WORLD TRADE ORGANIZATION

WT/DS442/R

16 December 2016

(16-6861)



Original: English

# EUROPEAN UNION – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN FATTY ALCOHOLS FROM INDONESIA

REPORT OF THE PANEL

*BCI deleted, as indicated **[***]***

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## CASES CITED IN THIS REPORT

| Short title | Full case title and citation |
|---|---|
| *Argentina – Ceramic Tiles* | Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241 |
| *Argentina – Footwear (EC)* | Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515 |
| *Argentina – Poultry Anti-Dumping Duties* | Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727 |
| *China – Broiler Products* | Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041 |
| *China – GOES* | Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251 |
| *China – HP-SSST (Japan) / China – HP-SSST (EU)* | Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R |
| *China – X-Ray Equipment* | Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659 |
| *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* | Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165 |
| *EC – Fasteners (China)* | Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995 |
| *EC – Fasteners (China)* | Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289 |
| *EC – Fasteners (China) (Article 21.5 – China)* | Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW and Add.1, adopted 12 February 2016 |
| *EC – Hormones* | Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135 |
| *EC – Salmon (Norway)* | Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3 |
| *EC – Tube or Pipe Fittings* | Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701 |
| *Egypt – Steel Rebar* | Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667 |
| *EU – Biodiesel (Argentina)* | Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, circulated to WTO Members 29 March 2016 |
| *EU – Footwear (China)* | Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585 |

| Short title | Full case title and citation |
|---|---|
| *Japan – Alcoholic Beverages II* | Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97 |
| *Korea – Certain Paper* | Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637 |
| *Thailand – H-Beams* | Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701 |
| *Thailand – H-Beams* | Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741 |
| *US – Countervailing Duty Investigation on DRAMS* | 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, DSR 2005:XVI, p. 8131 |
| *US – DRAMS* | Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, p. 521 |
| *US – Hot-Rolled Steel* | Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697 |
| *US – Lamb* | Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051 |
| *US – Line Pipe* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403 |
| *US – Softwood Lumber V* | Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875 |
| *US – Softwood Lumber V* | Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937 |
| *US – Softwood Lumber VI (Article 21.5 – Canada)* | Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865 |
| *US – Steel Safeguards* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117 |
| *US – Steel Safeguards* | Panel Reports, United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WT/DS248/R and Corr.1 / WT/DS249/R and Corr.1 / WT/DS251/R and Corr.1 / WT/DS252/R and Corr.1 / WT/DS253/R and Corr.1 / WT/DS254/R and Corr.1 / WT/DS258/R and Corr.1 / WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by Appellate Body Report WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, DSR 2003:VIII, p. 3273 |
| *US – Wool Shirts and Blouses* | Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323 |
| *US – Zeroing (EC)* | Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417 |
| *US – Zeroing (EC)* | Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, p. 521 |

## EXHIBITS REFERRED TO IN THIS REPORT

| Panel Exhibit | Short Title (if any) | Description |
|---|---|---|
| IDN-2 | | Email correspondence of 10 and 11 September 2013 between the Secretariat and the parties |
| IDN-3 | Preliminary Determination | Commission Regulation (EU) No. 446/2011 of 10 May 2011 imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia, Official Journal of the European Union, L Series, No. 122/47 (11 May 2011) |
| IDN-4 | Final Determination | Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, Official Journal of the European Union, L Series, No. 293/1 (11 November 2011) |
| IDN-5 | Revised Determination | Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012 amending Implementing Regulation (EU) No. 1138/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, Official Journal of the European Union, L Series, No. 352/1 (21 December 2012) |
| IDN-18 | | Corporate Structure of the Musim Mas Group, annex A-3.4. to PT Musim Mas' questionnaire response (BCI) |
| IDN-19 | | List of PT Musim Mas' Shareholders, annex A to PT Musim Mas' questionnaire response (BCI) |
| IDN-21 | | Attachment D-1.1 to PT Musim Mas's questionnaire response (BCI) |
| IDN-22 | | Excerpt from PT Musim Mas' questionnaire response (BCI) |
| IDN-24 | | Sale and Purchase Agreement between PT Musim Mas and ICOF-S (1 January 2009) (BCI) |
| IDN-25 | | Sale and Purchase Agreement between PT Musim Mas and ICOF-S (1 January 2010) (BCI) |
| IDN-26 | PT Musim Mas presentation | PT Musim Mas, "Impact of the Interpipe judgement on the fatty alcohol anti-dumping investigation (AD563), PTMM situation", presentation at the hearing at DG Trade, 16 August 2012 (BCI) |
| IDN-27 | | PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010 (BCI) |
| IDN-28 | | OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (22 July 2010) |
| IDN-33 | | Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin (BCI) |
| IDN-34 | | PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011 (BCI) |
| IDN-35 | | PT Musim Mas' comments on the complaint, 4 October 2010 |
| IDN-37 | | Anti-Dumping Complaint by Cognis GmbH and Sasol Olefins and Surfactants GmbH, 25 June 2010 |
| IDN-38 | | Company-internal note concerning verification of ICOF-S (BCI) |
| IDN-39 | | General Disclosure Document, 26 August 2011 |
| IDN-46 | | Summary of the meeting between PT Musim Mas and the European Commission related to case AD563 Fatty alcohols before the EU Hearing Officer, 4 October 2012 (BCI) |
| IDN-47 | | Verification Exhibit PTMM-18 (BCI) |
| IDN-49 | | Court of First Instance, Case T-249/06, Interpipe Niko Tube and Interpipe NTRP v Council (2009) ECR II |
| IDN-54 | | Template of an Intercompany Limited Risk Distribution Agreement by the law firm LCNlegal, available at <http://lcnlegal.com/template-intercompany-agreement-for-transfer-pricing-limited-risk-distribution-agreement>, accessed 16 September 2016 |
| IDN-55 | | ICOFS 2009 Financial Statements, attachment K1-5.2.1 to PT Musim Mas's questionnaire response (BCI) |
| IDN-56 | | ICOFS 2008 Financial Statements, attachment K1-5.2.2 to PT Musim Mas's questionnaire response (BCI) |
| IDN-58 | | Anti-Dumping Complaint before the European Commission against imports of Fatty Alcohol originating in India, Indonesia and Malaysia, submitted by Cognis GmbH, Sasol Olefins & Surfactants GmbH, 25 June 2010 |

| Panel Exhibit | Short Title (if any) | Description |
|---|---|---|
| IDN-60 | | Sasol letter to the EU Commission, 28 January 2011 |
| EU-3 | Basic Anti-Dumping Regulation | Council Regulation No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, Official Journal of the European Community, L Series, No. 343 (22 December 2009), p. 51 |
| EU-4 | | General Court, Case T-26/12, PT Musim Mas v Council (25 June 2015) |
| EU-5 | | PT Musim Mas Business Organization Structure (BCI) |
| EU-6 | | PT Musim Mas, Organization Chart- Fatty Alcohol Division (BCI) |
| EU-10 | | Letter regarding disclosure of definitive findings, 2 August 2011 (BCI) |
| EU-11 | | Detailed breakdown of the calculation PTMM's export price (BCI) |
| EU-12 | | Excel file "PTMM definitive disclosure.xls" (BCI) |
| EU-14 | | List of exhibits provided to PTMM at the conclusion of the verification visit (BCI) |

## ABBREVIATIONS USED IN THIS REPORT

| Abbreviation | Description |
|---|---|
| Basic Anti-Dumping Regulation | Council Regulation No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, Official Journal of the European Community, L Series, No. 343 (22 December 2009), p. 51 |
| DSB | Dispute Settlement Body |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| Ecogreen | P.T. Ecogreen Oleochemicals |
| EOS | Ecogreen Oleochemicals Pte Ltd (Singapore) |
| FOH | Fatty Alcohols |
| GATT 1994 | General Agreement on Tariffs and Trade 1994 |
| ICOF-S | Inter-Continental Oils & Fats Pte. Ltd (Singapore) |
| P&L | Profit and loss statement |
| PTMM | PT Musim Mas |
| SEE | Single economic entity |
| SG&A | Selling, general and administrative costs |
| Vienna Convention | Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679 |
| WTO | World Trade Organization |

# 1 INTRODUCTION

## 1.1 Complaint by Indonesia

1.1. On 27 July 2012, 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 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (the GATT 1994) with respect to anti-dumping measures imposed on imports of certain fatty alcohols from Indonesia, as well as to certain aspects of the investigation underlying those measures.[1]

1.2. Consultations were held on 13 September 2012 but failed to resolve this dispute.

## 1.2 Panel establishment and composition

1.3. On 1 May 2013, Indonesia requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 25 June 2013, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Indonesia in document WT/DS442/2, in accordance with Article 6 of the DSU.[3]

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

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Indonesia in document WT/DS442/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 8 December 2014, Indonesia requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 18 December 2014, the Director-General accordingly composed the Panel as follows:

| | |
|---|---|
| Chairperson: | Mr Paul O'Connor |
| Members: | Mr Greg Tereposky<br>Mr Mateo Diego Fernández |

1.6. India, Korea, Malaysia, Thailand, Turkey, and the United States notified their interest in participating in the Panel proceedings as third parties.

## 1.3 Panel proceedings

### 1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5], Additional Working Procedures Concerning Business Confidential Information (BCI), and timetable on 13 July 2015.

1.8. The Panel held a first substantive meeting with the parties on 25 and 26 November 2015. A session with the third parties took place on 26 November 2015. The Panel held a second substantive meeting with the parties on 15 March 2016. On 20 May 2016, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 29 July 2016. The Panel issued its Final Report to the parties on 23 September 2016.

[1] See *EU – Fatty Alcohols (Indonesia)*, Indonesia's request for consultations, 1 August 2012, WT/DS442/1 (Indonesia's request for consultations).
[2] Request for the establishment of a panel by Indonesia, WT/DS442/2 (Indonesia's panel request).
[3] See Minutes of meeting held in the Centre William Rappard on 25 June 2013, WT/DSB/M/333.
[4] *EU – Fatty Alcohols (Indonesia)*, constitution note of the Panel, WT/DS442/3, 19 December 2014.
[5] See the Panel's Working Procedures in Annex A-1 and Additional Working Procedures Concerning Business Confidential Information in Annex A-2.

### 1.3.2 Request for a preliminary ruling

1.9. On 8 January 2015, the European Union requested the Panel to issue a preliminary ruling that its authority to rule had lapsed, pursuant to Article 12.12 of the DSU. Indonesia provided a written response to the request for a preliminary ruling on 30 June 2015, in which it requested the Panel to reject the procedural objection made by the European Union. The United States also commented on the European Union's request in its third-party submission.

1.10. Following its review of the claims and arguments raised by the parties and third parties, the Panel ruled on 23 November 2015, that its authority had not lapsed pursuant to Article 12.12 of the DSU. The Panel indicated that the preliminary ruling and the reasoning of the Panel would form an integral part of the Panel's final report.

1.11. The Panel addresses the European Union's request for a preliminary ruling in its findings below.

## 2 FACTUAL ASPECTS

### 2.1 The measures at issue

2.1. This dispute concerns anti-dumping measures imposed by the European Union pursuant to Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia. The previously-applicable provisional measure challenged by Indonesia had been imposed pursuant to Commission Regulation (EU) No. 446/2011 of 10 May 2011 imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia.

2.2. On 11 December 2012, the European Union adopted Council Implementing Regulation (EU) No. 1241/2012 amending Implementing Regulation (EU) No. 1138/2011, which reduced to zero the anti-dumping duty applicable to one of the investigated Indonesian exporters (P.T. Ecogreen Oleochemicals (Ecogreen)), modified the duty applicable to all other exporting producers in Indonesia and confirmed the duty applicable to the other investigated exporting producer (PT Musim Mas).

## 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Indonesia requests that the Panel find that the anti-dumping measures imposed by the European Union on imports of certain fatty alcohols from Indonesia are inconsistent with the European Union's obligations under:

a. Articles 2.3 and 2.4 of the Anti-Dumping Agreement because the European Union made an improper adjustment to the export price of an Indonesian producer for a factor that did not affect price comparability;

b. Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the European Union failed to conduct a proper non-attribution analysis with respect to the factors "financial/economic crisis" and "issues related to the European Union's domestic industry's access to raw materials"; and

c. Article 6.7 of the Anti-Dumping Agreement because the European Union failed to disclose to either of the investigated Indonesian producers the results of the verification visits.

