EUROPEAN UNION – ANTIDUMPING MEASURES ON FATTY ACID (INDONESIA)

(DS622)

THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The United States welcomes the opportunity to present its views to the Panel. In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement") and the *General Agreement on Tariffs and Trade* (GATT) 1994 as relevant to certain issues in this dispute. First, we address the appropriate standard of review. Second, we address claims relating to the dumping determination under Articles 5.6, 5.4, 2.2 and 2.2.2 of the Anti-Dumping Agreement. Third, we address claims relating to the injury determination under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Fourth, we address the interpretation of Article X:3(a) of the GATT 1994. Finally, we address Indonesia's "as such" claim relating to the EU's calculation of SG&A and profit.

II. STANDARD OF REVIEW

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

3. Article 11 of the DSU establishes that "[t]he function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements." As such, "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."

4. Article 17.6 of the Anti-Dumping Agreement provides:

> In examining the matter referred to in paragraph 5:
>
> (i) in 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;
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> (ii) the 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.

5. With respect to the facts of the matter, the text of Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review for a panel undertaking its objective assessment pursuant to DSU Article 11. Specifically, a panel "shall determine" whether the investigating authority reached a conclusion that an "unbiased and objective" investigating authority could have reached "even though the panel might have reached a different conclusion." Under the plain meaning of its terms, Article 17.6 imposes "limiting obligations on a panel"[1] so as "to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."[2]

6. Therefore, in making its objective assessment under DSU Article 11 and Anti-Dumping Agreement Article 17.6, a panel is not undertaking a *de novo* evidentiary review or serving as "*initial trier of fact*," but is instead acting as "*reviewer* of agency action."[3] A complainant will prevail on its claims only where it has shown that the findings of the investigating authority are not findings that could have been reached by an objective and unbiased investigating authority.[4]

7. Accordingly, with respect to the facts, the Panel's task in this dispute is to assess whether the investigating authority, the European Commission (the "Commission"), properly established the facts and evaluated them in an unbiased and objective manner. The Panel's role is to determine whether an objective and unbiased investigating authority, reviewing the same evidentiary record as the Commission, could have – not would have – reached the same conclusions that the Commission reached. It would be inconsistent with the Panel's function under DSU Article 11 to exceed its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.

8. With respect to legal interpretation, the question under Article 17.6(ii) is whether an investigating authority's interpretation of the Anti-Dumping Agreement is based on a permissible interpretation. As the United States has explained for years, "permissible" means just that: a meaning that *could be* reached under the *Vienna Convention on the Law of Treaties*.[5] Article 17.6(ii) itself confirms that provisions of the Anti-Dumping Agreement may "admit[] of more than one permissible interpretation." Where that is the case, and where an investigating authority has relied on one such interpretation, a panel must find the measure to be in conformity with the Anti-Dumping Agreement. As one panel report stated, "[I]n accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it."[6]

9. Finally, where the Anti-Dumping Agreement is silent, it must not be interpreted so as to add to or diminish a Member's rights and obligations. Article 3.2 of the DSU indicates that the Panel is to utilize customary rules of interpretation of public international law to discern the meaning of relevant provisions of the covered agreements. Consistent with Article 31 of the Vienna Convention, a panel must therefore interpret the agreement "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object

[1] *See Thailand – H-Beams (AB)*, para. 114.
[2] *Thailand – H-Beams (AB)*, para. 117.
[3] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).
[4] *US – Coated Paper (Indonesia)*, paras. 7.3-7.7, 7.61, 7.83, 7.113, 7.193.
[5] *See, e.g.*, U.S. DSB Statement (February 2009) (WT/DSB/M/265), paras. 77-79.
[6] *Argentina – Poultry Anti-Dumping Duties*, para. 7.45.

and purpose." A corollary of this customary rule of interpretation is that an "interpretation must give meaning and effect to all the terms of the treaty;"[7] silence in the treaty on a given issue must likewise be given meaning. Such an approach serves to ensure conformity with Article 3.2 of the DSU, which provides that: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

