold domestically and a scenario where it is sold in low volumes are similar because both scenarios require construction of normal value due to "insufficient domestic sales".[185] Indonesia's argument is that they are, and thus the European Commission could not have adopted the CNV PCN methodology in one scenario and the CNV Company methodology in the other scenario. We disagree with Indonesia for the reasons set out below.

7.143. First, the reference in Article 2.2 to a scenario where there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country squarely covers a situation where there are simply no domestic sales. We note in this regard that Article 2.1 describes a normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Article 2.2 refers to a scenario where "there are no sales of the like product in the ordinary course of trade". Neither Article makes a distinction between a scenario where there are no domestic sales at all, and one where there are no sales in the ordinary course of trade. Thus, we disagree that the European Commission could not have applied a criterion based on ordinary course of trade where, as in the case of the five PCNs, there were no domestic sales.

[180] European Union's first written submission, para. 278.
[181] European Union's second written submission, para. 152.
[182] European Union's second written submission, para. 153.
[183] European Union's first written submission, para. 280 and fn 302.
[184] Indonesia's first written submission, para. 296.
[185] Indonesia's second written submission, para. 191.

7.144. Second, turning to the requirements under Article 2.2, we note that where there are no sales of the like product in the ordinary course of trade, domestic selling prices shall not be used to calculate normal value. Where an exporter has domestic sales in the ordinary course of trade, an investigating authority is required under Article 2.2 to calculate normal value based on domestic selling prices except when, either because of the particular market situation, or "the low volume of the sales in the domestic market of the exporting country", such sales do not permit a proper comparison. However, Article 2.2 does not characterize sales made in low volumes as sales outside the ordinary course of trade. Thus, Article 2.2 distinguishes between (a) a situation where there are no domestic sales of the like product in the ordinary course of trade (including where there are no domestic sales at all); and (b) a situation where there are domestic sales of the like product in the ordinary course of trade – even if in low volumes. This distinction also applies when the normal value is constructed at a PCN level.

7.145. Moreover, as stated above, Article 2.2.2 reflects this distinction, considering that under the *chapeau* of Article 2.2.2 SG&A costs and profits shall be based on actual data pertaining to production and sales in the "ordinary course of trade" of the like product, meaning that the data cannot be based on production and sales of the like product that are outside the ordinary course of trade. However, Article 2.2.2 does not preclude consideration of data pertaining to production and sales of the like product that is sold in low volumes in the domestic market, as we discussed in paragraph 7.121 above.

7.146. Indonesia's interpretation groups these two distinct scenarios into one, i.e. a scenario where there are "insufficient domestic sales". However, there is no basis in Article 2.2 or Article 2.2.2 to group these scenarios into one based on a criterion of insufficient domestic sales and Indonesia has not presented any other basis for grouping these domestic sales based on this criterion. Considering the differences in these two scenarios, the European Commission did not fail to apply its law in a uniform manner because it adopted the CNV PCN methodology in one scenario and the CNV Company methodology in the another.

7.147. For the foregoing reasons, we find that Indonesia has not established that in applying two different methodologies for constructing normal value of PCNs sold in "insufficient quantities on the domestic market" the European Commission failed to administer Article 2(6) of the EU Basic Anti-Dumping Regulation in a uniform manner.

7.3.2.2.2 Whether the European Commission failed to administer Article 2(6) of the EU Basic Anti-Dumping Regulation in a reasonable manner

7.148. Indonesia argues that the European Commission applied two different methodologies, i.e. the CNV Company and CNV PCN methodologies, based on "an arbitrary criterion of profitable sales", and in doing so failed to administer Article 2(6) of the EU Basic Anti-Dumping Regulation in a reasonable manner.[186] The European Union rejects Indonesia's arguments.

7.149. We reject Indonesia's claim that the European Commission failed to administer Article 2(6) of the EU Basic Anti-Dumping Regulation in a reasonable manner for the reasons set out in paragraph 7.141 above. In particular, Indonesia has not established that the European Commission applies the CNV PCN and CNV Company methodologies based on a criterion of profitable sales, and therefore Indonesia's claim, which is predicated on the European Commission's alleged use of this criterion, cannot stand. Moreover, we do not consider that the distinction between a scenario where there are no domestic sales in the ordinary course of trade, and a scenario where there are such sales, even if in low volumes, is arbitrary, considering that Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement provide the basis for such a distinction.

7.150. For the foregoing reasons, we find that Indonesia has not established that in applying two different methodologies for constructing normal value of PCNs sold in "insufficient quantities on the domestic market" the European Commission failed to administer Article 2(6) of the EU Basic Anti-Dumping Regulation in a reasonable manner.

[186] Indonesia's first written submission, para. 307.

7.3.2.2.3 Conclusion

7.151. For the foregoing reasons, we find that Indonesia has not established that in applying two different methodologies for constructing normal value of PCNs sold in "insufficient quantities on the domestic market" the European Commission failed to administer Article 2(6) of the EU Basic Anti-Dumping Regulation in a uniform or reasonable manner.

7.4 Indonesia's claims concerning the European Commission's alleged currency conversion

7.152. Indonesia's claim under Article 2.4.1 of the Anti-Dumping Agreement concerns the export transactions of Musim Mas to the European Union through its related trader, ICOF Europe GmbH (ICOF Europe).[187] Specifically, this claim concerns the use of an alleged incorrect exchange rate to convert 11 export transactions of ICOF Europe from EUR into USD which led to the incorrect calculation of Musim Mas's dumping margin. Consequently, Indonesia claims that the European Commission also violated Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by applying an anti-dumping duty that exceeded the correct dumping margin.

7.4.1 Legal standard

7.153. Article 2.4.1 of the Anti-Dumping Agreement provides as follows:

> When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used.[188]

7.154. Article 2.4.1 sets out the rules to be applied when "the comparison under paragraph 4", i.e. a fair comparison between the normal value and export price, "requires a conversion of currencies". Pursuant to Article 2.4.1, if a currency conversion is required, such conversion must be "made using the rate of exchange on the date of sale".[189]

7.155. Therefore, our analysis focuses on whether currency conversion was required for the 11 export transactions at issue, and if so, whether the rate of exchange on the date of sale was used for such conversion.

7.4.2 The European Commission's alleged currency conversion

7.156. The European Commission disclosed to Musim Mas its dumping margin calculations. The MS Excel sheet containing the alleged currency conversion includes the following titles for the columns relevant to our discussion below.[190]

5	…	34	…	40	41	…	44	…	67	…	68
Accounting currency	…	Net invoice value after taxes & discounts[191]	…	Invoice currency	Exchange rate	…	Net invoice value in accounting currency	…	Exchange rate for conversion in currency of exporting country	…	Net invoice value in currency of exporting country

7.157. ICOF Europe, as Musim Mas's related trader, reported export transactions in the "invoice currency" and in its own "accounting currency". ICOF Europe's invoice currency for the 11 transactions at issue was USD, and thus the net invoice values after taxes and discounts of these transactions were reported in USD. The invoice currency of ICOF Europe's other transactions were

[187] Indonesia's first written submission, para. 239.
[188] Fn omitted.
[189] Article 2.4.1 sets out a different approach "when a sale of foreign currency on forward markets is directly linked to the export sale involved", but that scenario does not arise here.
[190] ICOF Europe sheet (Exhibit IDN-40 (BCI)).
[191] This column contains the net invoice values in the invoice currency.

in EUR, and thus the net invoice values of those transactions were reported in EUR.[192] The parties agree that the European Commission was aware that ICOF Europe's "invoice currency" for certain export transactions was in USD, while for others it was in EUR.[193]

7.158. The accounting currency of ICOF Europe was EUR.[194] ICOF Europe reported the accounting currency of all export transactions (including the 11 transactions at issue) as EUR alone, which can be confirmed from a review of the relevant column of the MS Excel sheet (and which, in any case, the European Union does not dispute).[195] ICOF Europe also reported the net invoice values in its accounting currency for all export transactions.[196] Indonesia submits, and the European Union does not dispute, that the European Commission required ICOF Europe to convert values reported in the "invoice currency" into values in the "accounting currency".[197] ICOF Europe also reported the exchange rates used to convert the invoice values in USD of the 11 transactions at issue into EUR.[198]

7.159. While the accounting currency of ICOF Europe, as noted, was EUR, the accounting currency of Musim Mas was USD.[199] The European Commission made the dumping margin calculations in the accounting currency of Musim Mas, i.e. USD. The export prices ultimately used in the dumping margin calculations accordingly were supposed to be in USD and sourced from a particular column of the MS Excel sheet.[200] This column, titled "Net invoice value in currency of exporting country" should have been completed by ICOF Europe or Musim Mas, but as the parties agree, it was not.[201] We note in this regard, and as explained in paragraph 7.157 above, that ICOF Europe provided in a separate column the export prices in the invoice currency, which was USD, for the 11 transactions at issue, as part of the net invoice values. However, the European Union clarified that it did not use these values even though they were in USD because values expressed in the invoice currencies are not meant for direct use in dumping margin calculations.[202]

7.160. The European Commission did not find it necessary to request ICOF Europe or Musim Mas to provide the net invoice values in the currency of the exporting country, even though the European Commission sent a deficiency letter to Musim Mas asking it to complete several other fields in the questionnaire response.[203] Instead, the European Commission entered these values itself by deriving them from the net invoice values that ICOF Europe reported in its accounting currency, which as noted above, was EUR.[204]

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[192] Indonesia's first written submission, para. 240. See also ICOF Europe sheet (Exhibit IDN-40 (BCI)), column No. 40.

[193] Indonesia's first written submission, para. 247; European Union's response to Panel question No. 29(a), para. 31.

[194] Indonesia's first written submission, para. 239; European Union's response to Panel question No. 30(a), para. 33.

[195] ICOF Europe sheet (Exhibit IDN-40 (BCI)), column No. 5.

[196] ICOF Europe sheet (Exhibit IDN-40 (BCI)), column No. 44.

[197] Indonesia's first written submission, para. 239. The evidence supports Indonesia's submission. Specifically, the instructions that the European Commission provided required reporting in the "accounting currency of related company", which in relation to Musim Mas is ICOF Europe. (Indonesia's comments on the European Union's response to Panel question No. 73(a)-(b), para. 44 (quoting Information sheet for questionnaire response (Exhibit IDN-50), p. 3)). See also Indonesia's response to Panel question No. 29(b), paras. 135-136.

[198] ICOF Europe sheet (Exhibit IDN-40 (BCI)), column No. 41.

[199] Indonesia's first written submission, para. 239; European Union's response to Panel question No. 28, para. 33; and European Union's response to Panel question No. 73(a), para. 48.

[200] See, e.g. European Union's response to Panel question No. 30(a), para. 33 (referring to ICOF Europe sheet (Exhibit IDN-40 (BCI))). The export prices in USD used for the dumping margin calculations are set out in column No. 68 of the sheet, titled "Net invoice value in currency of exporting country". (See para. 7.156 above).