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

# 4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2, and C-1 and C-2).

# 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Turkey and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes D-1 and D-2). India, Korea, Malaysia, and Thailand did not submit written or oral arguments to the Panel.

# 6 INTERIM REVIEW

## 6.1 Introduction

6.1. On 29 July 2016, the Panel submitted its Interim Report to the parties. On 4 August 2016, Indonesia requested an extension for the submission of written requests for the review of precise aspects of the Interim Report, which the Panel granted. Accordingly, on 16 August 2016, Indonesia and the European Union submitted their written requests for review. On 23 August 2016, both parties submitted comments on the other party's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage. We modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, the Panel has made a number of changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors, certain of which were suggested by the parties.

6.3. As a result of the changes that we have made, the numbering of footnotes in the Final Report has changed from the Interim Report. References to footnotes and paragraph numbers in this section relate to the Interim Report.

## 6.2 The purpose and scope of the interim review

6.4. Before addressing the parties' individual requests for review of our Interim Report, we note that a significant number of Indonesia's comments are of a general nature and address entire sections, rather than precise aspects, of the Interim Report. We also note that many of Indonesia's comments concerning paragraphs of the Interim Report contain requests for the insertion into the Report of lengthy recitations of the arguments and evidence submitted by Indonesia in the course of the proceedings.[6] The European Union contends in its comments that Indonesia's interim review comments go "beyond the proper scope of interim review" and "constitute an attempt to re-argue the case".[7]

6.5. Article 15.2 of the DSU, and paragraph 22 of the Panel's Working Procedures, provide parties with an opportunity to request the Panel "to review precise aspects of the Interim Report". Previous panels have declined to expand the scope of interim review beyond that provided for in Article 15.2 and have accordingly circumscribed their review to address only those comments that relate to "precise aspects" of the Interim Report. Previous panels have also noted that it is not appropriate to re-open, at the interim review stage, arguments already put before a panel. In keeping with our understanding of Article 15.2 of the DSU and consistent with the approach adopted by previous panels, we will review our Interim Report only in light of the comments made by the parties which relate to "precise aspects" of the Interim Report.

[6] See for example Indonesia's request for review of the Interim Report, paras. 7.39, 7.99-7.104, 7.141, 7.150, 7.153, 7.166, and 7.180 and under fn 246.

[7] European Union's comments on Indonesia's request for review of the Interim Report, p. 1.

6.6. Regarding Indonesia's comments asking us to insert into the Report lengthy recitations of its arguments and evidence, we note that the Appellate Body has explained that panels need not refer explicitly to every argument made, or each piece of evidence adduced, by the parties. We thus have the discretion to address explicitly in our reasoning only the arguments and evidence we deem necessary to resolve a particular claim and support the reasoning we are required to provide.

6.7. Finally, we observe that Indonesia requests the Panel to identify precise passages of the published determinations dealing with specific arguments made by the interested parties during the underlying investigation or dealing with specific evidence relied upon by the Panel in its evaluation of the EU authorities' determination.[8] In its comments, the European Union notes in this respect that "it does not follow from the fact that particular record evidence is not expressly mentioned in the measure that it was not considered by the investigating authority. Nor does this preclude such evidence from being referenced in panel proceedings". The European Union also considers that, "in this case, the Panel has not exceeded these parameters".[9]

6.8. We refer to paragraph 7.8 of the Interim Report, where we recalled that:

> A panel must limit its examination to the evidence that was before the authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute. A panel's examination in that regard is not necessarily limited to the pieces of evidence *expressly* relied upon by an investigating authority in its establishment and evaluation of the facts in arriving at a particular conclusion. Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in the final determination. That notwithstanding, since a panel's review is not de novo, ex post rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's conclusion.[10]

We consider that we have strictly followed this standard of review in our Report.

6.9. With these preliminary remarks, we now turn to the substance of the parties' requests for review.

## 6.3 Requests for review submitted by the parties pertaining to Indonesia's claims under Articles 2.3 and 2.4 of the Anti-Dumping Agreement

### 6.3.1 Requests for review submitted by Indonesia

#### Paragraph 7.38

6.10. Indonesia asks the Panel to reflect more clearly in this paragraph its claim that "a violation of Article 2.4 has occurred because any adjustment was made, rather than because the amount of the adjustment was improper".[11]

6.11. The European Union deems the proposed change unnecessary, as it considers that it was clear from the exchange of arguments in the Panel proceedings that Indonesia challenged the adjustment in principle and did not take issue with the calculation of the amount.[12]

[8] See for example Indonesia's request for review of the Interim Report, paras. 7.84 and 7.85 and fn 156.
[9] European Union's comments on Indonesia's request for review of the Interim Report, pp. 1 and 2.
[10] Emphasis original, fns omitted.
[11] Indonesia's request for review of the Interim Report, para. 2.4.
[12] European Union's comments on Indonesia's request for review of the Interim Report, p. 2.

6.12. We have decided not to grant Indonesia's request because we consider that Indonesia's position on this issue was clarified through a question posed by the Panel[13] and that Indonesia's response is adequately reflected in paragraph 7.38 of the Interim Report.

### Paragraph 7.39

6.13. Indonesia requests the Panel to review its description of Indonesia's main arguments in paragraphs 7.36 to 7.40 of the Interim Report and in particular to revise paragraph 7.39 "to reflect Indonesia's arguments correctly".[14]

6.14. The European Union deems the proposed changes unnecessary as "Indonesia's argument of principle that intra-group commissions never justify adjustment was clear and adequately summarised by the Panel, before being clearly and correctly rejected by the Panel, for the reasons set out in the report".[15]

6.15. We consider that this paragraph, as well paragraphs 7.40 to 7.43, 7.103 to 7.107, 7.116, and 7.126 of the Interim Report as originally drafted reflect Indonesia's arguments adequately. Nonetheless, we have granted Indonesia's request in part, by modifying our description of Indonesia's arguments in those instances where the amendments proposed by Indonesia reflected more accurately its submissions before the Panel.

### Footnote 90

6.16. Indonesia requests the Panel to review its description of the comments made by PT Musim Mas during the underlying investigation in relation to the calculation of the normal value.[16]

6.17. The European Union deems the proposed change unnecessary, as "the report adequately summarises the arguments made during the administrative proceedings for the purposes of the findings made in the report."[17]

6.18. We have decided to grant Indonesia's request by clarifying in footnote 90 that PT Musim Mas' primary claim was that no adjustment to the export price should be made but that, if the Commission maintained the adjustment, then at least an identical adjustment should be made to the normal value.

### Paragraph 7.65

6.19. Indonesia requests the Panel to "complete" the description of the exchange during the on-the-spot verification between the EU authorities and PT Musim Mas.[18]

6.20. The European Union "strongly contest[s]" the proposed changes as well as Indonesia's version of the events that took place during the verification visits.[19]

6.21. We note that the purpose of paragraph 7.65 of the Interim Report is not to provide an exhaustive description of the discussion which took place between the companies and the EU authorities during the verification visits. Rather, the purpose of this paragraph is to set out the basis for the determination made by the EU authorities at the provisional stage of the investigation. In our view, at that stage of the investigation, the EU authorities relied primarily on the provisions of the Sale and Purchase Agreement between PT Musim Mas and Inter-Continental

[13] See Indonesia's response to Panel question No. 38, para. 1.108. The Panel asked Indonesia if it agreed with the statement made by the European Union that "in the present case the difference in view is not about the amount of the adjustment, but rather about the fact that any adjustment was made". Indonesia responded "[i]n effect, yes".
[14] Indonesia's request for review of the Interim Report, para. 2.5.
[15] European Union's comments on Indonesia's request for review of the Interim Report, p. 2.
[16] Indonesia's request for review of the Interim Report, paras. 2.6-2.11.
[17] European Union's comments on Indonesia's request for review of the Interim Report, p. 2.
[18] Indonesia's request for review of the Interim Report, para. 2.12.
[19] European Union's comments on Indonesia's request for review of the Interim Report, p. 2.

Oils & Fats Pte. Ltd (Singapore) (ICOF-S) and, as shown by the minutes of the verification visit, they were not convinced that an identical adjustment was warranted on the normal value. We have nevertheless decided to amend paragraph 7.65 to reflect our understanding more specifically.

### Paragraph 7.77

6.22. Indonesia criticizes the Panel's reference to transfer prices being "not only" significant for tax payers and tax administrations, "but also" as the prices at which an enterprise transfers physical goods and intangible property. Indonesia also considers that the Panel "leaves entirely unaddressed the very core of Indonesia's argument – that the 'payment' (whether at an arm's length price or not) is not an expense for one part of the SEE [single economic entity] because it may also be, at the same time, revenue, including profit, for the other part of the SEE."[20]

6.23. The European Union objects to the proposed changes.[21]

6.24. Since the description of the significance of transfer prices is quoted from an exhibit provided by Indonesia itself (Exhibit IDN-28, p. 19), we have decided not to grant Indonesia's request to amend this paragraph.

6.25. In any event, we note that what Indonesia describes in its request as the "very core of [its] argument" is addressed in detail at paragraphs 7.103 to 7.107 of the Interim Report.

### Paragraph 7.82

6.26. Indonesia requests the Panel to review its findings in relation to exhibits IDN-55 and 56 and in particular its finding that these exhibits do not record any expense incurred by ICOF-S for work undertaken in connection with domestic sales.[22]

6.27. The European Union asks the Panel to reject this request.[23]

6.28. The parties were given an opportunity (in the context of Panel question 35) to comment on the relevance of ICOF-S annual reports for assessing the nature of the mark-up as an expense or as a mere transfer of funds between related entities. Indonesia did provide extensive arguments on this issue in paragraphs 1.65 to 1.68 of its response to question 35 and again under paragraphs 1.84 to 1.91.

6.29. Nevertheless, we agree with Indonesia that the final three sentences of paragraph 7.82 are not necessary for the Panel to reach a conclusion on the European Union's determination that PT Musim Mas possessed its own sales and marketing capacity. As such, we have decided to grant Indonesia's request and have modified paragraph 7.82 accordingly.

### Paragraph 7.83

6.30. Indonesia asks the Panel to insert a sentence into paragraph 7.83 (or attach a footnote thereto) to clarify that Indonesia has never argued that the Sale and Purchase Agreement between PT Musim Mas and ICOFS was intended to cover anything other than export sales. Indonesia also asks the Panel to note that Indonesia's argument as to whether an adjustment may be made for intra-corporate transfers between PT Musim Mas and ICOFS did not depend on whether ICOFS was involved in domestic sales.[24]

6.31. We have decided to grant Indonesia's request by inserting a footnote to this paragraph indicating that "Indonesia does not argue before the Panel that the Sale and Purchase Agreement between PT Musim Mas and ICOF-S is intended to cover anything other than export sales."

[20] Indonesia's request for review of the Interim Report, para. 2.15.
[21] European Union's comments on Indonesia's request for review of the Interim Report, p. 2.
[22] Indonesia's request for review of the Interim Report, paras. 2.16-2.18.
[23] European Union's comments on Indonesia's request for review of the Interim Report, p. 2.
[24] Indonesia's request for review of the Interim Report, para. 2.19.

6.32. However, contrary to what Indonesia argues in its request for review, we see nothing in paragraph 4.183 of Indonesia's first written submission indicating that Indonesia's arguments with respect to the mark-up were the same regardless of the extent of ICOF-S' involvement in domestic sales. On the contrary, we consider that Indonesia argued that expenses incurred for domestic sales may be relevant for assessing whether an adjustment should be made on the export price: this is apparent from Indonesia's response to Panel questions 31 (paragraphs 1.12 and 1.13) and 38 (paragraph 1.108 (iii)).[25] This is also apparent in the last sentence of Indonesia's response to question 6 of the Panel (paragraph 1.32).[26] We have thus decided not to grant Indonesia's request on this point.