III. CLAIMS RELATING TO THE DUMPING DETERMINATION

A. Claims Relating to Article 5.6 of the Anti-Dumping Agreement

10. Indonesia challenges the EU's decision to proceed with the anti-dumping investigation after the complainant withdrew its application for relief, but after the investigation had already been initiated. Indonesia argues that the EU acted in a manner inconsistent with the *ex officio* or the "self-initiation" provision of Article 5.6 of the Anti-Dumping Agreement by proceeding with an investigation following the withdrawal of the application without making a separate determination that special circumstances exist and that there is sufficient evidence of dumping, injury, and a causal link.[8]

11. The EU argues that Article 5.6 does not apply in the circumstance where a complainant withdraws a complaint after initiation of an investigation[9] and that, moreover, the Anti-Dumping Agreement does not provide for this circumstance.[10]

12. Indonesia's argument is incorrect because Article 5.6 applies only to the question of initiation and does not speak to the continuation of an ongoing investigation. Article 5.6 of the Anti-Dumping Agreement provides:

> 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.

13. By its own terms, Article 5.6 provides an evidentiary standard for an investigating authority to initiate an investigation when no "written application by or on behalf of a domestic industry" has been submitted, *i.e.*, self-initiation or initiation *ex officio*. It does *not* apply to the circumstance where an investigating authority has already initiated an investigation but the written application has been, subsequently, withdrawn.[11]

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[7] *US – Gasoline (AB)*, 23.
[8] Indonesia's First Written Submission ("Indonesia FWS"), para. 123.
[9] EU FWS, para. 143.
[10] EU FWS, para. 137 ("Article 5.6 cannot be applied to an issue, namely the withdrawal of a complaint, which is not even regulated under the Anti-Dumping Agreement").
[11] Prior panels have considered this question and correctly reasoned that "the text of Article 5.6 gives no indication that its evidentiary standards apply to anything but the self-initiation of investigations." *US – Corrosion-Resistant Steel Sunset Review (Japan),* para. 7.36.

14. Ultimately, there is no basis for Indonesia to assert that Article 5.6 applies to a determination of whether to *continue* an investigation following the withdrawal of an application.

15. The fact that the Anti-Dumping Agreement as a whole does not contemplate the withdrawal of a complaint is a crucial flaw in Indonesia's argument – a fact which Indonesia concedes when it states at paragraph 126 of its first written submission: "[n]o provision in the Anti-Dumping Agreement expressly addresses the situation."[12] Where the Anti-Dumping Agreement is silent with respect to such a situation, it cannot be read to prohibit a Member from proceeding as the EU did here. Moreover, as provided in Article 17.6(ii), "[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." Here, the EU's determination to proceed with an already initiated investigation, despite withdrawal of the application for relief, is based on a permissible interpretation of the Anti-Dumping Duty Agreement where the Agreement is silent with respect to such a situation.

16. Indonesia's argument to the contrary rests on a convoluted interpretation that seeks to infer an obligation based on the "context" of Articles 5.1, 5.2, and 5.3 of the AD Agreement where no such obligation exists. Indonesia asserts that "[w]hen the written complaint is removed as a basis for initiation … the conditions for using the (only) alternative basis, namely self-initiation, must be satisfied."[13] However, what Indonesia refers to as the "context" of Articles 5.1, 5.2, and 5.3 is nothing more than the procedures which must be followed in determining whether to *initiate* an investigation based on a written application. As Indonesia itself concedes, Article 5.6 is an alternative basis for *initiating* an investigation, and there is no interpretive basis to suggest that Articles 5.1, 5.2, and 5.3 somehow impose a requirement that an investigating authority re-initiate an investigation after a written application is withdrawn. If anything, the context provided by Articles 5.1, 5.2, and 5.3 confirms that initiation is a binary question limited to the initial decision to begin an investigation or not. Nothing in these articles speaks to an obligation to *terminate* an ongoing investigation.