[201] European Union's first written submission, para. 212. Indonesia indicates that column No. 68 of the MS Excel sheet titled "Net invoice value in currency of exporting country" was part of the calculation made by the European Commission. (Indonesia's first written submission, table accompanying para. 241 (referring to ICOF Europe sheet (Exhibit IDN-40 (BCI)))).

[202] European Union's response to Panel question No. 74, para. 52. The reasons given by the European Union as to why they could not be directly used for dumping margin calculations are not at issue in this dispute, and we accordingly do not examine them further.

[203] European Union's first written submission, para. 213.

[204] European Union's first written submission, para. 213.

7.161. To do so, the European Commission applied exchange rates to convert the EUR values into USD.[205] For the transactions other than the 11 at issue, the European Commission applied EUR-USD exchange rates.[206] However, for the 11 transactions at issue, the European Commission multiplied the reported values by "1".[207] The European Union acknowledges that multiplying the EUR values by "1" instead of the appropriate EUR-USD exchange rates led to the net invoice values of the 11 transactions at issue in the currency of the exporting country (which was USD) being incorrect.[208]

7.162. The European Commission disclosed the dumping margin calculations, including the incorrect figures, to Musim Mas as part of its disclosure obligations. However, it did not receive any comments from Musim Mas or ICOF Europe drawing its attention to the incorrect figures.[209]

7.4.3 The European Union's arguments based on the standard of review of the Panel

7.163. The European Union acknowledges, as noted above, that multiplying the EUR values by "1" instead of the appropriate EUR-USD exchange rates led to the net invoice values in the currency of the exporting country, in USD, used in the dumping margin calculations, being incorrect.[210] However, in the European Union's view, we are precluded, in the light of the standard of review under Article 17.6(i) of the Anti-Dumping Agreement, from examining whether this error violated Article 2.4.1 (or Article 9.3) of this Agreement.[211]

7.164. The European Union's submission is based on its interpretation of Article 17.6(i) and Article 17.5(ii) of the Anti-Dumping Agreement. Noting that Article 17.6(i) requires that in its assessment of the facts of the matter, a panel determines "whether the authorities' establishment of the facts was proper", the European Union submits that this obligation on the panel must be read in the light of Article 17.5(ii), pursuant to which the panel is established to examine the matter based on "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".[212] Therefore, according to the European Union, if the panel finds that the facts were established in conformity with the appropriate domestic procedures, the panel should find that the establishment of the facts was proper.[213] Elaborating upon this view in response to our questions, the European Union contends that "where the propriety of the domestic procedure followed to establish the facts is not contested, and that procedure was in fact followed, the Panel should find that the authorities' establishment of the facts was proper".[214] The European Union supports its position by relying on the Appellate Body report in *Thailand – H-Beams*, which we discuss below.[215]

7.165. The European Union emphasizes that Musim Mas and ICOF Europe failed to provide the requested data in the currency of the dumping calculations, i.e. USD.[216] It submits that the European Commission filled in the data as part of its "deficiency process", which is a domestic procedure designed to (a) ensure that necessary data requested from a producer pursuant to Article 6.1 of the Anti-Dumping Agreement are made available to the European Commission; and (b) limit the need to rely on facts available under Article 6.8 of the Anti-Dumping Agreement.[217] The European Union contends that it is through this deficiency process, along with the verification and disclosure processes, that facts were made available to the European Commission within the meaning of Article 17.5(ii) of the Anti-Dumping Agreement.[218] Because Musim Mas and ICOF Europe did not dispute, in the course of the investigation, the facts determined through these processes,

[205] ICOF Europe sheet (Exhibit IDN-40 (BCI)), column No. 67.
[206] ICOF Europe sheet (Exhibit IDN-40 (BCI)), column No. 67. Indonesia submits that these exchange rates were provided by the European Commission in an annex to the questionnaire. (Indonesia's comments on the European Union's responses to Panel question No. 73(a)-(b), para. 48; question No. 74, para. 53 (referring to Exchange rate sheet (Exhibit IDN-62 (BCI))).
[207] ICOF Europe sheet (Exhibit IDN-40 (BCI)), column No. 67.
[208] European Union's response to Panel question No. 30(b), para. 34.
[209] European Union's first written submission, paras. 216-217.
[210] European Union's response to Panel question No. 30(b), para. 34.
[211] European Union's first written submission, para. 223.
[212] European Union's response to Panel question No. 33, para. 44.
[213] European Union's response to Panel question No. 33, para. 44.
[214] European Union's response to Panel question No. 75, para. 56. (emphasis omitted)
[215] European Union's response to Panel question No. 75, para. 58.
[216] European Union's response to Panel question No. 34(b), para. 49.
[217] European Union's comments on Indonesia's response to Panel question No. 76, para. 81.
[218] European Union's comments on Indonesia's response to Panel question No. 76, para. 81.

the European Union submits that these facts were correctly "placed beyond dispute", i.e. "properly established" within the meaning of Article 17.6(i).[219]

7.166. Indonesia rejects the European Union's interpretation of Articles 17.6(i) and 17.5(ii), contending that such interpretation conflates the requirements and purposes of these provisions.[220] Noting that the purpose of Article 17.5(ii) is to define the factual record that a panel may consider, Indonesia argues that this Article does not provide that facts are "established" when in conformity with domestic procedures.[221] In Indonesia's view, if an investigating authority establishes facts in accordance with domestic procedures, the establishment of those facts cannot be presumed to be in compliance with its Member's WTO obligations.[222]

7.167. Indonesia also contends that the European Union misrepresents the purpose of disclosure and verification obligations by attempting to shift to the interested parties the burden to confirm and verify whether the evidence is correct, noting that, as recognized in previous WTO disputes, an investigating authority has an obligation to ensure the accuracy of the information on which its findings are based.[223]

7.168. Pursuant to Article 17.5(ii), a panel is required to examine the matter based on, among other things, "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". This means that our determination must be based on the facts on the record before the investigating authority. However, Article 17.5(ii) does not limit which of the facts on the record before the investigating authority a panel is permitted to examine and assess for the purpose of its analysis. Therefore, the text of Article 17.5(ii) does not preclude us from examining any errors that may have been made by the investigating authority, forming part of the record, which are argued to lead to a violation of a provision of the Anti-Dumping Agreement.

7.169. Article 17.6(i) requires the panel to determine, as part of its assessment of the facts of the matter, whether the authorities' establishment of the facts was proper. This means that the panel enjoys a specific competence, distinct from Article 17.5(ii), to consider whether the establishment of the facts was proper or not. It follows that Article 17.6(i) does not provide that the authorities' establishment of the facts will be presumed to be proper if the facts are made available in conformity with domestic procedures, and we do not see anything in the standard of review set out therein that would preclude us from examining whether any errors made by the investigating authority might have led to a violation of a provision of the Anti-Dumping Agreement.

7.170. The European Union takes the view, as noted above, 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 authority's establishment of the facts was proper.[224] The European Union seeks to derive support for its view from the Appellate Body report in *Thailand – H-Beams*.[225] Noting that one of the ordinary meanings of "establishment" is "place beyond dispute", the European Union argues, relying on this report, that Article 17.6(i) requires the panel to examine whether the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member were correctly placed beyond dispute.[226] On the question of the "establishment of the facts", the European Union notes that the facts included in Exhibit IDN-40 (BCI) were requested from the Indonesian producer in accordance with Article 6.1 of the Anti-Dumping Agreement.[227] The producer submitted the data after which it underwent the deficiency, verification, and disclosure processes.[228] The European Union notes that at the conclusion of these processes the producer did not dispute the facts .[229] Therefore, those facts were placed

[219] European Union's response to Panel question No. 75, para. 63.
[220] Indonesia's comments on the European Union's response to Panel question No. 75, para. 59.
[221] Indonesia's comments on the European Union's response to Panel question No. 75, para. 60.
[222] Indonesia's second written submission, para. 129.
[223] Indonesia's comments on the European Union's response to Panel question No. 75, para. 63 (quoting Panel Reports, *Argentina – Ceramic Tiles*, para. 6.57; *EC – Fasteners (China) (Article 21.5 – China),* para. 7.191).
[224] European Union's response to Panel question No. 75, para. 56. (emphasis omitted)
[225] European Union's response to Panel question No. 75, para. 58.
[226] European Union's response to Panel question No. 75, para. 62.
[227] European Union's response to Panel question No. 75, para. 63.
[228] European Union's response to Panel question No. 75, para. 63.
[229] European Union's response to Panel question No. 75, para. 63.

beyond dispute, i.e. established.[230] Because "it is uncontested that the procedure was duly followed and sufficient time was afforded to the producer to examine the data", Indonesia, in the view of the European Union, has failed to demonstrate that this establishment was "incorrect or improper".[231]

7.171. We disagree with the European Union in this regard. The procedures set out in Article 6 of the Anti-Dumping Agreement, including the disclosure obligations under Article 6.9, serve a crucial role in the investigation. Nevertheless, we see nothing in Article 17.6(i) that would preclude us from examining whether an investigating authority's actions violate a provision of the Anti-Dumping Agreement simply because the authority has followed its domestic procedures, including the disclosure obligations, and the propriety of those domestic procedures is not contested by the complainant. It is difficult to read Articles 17.5(ii) and 17.6(i) to mean that the panel's competence to determine the propriety of the authority's establishment of the facts is confined to ensuring that the facts on the record were produced in conformity with appropriate domestic procedures. Whether the authorities' establishment of the facts was proper goes well beyond domestic procedural conformity. To the extent the European Union's argument is that it is not sufficient for a complainant to demonstrate that an authority through its errors has violated a provision of the Anti-Dumping Agreement, but rather that the complainant must also contest the "propriety of the domestic procedures", we see no basis in Article 17.6(i) for this view, especially as Article 17.6(i) sets out the standard of review for a panel.

7.172. We also find the European Union's reliance on the Appellate Body report in *Thailand – H-Beams* to be inapposite. The Appellate Body in that case was concerned with whether Article 17.6(i) precluded a panel from reviewing facts that were not disclosed to, or discernible by, interested parties at the time of the final determination and found that it did not. [232] The Appellate Body was not presented with a question, and did not make any findings, on whether the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member would be considered to be "properly" established under Article 17.6(i). On the contrary, like us, the Appellate Body recognized the importance of procedures and due process provisions under Articles 6 and 12 of the Anti-Dumping Agreement but was of the view that these matters were to be dealt with under those provisions rather than under Article 17.6(i).[233]

7.173. Finally, we note that Members are not precluded from claiming that a particular act of an investigating authority violated its WTO obligations simply because an interested party had not raised the issue in the course of the underlying domestic proceedings, and the European Union does not take that position in this dispute.[234]

7.174. For the foregoing reasons, we conclude that the standard of review under Article 17.6(i) does not preclude us from finding a violation of Article 2.4.1 in the present dispute.[235] Accordingly, we turn to consider whether Indonesia has established a violation of Article 2.4.1. In making this examination we are guided by the standard of review under Article 17.6(i) of the Anti-Dumping Agreement.