6.33. Finally Indonesia asks the Panel to clarify where it addressed its arguments and evidence (contained in Exhibits IDN-52, IDN-53, and IDN-54) in relation to the content of the Sale and Purchase Agreement between ICOF-S and PT Musim Mas.[27]

6.34. The European Union considers that the Panel's assessment of the content of the Sale and Purchase Agreement is correct and thus asks the Panel to reject the proposed changes.[28]

6.35. We do not see how Exhibits 52, 53, and 54, which contain general documentation on inter-company agreements (including loan agreements which are irrelevant to the present case), contradict or complete the provisions of the Sale and Purchase Agreement and in particular the fact that it "constitutes the entire agreement and understanding between the Parties in respect of its subject matter", or that ICOF-S might be otherwise involved in domestic sales. In addition, we note that Exhibit 54, which is a template for "Limited Risk Distribution Agreement" contains the following disclaimer:

> This template is written in general terms and its application to specific situations will depend on the particular circumstances involved. While it aims to set out terms which may commonly be used for intra group transactions, it does not purport to address every issue which parties could or should raise. What is appropriate in any particular case will depend on a variety of factors, including the functional analysis, the ownership of assets, the intended allocation of risk, the ability of the contracting parties to bear those risks, and any other contractual terms which form part of the chain of supply both internally and externally.[29]

Exhibit 53 contains a similar disclaimer.

6.36. We also note that the Interim Report addresses in detail, at paragraphs 7.77 and 7.103 to 7.106 why we found that the existence of transfer prices does not exclude the characterization of a payment as an expense rather than as a mere allocation of funds between two related entities. We have therefore decided not to grant the other aspects of Indonesia's request under this paragraph.

### Paragraph 7.84

6.37. Indonesia requests the Panel to refer to precise passages in the published determinations indicating that the EU authorities relied on the exporter's profit and loss statements (P&L) to conclude that PT Musim Mas possessed its own sales and marketing capacity for the product under

[25] "(iii) to the extent that the adjustment was intended to reflect the seller's SG&A on export sales, no deduction should have been made because … (b) the Commission included SG&A in the ex-factory normal value in this case".

[26] "[h]owever, since the EU's adjustment for the alleged commission is structured as being composed of indirect selling expense (SG&A) and profit components, it is important to note that, as explained in the responses to Questions 9 and 14, the Commission did not deduct either indirect selling expenses (SG&A) or profits from the normal value. To the contrary, the Commission *included* both SG&A and profit in the normal value when it used a constructed normal value". (emphasis original)

[27] Indonesia's request for review of the Interim Report, para. 2.21.

[28] European Union's comments on Indonesia's request for review of the Interim Report, p. 2.

[29] Template of an Intercompany Limited Risk Distribution Agreement by the law firm LCNlegal, available at <http://lcnlegal.com/template-intercompany-agreement-for-transfer-pricing-limited-risk-distribution-agreement>, accessed 16 September 2016, (Exhibit IDN-54), p. 1.

investigation and that PT Musim Mas incurred **[***]** costs for selling and marketing expenses for both its direct sales to domestic customers and for its sales to ICOF-S.[30]

6.38. The European Union considers that the measure at issue does not need to refer expressly to all relevant evidence and arguments.[31]

6.39. At paragraph 7.84 of the Interim Report we noted that the EU authorities had sufficient evidence in the investigation record to conclude that PT Musim Mas possessed its own sales and marketing capacity. The evidence cited by the EU authorities in their determinations refers to the level of direct sales (domestic sales and export sales) performed by PT Musim Mas.[32] We tested this determination against other evidence on the record, including the questionnaire response of the company, in which PT Musim Mas reported **[***]** amount of selling and marketing expenses for domestic sales and for export sales made via ICOF-S.

6.40. We do not consider that we are required to, or should, limit our evaluation of the determination reached by the investigating authority to the content of the published determination. We refer once more to paragraph 7.8 of the Interim Report which recalls that:

> A panel's examination in that regard is not necessarily limited to the pieces of evidence *expressly* relied upon by an investigating authority in its establishment and evaluation of the facts in arriving at a particular conclusion. Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in the final determination.[33]

6.41. On this basis we consider it was permissible and appropriate to assess the determinations reached by the EU authorities against the entire set of facts on the investigation record. This is especially the case when the relevant facts were provided by the exporter in its questionnaire response. We have thus decided not to grant Indonesia's request on this point. We nevertheless decided to add a reference to the Final Determination in footnote 155.

6.42. Indonesia also requests the Panel to "reconcile" its statement in paragraph 7.84 of the Interim Report that "the 'ICOF Margin' in the Sale and Purchase Agreement between PT Musim Mas and ICOF-S could reasonably be understood to reflect an additional cost, for which there is no equivalent on the domestic side", with the parties' agreement that the issue before the Panel does not involve a "level of trade" adjustment.[34]

6.43. The European Union considers that the fact that the trader's commission reflected the additional costs of doing business in the export market is a point about the facts while the observation that there was no level of trade issue is a point about the Panel's terms of reference; so there is no need for a reconciliation.[35]

6.44. Despite Indonesia's response to Panel question 1 (paragraph 1.13) that "the key issue before the Panel is whether the EU correctly adjusted for a factor that 'affect[ed] price comparability' within the meaning of Article 2.4 and conducted a 'fair comparison' at the same

[30] Indonesia's request for review of the Interim Report, para. 2.22.
[31] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.
[32] Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia, Official Journal of the European Union, L Series, No. 293/1 (11 November 2011) (Final Determination), (Exhibit IDN-4), recitals 31 and 35; and Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012 amending Implementing Regulation (EU) No. 1138/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia, Official Journal of the European Union, L Series, No. 352/1 (21 December 2012) (Revised Determination), (Exhibit IDN-5), recitals 24 and 27.
[33] Emphasis original, fns omitted.
[34] Indonesia's request for review of the Interim Report, para. 2.23.
[35] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

level of trade", we refrained – at the request of the parties – from making any finding regarding the level of trade of the comparison between the export price and the normal value. Footnote 223 of the Interim Report also indicates that the claim for a level of trade adjustment made by PT Musim Mas during the underlying investigation was "different from the argument made before the Panel by Indonesia in the present proceedings". The scope of Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement is therefore clear to us and is described precisely in the Interim Report. In addition, we consider that our findings under this paragraph are relevant to deciding whether or not the mark-up could be lawfully treated as a difference affecting price comparability. We have thus decided not to grant Indonesia's request on this point.

6.45. Finally Indonesia requests the Panel to "provide reasoning" that addresses its argument that, to the extent that the "ICOF margin" can be considered to be a cost to PT Musim Mas, it is revenue to ICOFS and therefore not an expense to the single economic entity as a whole.[36]

6.46. With regard to this argument, we explained at paragraph 7.103 of the Interim Report why we did not agree with Indonesia's argument that a single economic entity is dispositive of whether a given mark-up qualifies as a difference affecting price comparability. We considered that the "ICOF-Margin" could be reasonably treated by the EU authorities as the remuneration of certain functions, incurred only on export sales, rather than as a simple transfer of funds between related entities. In paragraph 7.88 of the Interim Report, we explained why we were convinced by the arguments put forward by the European Union in this regard. Moreover, we do not consider that, in order to reach their determination, the EU authorities were obliged to determine that "revenue to ICOF-S with respect to sales activities for the investigated export sales was not part of the [export] price" of the product concerned. Rather, in order to make an adjustment to the export price, the EU authorities had to determine that the mark-up was a difference affecting price comparability. We concluded that they did so by demonstrating, on the basis of facts on the record, that the mark-up was a component of the price of exports to the European Union representing the payment for a service and that there was no concomitant pricing or expense component on the domestic side. Contrary to what Indonesia suggests in its comments on this paragraph[37], the Panel does not "consider that because some SG&A [selling, general and administrative costs] and profit expenses are included in the export price, ICOFS' SG&A and profit can be deducted from the export price without creating an unfair comparison". As explained in paragraphs 7.86 and 7.129 of the Interim Report, we considered that the ICOF Margin "could reasonably be understood to reflect an additional cost, for which there is no equivalent on the domestic side …" and that ICOF-S' SG&A and profit represented a reasonable basis for calculating the actual value of this service. We also recalled at paragraph 7.123 of the Interim Report that our task in this dispute was not to assess whether the value of the allowance calculated by the EU authorities was correct and led to a "fair comparison".

6.47. For the foregoing reasons, we have decided not to grant Indonesia's request.

### Paragraph 7.85

6.48. Indonesia requests the Panel to[38]:

a. identify precise passages in the EU's published determination indicating that the EU authorities ascribed limited probative value to Exhibit P.T. Musim Mas (PTMM)-18 and that this exhibit does not reveal the nature, extent or scope of ICOF-S alleged involvement in domestic sales;

b. reflect that there is no evidence on the record as to whether the EU authorities requested additional information from the company on the involvement of ICOF-S in domestic sales; and

c. indicate how it treated the EU authorities' alleged failure to seek additional evidence on this issue.

[36] Indonesia's request for review of the Interim Report, para. 2.24.
[37] Indonesia's request for review of the Interim Report, para. 2.25.
[38] Indonesia's request for review of the Interim Report, paras. 2.26 and 2.27.

6.49. The European Union considers that the measure at issue does not need to refer expressly to all relevant evidence and argument and that the assertion that ICOF-S was also involved in domestic sales was implausible and unsubstantiated. The European Union thus considers that no changes to the Interim Report are warranted.[39]

6.50. We noted in this paragraph that the EU authorities rejected PT Musim Mas' argument with regard to the alleged involvement of ICOF-S in domestic sales and that Exhibit PTMM-18 was the only evidence cited by the parties supporting this argument. It is therefore implicit that the EU authorities did not consider this evidence as sufficient to contradict their assessment of the matter. We explained in this paragraph why we considered that it was not unreasonable for the EU authorities to reach this conclusion in the face of such limited evidence of ICOF-S' involvement in domestic sales.

6.51. We note that the record does not indicate whether the EU authorities requested further evidence of ICOF-S' involvement in domestic sales. We also note that although Indonesia did refer during the proceedings to the failure of the EU authorities to request additional evidence[40], it did not develop a claim under Article 2.4 of the Anti-Dumping Agreement on this basis: there was therefore no need to address the EU authorities' alleged failure to seek additional evidence in order to resolve the dispute. For the same reason, we consider that there is no reason to amend our Report on this point, and have thus decided not to grant Indonesia's request.

### Footnote 156

6.52. Indonesia asks the Panel to indicate that the issue of whether PT Musim Mas had its own marketing department arose for the first time before this Panel and that the EU authorities never discussed the charts included in Exhibits EU-5 and EU-6 during the underlying investigation.[41]

6.53. The European Union objects to the proposed changes and considers that the measure at issue does not need to refer expressly to all relevant evidence and argument.[42]

6.54. It is clear from the labelling of these exhibits (EU-5 and EU-6) that this evidence was brought to the attention of the Panel by the European Union during WTO panel proceedings. We also consider that our assessment of the determinations made by the EU authorities in this case should not be limited to the content of the published determinations, but should encompass the entire body of evidence that was on the record before the investigating authority during the course of the investigation. Evidence coming directly from the company (such as Exhibits EU-5 and EU-6) is particularly relevant to such an examination, even if the EU authorities did not expressly discuss this evidence in their published determinations. We have therefore decided not to grant Indonesia's request.

### Paragraph 7.90

6.55. Indonesia asks the Panel to delete the characterization as "factual" of the EU authorities' conclusion that ICOF-S performed "functions [similar to those] of an agent working on a commission basis" or to add an explanation why it considers this finding to be "factual" rather than "legal".[43]

6.56. The European Union objects to the proposed changes. It considers that the EU authorities' conclusion on this issue "may or may not be legal characterisations of fact in EU law, but they are statements of fact for the purposes of WTO law given the scope of these proceedings."[44]

[39] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.
[40] Indonesia's response to Panel question No. 35, para. 1.83; and comments on European Union's response to Panel questions, para. 4.15.
[41] Indonesia's request for review of the Interim Report, paras. 2.28 and 2.30.
[42] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.
[43] Indonesia's request for review of the Interim Report, paras. 2.31 and 2.35.
[44] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.

