EUROPEAN UNION – ANTI-DUMPING MEASURES ON FATTY ACID (INDONESIA)

(DS622)

RESPONSES OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

November 3, 2025

TABLE OF REPORTS

Short Title	Full Case Title and Citation
China – Raw Materials (Panel)	Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / Add. 1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
Egypt – Rebar (Panel)	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
EC – Bed Linen (Panel)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R
EC –Tube or Pipe Fittings (Panel)	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
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005

1. To the third parties: Indonesia attaches significance to the introductory wording of Article 5.1 which reads "[e]xcept as provided for in paragraph 6".

a. Indonesia submits that upon withdrawal of the application, the initial basis for initiation based on a written application comes to an end. Do you agree?

Response:

1. The United States does not agree with Indonesia that the "initial basis" for initiation based on a written application comes to an end where a complaint is withdrawn following initiation. As stated in the U.S. third-party submission, the question of initiation is a binary question and need not be revisited during the course of the investigation. Article 5 of the Anti-Dumping Agreement also contains no concept of an "initial basis" to initiate.

b. Does the reference to Article 5.6 in Article 5.1 suggest that when the application is withdrawn and the initial basis of initiation comes to an end, an investigating authority must comply with the requirement under Article 5.6 to continue with the investigation?

2. The reference to Article 5.6 in Article 5.1 of the Anti-Dumping Agreement does not establish an obligation whereby an investigating authority must comply with the requirements of Article 5.6 to continue with an investigation whenever an application is withdrawn following initiation.

3. Article 5.6 is an alternative basis for *initiating* an investigation. There is no interpretive basis to suggest that the reference to Article 5.6 in Article 5.1 creates a requirement that an investigating authority re-initiate an investigation after a written application is withdrawn. To the contrary, the context provided by Articles 5.1, 5.2, and 5.3 confirms that initiation is a question that is limited to the decision to begin an investigation or not. Nothing in these paragraphs of Article 5 speaks to an obligation to *terminate* an ongoing investigation that has already been initiated.

4. Article 5.7 further illustrates the distinction between initiation of an investigation and an ongoing investigation (i.e., after initiation). Article 5.7 states, "[t]he evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation …." Article 5.7 thus confirms that the Anti-Dumping Agreement considers that certain considerations must take place both during initiation and during the course of an investigation. Domestic industry support is *not* one of those ongoing considerations.

5. Therefore, under a proper interpretation, the reference to Article 5.6 in Article 5.1 of the Anti-Dumping Agreement cannot be read to require the investigating authority to revisit the issue of domestic industry support following its decision to initiate an investigation.

2. To the third parties: If Article 5.8 of the Anti-Dumping Agreement applies to the withdrawal of an application, why is Article 5.8 not the exclusive basis upon which obligations are cast upon the investigating authority in deciding whether to continue the investigation?

Response:

6. Article 5.8 of the Anti-Dumping Agreement does not apply to the withdrawal of a written application. Specifically, the first two sentences of Article 5.8 identify the circumstances in which an investigation must be terminated, and neither pertains to the withdrawal of a written application.

7. The first sentence of Article 5.8 states, "[a]n application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is no sufficient evidence of either dumping or of injury to justify proceeding with the case." There is no interpretive basis to suggest that the withdrawal of a written application constitutes "no sufficient evidence of either dumping or of injury to justify proceeding with the case."

8. The second sentence of Article 5.8 states, "[t]here shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible." There is no interpretive basis to suggest that the withdrawal of a written application constitutes: a *de minimis* dumping margin; a negligible volume of dumped imports; or negligible injury.

9. Therefore, under a proper interpretation, Article 5.8 cannot be read as establishing any requirement pertaining to whether an already-initiated investigation can or cannot proceed because of the withdrawal of a written application.

3. To the third parties: If an investigating authority initiates an anti-dumping investigation and an anti-subsidy investigation, and terminates the anti-subsidy investigation while continuing with the anti-dumping investigation, does Article X:3(a) of the GATT 1994 impose an obligation on the investigating authority to provide a reasoned explanation of its decision to continue an investigation? If it does, when must such an explanation be given in terms of Article X:3(a)?

Response:

10. No. The obligations provided in Article X:3(a) of the GATT 1994 relate to the "administ[ration]" of legal instruments.[1] The term "administer" is defined as to "carry on or execute (an office, affairs, etc.)," or manage or steward an activity.[2] An inconsistency with a Member's WTO obligations under Article X:3(a) thus arises where "the identified features of the challenged administration necessarily lead to an inconsistency with Article X:3(a) with respect to the administration of laws and regulations in a uniform, impartial and reasonable manner."[3]

[1] The "laws, regulations, decisions and rulings" described in Article X:1 include, in relevant part, those "of general application, made effective by any contracting party, pertaining to . . . rates of duties . . . or to restrictions or prohibitions on imports." GATT 1994, Article X:1.