7.4.4 Whether the European Commission acted inconsistently with Article 2.4.1 of the Anti-Dumping Agreement

7.175. Indonesia contends that the European Commission was aware that the 11 transactions at issue were invoiced in USD.[236] Indonesia notes that the European Commission did not use these original USD values to make its dumping margin calculations.[237] Instead the European Commission

[230] European Union's response to Panel question No. 75, para. 63.
[231] European Union's response to Panel question No. 75, para. 63.
[232] Appellate Body Report, *Thailand – H-Beams*, para. 118.
[233] Appellate Body Report, *Thailand – H-Beams*, para. 117.
[234] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 130-131. See also Panel Report, *China – X-Ray Equipment*, para. 7.39; Appellate Body Report, *US - Lamb*, paras. 113-114.
[235] The United States, in its response to the Panel's questions, supports the interpretation of the European Union, whereas Canada and Japan consider that a panel is permitted under its standard of review to examine whether an error led to a violation of a WTO Agreement even if the error was not identified in the domestic proceedings. (United States' third-party response to Panel question No. 9, para. 25; Canada's third-party response to Panel question No. 9, paras. 23-25; and Japan's third-party response to Panel question No. 9, paras. 18-19.)
[236] Indonesia's first written submission, para. 247.
[237] Indonesia's first written submission, para. 245.

took the values that ICOF Europe reported in its accounting currency, which was EUR, and then sought to reconvert these EUR values back to USD.[238] Considering ICOF Europe obtained the values in its accounting currency by converting the original USD values into EUR, Indonesia submits that if the European Commission had converted the EUR values back into USD using the exchange rates reported by ICOF Europe or used the original USD invoice values, Musim Mas's overall dumping margin would have been lower than what the European Commission found it to be.[239]

7.176. Indonesia also contends that, despite the large volume of transactions, applying a filter option in MS Excel would have limited the data set to the 11 transactions at issue, thus making them readily identifiable.[240] By doing so, the European Commission would have been able to verify that the values reported in the accounting currency for the 11 transactions at issue were in EUR. Indonesia also argues that the European Commission was in any event aware of these 11 transactions, having specifically applied a currency conversion rate of 1.00 to each of them and them alone, and that the European Union therefore cannot now contend that the European Commission was unable to identify them.[241]

7.177. As noted above, the European Union explains that the European Commission did not use the invoice values reported in the invoice currency (USD) for dumping calculations because they were not appropriate for direct use in dumping margin calculations.[242] Therefore, in order to calculate the export prices to be used in the dumping margin calculations, the European Commission derived the net invoice values in "*currency of exporting country*" from the net invoice values reported in the "*accounting currency*".[243]

7.178. The European Union argues that due to the large number of transactions the European Commission could not "reasonably have known" that the values of the 11 transactions at issue reported in the accounting currency were in EUR rather than in USD, and thus needed to be converted to USD for use in dumping margin calculations. [244] Therefore, according to the European Union, the European Commission did not perform any currency conversion when it sought to derive the net invoice values in currency of exporting country (which was USD) from the reported net invoice values in the accounting currency of ICOF Europe because it believed that these reported values were in USD.[245]

7.179. In particular, according to the European Union, when multiplying the reported values in the accounting currency by "1", the European Commission did not use an exchange rate of "1".[246] Instead, the value of "1" was "a calculation device in MS Excel to pass a value unchanged from one column to another", and since the "original value [was] multiplied by one, the same value simply appear[ed] in the target column".[247] The European Union acknowledges that the use of "1" means that the export prices in USD used in the dumping margin calculations for these 11 transactions were incorrect as the correct exchange rates were not applied.[248]

7.180. To support its submission that the European Commission could not reasonably have known that the values of the 11 transactions reported in the accounting currency were in EUR rather than in USD, the European Union contends that there are no formulae in the MS Excel sheet, specifically in column No. 44, showing that the "net invoice value in the accounting currency *had actually been converted* into the accounting currency", and that only a comparison of the values reported in the invoice currency (USD) with the values reported in the accounting currency (EUR) could show such a conversion.[249] However, the European Union submits that considering these transactions were

[238] Indonesia's first written submission, para. 241.
[239] Indonesia's first written submission, para. 248.
[240] Indonesia's second written submission, para. 140; comments on the European Union's response to Panel question No. 74, para. 55.
[241] Indonesia's second written submission, para. 140.
[242] European Union's response to Panel question No. 74, para. 52 (referring to ICOF Europe sheet (Exhibit IDN-40 (BCI)), column No. 34).
[243] European Union's first written submission, para. 213.
[244] European Union's response to Panel question No. 30(a), para. 32.
[245] European Union's response to Panel question No. 31(b), para. 36.
[246] European Union's first written submission, para. 214.
[247] European Union's first written submission, para. 214.
[248] European Union's response to Panel question No. 30(b), para. 34; response to Panel question No. 31(c), para. 37.
[249] European Union's response to Panel question No. 30(a), para. 32. (emphasis added)

only 11 out of 2,295, the European Commission could not reasonably have been expected to make such a comparison.[250]

7.181. There is no dispute between the parties that the currency in which the dumping margin calculations were conducted was USD, as we noted above.[251] Therefore, if the export prices reported by ICOF Europe were in a currency other than USD, they would need to be converted to USD for dumping margin calculation purposes. The question before us is whether an objective and unbiased investigating authority could have concluded that the values of the 11 transactions at issue reported in the accounting currency were in USD, and not in EUR (and thus did not need to be converted to USD).

7.182. ICOF Europe reported the invoice currency of the 11 export transactions at issue as USD and the invoice currency of other export transactions as EUR. There is no dispute between the parties that the European Commission was aware that ICOF Europe's "invoice currency" for certain export transactions was in USD, while for the rest of the transactions it was in EUR.[252]

7.183. We also note, as set out above, that ICOF Europe reported (a) the accounting currency of all of its export transactions, including the 11 transactions at issue, as *EUR alone*[253]; and (b) the net invoice values in accounting currency in the relevant column.[254] Therefore, if ICOF Europe reported values in the accounting currency in a currency other than EUR, despite specifically stating that the accounting currency was EUR, that would be tantamount to incorrect reporting, which has not been contended to be the case in the underlying investigation. Thus, the data reported in this format should have made it clear to an unbiased and objective authority that the values reported in the accounting currency of ICOF Europe were all in EUR, irrespective of whether the column containing these values was accompanied by formulae.[255]

7.184. Because the values in the accounting currency were EUR, and the export prices ultimately used in dumping margin calculations were in USD, a currency conversion using applicable exchange rates would have been required for the 11 transactions at issue. As noted above, for the export transactions other than the 11 at issue, the European Commission applied exchange rates to convert the EUR values into USD. However, for the 11 transactions at issue, the European Commission multiplied the reported values by "1". Considering a currency conversion was required for the 11 transactions at issue, by multiplying the reported invoice values in EUR by "1", the European Commission made a currency conversion using a formula other than "the rate of exchange on the date of sale", as required by Article 2.4.1.

7.185. For the foregoing reasons, we find that the European Commission's use of the value of "1" for the 11 transactions at issue was a failure to use the "rate of exchange on the date of sale" as required by Article 2.4.1. Therefore, we conclude that the European Commission acted inconsistently with Article 2.4.1.

7.4.5 Indonesia's consequential claims under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.186. Indonesia contends that, as a consequence of the European Commission's use of an incorrect exchange rate in violation of Article 2.4.1 of the Anti-Dumping Agreement, the European Commission imposed an anti-dumping duty exceeding the correct dumping margin.

[250] European Union's response to Panel question No. 30(a), para. 32.
[251] Indonesia's first written submission, para. 239; European Union's response to Panel question No. 28, para. 30.
[252] Indonesia's first written submission, para. 247; European Union's response to Panel question No. 29(a), para. 31.
[253] We can confirm this from column No. 5 of ICOF Europe sheet (Exhibit IDN-40 (BCI)).
[254] ICOF Europe sheet (Exhibit IDN-40 (BCI)), column No. 44.
[255] In this regard, as Indonesia notes, applying a filter option to the MS Excel sheet would have limited the data set to 11 out of 2,295 transactions. Considering ICOF Europe reported the "accounting currency" as EUR alone and the "invoice currency" of the 11 transactions at issue as USD in the relevant columns of the MS Excel sheet, a visual comparison of the columns pertaining to these 11 transactions would have also shown that the values reported in the invoice currency and those reported in the accounting currency were different.

Therefore, according to Indonesia, the European Commission acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[256]

7.4.5.1 Legal standard

7.187. The *chapeau* of Article 9.3 of the Anti-Dumping Agreement provides that:

> The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

7.188. Article VI:2 of the GATT 1994 provides that:

> In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

7.4.5.2 Whether the European Commission acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

7.189. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 provide that the anti-dumping duty shall not exceed the margin of dumping. The margin of dumping is one established under Article 2 of the Anti-Dumping Agreement. We have already found in this regard that the European Commission acted inconsistently with Article 2.4.1 of the Anti-Dumping Agreement in calculating Musim Mas's dumping margin.

7.190. Indonesia notes that Musim Mas's anti-dumping duty was imposed at the level of its dumping margin.[257] Indonesia submits that this dumping margin would have decreased by 0.31% if it was calculated using the correct exchange rates.[258] The European Union does not dispute (a) the impact of the error as asserted by Indonesia on the dumping margin; or (b) the fact that the anti-dumping duty was imposed at the level of the dumping margin established for Musim Mas.[259]

7.191. In the absence of a rebuttal from the European Union, we consider that Musim Mas's dumping margin was improperly inflated due to the inconsistencies we found under Article 2.4.1 above. The anti-dumping duty based on this inflated dumping margin was thus inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

7.192. For the foregoing reasons, we find that the European Commission acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

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

7.193. Indonesia's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement concern the European Commission's evaluation of the state of the domestic industry based on factors set out in Article 3.4.

a. First, Indonesia contends that the European Commission failed to make an objective examination of several injury factors set out in Article 3.4.[260]

b. Second, Indonesia argues that the European Commission failed to give appropriate weight to factors displaying a positive trend in its overall analysis of the state of the domestic industry.[261]

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[256] Indonesia's first written submission, para. 249.
[257] Indonesia's first written submission, para. 244.
[258] Indonesia's first written submission, para. 248.
[259] The European Union estimated the impact of the alleged error to be of around 0.3 percentage point. (European Union's second written submission, fn 146).
[260] Indonesia's first written submission, para. 279.
[261] Indonesia's first written submission, para. 279.

7.5.1 Legal standard

7.194. Article 3 of the Anti-Dumping Agreement sets out rules that apply to an investigating authority's injury determination. Article 3.1 provides in this regard as follows:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

7.195. To examine the impact of dumped imports on domestic producers, Article 3.4 requires authorities to evaluate *all* relevant "economic factors and indices" having a bearing on the state of the domestic industry and specifically lists several such factors. Article 3.4 states as follows:

> The 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, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.196. The provisions of Article 3.1, and in particular the requirement that authorities base their determination on "positive evidence" and conduct an "objective examination"[262], apply to an investigating authority's examination under Article 3.4.