6.57. We consider that the EU authorities' finding that ICOF-S performed functions similar to those of an agent working on a commission basis − and that Ecogreen Oleochemicals Pte Ltd (Singapore) (EOS) did not − was based on the specific facts concerning the two companies, as explained in paragraphs 7.93 to 7.95 and at paragraphs 7.147 and 7.148 of the Interim Report. Moreover, as explained at paragraph 7.152 of the Interim Report, although the EU authorities applied the same criteria under EU law to both ICOF-S and EOS, they introduced a quantitative criterion in the Revised Determination for direct sales made by the producers and for third-party sales made by the related trader. We therefore disagree with Indonesia's statement in its request for review that "the legal nature of this term is also more than amply demonstrated by the fact that, *without any change in the underlying facts*, Ecogreen went from being characterized as having the functions of an agent working on a commission basis (in the Definitive Determination) to no longer having these functions (in the Amending Regulation) …".[45] We have thus decided not to grant Indonesia's request.

### Paragraph 7.92

6.58. Indonesia asks the Panel to state the legal basis for the determination reached by the EU authorities with regard to the adjustment for a commission.[46]

6.59. The European Union objects to the proposed changes.[47]

6.60. In response to question 3 of the Panel, the European Union indicated that Article 2.10 of the Basic Regulation "was the basis for the adjustments that were made in this case". We analysed in detail the reasoning of the EU authorities in reaching their determination on the adjustment to the export price in paragraphs 7.63 to 7.71 of the Interim Report. As we stated in paragraph 7.73 of the Interim Report, in their Preliminary Determination:

> The EU authorities' explanations relied principally upon the Sale and Purchase Agreement between PT Musim Mas and ICOF-S to determine the existence of a mark-up on sales of the product at issue to the European Union.

In their Final Determination, the EU authorities also analysed (in response to comments made by the Indonesian exporters), whether the related trader had functions similar to an agent working on a commission basis, in the sense of Article 2(10)(i) of the Basic Regulation. We consider that there is no need to clarify further the legal basis for the determination reached by the European Union, especially as we see no need for us to express an opinion on the correct legal basis for the EU authorities' actions under EU law.

6.61. Indonesia also requests the Panel to state that Indonesia's claim under Article 2.4 is not based on the EU authorities having used an incorrect standard − namely using the concept of an entity having "functions" of an agent working on a commission basis − but rather on the fact that the adjustment made was inappropriate.[48]

6.62. However, we note that, at paragraph 4.139 of its first written submission, Indonesia argued that "the Commission's criterion is flawed and bereft of economic sense. The Commission's analysis, including the numerous facts it relied on concerning the companies' activities, does not justify the adjustment. The Commission's actions therefore amount to a violation of the Anti-Dumping Agreement". In light of this statement, we have decided not to grant Indonesia's request.

### Paragraph 7.93

6.63. Indonesia argues that PT Musim Mas and Indonesia made extensive arguments about the reasons why PT Musim Mas formally undertakes direct export sales, but that these reasons were

[45] Indonesia's request for review of the Interim Report, para. 2.33. (emphasis original)
[46] Indonesia's request for review of the Interim Report, paras. 2.37-2.40.
[47] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.
[48] Indonesia's request for review of the Interim Report, paras. 2.41-2.43.

insufficiently analysed by the EU authorities during the underlying investigation and by the Panel during the WTO proceedings.[49]

6.64. The European Union deems the proposed changes unnecessary and considers that the measure at issue does not need to refer expressly to all relevant evidence and arguments.[50]

6.65. The "extensive arguments" allegedly made by PT Musim Mas about direct export sales are not apparent to us at page 43 of Exhibit IDN-22, as this excerpt from the questionnaire merely describes PT Musim Mas as the "formal contract partner of customers in Indonesia".[51]

6.66. PT Musim Mas explains[52] that "some countries do not accept the ICOF-S issued certificate of origin that product is made in Indonesia. In such cases PTMM must contract directly (China, Japan) so that PTMM can issue a certificate of origin." This explanation is also developed by Indonesia before the Panel, as direct export sales made by PT Musim Mas are described as a mere formality[53] and "the undisputed evidence on the record is that all sales involve the participation of the sales and marketing arm in Singapore".[54] We disagree that these statements amount to "undisputed evidence". On the contrary, we found that the evidence on the record does not support the argument that sales formally made by PT Musim Mas are, in reality, made by ICOF-S.

6.67. We have nevertheless decided to add a sentence in Paragraph 7.93 to reflect that "PT Musim Mas and Indonesia have explained that the intervention of PT Musim Mas in sales of the product concerned was purely formal, but no probative record evidence has been brought to our attention in support of this explanation."

### Paragraphs 7.99-7.104

6.68. Indonesia asks the Panel to revise its description of Indonesia's arguments. Indonesia also requests the Panel to state clearly that Indonesia did not argue that a mark-up between related companies can never affect price comparability.[55]

6.69. The European Union considers the proposed changes unnecessary and that "Indonesia's argument of principle has been correctly summarised and rejected by the Panel."[56]

6.70. We have already rejected Indonesia's requests to review our description of Indonesia's arguments under paragraph 7.39 above and we reach the same conclusion with regard to paragraphs 7.99 to 7.104 of the Interim Report. We also consider that Indonesia's view is already accurately reflected at paragraphs 7.103 (where Indonesia's response to Panel question 33 is quoted) and 7.104 of the Interim Report.

6.71. In addition, Indonesia requests the Panel to clarify the role played by the concept of "an arm's length transaction" in its analysis, including the applicable legal standard under WTO, and to relate this concept to the published determinations. Indonesia understands the Panel to mean that "where transactions between parties within an SEE are 'at arm's length', the authority may adjust normal value or export price, as appropriate, for the entire amount of the transaction."[57]

6.72. This is not what we found. At paragraph 7.103 of the Interim Report, we stated that, "in our view, it is possible that a transaction between two entities within what Indonesia denotes as a 'single economic entity' could reflect an expense that must be recovered and thus would impact price comparability." As far as the amount of the adjustment is concerned, we refer to paragraph 7.129 of the Interim Report which states: "when a transfer of funds occurs between two related entities, an investigating authority would be justified in examining whether the actual value

[49] Indonesia's request for review of the Interim Report, paras. 2.44 and 2.45.
[50] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.
[51] Emphasis added.
[52] Company-internal note concerning verification of ICOF-S, (Exhibit IDN-38) (BCI), p. 3.
[53] See for example, Indonesia's first written submission, para. 4.7.
[54] Indonesia's first written submission, para. 4.169.
[55] Indonesia's request for review of the Interim Report, paras. 2.48 and 2.49.
[56] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.
[57] Indonesia's request for review of the Interim Report, para. 2.50.

of the expense differs from its reported value. Such an examination would, in our view, assist in identifying the proper amount of the adjustment to be made." We consider that this finding is consistent with the statement of the Appellate Body at paragraph 141 of its report in *US – Hot-Rolled Steel* that: "where the parties to a transaction have common ownership … usual commercial principles might not be respected between them".[58] We thus disagree with Indonesia's comment at paragraph 2.57 of its request for review that "in the Appellate Body's language" transactions within a single economic entity "are a vehicle for transferring economic resources within the single economic enterprise".[59]

6.73. Indonesia also asks the Panel to delete the offset-quote in paragraph 7.103, because that quote "did not address a transaction between two parts of an SEE, but instead addressed activity conducted by a part of an SEE that gives rise to a flow of funds *out of the SEE* ".[60]

6.74. We have decided not to grant Indonesia's request because we consider that Indonesia's response to question 10 of the Panel (which is quoted in part at paragraph 7.103 of the Panel Report) distinguishes clearly between actual expenses incurred by paying a third party and expenses incurred internally by the producer/exporter. Indonesia's view that such expenses "will be adjusted for" is also bereft of any ambiguity and consistent with the views expressed in paragraph 7.103 of the Interim Report.

6.75. Finally, Indonesia asks the Panel to clarify "whether its finding under Article 2.4 is based on a legal interpretation that a mark-up in a transaction between closely-intertwined companies in a single economic entity, such as the mark-up at issue in this case, is always an expense to the single economic entity that may be deducted from the export price (and/or normal value, if it occurs on the domestic market side)."[61]

6.76. We consider that the legal standard applied in this case is clearly spelled out at paragraphs 7.103 and 7.106 of the Interim Report. We therefore see no need to amend the Report on this point and have thus decided not to grant Indonesia's request.

### Footnote 201

6.77. Indonesia requests the Panel to delete the reference in footnote 201 to its position having "evolved" in the course of the proceedings with respect to whether transactions between entities in a single economic entity involve an expense. Indonesia argues that it explained consistently in its first written submission and subsequently that selling expenses incurred by the sales department of a seller, as indirect selling expenses, are not to be deducted in determining the export price.[62]

6.78. The European Union objects to the proposed change. It considers the Panel's statement in footnote 201 to be fair and accurate.[63]

6.79. We have decided not to grant Indonesia's request because we see some ambiguity in Indonesia's argument on this issue and footnote 201 is intended to acknowledge this ambiguity. In particular, we have difficulty reconciling Indonesia's initial argument that the mark-up is a mere allocation of sales proceeds between related entities[64], and Indonesia's responses to Panel questions following the second meeting of the Panel with the parties, which do not exclude that a transaction between two related entities may involve an actual expense.[65] The fact that the

[58] Emphasis added.
[59] Emphasis added.
[60] Indonesia's request for review of the Interim Report, para. 2.61..(emphasis original)
[61] Indonesia's request for review of the Interim Report, para. 2.63.
[62] Indonesia's request for review of the Interim Report, paras. 2.66 and 2.67.
[63] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.
[64] See for example Indonesia's first written submission, paras. 4.4, 4.94, and 4.100; and second written submission, paras. 2.8-2.12. See also Indonesia's response to Panel question No. 15, para. 1.71: "[t]hus, the mark-up is an allocation of revenues between closely-related companies (or within a single economic entity). It is not an expense."
[65] See for example Indonesia's response to Panel question No. 31, para. 1.36: "the amount of any expense for selling/trading services is not the amount transferred between the two companies, but instead is the amount of the actual expenses incurred in making the sales" and "these actual expenses can be identified and verified − as they were in this case − from ICOFS' financial statements". See also Indonesia's response to

amount actually transferred between the related entities as compensation for the services provided may differ from the actual cost of the service does not affect our conclusion that expenses − rather than mere allocations of sales proceeds − may be incurred between two related entities. As we noted at paragraph 7.128, Indonesia itself "recognizes [the] distinction between (i) identifying whether an allowance should be made; and (ii) identifying the proper amount for that allowance".

### Paragraph 7.109

6.80. Indonesia requests the Panel to clarify the appropriate legal standard under WTO law to determine whether the common ownership, control and management structure of two entities is such that they form part of a single economic entity and to identify with references where in its published determinations the EU authorities correctly stated and applied that standard to all of the evidence before it.[66]

6.81. The European Union asks the Panel to reject this request, since the legal standard is set out in Article 2.4 of the Anti-Dumping Agreement, as explained by the Panel.[67]

6.82. We see no need to modify the Interim Report on the basis of Indonesia's request. We recall, in particular, our analysis and conclusion in paragraphs 7.103-7.106 that the existence of a single economic entity is not dispositive of whether a given payment is a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement.