[2] The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, at 28.

[3] *China – Raw Materials (Panel)*, para. 7.708.

Article X:3(a) of the GATT 1994 imposes no additional obligation on an investigating authority when it continues an investigation that otherwise meets the relevant legal criteria.

4. To the third parties: If an investigating authority has discretion under its domestic legislation to either continue or terminate the investigation upon withdrawal of the application is the exercise of this discretion subject to the obligation under Article X:3(a) to administer the legislation in a uniform manner?

Response:

11. No. The United States respectfully refers the Panel to its response to Question 3.

5. To the third parties: The *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement requires SG&A costs and profits to "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."

a. Indonesia contends that the "like product" in this *chapeau* references the like product as a whole. If an investigating authority uses models as an intermediate step in dumping calculations, can the investigating authority use the SG&A costs and profits of one model to construct the normal value for that model?

b. Can SG&A costs and profits derived on this basis be considered as SG&A costs and profits "based on actual data" pertaining to the "like product"?

Response:

12. The United States addresses subparagraphs (a) and (b) of this question together.

13. Articles 2.1 and 2.2 of the Anti-Dumping Agreement establish that normal value is found by examining sales of the like product, in the ordinary course of trade, in the domestic market of the exporting country. Article 2.2 permits an investigating authority to use a data source other than the sales of the like product in the domestic market, but only under two circumstances.[4]

14. Whenever an investigating authority determines, based on the evidence of record, that one of these circumstances exist, Article 2.2 prescribes two alternative data sources that may be used to calculate normal value: third-country market sales prices or constructed normal value.[5] If an investigating authority decides to construct normal value, this is to be based on "the cost of

[4] The two circumstances are: "[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 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." Anti-Dumping Agreement, Art. 2.2.

[5] Article 2.2 permits an authority to calculate normal value using either alternative without any preference to use one over the other.

production in the country of origin plus a reasonable amount for administrative, selling and general [SG&A] costs and for profits."

15. The determination to construct normal value triggers the application of Article 2.2.2. Article 2.2.2 provides four methodologies for the calculation of an amount for SG&A costs and for profit – one "preferred method" and three alternative methods. The preferred method provides, "[f]or the purpose of paragraph 2, the amounts [to construct normal value] . . . 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." If the amount for SG&A costs and for profit cannot be based on the preferred method, Article 2.2.2 provides three alternative methodologies.[6]

16. The introductory clause of Article 2.2.2 – "[f]or the purpose of paragraph 2" – indicates that the calculation of SG&A costs and profit relate to the obligations established by Article 2.2.[7] In this way, each methodology set out in Article 2.2.2 is intended to create a reasonable proxy for the amount for SG&A costs and for profit from the sales of the "like product," in the ordinary course of trade, in the domestic market of the exporting country.

17. Article 2.6 of the Anti-Dumping Agreement establishes a rule of interpretation for the term "like product." Article 2.6 provides:

> *Throughout* … [the Anti-Dumping] Agreement the term 'like product' … 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 [an identical] … product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration [*i.e.*, similar product].[8]

Article 2.6 thus makes clear that whether a product is a "like product" is to be determined on the basis of a comparison to the product under consideration.[9]

18. The Panel's question does not provide sufficient information for the United States to understand whether the model in question is the "like product" in regard to the exported product under consideration, or just one of many models that together form this "like product."

---

[6] Anti-Dumping Agreement, Arts. 2.2(i)-(iii). Article 2.2.2 establishes no hierarchy among the three alternative methodologies. *See EC – Bed Linen (Panel)*, para. 6.62 (The order of the three alternatives "is without any hierarchical significance").

[7] *See EC – Bed Linen (Panel)*, para. 7.226 (finding with respect to Article 2.2.1.1 that the "opening phrase '[f]or the purpose of paragraph 2' makes clear that Article 2.2.1.1 elaborates on how the 'cost of production in the country of origin' in Article 2.2 is to be determined in constructing the normal value).

[8] Anti-Dumping Agreement, Art. 2.6 (italics added).

[9] The Anti-Dumping Agreement does not further define the term "product under consideration." Its existence is taken as a given, and it is clearly the basis – the starting point – for any determination about which products are "like products."

6. To the third parties: If "like product" in Article 2.2.2 is interpreted to mean the like product as a whole rather than individual models that make up the like product, would this lead to the concept of "like product" being interpreted differently under Article 2.2.2 compared to Articles 2.2 and 2.2.1?