7.197. Together with previous panels, we consider that the authority's obligation to "evaluate" under Article 3.4 requires an analysis of the economic factors and indices (and hence the data relevant to this enquiry), and an assessment of the role, relevance and relative weight of each factor in the investigation.[263] This analysis must be discernible from the investigation record.[264] However, Articles 3.1 and 3.4 do not regulate the manner in which the results of the analysis of each injury factor are to be set out in the published documents.[265]

7.198. It is not necessary for an investigating authority to find that all factors or even a fixed number of factors display negative trends to conclude that the domestic industry has suffered injury.[266] However, faced with contrary evidence of positive trends, an investigating authority must at least explain how it took into account such evidence in reaching its conclusion.[267]

7.199. We recall that pursuant to our standard of review, we must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. We will also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence.[268]

7.5.2 The European Commission's overall injury analysis

7.200. The European Commission found, based on its analysis, that the domestic industry suffered material injury.[269] While the European Commission found that the domestic industry's "injury … consisted mainly of price and performance indicators such as profitability and the ability to raise capital", it also found that the industry suffered a decline in volume indicators.[270] The volume

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[262] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[263] Panel Reports, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.351; *EC – Bed Linen (Article 21.5 – India)*, para. 6.162.
[264] Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.351.
[265] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 161.
[266] See e.g. Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.420.
[267] See e.g. Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.420.
[268] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.
[269] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 286.
[270] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 259.

indicators showing such a decline were production, capacity, capacity utilization, sales volume, and market share, as well as employment and productivity.[271] The European Commission found that the variation in closing stocks was not a factor that was key to its injury analysis.[272]

7.201. The European Commission found that factors such as sales prices, profitability, return on investment, and investment showed an "apparently positive trend".[273] However, as discussed in further detail below, it found the improvements were temporary or attributable to certain market developments such as raw material prices, and thus did not detract from its overall injury finding.

7.202. The European Commission's analysis with respect to the specific factors is discussed below as part of our findings.

7.203. In addressing Indonesia's claims, we will first address Indonesia's arguments challenging the European Commission's analysis of specific injury factors. In particular, we will address Indonesia's arguments challenging the evaluation of (a) profitability, (b) investments, (c) return on investments, (d) ability to raise capital, (e) sales prices, and (f) closing stocks. We will also address Indonesia's arguments challenging the evaluation of certain other factors on the ground that the European Commission did not consider positive trends between 2020 and the POI, and instead engaged in an end-point-to-end-point comparison. Having addressed the arguments concerning the first aspect of Indonesia's claims, we will turn to the second aspect of Indonesia's claims, i.e. that the European Commission failed to give appropriate weight to factors displaying a positive trend in its overall analysis of the state of the domestic industry.

7.5.3 The European Commission's examination of specific injury factors

7.5.3.1 Profitability

7.5.3.1.1 The European Commission's evaluation of profitability

7.204. The domestic industry's profitability as set out in the European Commission's final anti-dumping determination, was as follows over the injury period[274]:

	2018	2019	2020	POI
Profitability of sales in the EU market, to unrelated customers (based on % of sales turnover)	1.9	-0.5	-2.1	2.5

7.205. In its evaluation of this profit data, the European Commission noted that "[t]he profitability of the sampled producers remained low, namely below 3%" throughout the injury period and even declined from 1.9% in 2018 to -2.1% in 2020.[275] It noted the improvement in profitability at the end of the period, observing that "profitability recovered to 2.5% although it remained at low levels", and that the "slight recovery" was "because customers in the Union market were more likely to accept price increases from [EU] producers as exporting producers were impacted by the supply chain crisis in the context of the COVID-19 pandemic".[276] In particular, the European Commission noted that fatty acid supply from abroad was hindered during the POI by vessel delays from Asia and extreme hikes in freight costs.[277] According to the European Commission, "temporary disturbances" affected prices globally, and there was a decline in Indonesian imports, allowing the domestic industry to benefit from these specific temporary disturbances.[278]

7.206. In reaching its overall conclusions on injury, the European Union took the view that the modest improvement, *inter alia*, in the domestic industry's profitability during the POI did not change the fact that the performance of the industry remained at a level that was inadequate to ensure the viability of the domestic industry in the medium and long term.[279] The authority considered that

[271] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 259.
[272] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 255.
[273] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 256.
[274] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 244 and table 10.
[275] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 245.
[276] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 245.
[277] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 266.
[278] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 266.
[279] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 256.

"the low profitability", when considered along trends in sales prices and costs of production, clearly demonstrated price suppression.[280] The European Commission concluded that throughout the injury period, dumped imports remained at increased levels and low prices, and that the domestic industry was unable to raise prices to a level that would allow it to cover its costs and reach a target profit of 6%, which according to the authority was an appropriate profit threshold.[281] In this regard, the European Commission rejected arguments from the Government of Indonesia, which participated as an interested party in the underlying proceedings, objecting to the 6% profitability threshold. In doing so, the European Commission stated that there was no evidence on file regarding the historical profitability of the fatty acid industry in the absence of dumped imports from Indonesia, and that the interested parties had failed to substantiate what other level of profit should be used.[282] The European Commission thus considered the profitability of the broader chemicals industry, whose profitability, according to the different sources cited by the Commission, was higher than 6%, and concluded that the domestic industry did not reach a profitability level in accordance with normal market conditions of competition.[283]

7.5.3.1.2 Whether the European Commission's evaluation of profitability was inconsistent with Articles 3.1 and 3.4

7.207. Indonesia first contends that the European Commission failed to take into account a marked improvement in profitability during the injury period.[284] Indonesia notes that the domestic industry was more profitable during the POI than during any other year of the injury period, and thus disputes the European Commission's finding that the profitability was nevertheless too low.[285] In particular, observing that the European Commission's finding was based on the industry's profit figures being lower than the 6% target profit relied upon by the European Commission, Indonesia contends that this target profit was not appropriate because it did not take into account the specific characteristics of the fatty acid industry.[286]

7.208. Indonesia does not dispute the European Commission's explanation attributing the domestic industry's profit recovery to supply chain disruptions in imports into the European Union during the COVID-19 pandemic that allowed the domestic industry to increase prices.[287] However, Indonesia contends that the recovery cannot be fully explained by supply chain disruptions caused by the COVID-19 pandemic.[288] In particular, Indonesia submits that even accepting that the profit level achieved in the POI would have been lower absent these supply disruptions, it would have been at least comparable to, if not higher than, the profit achieved in 2018 when the volume of imports from Indonesia was much lower.[289]

7.209. The European Union submits that the profitability during the POI was explained by reduced imports due to the COVID-19 pandemic that allowed the domestic industry to increase prices.[290] With respect to the profitability benchmark, the European Union contends that this benchmark reflected a "target profit" that was not part of the European Commission's injury assessment and thus Indonesia's arguments pertaining to the benchmark are not relevant to its injury claims.[291] The European Union argues that this target profit was instead used as part of the price underselling assessment and in meeting the domestic law requirements of applying a lesser duty rule. In addition, the European Union contends that there were no data on the record that would have allowed the European Commission to establish the benchmark specifically for the fatty acid industry.[292] Therefore, the European Commission used a proxy, covering a broader segment of the industry (chemical sector), which included the fatty acid industry.[293] While the use of this proxy would have

[280] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 257. See also ibid. recital 246.
[281] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 257.
[282] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 268.
[283] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 268.
[284] Indonesia's response to Panel question No. 40, para. 165.
[285] Indonesia's first written submission, para. 265.
[286] Indonesia's first written submission, para. 265.
[287] Indonesia's response to Panel question No. 40, para. 165.
[288] Indonesia's opening statement at the second meeting of the Panel, para. 122.
[289] Indonesia's response to Panel question No. 77, para. 142.
[290] European Union's first written submission, para. 251.
[291] European Union's response to Panel question No. 44, para. 70.
[292] European Union's response to Panel question No. 44, para. 71.
[293] European Union's response to Panel question No. 44, para. 72.

led to higher profit figure, the European Union submits that the European Commission chose to apply a 6% profit margin.[294]

7.210. We note that Indonesia's challenge focuses on the European Commission's (a) alleged failure to take into account the improvements in profitability during the POI and (b) use of the 6% profitability benchmark.

7.211. Regarding the alleged failure to take into account the improvements in profitability, we note that the European Commission explained the improvements in profitability by referring to supply disruptions from imports into the European Union due to the COVID-19 pandemic. These disruptions made it more likely that the EU market would accept price increases from the domestic producers. Indonesia does not dispute the explanation as such, or that the profit would have been lower than what it was but for the disruptions.[295] Instead, its view is that the improvements in profitability cannot be fully explained by these disruptions and, but for these disruptions, the profits during the POI would be comparable to, if not higher than, those in 2018, when the volume of imports from Indonesia was much lower.

7.212. Indonesia's case is that the profits of the domestic industry secured in 2018, when the volume of imports was lower, suggests that, absent the effects of the COVID-19 pandemic in the POI, the domestic industry would have achieved profits comparable to those in 2018.[296] We are not persuaded. The European Commission found that the COVID-19 pandemic affected not only the volume of imports in the POI, but also the prices of these imports.[297] It follows that the domestic industry enjoyed less price competition from imports, and was thus able to improve its profitability. Once that is so, Indonesia has not explained the price effects of the COVID-19 pandemic upon the domestic industry's profitability, and hence what level of profitability could have been achieved by the domestic industry in the POI, absent the effects of the pandemic. Moreover, Indonesia has not pointed to any evidence on the record that contradicted the European Commission's finding that the COVID-19 pandemic explained the increase in the domestic industry's profits during the POI.

7.213. With respect to the benchmark, we agree with Indonesia that the European Commission's finding was based on the industry's profit figures being lower than the 6% target profit relied upon by the European Commission. We note in this regard the European Union's submission that the target profit, which the EU legislation provides shall not be lower than 6% and calculated in accordance with the legislative requirements, is used in European Commission proceedings to calculate the underselling margin.[298] The European Union submits that this underselling margin does not serve any purpose in the injury assessment and is thus not covered by Indonesia's claim.[299]

7.214. However, as noted above, in reaching its conclusions on material injury the European Commission concluded that the domestic industry was unable to raise prices to a level that would allow it to cover its costs and reach the target profit of 6%.[300] Moreover, in addressing interested parties' post-disclosure comments on injury factors, and specifically profitability, as also noted above, the European Commission found that there was no evidence on file that "undermine[d] the choice of a 6% level of profit used".[301] These references show that, as a factual matter, the European Commission relied on the 6% target profit as a benchmark for its profitability analysis under Article 3.4.