### Paragraph 7.123

6.83. Indonesia requests the Panel to reflect its argument that "a violation of Article 2.4 has occurred because an adjustment was made, rather than because the amount of the adjustment was improper." Indonesia also requests the Panel to either delete the assertion that Indonesia accepts that the value of the allowance is not at issue in the present dispute or include the certain text in footnote 237, since the portrayal that "Indonesia would be indifferent to the amount of deduction or that Indonesia would accept the manner in which the EU determined … cannot be considered an accurate or complete representation of Indonesia's arguments throughout these proceedings."[68]

6.84. The European Union objects to the proposed changes. For the European Union, it is clear that Indonesia stated that it was making an argument in principle, and not contesting the calculation of the amount of the adjustment.[69]

6.85. We have decided not to grant Indonesia's requests. We recall, in this regard, our reasoning in respect of Indonesia's request concerning paragraph 7.38 of the Interim Report, namely, that Indonesia's response to question 38 of the Panel is unambiguous ("[i]n effect, yes"[70]) and the Interim Report accurately reflects this answer. Further, we see nothing in the Interim Report that describes Indonesia's claim as implying that "should the EU be found to be entitled to make a deduction, Indonesia would be indifferent to the amount of deduction."[71]

### Paragraph 7.128

6.86. Indonesia argues that the Panel ignored Indonesia's argument that "for a producer/exporter using an independent trader, the entire amount paid by the producer/exporter is a selling expense that affects price comparability", but that "this is not the case where the 'downstream participant'

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Panel question No. 33, para. 1.55: "[t]he amount actually transferred between the affiliated producer/exporter and transporter for the services may be greater or lower than the amount of the expenses actually incurred. In any event, because of the relationship between the companies, this amount is deemed to be unreliable and does not reflect the 'actual' or 'genuine' expenses reflected in the profit and loss statements of the relevant entities."

[66] Indonesia's request for review of the Interim Report, paras. 2.68 and 2.69.
[67] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.
[68] Indonesia's request for review of the Interim Report, paras. 2.70-2.75.
[69] European Union's comments on Indonesia's request for review of the Interim Report, p. 3.
[70] Indonesia's response to Panel question No. 38, para. 1.108.
[71] Indonesia's request for review of the Interim Report, paras. 2.74 and 2.75.

... is a legally-separate sales entity within a single economic entity, where the 'additional costs and profits' remain the costs and profits of the producer/exporter single economic entity as a whole and are not *in toto* an expense that must be deducted".[72] Indonesia considers that, without addressing its arguments in this regard, the Panel appears to simply assume that all additional participants in the distribution chain are unrelated, independent companies.

6.87. The European Union sees no basis for any changes to precise aspects of the Interim Report and considers that Indonesia is attempting to re-argue its case.[73]

6.88. We see no need to modify the Interim Report on the basis of Indonesia's comments on this paragraph. Contrary to Indonesia's assertion, the Interim Report does not state that all downstream participants are necessarily unrelated companies or that transactions between related companies always reflect actual expenses. Rather, the precise wording we used is that "the intervention of downstream participants in the sales chain may result 'in additional costs and profits'".[74] In any event, we recall our conclusion in paragraph 7.105 of the Interim Report that the existence of a single economic entity is not dispositive of whether a given payment is a difference which affects price comparability. In the present case, we concluded at paragraph 7.88 that the EU authorities had a sufficient evidentiary basis for finding that the mark-up was a component of the price of exports to the European Union that represented the payment for a service and that there was no concomitant pricing or expense component on the domestic side.

### Paragraph 7.129

6.89. Indonesia asks the Panel to address in the Final Report certain arguments which, according to Indonesia, were insufficiently considered by the Panel[75]:

a. whether it was permissible for the EU authorities to deduct the SG&A and profit of the related trader;

b. whether and in which situations the relationship between a producing entity and an affiliated sales entity affects the type and nature of the expenses incurred;

c. whether it is appropriate to deduct from the export price the "profit" of a related sales entity where that sales entity is a 100% subsidiary of the group holding company.

6.90. In addition, Indonesia considers that, by finding in this paragraph that "when a transfer of funds occurs between two related entities, an investigating authority would be justified in examining whether the actual value of the expense differs from its reported value", the Panel encourages investigating authorities to ignore how enterprises structure their business when calculating dumping margins.[76]

6.91. The European Union sees no basis for any changes to precise aspects of the Interim Report, and considers that Indonesia is attempting to re-argue its case. For the European Union, Indonesia's argument of principle was clear, and it was clearly and rightly rejected by the Panel for the reasons set out in the report.[77]

6.92. We see no need to modify the Interim Report on the basis of Indonesia's comments on this paragraph. We consider that our analysis and conclusion in paragraphs 7.103-7.106 sufficiently address the matters referred to by Indonesia in its comments on this paragraph.

### Footnote 244

6.93. Indonesia takes issue with the Panel's understanding that, "[i]n practical terms", the EU authorities have "verified" "actual expenses ... in a context of common ownership/control by

[72] Indonesia's request for review of the Interim Report, paras. 2.78 and 2.79.
[73] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.
[74] Emphasis added.
[75] Indonesia's request for review of the Interim Report, para. 2.82.
[76] Indonesia's request for review of the Interim Report, paras. 2.85-2.92.
[77] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

reference to the relevant entity's P&L". Indonesia requests the Panel to clarify whether the EU authorities performed a verification or based their determination on such "actual expenses". Indonesia makes six specific requests for clarification in that regard.[78]

6.94. The European Union sees no reason for any changes to precise aspects of the Interim Report on the basis of Indonesia's requests. For the European Union, the measure at issue does not need to refer expressly to all relevant evidence and argument and the Panel's analysis is adequate as it stands.[79]

6.95. We do not see how the clarifications requested by Indonesia would assist the parties in the resolution of the dispute. We have thus decided not to grant Indonesia's request. We have however decided to delete the last sentence of footnote 244 of the Interim Report, which reflected our understanding of the EU authorities' actions in the underlying investigation, but is not directly relevant to the resolution of this dispute.

### Footnote 246

6.96. Indonesia requests that its arguments related to the matters addressed in footnote 246 be reflected in a "complete and accurate manner", for instance, by inserting certain text proposed by Indonesia. Indonesia also requests the Panel to elaborate on the reasoning in footnote 246 and adequately address Indonesia's argument, including (and in particular) Indonesia's arguments in its comments on the EU's second answers, in paragraphs 2.1 to 2.9 and the scenarios set out in paragraph 2.7 of that document.[80]

6.97. The European Union objects to the proposed changes. For the European Union, Indonesia's argument of principle has been correctly summarised and rejected by the Panel. In the European Union's view, Indonesia appears to be attempting to re-argue its case, and to be conflating issues associated with the construction of an export price with issues associated with the making of necessary adjustments.[81]

6.98. We have decided not to grant Indonesia's requests. We recall again that panels are not required to address in their reports every single argument or piece of evidence submitted by a party. To the extent that Indonesia's requests for review are premised on the proposition that the relationship between two entities is determinative to whether an adjustment should be made, we consider that this matter is addressed sufficiently in paragraphs 7.103-7.106 of the Interim Report.

### Paragraph 7.139

6.99. Indonesia requests that subparagraph (ii) of paragraph 7.139 be amended with certain text in order to clarify that the term "performed from Indonesia" was used by the EU authorities and was not endorsed or agreed by Indonesia.[82]

6.100. The European Union objects to the proposed changes. It considers that the Interim Report adequately and fairly reflects the arguments that were exchanged by the parties during the proceedings.[83]

6.101. Paragraph 7.71 of the Interim Report, which describes the factual findings made by the EU authorities in the Revised Determination, clearly indicates that *the EU authorities* found that "given the level of direct export sales, it can only be concluded that PTMM's export sales are performed not only from [ICOF-S], but also from Indonesia." A reference to recital 27 of the Revised Determination is also included in footnote 116 of the Interim Report. In any event, we consider that the wording of sub-paragraph (ii) of paragraph 7.139 sufficiently captures

[78] Indonesia's request for review of the Interim Report, paras. 2.93 and 2.94.
[79] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.
[80] Indonesia's request for review of the Interim Report, paras. 2.98-2.104.
[81] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.
[82] Indonesia's request for review of the Interim Report, paras. 2.105-2.107.
[83] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

Indonesia's argument and we see no further basis for any modification. We have thus decided not to grant Indonesia's request.

### Paragraph 7.140

6.102. Indonesia requests the Panel to add a reference in this paragraph to the fact that it has "consistently argued" that third-party sales performed by ICOF-S were "nothing but a second line of business". Indonesia also requests the Panel to clarify where it has addressed this argument.[84]

6.103. The European Union considers the proposed changes unnecessary. In its view, Indonesia's argument of principle has been correctly summarised and rejected by the Panel.[85]

6.104. We note that paragraphs 4.103 to 4.106 of Indonesia's first written submission and paragraph 45 of Indonesia's opening statement at the first meeting of the Panel with the parties merely describe a "scenario" – intended to support Indonesia's argument – in which *an entity* establishes two lines of business. We see nothing in these paragraphs indicating that third-party sales performed *by ICOF-S* were "nothing but a second line of business". We also note that we addressed the importance of third-party sales for ICOF-S in paragraph 7.94 and footnote 169 of the Interim Report. We have thus decided not to grant Indonesia's request.

### Paragraph 7.141

6.105. Indonesia requests the Panel to include in paragraph 7.141 a more complete description of its argument, particularly as it pertains to Ecogreen and PT Musim Mas exhibiting the same business structures.[86]

6.106. The European Union considers the proposed changes unnecessary. In its view, the summary of the arguments and the Panel's assessment are adequate as they stand in order to deal with Indonesia's claim in this regard.[87]

6.107. We have decided not to grant Indonesia's request. We recall again that panels are not required to address in their reports every single argument or piece of evidence submitted by a party. In any event, the Interim Report states in paragraph 7.141 that "Indonesia considers that it was incumbent upon EU authorities to explain in which regard the relationship between PT Musim Mas and ICOF-S was different from the relationship between Ecogreen and EOS", and proceeds to explain in paragraph 7.157 that "we do not have sufficient information before us to assess whether the circumstances of the two companies were identical or similar in all aspects."

### Paragraph 7.148

6.108. Indonesia requests that the Panel delete the word "factual" in paragraph 7.148 as it pertains to subparagraph (a) or, alternatively, explain in detail why it considers this finding to be "factual", as opposed to "legal".[88]

6.109. The European Union objects to the proposed changes for the reasons already explained above in respect of Indonesia's requests for review of paragraph 7.90.[89]

6.110. We consider that the EU authorities' finding that the mark-up was a factor that had an impact on the price to be compared and was granted on export sales but not on domestic sales, was based on an examination of the facts regarding PT Musim Mas and ICOF-S on the record. The evidence supporting this conclusion is described in details in paragraphs 7.64 to 7.69 and 7.73 to 7.88 of the Interim Report. Our conclusion at paragraph 7.88 of the Interim Report is that "on the basis of the foregoing, we consider that the EU authorities' *factual* finding of a mark-up and associated expenses linked to export sales only was proper and provided a sufficient basis for

[84] Indonesia's request for review of the Interim Report, paras. 2.108 and 2.109.
[85] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.
[86] Indonesia's request for review of the Interim Report, paras. 2.110-2.113.
[87] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.
[88] Indonesia's request for review of the Interim Report, paras. 2.114 and 2.115.
[89] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.

concluding that the factor at issue constituted a difference which affects price comparability".[90] We have thus decided not to grant Indonesia's request.

