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

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY INDONESIA

The following communication, dated 14 November 2024, from the delegation of Indonesia to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

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 European Union's definitive anti-dumping measures imposed on imports of fatty acid originating in Indonesia,¹ the investigation leading to the imposition of those measures (fatty acid anti-dumping investigation) in the context of the termination of the parallel anti-subsidy investigation, as well as the methodologies applied by the European Union in its anti-dumping investigations (including in, but not limited to, the fatty acid anti-dumping investigation) for constructing normal value based on PCN-specific costs and profit data.

Indonesia considers that these measures are inconsistent with the Anti-Dumping Agreement and the GATT 1994.

The consultations took place in Brussels on 22 April 2024, with a view to reaching a mutually satisfactory settlement of the matter. Unfortunately, the consultations failed to resolve the dispute.

Therefore, Indonesia respectfully requests, pursuant to Articles 4 and 6 of the DSU, Article XXIII of GATT 1994, and Article 17.4 of the Anti-Dumping Agreement that the Dispute Settlement Body establish a panel to examine this matter, based on the standard terms of reference as set out in Article 7.1 of the DSU.

I. FACTUAL BACKGROUND AND THE SPECIFIC MEASURES AT ISSUE

A. Fatty acid investigations²

1. Fatty acid anti-dumping investigation

a. Initiation of the investigation

On 18 October 2021, the Coalition against Unfair Trade in Fatty Acid (CUTFA) lodged a complaint pursuant to Article 5 of Regulation (EU) 2016/1036 of the European Parliament

¹ Commission Implementing Regulation (EU) 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, OJ 2023 L 18, p. 1 (Definitive Anti-Dumping Regulation).

² This term covers both the anti-dumping investigation concerning imports of fatty acid originating in Indonesia (AD687) and the anti-subsidy investigation concerning imports of fatty acid originating in Indonesia (AS688).

and of the Council (Basic Anti-Dumping Regulation)³ with the European Commission (Commission) requesting the initiation of an anti-dumping investigation. That complaint alleged that imports of fatty acid originating in Indonesia were sold in the European Union at dumped prices and caused material injury to the Union industry.

On 30 November 2021, the Commission published a "Notice of initiation of an anti-dumping proceeding concerning imports of fatty acid originating in Indonesia"⁴ in the Official Journal of the European Union, whereby it initiated an investigation with a view to imposing anti-dumping duties on imports of certain fatty acid products. The investigation was initiated on the basis of the complaint made by CUTFA, on behalf of the Union industry of fatty acid, in the sense of Article 5(4) of the Basic Anti-Dumping Regulation. The Commission considered that the complaint contained evidence of dumping and of resulting material injury that was sufficient to justify the initiation of the investigation.⁵ The investigation of dumping and injury covered the period from 1 October 2020 to 30 September 2021 (i.e., the investigation period). The examination of trends relevant for the assessment of injury covered the period from 1 January 2018 to the end of the investigation period (i.e., the period considered).

On 1 July 2022, the Commission informed the Member States and all interested parties that no provisional duties would be imposed on imports of fatty acid originating in Indonesia, and that the investigation would continue.⁶

b. Product under investigation

The product under investigation described in the Notice of Initiation covers fatty acid with a carbon chain length of C6, C8, C10, C12, C14, C16 or C18 with an iodine value below 105g/100g including: single fatty acid (also referred to as "pure cut"), and blends containing a combination of two or more carbon chain lengths;⁷ and, excluding fatty acid certified by a voluntary scheme for the production of sustainable biofuels, bioliquids and biomass fuels recognised by the Commission.⁸

Following comments received from the parties, the Commission issued, on 21 January 2022, a Note to the File regarding the product scope (Note to File on Product Scope). That note stated that the investigation covered only fatty acid with a ratio of free fatty acids to triglycerides (degree of split – DoS) of at least 97%.⁹ The product concerned is the product under investigation originating in Indonesia.¹⁰

c. Withdrawal of the complaint

On 15 August 2022, KLK Emmerich GmbH (KLK), the largest sampled Union producer, sent a letter to the Commission expressing its concern that anti-dumping duties would cause turbulence on the fatty acid market (KLK letter of 15 August 2022). On 19 August 2022, KLK sent another letter to the Commission informing it that the company opposes the imposition of anti-dumping duties because it considers those duties to be against the interests of the company and of the Union industry in general (KLK letter of 19 August 2022). It stated that "Europe needs to maintain a competitive environment for fatty acids in the interest of all stakeholders". KLK also noted that it was able to stay competitive and profitable with imports of the product concerned from Indonesia.