7.215. We accordingly turn to Indonesia's arguments challenging the European Commission's use of this benchmark on the basis that it did not take into account the specific characteristics of the

[294] European Union's response to Panel question No. 44, para. 72.
[295] Indonesia's response to Panel question No. 77, paras. 140-142.
[296] Indonesia's response to Panel question No. 77, para. 142.
[297] See para. 7.205 above.
[298] European Union's response to Panel question No. 79(a), para. 75.
[299] European Union's response to Panel question No. 79(a), para. 78.
[300] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 257.
[301] These post-disclosure comments were cross-referred in the European Commission's conclusions on the state of the domestic industry. (Final anti-dumping determination on fatty acid (Exhibit IDN-4), recitals 256 and 268). The European Union submits that such a cross-reference is "merely redactional coincidence". We are not persuaded that such a cross-reference can be seen as merely a coincidence, especially considering a specific reference in recital 257 of the final anti-dumping determination, which concerns injury, to the target profit rate.

fatty acid industry. Indonesia clarified in these proceedings that whether the European Commission was required, as a matter of law (by Article 3.4) to calculate a benchmark is not relevant to its claim.[302] Instead, noting that profitability is industry-specific, Indonesia asks us to assess whether the European Commission provided a sufficient justification for the adoption of the 6% target profit figure in the underlying investigation. Indonesia complains that if a benchmark was to be used, it should have been based on data relating specifically to the fatty acid industry.[303]

7.216. Neither Article 3.1 nor Article 3.4 provides any guidance as to how an investigating authority is to calculate a profit benchmark. Instead, the obligation resting upon an authority under Articles 3.1 and 3.4 is to make an evaluation that is based on positive evidence and involves an objective examination. This evaluation is fact-specific, and thus in determining whether the authority has complied with its obligation under Articles 3.1 and 3.4 we must have regard to the circumstances before the authority. In addition, if an authority adopts a benchmark in its assessment of profitability, that benchmark must have an objective foundation.

7.217. As we noted above, the European Commission explained that the interested parties failed to substantiate what level of profit should be used, instead of the 6% benchmark. The European Commission also stated that there was no evidence on file of the level of historical profitability of the fatty acid industry in the absence of dumped imports from Indonesia. Indonesia does not dispute this statement. Considering it is not disputed that there was no evidence on file regarding the historical profitability of the fatty acid industry that could provide an industry-specific benchmark, in our view it was reasonable for the authority to use a proxy.

7.218. On the choice of an appropriate proxy, Indonesia has not argued in these proceedings that interested parties presented any alternative benchmarks to the European Commission, or whether any proposed benchmarks showed that the profit achieved by the domestic industry was consistent with what it would have been expected to achieve. The European Commission, as noted, cross-checked the 6% benchmark that it ultimately used against the historical profitability of the chemicals industry (which, as is not disputed, included the fatty acid industry). It used the 6% benchmark after finding that the profitability of the broader chemicals industry was higher. In a scenario where there were no alternative (and more industry-specific) data that the European Commission could rely upon to compare the profitability of the domestic industry, we do not consider that the European Commission's use of a proxy of 6% as a benchmark showed a failure to make an objective examination.

7.219. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in failing to make an objective examination of positive evidence when it evaluated the profitability of the domestic industry.

7.5.3.2 Investments and return on investments

7.5.3.2.1 The European Commission's evaluation of investments and return on investments

7.220. The domestic industry's investments and return on investments, as set out in the European Commission's final anti-dumping determination, over the injury period were as follows[304]:

	2018	2019	2020	POI
Investments (EUR)	7,394,509	11,767,077	10,473,680	8,531,863
Index	100	159	142	115
Return on investments (%)	9.0	0.6	-4.4	12.1
Index	100	7	-48	134

7.221. The European Commission noted that, among other factors, the "return on investments" and "investment" showed an "apparently positive trend" during the injury period.[305] However, it was of the view that despite the modest improvement in return on investments (along with profitability)

[302] Indonesia's response to Panel question No. 45, para. 169.
[303] Indonesia's response to Panel question No. 45, para. 173.
[304] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 244 and table 10.
[305] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 256.

the performance remained at a level that was inadequate to ensure the viability of the Union industry in the medium and long term.[306] To support this view, the European Commission cross-referred to its analysis in other parts of the final anti-dumping determination, including its finding that the domestic industry's profitability during the POI was attributable to supply issues faced by Indonesian exporters that led to decline of their sales in the EU market, and that profit levels achieved by the domestic industry were insufficient to undertake the required level of investment.[307]

7.5.3.2.1.1 Investments

7.222. On investments made by the domestic industry, the European Commission distinguished between investments to (a) make efficiency gains and maintain existing facilities and (b) increase capacity. It stated that the sampled domestic producers continued to invest during the injury period mainly to "make efficiency gains and maintain existing facilities".[308] It also noted that such investments were threatened by a decreasing ability to raise capital.[309]

7.223. The European Commission stated that certain investments to increase capacity had not gone ahead as planned, with all sampled producers delaying investments during the period.[310] It noted in this regard that the inadequate level of return on investments also jeopardized the future ability of the Union industry to raise capital and thus survive in the medium and long term.[311]

7.5.3.2.1.2 Return on investments

7.224. Regarding return on investments, the European Commission noted that the trends in "return on investments" developed in a similar manner to the return on turnover, falling in 2019 and 2020 and experiencing a "modest" increase in the POI.[312] Moreover, it noted that the trend in return on investments followed the trend in profitability. The return on investments decreased when profitability did and increased in the POI following an increase in profitability.[313] However, because the increase in profitability during the POI was only temporary, the European Commission maintained its conclusion that investment levels were inadequate for the future survival of the domestic industry.[314]

7.5.3.2.2 Whether the European Commission's evaluation of investments and return on investments was inconsistent with Articles 3.1 and 3.4

7.225. Indonesia challenges the European Commission's evaluation of developments in investments and returns on investments in the fatty acid industry during the POI. Although the European Commission expressly noted the positive developments of these factors, Indonesia considers that it dismissed the relevance of those factors.[315] We address these factors separately in our evaluation below.

7.5.3.2.2.1 Investments

7.226. Indonesia contends that the European Commission did not provide any explanation or evidence to support its statement that the domestic industry's investments to increase capacity had not gone ahead as planned.[316] In particular, Indonesia argues that the European Commission failed to adequately address conflicting evidence.[317] Indonesia notes that KLK Emmerich GmbH (KLK), which is one of the main EU producers, stated that it had continued to invest in "process efficiencies, cost improvements and downstream integration", and that it was "able to stay competitive and

[306] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 256.
[307] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recitals 256 and 266-269.
[308] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 253.
[309] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 253.
[310] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 254.
[311] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 254.
[312] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 252.
[313] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 280. See also European Union's response to Panel question No. 41, para. 66.
[314] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 280.
[315] Indonesia's first written submission, para. 268.
[316] Indonesia's first written submission, para. 269.
[317] Indonesia's first written submission, para. 269.

profitable with Indonesian [exports]".[318] However, the European Commission dismissed this statement.[319]

7.227. The European Union rejects Indonesia's argument that the European Commission failed to take into account conflicting evidence. The European Union argues that KLK's statements did not concern investments in capacity expansion. It also argues that investments by the domestic industry were limited, due to the negative or low profitability during the injury period.[320] In addition, there were no investments to develop production capacity, which is confirmed by data showing that the capacity of the domestic industry remained flat.[321]

7.228. Indonesia's argument focuses on the European Commission's finding that *investments to increase capacity* had not gone ahead as planned. We note that KLK stated that it "had invested and will continue to invest in our process efficiencies, cost improvements and downstream integration"[322], and was able to stay competitive and profitable with the Indonesian imports. This letter, as the European Union notes, does not refer to investments in capacity. Thus, we do not consider that this letter undermines the European Commission's finding that investments to increase capacity had not gone ahead as planned. The European Commission, as noted above, recognized that the domestic industry had made investments to make efficiency gains and maintain existing facilities. Therefore, Indonesia has not established that the European Commission failed to make an unbiased and objective evaluation of the record evidence.

7.229. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in failing to make an objective examination of positive evidence when it evaluated the investments of the domestic industry.

7.5.3.2.2.2 Return on investments

7.230. Indonesia contends that the European Commission failed to substantiate why it considered that the domestic industry's return on investments, which was positive, supported its injury determination. Indonesia submits that while the European Commission concluded that the "inadequate" level of return on investments affected the domestic industry's survival in the medium and long term, it did not explain why the return was inadequate, nor did it provide any benchmark against which it measured the adequacy of the return.[323]

7.231. The European Union submits that the return on investments was inadequate and compromised the industry's ability to raise capital in the future and survive in the medium and long term.[324] It contends in this regard that the chemical sector is a capital-intensive industry that has to make profits in the medium to long term to survive by regular investment and innovation. The European Union submits that the small profits recorded during 2018-2021 were clearly inadequate in this regard.[325]

7.232. As explained above, the authority found that the trends in the return on investments were "apparently positive" but "did not change the fact that the performance during the period considered remained at a level that was inadequate to ensure the viability of the Union industry in the medium and long term".[326] The European Commission was also of the view that the level of the return on investments jeopardized the future ability of the domestic industry to raise capital and thus survive in the medium and long term. The question before us is thus whether the European Commission correctly established how the positive trends regarding the return on investments nevertheless supported its finding of material injury.

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[318] Indonesia's first written submission, para. 269 (quoting KLK's letter to the European Commission (Exhibit IDN-9)).
[319] Indonesia's first written submission, para. 269.
[320] European Union's first written submission, para. 251.
[321] European Union's first written submission, para. 262.
[322] KLK's letter to the European Commission (Exhibit IDN-9).
[323] Indonesia's first written submission, para. 270.
[324] European Union's first written submission, para. 251. See also European Union's response to Panel question No. 41, para. 67.
[325] European Union's response to Panel question No. 41, para. 68.
[326] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 256.

7.233. We note that while recognizing the positive trends in return on investments, the European Commission linked the return on investments to the trend in profitability. In particular, as explained by the European Commission, and noted by the European Union in response to Panel questions, the return on investments is the value of the total profit of the product under investigation divided by the value of the total fixed assets used for its production.[327] The European Commission found that the value of the domestic industry's total fixed assets remained "rather stable" during the injury period, and thus the trends with respect to return on investments followed the trend in profitability.[328] The European Commission found, as noted above, that the trend in profitability during the POI was temporary.

7.234. Therefore, the European Commission's conclusion that the return on investments was not adequate to ensure the medium- and long-term survival of the domestic industry was based on the temporary nature of the return seen during the POI and the level of profits seen during the rest of the injury period. We do not consider that this conclusion was not reasoned and adequate just because the European Commission did not establish a benchmark rate on return on investments. In the absence of a requirement set out in the text of Article 3.4 for such a benchmark, the absence of any specific methodology in Articles 3.1 and 3.4 to evaluate any injury factor, and the case-specific nature of the evaluation under Article 3.4, we do not consider that a benchmark return on investments needs to be established in each and every case.

7.235. Moreover, while the return substantially improved in the last year of the injury period, an authority is entitled, in our view, to assess this recovery in the light of the low and negative returns witnessed in the preceding years. Specifically, in assessing whether the return could jeopardize the domestic industry's future ability to raise capital and survive over a medium- to long-term horizon, the evolution of the data over the injury period could have led an authority to conclude that the level of the return was inadequate to raise capital over that time horizon.[329]

7.236. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in failing to make an objective examination of positive evidence when it evaluated the return on investments of the domestic industry.