### Paragraph 7.150

6.111. Indonesia requests that paragraph 7.150 be amended to "reflect correctly" Indonesia's argument and remove what it considers to be a misleading description in the Interim Report. Indonesia states that it consistently argued that the criteria used by the EU authorities are flawed because they reveal no meaningful information about whether a payment made between two related entities affects price comparability and because the EU authorities did not explain anywhere why they affect price comparability. Indonesia also asserts that it argued that the fact that the EU authorities first found that the two companies were in an identical situation and warranted equal treatment, and then, without any change in facts, found that the two companies warranted differential treatment, casts doubt on the validity of those criteria and requires a particularly thorough explanation.[91]

6.112. The European Union objects to the proposed changes. It considers that the summary of the arguments and the Panel's assessment are adequate.[92]

6.113. We have decided not to grant Indonesia's request. We note, in this regard, that the title of section 7.3.5.4.3.1 of the Interim Report describes accurately Indonesia's argument: "that the criteria used by the EU authorities were irrelevant to an analysis of price comparability".[93] Moreover, in paragraph 7.44 we explain that Indonesia states "that the EU authorities used incorrect and arbitrary criteria under Article 2.4 in making the adjustment for PT Musim Mas".[94]

### Paragraph 7.153

6.114. Indonesia requests that its arguments be reflected in the same manner as they have been set out in its submissions to the Panel, emphasizing that a shift in the investigating authorities' analytical framework without any change in the underlying facts, requires a particularly thorough reasoned and adequate explanation.[95]

6.115. The European Union does not consider that Indonesia's comments in this regard disclose any basis for changes to precise aspects of the Interim Report. In its view, the summary of the arguments and the Panel's assessment are adequate as they stand.[96]

6.116. A summary of Indonesia's arguments in relation to the different outcome for Ecogreen is contained in paragraphs 7.137 to 7.141 of the Interim Report. This section clearly indicates that, according to Indonesia, the EU authorities failed to provide a reasoned and adequate explanation for eventually treating the two Indonesian exporting producers differently in relation to the trading commission received by their respective traders. The Interim Report also quotes in part paragraph 4.270 of Indonesia's first written submission.[97] We have nevertheless decided to grant Indonesia's request by quoting in full paragraph 4.270 of Indonesia's first written submission.

### Paragraph 7.159

6.117. Indonesia considers that the Panel mischaracterized its claim by stating in this paragraph that "Indonesia is not making a claim that [the] EU authorities violated Article 2.4 by not making an allowance to Ecogreen's export price or by changing their assessment after the end of the investigation".[98] Indonesia also takes issue with the Panel's conclusion that the explanation given

[90] Emphasis added.
[91] Indonesia's request for review of the Interim Report, paras. 2.116 and 2.117.
[92] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.
[93] Emphasis added.
[94] Emphasis added.
[95] Indonesia's request for review of the Interim Report, para. 2.218.
[96] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.
[97] Para. 7.137 of the Interim Report.
[98] Indonesia's request for review of the Interim Report, paras. 2.122-2.124.

by the EU authorities in the case of Ecogreen did not affect the explanation supporting the determination concerning PT Musim Mas.

6.118. The European Union does not consider that Indonesia's comments in this regard disclose any basis for changes to precise aspects of the Interim Report. In its view, the summary of the arguments and the Panel's assessment are adequate.[99]

6.119. We note that Indonesia's request for findings at paragraph 2.79 of its second written submission states that its claim relates to the adjustment made "to PT Musim Mas' export price".[100] We have not been able to identify any request for a finding that the European Union violated Article 2.4 by not making an allowance to Ecogreen's export price or by modifying the assessment of Ecogreen's situation after the end of the investigation. We have thus decided not to grant Indonesia's request.

### 6.3.2 Requests for review submitted by the European Union

#### Paragraphs 7.37(b) and 7.112-7.130

6.120. The European Union requests that the Interim Report be clarified to reflect that the reason referred to in paragraph 7.37(b) and discussed in paragraphs 7.112-7.130 was not a separate "claim/argument"[101] by Indonesia.

6.121. Indonesia submits that "[e]verything that Indonesia has said under the heading of Article 2.4 are *arguments* in support of that one single overarching claim."[102] Indonesia also disagrees with any suggestion that it did not take any issue with the amount of the adjustment made by the EU authorities.

6.122. We consider that paragraph 7.38 reflects sufficiently that the three arguments of Indonesia referred to in paragraph 7.37 were intended, jointly and independently, to support Indonesia's claim that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement. We therefore see no reason to grant the European Union's request in this regard.

#### Paragraph 7.58

6.123. The European Union requests certain modifications to this paragraph.[103] Indonesia did not express a view on this request. We have decided to grant the European Union's request and have modified paragraph 7.58 accordingly.

#### Paragraph 7.65

6.124. The European Union requests certain modifications to this paragraph.[104] Indonesia did not express a view on this request. We have decided to grant the European Union's request by adding a footnote to the relevant sentence in paragraph 7.65.

#### Paragraph 7.71

6.125. The European Union requests that the phrase "[i]n line with the specific requirements of EU law" be added to the first sentence of paragraph 7.71.[105] Indonesia did not express a view on this request.

[99] European Union's comments on Indonesia's request for review of the Interim Report, p. 4.
[100] Emphasis added.
[101] European Union's request for review of the Interim Report, p. 4.
[102] Indonesia's comments on the European Union's request for review of the Interim Report, para. 2.2. (emphasis original)
[103] European Union's request for review of the Interim Report, p. 4.
[104] European Union's request for review of the Interim Report, p. 4.
[105] European Union's request for review of the Interim Report, p. 4.

6.126. We have decided not to grant the European Union's request because we are not called upon in the present dispute to express views on what may or may not be "in line with the specific requirements of EU law".

### Paragraph 7.80

6.127. The European Union requests a modification to this paragraph to reflect that "[t]he issue was not whether or not ICOF-S was involved in domestic sales but rather whether there was any evidence of a commission being paid for the alleged involvement of ICOF-S in domestic sales".[106]

6.128. Indonesia does not express a view on whether the specific modification requested by the European Union should be made. However, Indonesia submits that "this correction by the EU illustrates the recurring disregard by the Panel of the proper standard of review in its analysis" and expresses views on the "substantive implications" of the European Union's request.[107]

6.129. We have decided not to grant the European Union's request. We do not consider that our understanding that the EU authorities inferred that ICOF-S was not involved in domestic sales is incorrect or an inaccurate representation of the issue before them. The determinations make clear that the EU authorities considered and rejected PT Musim Mas' assertions concerning the involvement of ICOF-S in domestic sales, namely, that ICOF-S "would also coordinate domestic sales" and that "functions of marketing and sales were carried out by" ICOF-S.[108] We also note that the European Union itself stated that "PT Musim Mas directly invoiced all of its domestic sales transactions *without the apparent involvement of ICOF-S*" and that this "further contradicts the assertion that ICOF-S performed the functions of an internal sales department of PT Musim Mas".[109] Additionally, the minutes prepared by ICOF-S and PT Musim Mas during their respective verification visits (submitted by Indonesia as evidence) indicate that whether or not ICOF-S was involved in domestic sales was a pertinent issue before the EU authorities.[110]

### Paragraph 7.158

6.130. The European Union requests the deletion of the final three sentences of paragraph 7.158. The European Union considers that "the Panel itself states [that these sentences] are irrelevant to the determinations it is called upon to make."[111]

6.131. Indonesia does not express a view on whether the specific modification requested by the European Union should be made. However, Indonesia submits that it "is unable to understand how the Panel can find that the EU failed to provide a reasoned and adequate explanation for its treatment of Ecogreen, all the while rejecting Indonesia's claim that the EU failed to provide a reasoned and adequate explanation for its treatment of PT Musim Mas."[112]

6.132. We agree with the European Union that the final three sentences of paragraph 7.158 are not relevant to the particular determinations we are called upon to make, as reflected in paragraph 7.159. As such, we have decided to grant the European Union's request and have modified paragraph 7.158 accordingly.

[106] European Union's request for review of the Interim Report, p. 5.
[107] Indonesia's comments on the European Union's request for review of the Interim Report, paras. 2.6 and 2.9-2.12.
[108] Final Determination, (Exhibit IDN-4), recital 35; and Revised Determination, (Exhibit IDN-5), recitals 24 and 27.
[109] European Union's first written submission, para. 46 (emphasis added). See also European Union's second written submission, paras. 76 and 81-83.
[110] See PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010, (Exhibit IDN-27) (BCI), p. 13.
[111] European Union's request for review of the Interim Report, p. 5.
[112] Indonesia's comments on the European Union's request for review of the Interim Report, para. 2.16.

## 6.4 Requests for review submitted by the parties pertaining to Indonesia's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

### Paragraph 7.166

6.133. Indonesia requests the Panel to delete the word "additionally" in line 11 of paragraph 7.166 because it does not understand what is "additional".[113]

6.134. The European Union considers the proposed change unnecessary and that the summary in the Interim Report adequately reflects what Indonesia actually argued in this regard.[114]

6.135. In order to avoid misrepresenting Indonesia's argument, we have decided to grant Indonesia's request and have made the modification sought.

### Paragraphs 7.166 and 7.180

6.136. Indonesia submits that the Panel has summarized Indonesia's argument with respect to the beginning of the economic crisis in a highly selective and incomplete manner. Indonesia requests that paragraphs 7.166 and 7.180 be amended to reflect what it considers to be the three arguments (or the three-pronged argument) concerning the beginning of the economic crisis that it made during the proceedings.[115]

6.137. The European Union considers the proposed changes unnecessary and that the summary in the Interim Report adequately reflects what Indonesia actually argued in this regard.[116]

6.138. In order to avoid misrepresenting Indonesia's argument, we have modified paragraph 7.166 to reflect additional aspects of Indonesia's argument. We have also added a footnote to paragraph 7.181 clarifying that we consider it unnecessary for the effective resolution of the dispute to address any further aspects of Indonesia's argument in this regard.

### Paragraph 7.177 and footnote 327

6.139. Indonesia requests that the Panel delete the assertions that Indonesia considered that a quantitative analysis was required and that it changed its arguments during the course of the proceedings. Indonesia asserts that it never argued – either explicitly or "in effect" – that investigating authorities must use quantitative methodologies for their non-attribution analysis. Indonesia further asserts that it therefore cannot be said to have "move[d] away" from an "emphasis on quantitative tools". Indonesia also notes that its use of the term "extent" reflects the Appellate Body's long-standing legal standard.[117]

6.140. The European Union considers the proposed changes unnecessary and that the summary in the Interim Report adequately reflects what Indonesia actually argued in this regard.[118]

6.141. In order to avoid misrepresenting Indonesia's argument, we have modified the relevant sentence in paragraph 7.177 to reflect that our understanding pertains to what Indonesia argued would have been preferable in the present case, even if not required under Article 3.5 of the Anti-Dumping Agreement. We have likewise modified footnote 327 in light of Indonesia's request.

### Paragraph 7.190

6.142. Indonesia requests the Panel to replace the phrase in paragraph 7.190 "and further, that i[t] i[s] not for investigated producers to 'substantiate' that a particular factor is causing injury,

[113] Indonesia's request for review of the Interim Report, paras. 2.125 and 2.126.
[114] European Union's request for review of the Interim Report, p. 4.
[115] Indonesia's request for review of the Interim Report, paras. 2.127-2.134.
[116] European Union's request for review of the Interim Report, p. 4.
[117] Indonesia's request for review of the Interim Report, paras. 2.135-2.141 (referring to Appellate Body Reports, *US – Hot-Rolled Steel*, para. 227; *US – Line Pipe*, paras. 213 and 214; and *EC – Tube or Pipe Fittings*, paras. 188 and 189; and Panel Report, *US – Steel Safeguards*, paras. 329-332).
[118] European Union's request for review of the Interim Report, p. 5.

but rather, it is for an investigating authority to investigate and make a determination" with the phrase "and further, that although it is for an investigated producer to substantiate that a particular factor is causing injury, it is subsequently for an investigating authority to investigate and make a determination of non-attribution." Indonesia's request in this regard relates to the omission in the Interim Report of the preceding part of Indonesia's relevant statement, as well as to an "editorial error" in Indonesia's relevant statement, which Indonesia considers leads to ambiguity.[119]

6.143. The European Union considers the proposed changes unnecessary and that the summary in the Interim Report adequately reflects what Indonesia actually argued in this regard.[120]

6.144. In order to avoid misrepresenting Indonesia's argument, we have decided to reflect the additional aspect of the statement referred to by Indonesia. We have also granted Indonesia's request to modify the "editorial error" that it made in that statement.

### Paragraph 7.198

6.145. Indonesia requests that the Panel quote Indonesia's response to Panel question 21 in its entirety.[121] The European Union considers the proposed changes unnecessary and that the summary in the Interim Report adequately reflects what Indonesia actually argued in this regard.[122]

6.146. We have decided not to grant Indonesia's request, because the matter raised by Indonesia is already addressed in paragraph 7.199.