On 24 August 2022, CUTFA withdrew its anti-dumping complaint, "due to the influence from stakeholders" (CUTFA withdrawal of 24 August 2022). Interested parties filed comments on

³ 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, OJ 2016 L 176, p. 21.

⁴ Notice of initiation of an anti-dumping proceeding concerning imports of fatty acid originating in Indonesia, OJ 2021 C 482, (Notice of Initiation), p. 5.

⁵ Definitive Anti-Dumping Regulation, recital 2.

⁶ Definitive Anti-Dumping Regulation, recitals 55-56.

⁷ Notice of Initiation, recital 2.

⁸ Definitive Anti-Dumping Regulation, recitals 70, 101-102, Article 1.

⁹ European Commission, Note to the File for the Inspection by Interested Parties - Clarifications on the product scope, restart of sampling process and procedural aspects (21 January 2022), Ref t22.000602.

¹⁰ Definitive Anti-Dumping Regulation, recital 74.

the withdrawal of the complaint,¹¹ requesting the Commission to terminate the investigation in light of the lack of Union interest as well as the lack of injury to the Union industry, as apparent from the withdrawal of the complaint and KLK's letters of 15 and 19 August 2022.

d. Imposition of the definitive anti-dumping measures

On 18 January 2023, the European Union adopted the Definitive Anti-Dumping Regulation imposing a definitive anti-dumping duty on imports of fatty acid originating in Indonesia. The Definitive Anti-Dumping Regulation imposes anti-dumping duties ranging from 15.2% to 46.4% on imports into the European Union of fatty acid originating in Indonesia. These anti-dumping duties are due to expire on 20 January 2028.

Definitive anti-dumping duties were set at the level of the dumping margin for two Indonesian producers (Wilmar and Musim Mas) at 15.2% and 46.4%, respectively.¹² The definitive duty for the other cooperating non-sampled companies in Indonesia was based on the weighted average dumping margin for those two sampled companies, at 26.6%. The definitive duty for all other companies was based on the highest dumping margin of the two sampled cooperating exporters, at 46.4%.¹³

2. *Fatty acid anti-subsidy investigation*

On 13 May 2022, the Commission initiated¹⁴ a separate anti-subsidy investigation concerning imports of fatty acid originating in Indonesia following a complaint made by CUTFA pursuant to Article 10 of Regulation (EU) 2016/1037 of the European Parliament and of the Council (Basic Anti-Subsidy Regulation).¹⁵ The fatty acid anti-dumping and anti-subsidy investigations share the same product scope, the same investigation period and the same period considered.¹⁶

On 24 August 2022, KLK sent a letter to the Commission expressing its opposition to the imposition of countervailing measures on imports of the product concerned from Indonesia (KLK letter of 24 August 2022).

On 3 October 2022, CUTFA withdrew its anti-subsidy complaint (CUTFA withdrawal of 3 October 2022).

Consequently, the Commission terminated the fatty acid anti-subsidy investigation. The decision to that effect was published by the Commission on 20 March 2023.¹⁷ In that decision, the Commission referred to the withdrawal of the complaint and stated that "[t]he investigation had not brought to light any considerations demonstrating that such termination would not be in the Union interest".¹⁸

B. EU methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country

In EU anti-dumping investigations, the product concerned is typically subdivided into several models designated by product control numbers (PCNs). The normal value and the export

¹¹ Definitive Anti-Dumping Regulation, recital 62.

¹² Definitive Anti-Dumping Regulation, recitals 487-488.

¹³ Definitive Anti-Dumping Regulation, recitals 489.

¹⁴ Notice of initiation of an anti-subsidy proceeding concerning imports of fatty acid originating in Indonesia, OJ 2022 C 195, p. 11. The EU case number of the anti-subsidy investigation is AS688.

¹⁵ 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, OJ 2016 L 176, p. 55.

¹⁶ Definitive Anti-Dumping Regulation, recital 54.

¹⁷ Commission Implementing Decision (EU) 2023/617 of 17 March 2023 terminating the anti-subsidy proceeding concerning imports of fatty acid originating in Indonesia, OJ 2023 L 80, p. 99 (Anti-subsidy termination decision).