7.5.3.3 Ability to raise capital

7.5.3.3.1 The European Commission's evaluation of the domestic industry's ability to raise capital

7.237. In the underlying investigation, as noted above, the European Commission concluded that the injury consisted mainly of price and performance indicators such as profitability and the ability to raise capital.[330] Finding that the domestic industry continued to invest during the injury period, "mainly … in order to make efficiency gains and maintain existing facilities", the European Commission noted that "[s]uch investments [were] threatened by a decreasing ability to raise capital".[331] It also found that "other investments to increase capacity" had not gone ahead as planned during the injury period.[332] The European Commission added that the "inadequate level of the return on investments also jeopardises the future ability of the Union industry to raise capital and thus its survival in the medium and long term".[333]

[327] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 280; European Union's response to Panel question No. 41, para. 67.
[328] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 280.
[329] We note that the issue presented before us by Indonesia is not whether the injury suffered by the domestic industry was linked to the dumped imports.
[330] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 259.
[331] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 253.
[332] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 254. Recitals 253-254 suggest that the European Commission distinguished between (a) investments "to make efficiency gains and maintain existing facilities" and (b) "other investments to increase capacity".
[333] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 254.

7.238. In addition to the European Commission's determination, the European Union also relies in these panel proceedings on two documents from the European Commission's record to defend the European Commission's evaluation of this factor[334]:

a. The questionnaire response of [[***]], which is described as one of the largest domestic producers in the underlying investigation. [[***]] stated in its response that [[***]].[335]

b. The verification report of another EU producer[336] along with certain exhibits[337] that form part of the report (discussed below). The European Union describes this producer as one of the smaller sampled EU producers.

7.5.3.3.2 Whether the European Commission's evaluation of the ability to raise capital was inconsistent with Articles 3.1 and 3.4

7.239. Indonesia contends that the European Commission's statement that investments were threatened by a decreasing ability to raise capital was not supported by any evidence.[338] Therefore, according to Indonesia, the European Commission failed to provide a reasoned and adequate explanation on what evidence supported its conclusion regarding the domestic industry's inability to raise capital.[339] This is all the more important as the investigating authority identified the industry's inability to raise capital as one of the main reasons for finding material injury. Indonesia asserts that investments of the domestic industry actually substantially increased during the injury period, thus undermining the idea that the industry had difficulty raising capital.[340] Moreover, questioning the European Union's submission that low profits will discourage investors from injecting new capital into any business activity, Indonesia contends that investors may be willing to do so if they anticipate future growth or strategic value.[341] Indonesia also asserts in this regard that, unlike the European Union before this Panel, the anti-dumping determination made no express linkage between the domestic industry's ability to raise capital and its profitability levels.[342]

7.240. The European Union disagrees that the European Commission failed to specify the evidence that supported its conclusion that the domestic industry's investments were threatened by a decreasing ability to raise capital. For the European Union, profits are the main indicator that a business is viable and, in the absence of any other elements forecasting improvements in the future, losses or low profits discourage investors from injecting capital into the business.[343] The European Union also submits that the domestic industry's ability to raise capital declined because the profit rate was on average below 1% over the injury period.[344] In particular, it argues that the very low profitability of the sampled industry, and the evidence from the largest sampled producer, supported the European Commission's industry-wide conclusion regarding the domestic industry's decreased ability to raise capital.[345] Finally, the European Union disagrees with Indonesia's submission that the domestic industry's increase in investments showed that it was able to raise capital: the record shows that the only investments made were those needed for maintenance and compliance with environment and labour standards and that even these investments were threatened by a decreasing ability to raise capital.[346]

7.241. The question before us is whether, in evaluating the domestic industry's ability to raise capital, the European Commission made an objective examination of the positive evidence on record. To address this question we will assess whether the European Commission's explanations were reasoned and adequate in the light of the record evidence. We find it important to note here that,

[334] European Union's response to Panel question No. 38, paras. 62-64.
[335] Questionnaire response of a sampled producer (Exhibit EU-13 (BCI)), p. 28.
[336] Verification report of an EU producer (Exhibit EU-12 (BCI)).
[337] EU producer's study and engineering agreement (Exhibit EU-8 (BCI)); EU producer's study and engineering agreement and annex (Exhibit EU-9 (BCI)); EU producer's audit report (extract) (Exhibit EU-10 (BCI)); and EU producer's investment plan presentation (Exhibit EU-11 (BCI)).
[338] Indonesia's first written submission, para. 262.
[339] Indonesia's first written submission, para. 262.
[340] Indonesia's first written submission, para. 262.
[341] Indonesia's comments on the European Union's response to Panel question No. 85(a), para. 81.
[342] Indonesia's comments on the European Union's response to Panel question No. 84, para. 78.
[343] European Union's response to Panel question No. 85(a), para. 90.
[344] European Union's response to Panel question No. 38, para. 62.
[345] European Union's response to Panel question No. 38, para. 64.
[346] European Union's response to Panel question No. 85(a), para. 91.

in the context of an investigation, an authority may often be required to reach its conclusions based on various pieces of evidence. One piece of such evidence may or may not, in and of itself, support the ultimate conclusion of the authority. However, our task is to examine the authority's conclusions in the light of the totality of the evidence on the record. Therefore, we would thus expect the complainant to establish that the authority's conclusions in the light of the totality of such evidence are not one that an unbiased and objective authority could have reached.

7.242. We start by noting that the European Commission's conclusions regarding the domestic industry's inability to raise capital were linked to the low profitability of the domestic industry. For instance, the European Commission considered the level of profitability to be below what the industry should obtain under normal conditions of competition and to be inadequate to ensure the industry's long-term survival. It stated in this regard that investments had to be made to maintain existing facilities, but that the compromised ability to raise capital threatened those investments.[347] The European Commission also found, as noted above, that the "inadequate level of the return on investments also jeopardises the future ability of the Union industry to raise capital and thus its survival in the medium and long term." Considering that the return on investments reflects the value of total profit divided by the fixed assets (the assets, as the European Commission found, remained stable[348]), we are of the view that the European Commission did link profitability with the ability to raise capital, contrary to what Indonesia submits.

7.243. On the linkage between decreasing profitability and the declining ability to raise capital, we consider that a company's ability to raise capital is likely to be strengthened if it makes a profit and weakened if it makes a loss.[349] We agree with Indonesia that there may be circumstances where investors are willing to inject capital into a business that is making low profits, or even losses, such as when they anticipate future growth or strategic value. However, Indonesia has not pointed to anything on the record of the European Commission that would suggest that the domestic industry could attract investments notwithstanding its losses and low profits over the injury period, such as for the reasons pointed out by Indonesia. Thus, we do not consider that the European Commission's evaluation of the domestic industry's ability to raise capital was undermined because it did not engage in a hypothetical enquiry on whether the domestic industry's ability to raise capital notwithstanding its losses and low profits was unaffected because of such reasons.

7.244. Moreover, we find the record evidence presented by the European Union, cited in paragraph 7.238 above, to be consistent with the European Commission's findings in this regard. In particular, as noted above, [[***]], a sampled domestic producer, informed the European Commission in its questionnaire response that [[***]].[350] Indonesia contends that [[***]] statement does not show that [[***]], let alone the EU industry, experienced a decreased ability to raise capital.[351] Indonesia submits that the fact that [[***]].[352] Indonesia asserts that the record does not indicate that "loans were denied, that investments were cancelled, or that capital was unavailable".[353] Moreover, Indonesia notes that KLK informed the European Commission in the course of the investigation that it had invested, and would continue to invest, in its processes, cost improvements and downstream integration, and that the European Commission should have considered these statements when examining [[***]], and that it was able to stay competitive and profitable with the Indonesian exports.[354]

7.245. We note that the domestic industry's ability to raise capital may be affected even if the industry is not in a situation where no capital is available, or loans are not denied. Thus, the absence

[347] European Union's response to Panel question No. 84, para. 88 (quoting Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 368). This finding is reflected in the causation section of the determination, but that does not preclude us from considering it.

[348] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 280. Indonesia does not dispute this finding.

[349] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.185. In this regard, we agree with this panel that while it is possible that a loss-making enterprise may still be able to raise capital on the market by taking a loan or selling its shares, under normal market conditions, a company's ability to raise capital is strengthened if it is profit making, and is weakened when it is loss making.

[350] Questionnaire response of a sampled producer (Exhibit EU-13 (BCI)), p. 28.

[351] Indonesia's second written submission, para. 160.

[352] Indonesia's response to Panel question No. 85(b), para. 161; comments on the European Union's response to Panel question No. 83, para. 76 (referring to Excerpt from OECD report *Transfer Pricing Guidance on Financial Transactions* (Exhibit IDN-63), pp. 29-34).

[353] Indonesia's response to Panel question No. 85(b), para. 161.

[354] Indonesia's response to Panel question No. 85(b), para. 162.

of evidence showing that "no" capital was available does not necessarily undermine the authority's evaluation of the domestic industry's ability to raise capital. Moreover, here, the record evidence shows that [[***]]. Thus, we are not persuaded by Indonesia's arguments set out above questioning the probative value of this evidence on that basis.

7.246. In addition, we note that the European Commission had on file KLK's letter, discussed in paragraph 7.228 above, that it had invested, and would continue to invest, in its processes, cost improvements, and downstream integration, and that it was able to stay competitive and profitable with Indonesian imports. However, that KLK was able to make certain investments and its view that it was able to stay competitive and profitable with Indonesian imports does not detract from its submission (whose factual accuracy is not in dispute) [[***]].

7.247. On the verification report of the smaller EU producer, the report notes that [[***]].[355] The producer also stated that [[***]].[356] Indonesia submits that (a) only a part of the investment [[***]] did not materialize and the investment in the [[***]]; (b) the verification report does not suggest that this investment was scheduled during the POI; (c) the producer in question was a smaller producer; and that (d) its explanations [[***]] was generic.[357] The European Union notes that [[***]].[358] This producer, irrespective of its size, was part of the EU industry, so that the evidence it presented can be part of the European Commission's evaluation. Moreover, the European Commission was certainly not precluded from drawing conclusions from [[***]], due to its inability to raise capital, even if it was able to [[***]].

7.248. That being said, while this verification report notes that this producer attributed the [[***]], we are sympathetic to Indonesia's concerns regarding the generic nature of this response which does not set out in more detail the underlying basis for this statement. However, we note that this is not the only piece of evidence supporting the European Commission's overall findings. Moreover, this piece of evidence does not contradict the European Commission's findings regarding the domestic industry's ability to raise capital (in which case we would have expected an authority to explain its conclusions in the light of contradictory evidence). Therefore, Indonesia has not established, in the light of the totality of the evidence, that the European Commission failed to evaluate the domestic industry's ability to raise capital in an objective and unbiased manner.

7.249. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in evaluating the domestic industry's ability to raise capital.