### Paragraphs 7.200 and 7.201

6.147. Indonesia submits that the Panel's characterization of Indonesia's arguments is "entirely misleading", and that "the allegation that Indonesia made some sort of 'factual error' is incorrect."[123] Indonesia therefore requests that the Panel adjust its description of Indonesia's arguments and delete the "allegation" of a "factual error".

6.148. The European Union considers the proposed changes unnecessary and that the summary in the Interim Report adequately reflects what Indonesia actually argued in this regard.[124]

6.149. We consider that paragraph 7.191 of the Interim Report describes accurately and sufficiently Indonesia's position that "although the impact of the issue of raw materials access and the relevant price fluctuations was conceptually separate and distinct from the economic crisis *per se*, this impact was nevertheless particularly pronounced during the economic crisis." We have thus decided to grant Indonesia's request by deleting paragraph 7.200 and the first sentence of paragraph 7.201. The Panel's conclusion in paragraph 7.202 of the Interim Report is not affected by this change.

### Footnote 388

6.150. Indonesia requests that the Panel delete the word "manifestly" in footnote 388.[125] The European Union considers the proposed change unnecessary and that the summary in the Interim Report adequately reflects what Indonesia actually argued in this regard.[126]

6.151. In order to avoid misrepresenting Indonesia's argument, we have decided to grant its request regarding footnote 388.

[119] Indonesia's request for review of the Interim Report, paras. 2.142-2.148.
[120] European Union's request for review of the Interim Report, p. 5.
[121] Indonesia's request for review of the Interim Report, paras. 2.149-2.152.
[122] European Union's request for review of the Interim Report, p. 5.
[123] Indonesia's request for review of the Interim Report, para. 2.166.
[124] European Union's request for review of the Interim Report, p. 5.
[125] Indonesia's request for review of the Interim Report, paras. 2.169-2.171.
[126] European Union's request for review of the Interim Report, p. 5.

### 6.5 Requests for review submitted by the parties pertaining to Indonesia's claim under Article 6.7 of the Anti-Dumping Agreement

6.152. Indonesia requests that the Panel include a reference to certain arguments made by Indonesia with respect to Exhibit PTMM-18. Indonesia requests that such a reference be included in the Panel's discussion of the failure of the EU authorities to disclose the results of the verification.[127]

6.153. The European Union submits that Indonesia appears to be rearguing the case and requests the Panel to reject Indonesia's request in this regard.[128]

6.154. Nothing in Indonesia's request affects our reasoning or conclusion in relation to its claim under Article 6.7 of the Anti-Dumping Agreement. Accordingly, we see no reason to make any changes to the section of the Interim Report pertaining to Indonesia's claim under Article 6.7.

## 7 FINDINGS

7.1. This dispute concerns European Union measures imposing anti-dumping duties on certain fatty alcohols from Indonesia. Indonesia's claims proceed under various provisions of the Anti-Dumping Agreement. The European Union requests that the Panel reject each of the claims presented by Indonesia, and in addition, requests the Panel to find that the authority for the establishment of this Panel has lapsed pursuant to Article 12.12 of the DSU, and that there is therefore no legal basis on which it may make rulings.

7.2. We begin by examining the request for a preliminary ruling submitted by the European Union. Thereafter, we consider Indonesia's claims under Articles 2.3 and 2.4 of the Anti-Dumping Agreement pertaining to the deduction from PT Musim Mas' export price for the activities of ICOF-S, before considering Indonesia's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement pertaining to the EU authorities' non-attribution analysis. We then consider Indonesia's claim under Article 6.7 of the Anti-Dumping Agreement pertaining to the results of the verification visit. However, before proceeding to do so, we briefly recall the relevant general principles regarding treaty interpretation, the standard of review and the burden of proof in WTO dispute settlement proceedings, as laid down by the Appellate Body.

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

#### 7.1.1 Treaty interpretation

7.3. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.[129]

#### 7.1.2 Standard of review

7.4. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part:

> [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.[130]

[127] Indonesia's request for review of the Interim Report, paras. 2.172-2.175.
[128] European Union's request for review of the Interim Report, p. 5.
[129] Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10, section D.
[130] Emphasis added.

7.5. Further to Article 11 of the DSU, Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review applicable to anti-dumping disputes, namely:

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

7.6. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the authority provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[131]

7.7. The Appellate Body has also stated that a panel reviewing an investigating authority's determination may not undertake a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[132]

7.8. A panel must limit its examination to the evidence that was before the authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[133] A panel's examination in that regard is not necessarily limited to the pieces of evidence *expressly* relied upon by an investigating authority in its establishment and evaluation of the facts in arriving at a particular conclusion.[134] Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in the final determination.[135] That notwithstanding, since a panel's review is not *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation − even when founded on record evidence − cannot form the basis of a panel's conclusion.[136]

### 7.1.3 Burden of proof

7.9. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[137] Therefore, as the complaining party, Indonesia bears the burden of demonstrating that the European Union measures it challenges are inconsistent with the provisions of the covered agreements that it invokes. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely, a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in

[131] Appellate Body Report, *US − Countervailing Duty Investigation on DRAMS*, para. 186.
[132] Appellate Body Reports, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 93; and *US − Lamb*, paras. 106 and 107.
[133] Appellate Body Report, *US − Countervailing Duty Investigation on DRAMS*, para. 187.
[134] See Appellate Body Report, *Thailand − H-Beams*, paras. 117-119.
[135] See Appellate Body Report, *US − Countervailing Duty Investigation on DRAMS*, para. 164.
[136] Appellate Body Report, *US − Lamb*, paras. 153-161. See also Appellate Body Reports, *US − Steel Safeguards*, para. 326; and *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 97; and Panel Reports, *Argentina − Ceramic Tiles*, para. 6.27; and *Argentina − Poultry Anti-Dumping Duties*, para. 7.48.
[137] Appellate Body Report, *US − Wool Shirts and Blouses*, p. 14.

favour of the complaining party.[138] It is generally for each party asserting a fact to provide proof thereof.[139]

## 7.2 European Union's request for a preliminary ruling

### 7.2.1 Procedural background

7.10. On 8 January 2015, the European Union requested the Panel to issue a preliminary ruling that its authority to rule had lapsed, pursuant to Article 12.12 of the DSU, following the alleged suspension of Panel proceedings for more than 12 months. The European Union reiterated its request at the organizational meeting of the Panel on 30 June 2015. While it expressed its preference for the Panel to reach an early ruling on this matter, the European Union deferred to the discretion of the Panel in respect of the timing of the ruling.

7.11. Indonesia provided a written response to the request for a preliminary ruling on 30 June 2015, in which it requested the Panel to reject the procedural objection made by the European Union. Rather, Indonesia requested the Panel to rule that its jurisdiction had not lapsed.

7.12. In the interest of due process, the Panel informed the parties on 20 November 2015 that it intended to respond to the request for a preliminary ruling before the first substantive meeting, while indicating that it may provide its reasons at a later date.

7.13. Following its review of the claims and arguments raised by the parties and third parties, the Panel ruled on 23 November 2015 that its authority had not lapsed pursuant to Article 12.12 of the DSU. The Panel indicated that the preliminary ruling and the reasoning of the Panel would form an integral part of the Panel's final report.

### 7.2.2 Main arguments of the parties

#### 7.2.2.1 European Union

7.14. The arguments put forward by the European Union in support of its request can be summarized as follows:

a. First, the European Union submits that Indonesia sent a "request" to the WTO Secretariat on 11 July 2013 with a view to suspending the work of the Panel in the sense of the first sentence of Article 12.12 of the DSU. According to the European Union, the fact that this request took the form of a simple email did not affect its nature or validity because "a request in this sense is simply an indication from the complaining member that it seeks suspension of the work of the panel".[140]

b. Second, the European Union considers that the term "work of the panel" in Article 12.12 refers to any task performed by a panel or by the WTO Secretariat, on behalf of the panel, "from the moment when the panel is established".[141] Therefore, the fact that Indonesia's request occurred before panel composition did not affect its validity.

c. Third, pending panel composition, the European Union considers that a request to suspend the work of the panel can be disposed of by the WTO Secretariat as part of its right to exercise "reasonable executive action"[142] on behalf of the panel. In particular, the European Union submits that "the suspension may be communicated to the parties and third parties by any natural person properly acting in the name of the panel, including a duly authorized member of the Secretariat assisting the panel pursuant to Article 27 of the DSU."[143]

[138] Appellate Body Report, *EC – Hormones*, para. 104.
[139] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[140] European Union's request for a preliminary ruling, para. 13.
[141] Ibid. para. 14.
[142] Ibid. para. 35.
[143] Ibid. para. 15.

d. Fourth, according to the European Union, Indonesia's request to suspend panel composition had the consequence of either effectively suspending the work of the Panel as of the date of the request, or – if the Panel finds that the work of the Panel had not yet started – of suspending the "future work" of the Panel.[144]

e. Finally, the European Union submits that its interpretation of the provisions of Article 12.12 of the DSU is consistent with the purpose of the DSU, which aims *inter alia* at the prompt settlement of disputes.[145]

#### 7.2.2.2 Indonesia

7.15. Indonesia presents two main arguments in response:

a. First, Indonesia argues that the email correspondence from the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 was not intended as a request to suspend the work of the panel under Article 12.12.[146] Indonesia notes that the wording of the email in question does not explicitly refer to the "suspension" of the Panel's "work", nor does it refer explicitly or implicitly to Article 12.12 of the DSU.[147] Further, the email correspondence did not take the form of an official communication from a party to the Panel.[148] In fact, according to Indonesia, this email was simply a response to an invitation to attend a preferences meeting for Panel composition: it was addressed to the WTO Secretariat rather than the Panel and it merely sought to postpone the "preferences meeting" in respect of the composition of the Panel rather than the "work of the panel" generally.[149]

b. Second, Indonesia considers that the work of the panel cannot be suspended before panel composition, since Article 12.12 calls for a panel to take a decision as to whether or not a suspension should be granted.[150] This discretion conferred on the panel, in turn, presupposes that panelists have been appointed in order to be able to deliberate and decide on the request.[151]

### 7.2.3 Main arguments of the United States as third party

7.16. The United States disagrees with the European Union that a non-composed panel can suspend its work in the sense of Article 12.12. The United States contends that the circumstance contemplated in the final sentence of Article 12.12 "arises only when there is a panel to which the complaining party may direct its 'request' and only if the panel has decided to exercise its discretion to accede to that request".[152]

### 7.2.4 Evaluation by the Panel

#### 7.2.4.1 Introduction

7.17. The request for a preliminary ruling submitted by the European Union is based on "the final sentence of Article 12(12)" of the DSU. Paragraph 12 of Article 12 provides:

> The panel may suspend its work at any time at the request of the complaining party for a period not to exceed 12 months. In the event of such a suspension, the time-frames set out in paragraphs 8 and 9 of this Article, paragraph 1 of Article 20, and paragraph 4 of Article 21 shall be extended by the amount of time that the work

[144] European Union's request for a preliminary ruling, para. 32.
[145] Ibid. para. 20.
[146] Indonesia's response to European Union's request for a preliminary ruling, para. 4.8.
[147] Indonesia's response to European Union's request for a preliminary ruling, para. 4.5.
[148] Ibid. paras. 4.9 and 4.10.
[149] Ibid. paras. 4.7 and 4.8.
[150] Ibid. para. 4.16.
[151] Ibid. paras. 4.40 and 4.41.
[152] United States' third-party submission, para. 7.

> was suspended. If the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse.

7.18. This provision, which is the last paragraph of an Article dedicated to "Panel Procedures", deals specifically with the temporary suspension of panel work. The last sentence of paragraph 12 sets out the maximum time-period for such suspensions (12 months), as well as the consequences attached to the lapsing of this 12-month period: the expiry of the authority for the panel's establishment − that is, its existence. The first sentence of paragraph 12 describes the conditions which need to be met for such a suspension to occur, while the second sentence provides for the extension of the time-frames for the panel's final report in the event of a suspension.