17. Indonesia also argues that initiation under Article 5.6 is somehow implicated by Article 12 of the Anti-Dumping Agreement so as to require investigating authorities to issue a new notice of initiation following the withdrawal of a written complaint.[14] But as the EU adequately explains, there is no support in Article 12 for the assertion that an administering authority must "provide a new notification after it has determined that the investigation can proceed despite the withdrawal of the complaint."[15]

18. For the reasons above, Indonesia's argument is not supported by the text of the Anti-Dumping Agreement.

19. Furthermore, the United States disagrees with Indonesia's interpretation of Article 5.6 as requiring a situation that is "exceptional" or "out of the ordinary" for an investigating authority

[12] Indonesia FWS, para. 126.
[13] Indonesia FWS, paras. 125-135.
[14] Indonesia FWS, paras. 141-142, 168.
[15] EU FWS, para. 140.

to initiate an investigation *ex officio* in contrast to initiation by written application provided for by Article 5.1.[16] There is nothing in the text of Article 5.6 to suggest that initiation of an anti-dumping investigation must be subject to heightened scrutiny or a unique evidentiary threshold. This is evidenced by the text of the provision itself, which provides that investigations may be initiated by an administering authority "only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation."

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

21. Indonesia interprets the term "special circumstances" as used in Article 5.6 of the Anti-Dumping Agreement to argue that there exists a higher threshold for an *ex officio* initiation by a competent authority.[17] But as Indonesia itself acknowledges, the Anti-Dumping Agreement does not explicitly state what "special circumstances" means or what such circumstances must arise, if any, in order to permit the initiation of an investigation by an administering authority.[18] What the Anti-Dumping Agreement does state is that initiation under Article 5.6 is an exception to initiation under Article 5.1. Thus, the "special circumstance" included in Article 5.6, when read together with Article 5.1, is merely the recognition that an investigation is typically initiated via a written application. That is to say, an Article 5.6 initiation is the "special circumstance" in and of itself. Further, such an initiation *ex officio* does not require a more restrictive threshold as read into the Agreement by Indonesia. In the absence of any other language, Article 5.6 cannot be read to require a finding that "exceptional" or "out of the ordinary" circumstances exist in order to effect an *ex officio* initiation.

B. Claims Relating to Article 5.4 of the Anti-Dumping Agreement

22. Indonesia argues the EU acted in a manner inconsistent with the industry support provision of Article 5.4 of the Anti-Dumping Agreement when it did not terminate the investigation at the time the written application was withdrawn, because, according to Indonesia, the domestic industry lacked standing as of that time.[19]

23. The EU argues that Indonesia's understanding of Article 5.4 is incorrect because the text contains no obligation to *reconsider* the industry support requirement after initiation of the investigation.[20]

[16] Indonesia FWS, para. 144.
[17] *Id.*
[18] *Id.*
[19] Indonesia FWS, para. 181.
[20] EU FWS, para. 178.

24. Indonesia is incorrect because Article 5.4 applies to initiation, but does not contain an ongoing obligation applicable to the subsequent investigation. Article 5.4 of the Anti-Dumping Agreement provides:

> An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

25. Article 5.4 thus describes the domestic industry support necessary for an investigating authority to *initiate* an investigation on the basis of written application. Article 5.4 of the Anti-Dumping Agreement does *not* create an obligation to reconsider the standing requirement after a written application has been withdrawn.[21] The investigating authority is, however, obligated to ensure that, pursuant to Articles 4.1, 5.3, and 5.4 of the Anti-Dumping Agreement, industry support has been properly established prior to the initiation of an investigation.

26. Looking to the key language, Article 5.4 specifies that "[a]n investigation shall not be *initiated* pursuant to paragraph 1 unless the authorities have determined . . . that the application has been made by or on behalf of the domestic industry" (emphasis added). Article 5.4 further states that "no investigation shall be *initiated* when domestic producers expressly supporting the application account for less than 25 per cent of the total production of the like product produced by the domestic industry" (emphasis added).