7.5.3.4 Sales prices

7.5.3.4.1 The European Commission's evaluation of sales prices

7.250. In the underlying investigation, the European Commission noted an improvement in the sales prices of fatty acid during the POI but explained that this positive development should be considered in the context of a parallel increase in raw material costs (of 23% over the injury period).[359]

[355] Verification report of an EU producer (Exhibit EU-12 (BCI)), p. 9. Indonesia submits that this evidence was not on the "public" record of the European Commission, but does not argue that it was not on the record. It notes in this regard that the public record contained a non-confidential version of the verification report of an EU producer contained in Exhibit EU-12 (BCI). (Indonesia's second written submission, para. 157 and fn 167). In previous disputes, with which we agree, Articles 17.5 and 17.6(i) of the Anti-Dumping Agreement have been understood to permit panels to examine facts that were not disclosed to, or discernible by, interested parties at the time of the final determination. (Appellate Body Report, *Thailand – H-Beams*, para. 118).

[356] Verification report of an EU producer (Exhibit EU-12 (BCI)), p. 9.

[357] Indonesia's response to Panel question No. 85(b), paras. 156-158; comments on the European Union's response to Panel question No. 85(c), para. 85.

[358] European Union's response to Panel question No. 82, paras. 84 and 86 (referring to EU producer's investment plan presentation (Exhibit EU-11 (BCI))).

[359] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 239.

7.5.3.4.2 Whether the European Commission's evaluation of sales price was inconsistent with Articles 3.1 and 3.4

7.251. For Indonesia, simply accepting that the hike in sales prices is justified by an increase in raw materials prices does not amount to an objective examination of this factor by the authority.[360] While Indonesia acknowledges that the cost of raw materials did increase over the period, it argues that the European Commission failed to take into account a marked improvement in sales prices over the injury period.[361]

7.252. For the European Union, the European Commission compellingly explained why the positive development in sales prices were related to the significant increase in raw material prices during the POI.[362]

7.253. We note that the European Commission acknowledged the positive development in sales prices and explained the reasons for such an increase in its determination. In particular, the European Commission insisted on the fact that the cost of raw materials represented a major proportion of the cost of production of fatty acid (70%) and that it matched the evolution of sales prices over the period. Therefore, we are not persuaded by Indonesia's argument that the European Commission did not make an objective assessment of this factor.

7.254. In response to a question posed by the Panel after the second meeting, Indonesia made a new argument[363], relying on previous panel reports, that in requiring an examination of the impact of the dumped imports on the domestic industry, Article 3.4 requires a link between dumped imports and the state of the domestic industry.[364] Thus, according to Indonesia, the European Commission "was required to *demonstrate* how *imports constrained the sales price of the [domestic industry] despite the fact that sales price increased beyond raw material costs*".[365] The European Union did not respond to this new argument in its comments. We note with some concerns the timing of this new argument.[366] Nonetheless, any consideration of "how imports constrained the sales price of the [domestic industry] despite the fact that sales price increased beyond raw material costs" would essentially be part of a price suppression analysis under Article 3.2 of the Anti-Dumping Agreement. Moreover, neither Article 3.2 nor Article 3.4 require a "demonstration" of the effect of imports, and it is Article 3.5 which requires such a demonstration that the dumped imports are, through the effects of dumping, as set forth in Articles 3.2 and 3.4, causing injury to the domestic industry. Indonesia has not challenged the European Commission's price suppression analysis or explained why this analysis needs to be duplicated under Article 3.4. Indonesia has also not challenged the European Commission's causation determination under Article 3.5. We accordingly reject Indonesia's new argument.

7.255. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in evaluating the domestic industry's sales prices.

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[360] Indonesia's first written submission, para. 266.
[361] Indonesia's response to Panel question No. 42, para. 167.
[362] European Union's first written submission, para. 247.
[363] The arguments advanced by Indonesia prior to its response to our questions following the second meeting are set out in the following documents: Indonesia's first written submission, para. 266; second written submission, para. 146; opening statement at the first meeting of the Panel, para. 128; and response to Panel question No. 42, para. 167.
[364] Indonesia's response to Panel question No. 86(a)-(b), para. 166 and fn 157.
[365] Indonesia's response to Panel question No. 86(a)-(b), para. 166. (emphasis added)
[366] We note that throughout the course of the proceedings Indonesia's arguments focused on the European Commission's alleged dismissal of the positive trends in sales price. Meanwhile, the new argument focuses on the need for an authority to establish a "link" between dumped imports and the sales price of the domestic industry.

7.5.3.5 Closing stocks

7.5.3.5.1 The European Commission's evaluation of closing stocks

7.256. The domestic industry's closing stocks, as set out in the European Commission's final anti-dumping determination, over the injury period were as follows[367]:

	2018	2019	2020	POI
Closing stocks (tonnes)	21,784	23,066	23,708	19,013
Index	100	106	109	87
Closing stocks as a percentage of production	3.8	4.1	4.5	3.6
Index	100	108	116	93

7.257. The European Commission noted that stocks of the sampled producers decreased over the injury period.[368] It explained that stocks as a percentage of production were low throughout the injury period because the fatty acid industry generally operated on a production-to-order basis and stocks are kept at low levels because they can deteriorate in quality or change specifications.[369] Thus, the European Commission concluded that stocks as an injury factor were of lesser importance to its overall injury analysis.[370]

7.5.3.5.2 Whether the European Commission's evaluation of closing stocks was inconsistent with Articles 3.1 and 3.4

7.258. While Indonesia accepts the European Commission's explanation that stocks are generally kept at low volumes in the fatty acid industry, it submits that the European Commission was nevertheless required to take into account, in its injury as assessment, the decreasing level of stocks over the POI.[371] According to Indonesia, rather than dismissing the relevance of this indicator, the investigating authority should have found that such a significant decrease in stocks was indicative of a positive trend in domestic sales.

7.259. The European Union disagrees with Indonesia's view that a decline in stocks inevitably shows an increase in sales.[372] It argues that production in the fatty acid sector is driven by sales orders and that storage space is typically limited because stocks can deteriorate in quality over time or fall outside specifications.[373] The European Union explains that closing stocks as a percentage of production were low throughout the injury period and thus the European Commission was correct in considering decreasing stocks to be of lesser importance to the injury analysis.[374]

7.260. We note that the European Commission acknowledged the decrease in stocks but explained that this factor was of lesser importance because the fatty acid industry generally operated on a production-to-order basis and stocks were kept at low levels because they can deteriorate in quality or change specifications. We also note that the explanations given by the European Commission, as part of its evaluation of sales volume are consistent with those it provided with respect to closing stocks. In particular, the European Commission observed that the trend of EU industry sales (including captive use) was similar to production over the injury period, because production was driven by sales orders.[375] The European Commission added that storage space is typically limited in the fatty acid industry, and stocks of finished goods can over time deteriorate in quality or fall outside specifications.[376] Therefore, inventories were normally kept at very low volumes.[377]

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[367] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 242 and table 9.
[368] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 243.
[369] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 243.
[370] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 243.
[371] Indonesia's opening statement at the first meeting of the Panel, para. 131; first written submission, para. 267.
[372] European Union's first written submission, para. 260 (referring to the Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 225).
[373] European Union's first written submission, para. 260.
[374] European Union's first written submission, para. 260 (referring to the Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 243).
[375] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 225.
[376] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 225.
[377] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 225.

7.261. Considering that Indonesia (a) does not dispute the European Commission's explanation on why closing stocks remained at a low level throughout the POI and were thus of lesser importance to the injury analysis, and (b) contends that a decrease in stocks indicates a positive trend in the sales volume, but at the same time does not dispute the European Commission's findings on the sales volume, we are not persuaded that Indonesia has met its burden of establishing that the European Commission failed to evaluate closing stocks in an objective and unbiased manner.

7.262. For the foregoing reasons, we find that Indonesia has not established that the European Commission acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in evaluating the domestic industry's closing stocks.

7.5.3.6 Whether the European Commission failed to take into account the existence of positive trends in its analysis of injury

7.263. Indonesia contends that, with respect to several factors, the European Commission failed to take into account the positive developments which occurred between 2020 and the POI. Indonesia refers to the improvements in production, production capacity, cash flow, productivity, labour costs, and market share as well as in factors already discussed above (such as return on investments, stocks, sales prices, and profitability).[378]

7.264. We note that recital 282 of the final anti-dumping determination addresses the question of positive trends occurring at the end of the injury period, in response to comments made by interested parties. It states that the improvement in certain injury factors between 2020 and the POI was found to be too small or merely temporary and therefore insufficient to reverse the injury findings.[379] Recital 282 states the following:

> The Commission must carry out the injury assessment for the entire period considered and not only during the investigation period. The methodology suggested by the Musim Mas group, like the assessment of the GOI and Wilmar above, would not represent a full and accurate analysis of the injury situation of the Union industry as required by Article 3 of the basic Regulation. The small increase in production volume (1,2 %), production capacity (1,9 %), and the decrease in stocks was due to the temporary increase in profitability, as explained in recital (266). The cash flow and return of investment followed the development of profitability. The market share of the Union industry on the free market decreased in the IP as compared to 2020 from 68,4 % to 68,3 %. The selling price of the Union industry increased in line with the increased unit cost of production due to the increase in raw materials prices, which was rendered possible by the temporary supply disruptions and the effects of the COVID 19 pandemic in particular during the IP. Therefore, the claim was rejected.

7.265. In response to our questions on whether recital 282 shows that the European Commission did examine the intervening trends of the listed factors, Indonesia submits that this recital merely shows that positive trends in several factors were acknowledged.[380] However, it does not show that the European Commission took those trends into account in its injury analysis.[381] In addition, according to Indonesia, the European Commission's examination and conclusions in other parts of the determination with respect to production, production capacity, and cash flow show that it focused exclusively on the change in figures between the beginning and the end of the injury period.[382] Indonesia also submits that recital 282 does not refer to productivity and labour costs, which showed positive developments between 2020 and the POI. Finally, with respect to productivity, Indonesia

[378] Indonesia's first written submission, paras. 272-273.
[379] European Union's first written submission, para. 248.
[380] Indonesia's response to Panel question No. 88, para. 171.
[381] Indonesia's response to Panel question No. 88, para. 171.
[382] Indonesia's response to Panel question No. 88, para. 172 (referring to Final anti-dumping determination on fatty acid (Exhibit IDN-4), recitals 221-222 and 251).

submits that the European Commission's finding was internally contradictory[383] and thus fell short of an objective assessment.[384]

7.266. We disagree with Indonesia for the following reasons.

7.267. First, we note that for factors other than *productivity* and *labour costs*, the European Commission explicitly addressed the specific issue of intervening trends in recital 282 of its final determination. It specifically set out why it found that the improvements between 2020 and the POI did not detract from a finding of injury. More detailed analysis on trends between 2020 and POI are also discussed in other parts of the determination with respect to some of these factors, as we discussed above. In this regard, we recall that the Anti-Dumping Agreement does not impose a formal structural obligation on an authority to confine its analysis on any injury factor to any specific part of its determination, provided the overall analysis shows that the authority has met its obligations under these provisions. We thus find that Indonesia has not substantiated why the analysis of these injury factors is qualitatively deficient under Articles 3.1 and 3.4.[385] Thus, we reject Indonesia's arguments in this regard.

