# *European Union – Anti-Dumping Measures on Imports of Fatty Acid from Indonesia*

# (DS622)

**INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA**

**November 10, 2025**

<u>**EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION**</u>

## I. STANDARD OF REVIEW

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

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

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

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

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

## II. CLAIMS REGARDING ARTICLE 5.6 OF THE AD AGREEMENT

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

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

8. The fact that the AD Agreement as a whole does not contemplate the withdrawal of a complaint is a crucial flaw in Indonesia's argument – a fact which Indonesia concedes when it states at paragraph 126 of its first written submission: "[n]o provision in the AD Agreement expressly addresses the situation." Where the AD Agreement is silent with respect to such a situation, it cannot be read to prohibit a Member from proceeding as the EU did here. Moreover, as provided in Article 17.6(ii), "[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the

authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." Here, the EU's determination to proceed with an already initiated investigation, despite withdrawal of the application for relief, is based on a permissible interpretation of the AD Duty Agreement where it is silent with respect to such a situation.

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

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

11. Therefore, the standard for initiation by an investigating authority (i.e., under Article 5.6) is explicitly the same as the standard for an initiation by application under Article 5.1. Moreover, the text of Article 5.1 provides that "[e]xcept as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry." While initiation

pursuant to Article 5.6 is an exception to the initiation procedures outlined in Article 5.1, there is no further limitation on when that exception may be invoked.

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

## III. CLAIMS REGARDING ARTICLE 5.4 OF THE AD AGREEMENT

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

14. Indonesia argues "that the investigation should have been terminated at the time the Complaint was withdrawn, because the standing requirement under Article 5.4 of the AD Agreement was likely no longer met." However, nowhere in the plain language of Article 5.4 is it stated that the standing requirement of Article 5.4 applies at any time other than initiation. As noted above, the question of industry support is considered during the initiation phase of an inquiry. Further, Article 5.7 illustrates the categorical distinction between initiation of an investigation and an ongoing investigation. Article 5.7 states "[t]he evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the investigation . . . ." Article 5.7 confirms that the AD Agreement considers that certain considerations must take place both during initiation and during the course of an investigation. As discussed above, domestic

industry support is not one of those ongoing considerations. Article 5.7 thus provides further confirmation that domestic industry support is a matter for an investigating authority to consider at initiation. Therefore, under a proper interpretation of the AD Agreement, Article 5.4 does not require the investigating authority to revisit the issue of domestic industry support following its decision to initiate an investigation and after providing a reasonable opportunity for comments from interested parties during the initiation comment period. As a corollary, Article 5.4 of the AD Agreement does not contain an obligation and is, indeed, silent on whether an investigating authority must terminate an investigation once industry support has been determined at initiation of the investigation.

## CLAIMS RELATING TO ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

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

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

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

## CLAIMS RELATING TO ARTICLE X:3 OF THE GATT 1994

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

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

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