27. Indonesia argues "that the investigation should have been terminated at the time the Complaint was withdrawn, because the standing requirement under Article 5.4 of the Anti-Dumping Agreement was likely no longer met."[22] However, nowhere in the plain language of Article 5.4 is it stated that the standing requirement of Article 5.4 applies at any time other than initiation.[23] As noted above, the question of industry support is considered during the initiation phase of an inquiry.[24]

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[21] EU FWS, para. 163.
[22] Indonesia FWS, para. 183.
[23] *See Mexico – Steel Pipes and Tubes*, para. 7.347 ("In our view, Article 5.4 pertains exclusively to initiation, and there is no on-going obligation to monitor domestic industry support once an investigation has been initiated under the *Anti-Dumping Agreement*").
[24] In pertinent part, "The authorities shall examine the *accuracy and adequacy* of the evidence provided in the written application . . . ." (emphasis added).

28. Further, Article 5.7 illustrates the categorical distinction between initiation of an investigation and an ongoing investigation. Article 5.7 states "[t]he evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation . . . ."

29. Article 5.7 confirms that the Anti-Dumping Agreement considers that certain considerations must take place both during initiation *and* during the course of an investigation. As discussed above, domestic industry support is *not* one of those ongoing considerations. Article 5.7 thus provides further confirmation that domestic industry support is a matter for an investigating authority to consider at initiation.

30. Therefore, under a proper interpretation of the Anti-Dumping Agreement, Article 5.4 does not require the investigating authority to revisit the issue of domestic industry support following its decision to initiate an investigation and after providing a reasonable opportunity for comments from interested parties during the initiation comment period.

31. As a corollary, Article 5.4 of the Anti-dumping Agreement does not contain an obligation and is, indeed, silent on whether an investigating authority must *terminate* an investigation once industry support has been determined at initiation of the investigation.[25]

C. Claims Relating to Article 2 and Article 2.2.2 of the Anti-Dumping Agreement

32. Indonesia makes a series of arguments in which it alleges that the methodology used by the EU in calculating SG&A and profit for certain product control numbers (PCNs) sold in low quantities is inconsistent with Article 2 and Article 2.2.2 of the Anti-Dumping Agreement.

33. The EU argues that Article 2.2 and Article 2.2.2 of the Anti-Dumping Agreement allow for the calculation of SG&A and profit based on sales of PCNs which are sold in low quantities.[26]

34. Article 2.2 of the Anti-Dumping Agreement states, in pertinent part, that "[w]hen 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 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 the cost of production in the country of origin plus a reasonable amount of administrative, selling and general costs and for profits."

35. In turn, Article 2.2.2 of the Anti-Dumping Agreement states, in pertinent part, that "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 under investigation."

36. Nothing in the text of Article 2.2.2 prohibits the calculation of SG&A and profit based on sales of PCNs which are sold in low quantities. Thus, a Member may calculate SG&A and

[25] EU FWS, paras. 177-178.
[26] EU FWS, para. 209.

profit based on sales of PCNs which are sold in low quantities. The panel in *EC – Salmon (Norway)* reasoned correctly that "Article 2.2.2 does not envisage a 'low-volume' sales exception to the rule that SG&A costs and profit used for the purpose of constructing normal value be calculated on the basis of data pertaining to sales made in the ordinary course of trade."[27]

37. In conclusion, the United States agrees that Article 2.2.2 allows for calculation of SG&A expenses using a low volume of sales.[28]

IV. CLAIMS RELATING TO THE INJURY AND CAUSATION DETERMINATIONS

A. Claims Relating to Articles 3.1 and 3.4 of the Anti-Dumping Agreement

38. Indonesia claims that the EU acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the Commission failed to make an objective and unbiased examination of the injury factors by concluding that an EU industry had been materially injured.[29] Specifically, Indonesia argues that the Commission did not take into account conflicting evidence that showed a positive trend in various injury factors during the period of investigation.[30] In particular, Indonesia contends that the Commission's evaluation of the EU industry's profitability during the period of investigation (POI), which it treated as a key metric in its impact evaluation, was based on a statutory target profit rate unmoored to the financial condition of the EU fatty acid industry.[31] Indonesia also contends that the Commission did not adequately explain how the negative trends in some factors outweighed the positive trends in others.[32]