¹⁸ Anti-subsidy termination decision, recitals 9-11.

price are computed for each PCN and the comparison between normal value and export price is carried out on a PCN-basis.

When the normal value cannot be established based on the domestic sales prices in the exporting country, the European Union resorts to a constructed normal value based on the cost of production plus a reasonable amount for selling, general and administrative (SG&A) costs and for profits.

Pursuant to Article 2(6) of the Basic Anti-Dumping Regulation, which mirrors the text of Article 2.2.2 of the Anti-Dumping Agreement, "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".

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);
- 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).

The second methodology, whereby the Commission exclusively uses the data relating to the specific PCN, is consistently applied by the 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 Commission when calculating normal value.

C. The specific measures at issue

The specific measures at issue in this dispute cover 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. They include any amendments, supplements, reviews, replacements, renewals, extensions, implementing measures and any other related measures taken by the European Union in relation to the investigation and/or the anti-dumping measures at issue. The measures at issue also specifically include the European Union's decision to terminate the anti-subsidy investigation, as published on 20 March 2023.

In addition, the 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 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.

II. LEGAL BASIS FOR THE COMPLAINT

Indonesia considers that 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 appear to be inconsistent with the following obligations in the relevant WTO covered agreements:

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- Articles 5.3 and 5.8 of the Anti-Dumping Agreement because the European Union failed to reject the application based on a determination that the application was supported by insufficient evidence of injury, particularly as a result of the deficient product scope included in the application.
 - Article 5.4 of the Anti-Dumping Agreement because the European Union failed to reject the application or terminate the investigation despite the lack of standing of the domestic industry.
 - Article 5.6 of the Anti-Dumping Agreement, because – following the withdrawal of the complaint – the European Union *de facto* carried out an *ex officio* investigation, without sufficient evidence of dumping, injury and a causal link.
 - Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement because when constructing the normal value of PCNs sold in insufficient quantities in the domestic market, the European Union used amounts for SG&A costs and for profit which are not reasonable and are not based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.
 - Articles 2.4.1 and 9.3 of the Anti-Dumping Agreement, as well as Article VI:2 of the GATT 1994, because the European Union applied an anti-dumping duty which exceeds the margin of dumping, as a result of using an incorrect exchange rate.
 - Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the European Union failed to make an objective and unbiased examination of the injury factors and erroneously found the existence of material injury to the Union industry.
 - Articles 9.2 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, because the amount of the anti-dumping duty imposed by the European Union exceeds the margin of dumping as established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.
 - Article X:3(a) of the GATT 1994 because by imposing the anti-dumping duties while terminating a parallel countervailing investigation following the withdrawal of both complaints, the European Union failed to administer its Basic Anti-Dumping and Basic Anti-Subsidy Regulations, and in particular Articles 9(1) and 14(1) of these respective regulations governing the termination of an investigation following the withdrawal of a complaint, in a uniform and reasonable manner.
 - Article X:3(a) of the GATT 1994 because by applying different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic market of the exporting country, depending on the existence of profitable sales of those PCNs, the European Union failed to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner.
 - Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 as a consequence of the violations described above.

Indonesia considers that the EU methodologies for constructing normal value in the circumstances described in Section I.B above, appear to be as such inconsistent with the following obligations in the relevant WTO covered agreements:

- Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement because by requiring the use of the SG&A and profit data relating exclusively to a specific PCN sold in insufficient quantities on the domestic market of the exporting country, the second methodology uses amounts for SG&A costs and for profit which are not reasonable and are not based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.
- Article X:3(a) of the GATT 1994 because by applying different methodologies for constructing normal value for PCNs sold in insufficient quantities on the domestic

market of the exporting country, depending on the existence of profitable sales of those PCNs, the European Union fails to administer Article 2(6) of the Basic Anti-Dumping Regulation in a uniform and reasonable manner.

The specific measures at issue described above appear to nullify or impair the benefits accruing to Indonesia, directly or indirectly, under the Anti-Dumping Agreement and the GATT 1994. This request also covers amendments, supplements, reviews, replacements, renewals, extensions, implementing measures and any other related measures taken by the European Union that relate to the specific measures at issue.

Accordingly, Indonesia respectfully requests that the Dispute Settlement Body establishes a panel to examine this matter, with standard terms of reference as set out in Article 7.1 of the DSU.

Indonesia asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 25 November 2024.