Response:

19. The United States understands the term "like product as a whole" to mean the database comprising *all* sales of the like product in the domestic market (*i.e.,* not only the like product identical or similar to the exported product under consideration for which the investigating authority is constructing a comparative normal value, but also the like product *not* identical or similar to that exported product). In contrast, the United States understands that the term "individual models that make up the like product" as limited just to the like product identical or similar to the exported product under consideration for which the investigating authority is constructing a comparative normal value.

20. As explained in the United States response to Question 5, Article 2.6 of the Anti-Dumping Agreement establishes a rule of interpretation that requires the term "like product" to be interpreted consistently *throughout* the Anti-Dumping Agreement. For this reason, if "like product" in Article 2.2.2 was to be interpreted to mean "like product as a whole" (as that term is understood by the United States), such an interpretation would differ from the definition of "like product" as "individual models that make up the like product" for purposes of Articles 2.2 and 2.2.1.

7. To the third parties: Assume that, in calculating a PCN-specific margin as an intermediate step in its dumping calculations, the investigating authority compares the export price of the PCN with a constructed normal value of that PCN. If the profit and SG&A costs used in the constructed normal value of the PCN are based on data pertaining to the like product as a whole (i.e. all PCNs) and not the PCN for which the normal value is constructed, is this comparison of the PCN-specific constructed normal value and export price consistent with the requirement under Article 2.4 of the Anti-Dumping Agreement, to make due allowance for differences which affect price comparability, in particular physical characteristics? If yes, why? If not, why not?

In answering this question, assume that the product under consideration and domestic like product are made of two or more PCNs, and the investigating authority has reliable data pertaining to SG&A costs and profits for the PCNs and for the like product as a whole.

Response:

21. The United States offers the following views on the appropriate legal interpretation of Article 2.4 of the Anti-Dumping Agreement.

22. Article 2.4 provides in relevant part:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of

> trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

23. Article 2.4 obligates an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. The text of Article 2.4 presupposes that the appropriate normal value has been identified. Once normal value and export price have been established, the investigating authority is required to select the proper sales for comparison (sales at the same level of trade and as nearly as possible the same time) and make appropriate adjustments to those sales (due allowances for differences which affect price comparability).[10]

24. The essential requirement for any adjustment under Article 2.4 is that a factor for which adjustment is requested must affect price comparability. The use of constructed normal value does not preclude the need for due allowances or adjustments *between* the export price and the normal value.[11] However, the construction of normal value through the selection of costs pursuant to Article 2.2.1, or SG&A costs and profit pursuant to Article 2.2.2, is not a relevant difference *between* the export value and the normal value, because these selections do not relate to a difference between the export and domestic transactions being compared.

9. <u>To the third parties</u>: Article 17.6(i) of the ADA states that in its assessment of the facts of the matter, the panel shall determine, among other things, that "the authorities' establishment of the facts was proper".

If an investigating authority makes a calculation error in dumping calculations and the interested party to which the calculation is disclosed does not identify the error, or if it does, it does not inform the investigating authority in the course of the investigation, is it outside the panel's standard of review to determine whether because of that error the facts were not established properly?

<u>Response</u>:

25. The situation described by the panel in this question involves post-determination evidence; *i.e.*, the investigating authority did not have evidence as to the existence of the error at the time of its determination. For this reason, a panel's consideration of the error would not be

[10] For instance, Article 2.4 articulates that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and/or in varying quantities, all of which may affect price. *See EC –Tube or Pipe Fittings (Panel)*, para. 7.157. The panel in *Egypt –Rebar* explained, "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value." (para. 7.335).

[11] *Egypt – Rebar (Panel)*, para. 7.352 ("Article 2.4 . . . explicitly require[s] a fact-based, case-by-case analysis of differences that affect price comparability").

an "objective assessment" of the matter at issue but would rather constitute a *de novo* review of the evidence. If the investigating authority's dumping calculations and data were disclosed to the interested parties but no interested party identified the alleged factual error (regarding the calculations or data), then the authority's "establishment of facts was proper" under Article 17.6(i) of the Anti-Dumping Agreement. Because "proper" means "of requisite standard or type; fit, suitable, appropriate", in addition to correct,[12] taking into account the arguments made by the interested parties, an unbiased and objective investigating authority could have reached the same conclusion as to the calculation or underlying fact in question.

26. As the United States noted in its third-party submission,[13] in making its objective assessment under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement, a panel must not conduct a *de novo* review of the evidence or serve as initial trier of fact, but instead act as "reviewer of agency action."[14] A panel's role is to determine whether an objective and unbiased investigating authority, reviewing the *same* evidentiary record as the authority, could have – not would have – reached the same conclusions reached by the authority. It would be inconsistent with a panel's function under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement for the panel exceed its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of an investigating authority.

[12] The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, at 2379.

[13] *See* U.S. Third-Party Submission, paras. 5-7.

[14] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (italics removed).