39. The EU maintains that Indonesia's claims under Articles 3.1 and 3.4 are unfounded because the Commission considered all relevant injury factors listed under Article 3.4 and based its examination on positive evidence of the state of the domestic industry over the entire POI.[33]

40. The United States offers the following views on the appropriate legal interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

41. Article 3.1 of the Anti-Dumping Agreement provides the following:

> A determination of injury for the 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.

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[27] *See EC – Salmon (Norway)*, para. 7.304.
[28] EU FWS, para. 184.
[29] Indonesia FWS, para. 251.
[30] Indonesia FWS, paras. 263-274.
[31] Indonesia FWS, para. 265.
[32] Indonesia FWS, paras. 276-279.
[33] EU FWS, paras. 242-251, 258-268.

42. Article 3.4 provides that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and lists specific economic factors that an authority must evaluate.[34] Article 3.4 also provides that its list of factors and indices "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

43. The importance of certain factors may vary significantly from case to case, and the relative weight that an investigating authority may give to certain factors in an investigation has no bearing on their importance vis-à-vis other factors addressed in Article 3.4.[35] As the panel in *Thailand – H-Beams* recognized,

> Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of "relevance or irrelevance" of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4, must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury.[36]

44. Article 3.4 does not dictate the methodology that should be employed in conducting the examination of the impact of dumped imports on the domestic industry, or the manner in which the results of this examination are to be set out in the record of the investigation.[37] A determination, through its demonstration of why the investigating authority relied on the specific factors it found to be material in the case, may disclose why other factors on which it did not make specific findings were accorded little weight or deemed irrelevant.

45. For example, nothing in Article 3.4 requires an investigating authority to reach a negative determination of injury merely because a domestic industry reported a number of positive or improving economic indicators during the POI. Nor does it follow as a matter of logic from a conclusion that an industry is being injured that every indicator must be negative. As the panel in *EC – Footwear* reasoned, "it [is] clear that it is not necessary that all relevant factors, or even most or a majority of them, show negative developments in order for an investigating authority to make a determination of injury."[38] Therefore, an authority is not required to find that a certain

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[34] These factors are "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."

[35] *See Korea – Pneumatic Valves (AB)*, para. 5.172 ("while Article 3.4 requires an examination of the explanatory force of subject imports on the state of the domestic industry through an evaluation of *all* the relevant factors *collectively*, it does not follow that a particular factor should be evaluated in a particular manner or given a particular relevance or weight") (italics original).

[36] *Thailand – H-Beams (Panel)*, para. 7.236 (footnote omitted).

[37] *See EC – Tube or Pipe Fittings (AB)*, para. 131 ("By its terms, [Article 3.4] does not address the manner in which the results of this evaluation are to be set out, nor the type of evidence that may be produced before a panel for the purpose of demonstrating that this evaluation was indeed conducted" (footnote omitted)).

[38] *EU – Footwear (China)*, para. 7.413 (footnote omitted).

number of injury factors declined during the POI in order to make an affirmative determination of injury. Still, as with all aspects of the injury determination, the authority's consideration of all relevant factors and indices must be based on an "objective examination" of "positive evidence" as required by the overarching obligations set out in Article 3.1 of the Anti-Dumping Agreement.

46. Here the role of a panel in a dispute involving a Member's application of an antidumping or countervailing duty measure is to assess "whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner" – and not, therefore, to serve an initial trier of fact.[39]

47. The United States observes that the Panel in the present dispute must be able to discern that the investigating authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination. To make this assessment, the Panel must determine whether an "unbiased and objective" investigating authority could have reached the same conclusion as the Commission and not whether the Panel would have reached the same conclusion.