7.268. Indonesia also contends that recital 282 does not refer to productivity and labour costs, and that the European Commission's statements on productivity were internally inconsistent.

7.269. On the question of *productivity*, we note that the European Commission observed that productivity measured in terms of tonnes per employee fell in 2020 but remained largely stable over the injury period.[386] In its overall conclusions on injury, the European Commission noted that declines occurred in employment and productivity, along with the lower levels of production and sales volume.[387] The European Commission's assessment that productivity remained stable over the injury period suggests that it did consider the trends over this period. Moreover, we do not see a contradiction in the European Commission's two statements relied on by Indonesia that would show that the authority acted inconsistently with Articles 3.1 and 3.4. We note that the productivity declined over the injury period from 990 to 971 (tonnes per employee) and fell from 1012 in 2019 to 906 in 2020. This decline in productivity would support the European Commission's conclusion regarding a decline in productivity over the injury period. However, considering the limited movement in trends over this period, an objective and unbiased authority may well have also viewed the trends as "overall" "largely stable". We do not find any basis to conclude that this alleged contradiction shows a failure to make an objective examination as alleged by Indonesia.

7.270. On *labour costs*, we note that the European Commission found that the cost of labour increased by 8% over the injury period. We note that there was a consistent year-on-year increase in labour costs from 2018-2020, and a percentage point decline from 2020 to the POI. Indonesia characterizes the trends in labour costs as positive.[388] Indonesia asserts that the positive development towards the end of the injury period should have been given appropriate weight, but that the European Commission engaged with an end-point-to-end-point comparison of, among other factors, labour costs.[389] We note that there was a year-on-year increase in labour costs and a slight decline in those costs during the end of the injury period. We note the European Commission's explanation, which Indonesia does not engage with, that developments in salaries are negotiated with labour unions and other employee-related costs are set by the national administration. Indonesia also does not explain how the decline in average labour cost per employee between 2020 and the POI shows lack of injury to the domestic industry. Thus, in the absence of substantiation from Indonesia we reject Indonesia's arguments based on the European Commission's evaluation of labour costs.

[383] Indonesia's first written submission, para. 275 (referring to Final anti-dumping determination on fatty acid (Exhibit IDN-4), recitals 233 and 259). The contradiction arises because the European Commission recognized that productivity remained "largely stable", and yet, in the conclusion section of the injury analysis found that productivity declined.

[384] Indonesia's first written submission, para. 275.

[385] We also noted above that the European Commission while stating that the domestic industry suffered a decline in volume indicators like production and capacity, concluded that the injury it found consisted mainly of price and performance indicators.

[386] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 233.

[387] Final anti-dumping determination on fatty acid (Exhibit IDN-4), recital 259.

[388] Indonesia's first written submission, para. 273.

[389] Indonesia's first written submission, para. 274.

7.5.4 Whether the European Commission failed to give appropriate weight to injury factors showing a positive trend in its overall injury analysis

7.271. Indonesia contends that when many of the injury factors set out in Article 3.4 of the Anti-Dumping Agreement show a positive trend, an investigating authority is required to provide a compelling explanation of how and why, despite those positive trends, it ultimately concludes that the domestic industry is injured.[390] However, in Indonesia's view, the European Commission failed to do so.

7.272. In particular, Indonesia contends that only three of the 15 injury factors under Article 3.4 showed a "clear negative trend", and these trends were capacity utilization, sales and employment.[391] However, according to Indonesia, the European Commission dismissed the positive trends and thus failed to provide a reasoned and compelling explanation of how the negative trends outweighed the positive developments.[392] Indonesia submits that the absence of any injury in this regard was confirmed by a letter provided by KLK (an EU producer) to the European Commission and its explanation that it was able to stay competitive and profitable with the Indonesian imports, and also confirmed by the applicant's withdrawal of the written application in the course of the investigation.[393]

7.273. The European Union rejects Indonesia's arguments by contending that Indonesia fails to review the trends in the injury factors in proper context, while also noting that positive trends in certain injury factors specifically between 2020 and the POI were too small or merely temporary.[394] Therefore, according to the European Union, these trends were insufficient to undermine the European Commission's injury findings.[395]

7.274. The question posed by this claim is whether the European Commission explained how it took into account evidence of positive trends in reaching its conclusions on material injury to the domestic industry. We recall that it is not necessary for an investigating authority to find that all factors or even a certain number of factors are displaying negative trends to conclude that the domestic industry has suffered injury.[396] However, faced with evidence that contradicts its conclusions, an investigating authority must at least explain how it took into account evidence of such positive trends in reaching its conclusion.[397]

7.275. In our review of Indonesia's submissions challenging the European Commission's evaluation of several injury factors, we have found that Indonesia has not established that the European Commission failed to evaluate these factors consistently with its obligations under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In its overall conclusions on injury, building on its analysis of these individual factors, the European Commission found, as noted in paragraphs 7.200-7.201 above, that the injury to the domestic industry consisted mainly of price and performance indicators such as "profitability and the ability to raise capital". We find, in the light of the reasons set out above, that the European Commission provided a reasoned and adequate explanation of each of the injury factors it examined as part of its injury analysis. These factors, taken together, also provided a coherent account of injury suffered to the domestic industry.

7.276. Moreover, in presenting this aspect of its claim, Indonesia relied again on KLK's letter stating that it was able to make, and would continue making investments in process efficiencies, cost improvements, and downstream integration, as well as that it was able to stay competitive and profitable with Indonesian imports.[398] Indonesia submits that the European Commission dismissed KLK's comments by noting that a letter from a single EU producer cannot override the European Commission's conclusions on material injury.[399] We discussed this letter from KLK when reviewing Indonesia's arguments on the European Commission's evaluation of investments. However, we note that in presenting this aspect of Indonesia's claim, Indonesia does not

[390] Indonesia's first written submission, para. 276.
[391] Indonesia's first written submission, para. 276 and fn 262.
[392] Indonesia's first written submission, para. 277.
[393] Indonesia's first written submission, para. 278.
[394] European Union's first written submission, paras. 248, 264-265, and 267, and fn 257.
[395] European Union's first written submission, para. 248 and fn 257.
[396] See e.g. Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.420.
[397] See e.g. Panel Report, *Pakistan – BOPP Film (UAE)*, appealed 22 February 2021, para. 7.420.
[398] Indonesia's first written submission, para. 278.
[399] Indonesia's first written submission, para. 278.

substantiate its submission by explaining how the European Commission failed to act consistently with Articles 3.1 and 3.4 by rejecting KLK's submission for the reasons that it did. In particular, Indonesia does not substantiate why the European Commission's overall analysis on injury was undermined by the views set by one of the producers in this letter.

7.277. For the foregoing reasons, we find that Indonesia has not established that the European Commission failed to give appropriate weight, in its overall assessment of the state of the domestic industry, to factors displaying a positive trend.

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

7.278. Indonesia contends that as a consequence of the substantive violations under the Anti-Dumping Agreement and the GATT 1994, the European Union acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.[400]

7.279. We note that Indonesia's claim under Article 1 of the Anti-Dumping Agreement is a purely consequential one. As a consequence of the substantive violations that we found above, we find that the European Commission also acted inconsistently with Article 1 of the Anti-Dumping Agreement.

7.280. With respect to Indonesia's consequential claim under Article VI of the GATT 1994, in presenting this consequential claim Indonesia does not identify the specific paragraphs of Article VI, or the specific obligations that it seeks to challenge. Like the panel in *US – OCTG (Korea)*, we do not consider that we can make findings under Article VI in general, or parse the complainant's claim to identify which obligations in Article VI are violated as a consequence of the substantive violations.[401] Therefore, we reject this consequential claim under Article VI. Nonetheless, we note that that we found, for the reasons set out above, a violation under Article VI:2 of the GATT 1994 because the anti-dumping duty imposed on Musim Mas was based on a margin of dumping calculated inconsistently with Article 2.4.1 of the Anti-Dumping Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this Report, we conclude that the European Union acted inconsistently with:

a. Article 2.4.1 of the Anti-Dumping Agreement because of the European Commission's failure to use the rate of exchange on the date of sale as required by this Article[402];

b. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing an anti-dumping duty exceeding the margin of dumping that should have been established under Article 2 due to the inconsistency with Article 2.4.1 of the Anti-Dumping Agreement as set out in paragraph 8.1(a) above[403]; and

c. Article 1 of the Anti-Dumping Agreement as a consequence of these inconsistencies.[404]

8.2. For the reasons set out in this Report, we conclude that Indonesia has failed to establish that the European Union acted inconsistently with:

a. Article 5.6 of the Anti-Dumping Agreement by continuing the anti-dumping investigation on imports of fatty acid despite the withdrawal of the written application[405];

[400] Indonesia's first written submission, paras. 310 and 370.
[401] Panel Report, *US – OCTG (Korea)*, para. 7.337. We are aware that some other panels have found consequential violations under Article VI as a whole, but do not consider such an approach to be warranted in this dispute. (See e.g. Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.336; and *Canada – Welded Pipe*, para. 7.223)
[402] See para. 7.185 above.
[403] See para. 7.192 above.
[404] See para. 7.279 above.
[405] See para. 7.24 above.

b. Article X:3(a) of the GATT 1994 by reason of the European Commission's administration of Article 9(1) of the EU Basic Anti-Dumping Regulation and Article 14(1) of the EU Basic Anti-Subsidy Regulation by continuing the anti-dumping investigation while terminating the countervailing duty investigation despite the withdrawal of the written applications in both investigations[406];

c. Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement and Article X:3(a) of the GATT 1994 "as such" by recourse to an alleged unwritten measure which Indonesia has failed to prove [407];

d. Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement "as applied" by reason of the European Commission's construction of the normal value of two PCNs using SG&A costs and profits derived from the production and sales in the ordinary course of trade of those specific PCNs[408];

e. Articles 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 as a consequence of the alleged "as applied" violations under Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement[409];

f. Article X:3(a) of the GATT 1994 "as applied" by reason of the European Commission's administration of Article 2(6) of the EU Basic Anti-Dumping Regulation in its application of two methodologies for constructing the normal value of PCNs sold in insufficient quantities on the domestic market[410];

g. Articles 3.1 and 3.4 of the Anti-Dumping Agreement in connection with (i) the European Commission's examination of specific injury factors, and (ii) the European Commission's alleged failure to give appropriate weight to injury factors showing a positive trend in its overall injury analysis[411]; and

h. Article VI of the GATT 1994 as a consequence of the inconsistencies with the Anti-Dumping Agreement and the GATT 1994.[412]

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Anti-Dumping Agreement and the GATT 1994, they have nullified or impaired benefits accruing to Indonesia under these agreements.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994.

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[406] See paras. 7.59 and 7.63 above.
[407] See para. 7.106 above.
[408] See para. 7.129 above.
[409] See para. 7.132 above.
[410] See para. 7.151 above.
[411] See paras. 7.219, 7.229, 7.236, 7.249, 7.255, 7.262, 7.267, 7.269-7.270 and 7.277 above.
[412] See para. 7.280 above.