V. CLAIMS RELATING TO THE INTERPRETATION OF ARTICLE X:3 OF THE GATT 1994

48. Indonesia claims that the EU acted in a manner inconsistent with GATT 1994 Article X:3(a) with respect to two issues: first, that the EU acted in a manner inconsistent with GATT 1994 Article X:3(a) by continuing the AD investigation and terminating the anti-subsidy investigation;[40] and second, that the EU acted in a manner inconsistent with GATT 1994 Article X:3(a) by using two different methodologies for calculating PCNs, depending on profitability.[41] Each of Indonesia's GATT 1994 Article X:3(a) claims appears to be based on an incorrect interpretation of the text as applied or as otherwise relevant to the challenged or alleged measures.

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

> 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.

50. In this regard, paragraph 1 of Article X, titled "Publication and Administration of Trade Regulations," describes "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party," and requires these to "be

[39] *See* Anti-Dumping Agreement, Art. 17.6(i); *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.82. *See also ibid*., paras. 7.78-7.83; *US – Supercalendered Paper (Panel)*, paras. 7.40, 7.150, 7.202; *US – Coated Paper (Indonesia) (Panel)*, paras. 7.61, 7.83; *US – Countervailing Measures (China) (Panel)*, para. 7.382; *China – GOES (Panel)*, paras. 7.51-7.52; *EC – Countervailing Measures on DRAM Chips (Panel)*, paras. 7.335, 7.373.

[40] *See* Indonesia FWS, paras. 90-102.

[41] *See* Indonesia FWS, paras. 296-309. *Nota Bene* Indonesia also claims that the use of two different methodologies for calculating PCNs, depending on profitability is an unwritten measure that is "as such" inconsistent with, *inter alia*, GATT Art. X:3 on the same basis. *See* Indonesia FWS, para. 367.

published promptly in such a manner as to enable governments and traders to become acquainted with them."

51. With respect to its first claim, Indonesia argues that the EU failed to administer the provisions governing the withdrawal of complaints in its anti-dumping and anti-subsidy regulations in a uniform and reasonable manner in violation of Article X:3(a) of the GATT 1994.[42] Indonesia argues that the EU violated Article X:3(a) by deciding to continue the anti-dumping investigation and ultimately impose definitive anti-dumping duties, while terminating a parallel anti-subsidy investigation following the withdrawal of both complaints.[43]

52. The EU argues that Indonesia's claim under Article X:3(a) of the GATT 1994 fails because it seeks to assess the consistency of the EU's decisions with its own domestic law and practice.[44]

53. Despite Indonesia's arguments to the contrary that "[t]he Commission's practice in past . . . proceedings indicates that an investigation will typically be terminated" and that "a review of the Commission's practice reveals that in virtually all previous cases . . . the Commission invariably decided to terminate the proceedings,"[45] the task of a panel is to review the consistency of a Member's actions with the Agreement and not with that Member's domestic laws, regulations or practices.[46] Consistency is an important feature of a transparent anti-dumping procedure. Consistency with prior cases is a laudable goal, to the extent the actions taken in such cases were themselves consistent with the AD Agreement. However, a "uniform, impartial and reasonable" system is not necessarily one in which each decision looks like the one before. The benefits of consistency do not always outweigh the need of investigating authorities to allow their policies to evolve to suit new factual scenarios. This understanding of Article X:3 is reinforced by the fact that the disputes in which panels applied that provision relate to situations in which the overall administration of some program was alleged to be arbitrary or biased in its administration writ large.[47]

54. Thus, Indonesia's emphasis on the EU's alleged departure from "the Commission's practice relating to the withdrawal of complaints in past anti-dumping and anti-subsidy

[42] Indonesia FWS, para. 62.
[43] Indonesia FWS, para. 91.
[44] EU FWS, para. 83.
[45] Indonesia FWS, para. 89.
[46] This Panel's mandate is set forth in its terms of reference and DSU Article 7.2, which requires panels to "address the relevant provisions in *any covered agreement or agreements* cited by the parties to the dispute" (emphasis added). Further, under Article 3.2 of the DSU, the purpose of the dispute settlement system of the WTO is to: "preserve the rights and obligations of members *under the covered agreements*, and to clarify the existing provisions *of those agreements*…" (emphasis added). Finally, Article 3.7 of the DSU provides that "…the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned *if these are found to be inconsistent with the provisions of the covered agreements*" (emphasis added). Thus, the clear focus of the dispute settlement system is consistency of an action with the covered agreements. *See also, e.g., EC – Bananas*, para. 200 ("The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings.").
[47] For example, the allegation addressed under Article X:3 in *US – Shrimp* was that the entire procedure under review was "non-transparent and ex-parte," that there was no formal notice of or reasons provided for actions, and that there was no opportunity for review of or appeal from an action. *See US – Shrimp (AB)*, para. 188.

investigations"[48] is not compelling with respect to the application of GATT 1994 Article X:3(a). As the panel in *US – Stainless Steel (Korea)* correctly reasoned, Art. X:3(a) "was not […] intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practices; that is a function reserved for each Member's judicial system."[49]

55. Second, with respect to Indonesia's claim that the EU acted in a manner inconsistent with GATT 1994 Article X:3(a) by using two different methodologies for calculating PCNs, depending on profitability, the EU explains that the two different approaches are based on whether or not there are sales in the ordinary course of trade, a "distinction [which] is entirely consistent with Article 2.2 of the Anti-Dumping Agreement."[50] Without opining on the facts of the EU approach, it appears that Indonesia's argument turns on the adequacy of the EU's justification for the distinction it has made and not whether the EU administered its trade regulations in a "uniform, impartial and reasonable manner."[51] In this regard, the premise of Indonesia's Article X:3(a) claim may be unable to support a conclusion under that provision.

56. Ultimately, Indonesia's claims do not appear to be viable under a correct interpretation of Article X:3(a).

VI. CLAIMS RELATING TO INDONESIA'S "AS SUCH" CHALLENGE TO THE EU'S CALCULATION OF SG&A AND PROFIT

57. Indonesia argues that the approaches used by the EU in a number of instances to calculate SG&A and profit constitute "measures of general and prospective application which can be subject to an 'as such' challenge."[52]

58. The EU argues that the evidence provided by Indonesia to show the existence of the unwritten norm or rule is insufficient for the Panel to make any findings, first, because "Indonesia fails to indicate the existence of any legal basis mandating the Commission to act in [a] particular manner"; and, second, because the determinations Indonesia points to in order to demonstrate that the EU applied the same methodologies and will apply the same methodologies in the future are fact specific and the Panel "should not draw any inferences from the text used in those 14 determinations."[53]

59. The WTO dispute settlement system exists so that a complaining party may seek DSB findings on a measure that exists when the matter is referred to a panel for examination, so that the DSB may recommend to the responding party to bring its measure into conformity with its

[48] Indonesia FWS, para. 96.
[49] *US – Stainless Steel (Korea)*, para. 6.50.
[50] Indonesia FWS, paras. 296-309; EU FWS at para. 282.
[51] Indonesia FWS, paras. 308, 368 ("The fact that the Commission has split the category of PCNs which were not sold on the domestic market in representative quantities into two sub-categories depending on the existence of profitable sales of those PCN and then applies two different methodologies for determining the SG&A costs and profits of those PCNS to arrive at their constructed normal value, *without any basis* in the text of Article 2(6) of the Basic Anti-Dumping Regulation, leads to an unreasonable administration of that provision.") (emphasis added).
[52] Indonesia FWS, para. 343.
[53] EU FWS, paras. 38-39.

WTO obligations.[54] The DSU is not a mechanism for complaints speculating about whether future actions may lead to a WTO inconsistency at some future date. Thus, to make findings on a non-existent measure is inconsistent with DSU Articles 7.1 (panel's terms of reference), 19.1 (recommendation on an inconsistent measure), 3.3 (contribution of dispute settlement to balance of WTO rights and obligations), and 4.2 (consultations concerning measures affecting the operation of the covered agreements).

60. Unless the complaining Member establishes through evidence and argument that a Member has adopted a decision to follow certain conduct in the future, vague statements of what a Member "does" do not establish the existence of a measure. In order for the alleged measure to give rise to a breach of a WTO obligation, the measure would have to have independent legal effect.

61. As a matter of logic, the evidence a complainant is required to submit to prove the existence of a measure depends on the nature of the claim. There is no special rule under the DSU that requires a higher burden in terms of the evidence needed to establish unwritten measures. Nor is a claim against an unwritten measure subject to a minimum "evidentiary threshold" in order to raise a presumption of the existence of that measure. Such views have no basis in the DSU text.

62. Moreover, the United States considers that the concepts of "rule or norm" and "general and prospective application" are not necessary elements to establish an unwritten measure; those concepts are not based in the DSU text. The phrases "rule or norm" and "general and prospective application" are simply descriptive analytical phrases used by certain past adjudicators to describe certain measures challenged "as such," and they do not govern the entire spectrum of challengeable measures under WTO dispute settlement.[55] What ultimately matters is whether the complainant has demonstrated with sufficient evidence that the alleged measure has legal effect within the domestic system of the Member that is being challenged.

63. The United States agrees with the premise of the EU's argument that "Indonesia fails to indicate the existence of any legal basis mandating the Commission to act in [a] particular manner,"[56] as it is another way of saying that, in order for the alleged measure to give rise to a breach of a Member's obligation, the alleged measure would have to have an independent legal effect. That is, the "measure" challenged would have to be the "legal basis mandating" behavior by giving rise to the legal effect in that Member's domestic regime.

64. Furthermore, to the extent that Indonesia argues that the EU is bound by a "practice" established in its prior determinations, a "practice" (so called), in the sense of some approach more or less typically followed, is not a "measure" because it does not have independent legal status or produce legal effects in a domestic legal regime. Rather, put more precisely, "practice"

[54] Article 19.1 sets out in mandatory terms that, where a panel or the Appellate Body "concludes that a measure is inconsistent with a covered agreement, it *shall recommend* that the Member concerned bring *the measure* into conformity with that agreement." Thus, pursuant to Article 19.1, a panel is *required* to make a recommendation where it has found a measure that exists at the time of its establishment to be inconsistent with the covered agreements.
[55] *See Argentina – Import Measures (AB)*, para. 5.109.
[56] EU FWS, para. 42.

is a term of convenience used to describe the decision or decisions taken under some other legal authority. Specifically, it is a "repeated pattern of similar responses to a set of circumstances – that is, it is the past decision of" the investigating authority.[57] That such a response has been repeated "and may be predicted to be repeated in the future, does not . . . transform it into a measure" capable of challenge in dispute settlement.[58] In past reports, panels have evaluated whether the measure in question was intended to apply in the future, including whether the measure reflects a deliberate policy that goes beyond mere repetition of conduct.[59] Specifically, there is a distinction between an intentional or deliberate decision to take future action on the one hand and, on the other, a string of cases or mere repetition.

65. Thus, if Indonesia simply identifies what was the Commission's approach in different anti-dumping determinations, that alone would not suffice to conclude that the Commission will continue to follow the same course of action in the future. That is, prior applications of the alleged approach would not suffice to demonstrate that the EU had decided to apply that approach in future scenarios.

66. Ultimately, the Panel is charged to assist the DSB by conducting "an objective assessment of the facts of the case" to "make an objective assessment of the matter before it," as provided in Article 11 of the DSU. Thus, it is for this Panel to consider the totality of evidence, in light of the facts and circumstances, as to whether a measure exists with respect to the EU's calculation of SG&A and profit.

VII. CONCLUSION

67. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the Anti-Dumping Agreement and the GATT 1994.

[57] *US – Steel Plate (India)*, para. 7.22.
[58] *Id.*
[59] *See*, *e.g.*, *id*.