7.19. The first and final sentences of paragraph 12 appear inextricably linked. In assessing if the work of the Panel has been suspended, it is necessary to examine if the conditions set forth in the first sentence are fulfilled, in order to determine whether there was a valid suspension in the first place. A suspension of the Panel's work which did not comply with these criteria could not lead to the consequences provided for in the last sentence of paragraph 12, that is, the lapsing of the authority for the Panel.

7.20. On its face, the plain text of Article 12.12 sets out three conditions which must be fulfilled before it can be concluded that the authority for the establishment of the Panel has lapsed:

a. the complaining party must have submitted a request to suspend the work of the Panel;

b. the Panel must have suspended its work; and

c. the work of the Panel must have been suspended for more than 12 months.

7.21. We will first assess whether Indonesia's correspondence of 11 July 2013 can be characterized as a request to suspend the work of the Panel in the sense of Article 12.12 of the DSU.

#### 7.2.4.2 Whether Indonesia made a "request" to suspend the work of the Panel under Article 12.12 of the DSU

7.22. In *EC − Bananas III (Article 21.5 − Ecuador II) / EC − Bananas III (Article 21.5 − US)*, the Appellate Body expressed the view that the relinquishment of rights granted by the DSU could not be lightly assumed, and, therefore, the language in the documents that are alleged to waive such rights must "reveal clearly that the parties intended to relinquish their rights".[153]

7.23. A close examination of the facts is all the more warranted in the present case as the consequences associated with a request under Article 12.12 are particularly serious: the practical effect of this provision is that a complainant is deprived of the right to continue with a claim in the event that 12 months pass following the suspension of a panel's work.

7.24. The Panel must therefore determine, as a threshold matter, if a request to suspend the work of the Panel was, in fact, made by Indonesia.

7.25. The European Union's allegation that the contested correspondence was in fact a request under Article 12.12 rests entirely on the statement, in Indonesia's email, that "[w]e would like to suspend the meeting while waiting the development from Brussel [*sic*]".[154] This language, together with the ensuing consequences i.e. a general halt in the progression of the proceedings is, according to the European Union, sufficient to demonstrate that Indonesia made a request under Article 12.12.

[153] Appellate Body Reports, *EC − Bananas III (Article 21.5 − Ecuador II) / EC − Bananas III (Article 21.5 − US)*, para. 217.

[154] See Email correspondence of 10 and 11 July 2013 between the Secretariat and the parties, (Exhibit IDN-2), p. 1.

7.26. In our view, the plain language of Indonesia's email contradicts the European Union's characterization in this regard:

a. While the use of the term "suspend" in the email could evoke Article 12.12, the absence of any attendant reference to "the work of the panel" or to "Article 12.12 of the DSU" suggests that the wording of the alleged request is, at best, ambiguous.

b. Indonesia's request to "suspend the meeting" rather than "the work of the panel" militates against a reading that Indonesia made a request pursuant to Article 12.12. Rather, the fact that the request was made in response to an invitation from the WTO Secretariat to attend a meeting in respect of Panel composition and that it was addressed to the WTO Secretariat rather than to "the Panel" suggests to us that Indonesia's intention was to make a request to the WTO Secretariat, acting in its capacity of assisting the parties during panel composition under Article 8 of the DSU, to postpone the proposed meeting.

7.27. Against this background of, at a minimum, ambiguity concerning the meaning and intention of Indonesia's email, we recall the Appellate Body's observation that the relinquishment of rights granted by the DSU should not be lightly assumed. We therefore conclude that the European Union has not sufficiently demonstrated that Indonesia did, in fact, make a "request" in the sense of the first sentence of Article 12.12 of the DSU. We therefore proceed on the basis that, as a matter of fact, no such request was made.

7.28. Since the suspension of the Panel's work is contingent on a request in this respect having been made by the complainant, we find, in the absence of such a request, that this Panel's work has not been suspended in the sense of Article 12.12 of the DSU. In the light of this finding, we do not consider it necessary for the effective resolution of this request to address the other arguments raised by the parties and third parties.

#### 7.2.4.3 Conclusion

7.29. Based on the foregoing considerations, we find that:

a. the European Union has not demonstrated sufficiently that the correspondence sent by the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of DSU Article 12.12;

b. the work of the Panel was not suspended; and

c. the authority for the establishment of this Panel has not lapsed.

### 7.3 Indonesia's claims under Articles 2.3 and 2.4 of the Anti-Dumping Agreement

#### 7.3.1 Introduction

7.30. Indonesia claims that the EU authorities acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement by making an improper allowance for a factor that did not affect price comparability.[155] This allowance was made on the basis of Article 2(10)(i) of the Basic Anti-Dumping Regulation, which specifically addresses the treatment of trading commissions in the calculation of dumping margins. This provision[156] states:

> (i) Commissions
>
> An adjustment shall be made for differences in commissions paid in respect of the sales under consideration.

[155] Indonesia's second written submission, para. 5.1.
[156] Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, Official Journal of the European Community, L Series, No. 343 (22 December 2009), p. 51 (Basic Anti-Dumping Regulation), (Exhibit EU-3), Article 2(10)(i).

> The term 'commissions' shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis.

7.31. The EU authorities determined that a mark-up, within the meaning of this provision, granted by an Indonesian producer of fatty alcohols (PT Musim Mas) to its related trader (ICOF-S) was a difference affecting prices and price comparability of the product under investigation.[157] The EU authorities therefore made an allowance in the form of a downward adjustment to the export price and compared it with the normal value to establish the dumping margin.

7.32. Indonesia claims that the EU authorities mischaracterized the mark-up as a trading commission rather than as a transfer of funds between PT Musim Mas and ICOF-S that is "simply an allocation, or shifting, of funds (profits) from 'one pocket to another'" within a single economic entity, and therefore adjusted the export price for a factor which did not affect price comparability.[158] As a consequence, the allowance led to an unfair comparison between the export price and the normal value and is thus inconsistent with Article 2.4 of the Anti-Dumping Agreement. Indonesia also makes a consequential claim under Article 2.3 of the Anti-Dumping Agreement.

7.33. The principal question before us is whether the EU authorities correctly characterized the mark-up paid by PT Musim Mas to ICOF-S as a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement.[159] In addressing this question, we begin with an overview of the parties' and third parties' arguments, before setting out our understanding of the legal standard under Article 2.4 as relevant to the claim and arguments before us. We then review the EU authorities' explanation and relevant record evidence with a view to determining whether an unbiased and objective investigating authority could have treated the mark-up as a difference which affects price comparability. In light of this conclusion, we then evaluate the arguments made by Indonesia in support of its claim of inconsistency with Article 2.4, namely: (a) that the existence of a single economic entity precluded the EU authorities from making an allowance for the mark-up; (b) that the allowance resulted in an asymmetrical comparison with the normal value; and (c) that the different outcomes for the two Indonesian producers demonstrate that the EU authorities' analysis was arbitrary.

### 7.3.2 Relevant provisions of the covered agreements

7.34. Article 2.4 of the Anti-Dumping Agreement provides, in pertinent part:

> A fair comparison shall be made between the export price and the normal value. … 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.[*] … The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.
>
> [*fn original][7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

7.35. Article 2.3 of the Anti-Dumping Agreement provides:

> In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory

[157] Commission Regulation (EU) No. 446/2011 of 10 May 2011 imposing a provisional anti-dumping duty on imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia, Official Journal of the European Union, L Series, No. 122/47 (11 May 2011) (Preliminary Determination), (Exhibit IDN-3), recital 38.

[158] See Indonesia's second written submission, paras. 2.8, 2.12, and 2.24. See also Indonesia's first written submission, paras. 4.9 and 4.71; and response to Panel question No. 42(ii), para. 3.5.

[159] The parties do not dispute this. (See Indonesia's first written submission, para. 4.57; second written submission, para. 5.1; and European Union's first written submission, para. 77).

arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

### 7.3.3 Main arguments of the parties

#### 7.3.3.1 Indonesia

7.36. Indonesia claims that the EU authorities did not make a fair comparison between the normal value and the export price of the product under investigation. In particular, Indonesia submits that the EU authorities adjusted the export price of the product under consideration for a factor that did not constitute a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement.

7.37. Indonesia submits that "the ultimate litmus test" for any adjustment is that the factor being adjusted for must affect price comparability.[160] An allowance may be made only if it is "demonstrated" that a given factor affects price comparability.[161] For Indonesia, this implies that an allowance is consistent with Article 2.4 only if the investigating authority's determination contains a reasoned and adequate explanation that a particular factor affects price comparability. Indonesia considers that the explanation given by the EU authorities in the investigation at issue was not reasoned and adequate for the following reasons:

a. the Indonesian producer (PT Musim Mas) and its Singapore-based trader (ICOF-S) formed a single economic entity such that the mark-up granted on the transfer price of the product under investigation should not be treated as an expense and as a difference which affects price comparability[162];

b. by calculating the value of the adjustment on the basis of the indirect selling costs and profit of ICOF-S, the EU authorities created an asymmetry between the export price and the normal value[163]; and

c. the determination made by the EU authorities was arbitrary because no adjustment for a commission paid to a related trader was made to the export price of the second Indonesian exporting producer (Ecogreen) of fatty alcohols despite it being in the same factual circumstances.[164]

7.38. Indonesia contends that these arguments, jointly and independently, support its claim that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by making an improper deduction for a factor that did not affect price comparability.[165] We note that Indonesia does not dispute that commissions can be the subject of an adjustment under Article 2.4 when paid to an independent trader[166], and further, that Indonesia does not take issue with the amount of the adjustment that was made in the present case.[167]

7.39. Indonesia's first argument is that no allowance for a trading commission should be made when a producer and a trader form a single economic entity. Rather, in such a case, the related trader should be treated in the same manner as the internal sales department of the producer. Indonesia acknowledges that the list of potential factors for which an allowance can be made under the third sentence of Article 2.4 is not exhaustive and that commissions paid to an unaffiliated trader may, in certain cases, qualify as a difference which affects price comparability

[160] Indonesia's first written submission, para. 4.57.
[161] Indonesia's first written submission, para. 4.57.
[162] Indonesia's second written submission, paras. 2.8-2.10.
[163] Indonesia's response to Panel question Nos. 6, para. 1.32, and 14, para. 1.69.
[164] Indonesia's first written submission, paras. 4.43 and 4.47.
[165] See Indonesia's first written submission, para. 4.48; and second written submission, para. 5.1.
[166] Indonesia's first written submission, paras. 4.67 and 4.68.
[167] Indonesia's response to Panel question No. 38, para. 1.108.

for which an allowance is necessary.[168] However, the circumstances in the present case did not justify such an allowance because ICOF-S, the related trader based in Singapore, operated as the internal sales department of PT Musim Mas, with which it formed a single economic entity. As a consequence of the very close corporate ties between the two entities, financial flows between them "are, in effect, financial flows from one pocket of the exporting [single economic entity] to another pocket of the same [single economic entity]".[169] For Indonesia, such internal monetary flows between related parties do not in themselves constitute an actual expense which can be adjusted for in the process of calculating a dumping margin.[170] Indonesia contends further that financial flows between related entities cannot be treated as selling expenses or as factors affecting price comparability under Article 2.4 of the Anti-Dumping Agreement because they do not affect the net ex-factory price accruing to the exporting producer.[171] The companies within the single economic entity could adjust the level of the mark-up transferred between them independently of either the price charged to the first unaffiliated customer or the actual selling expenses incurred in making the sale and, as such, internal transfers within it do not affect its pricing decisions.[172]

7.40. In light of the importance of the existence of a single economic entity to determining whether an adjustment is warranted, Indonesia contends that investigating authorities are "implicitly require[d]" under Article 2.4 to assess whether such an entity exists in a given case.[173] For Indonesia, the criteria for making this determination pertain primarily to the corporate and structural links between the entities in question, such as whether there is common ownership, control, and management.[174] Indonesia draws on Article 6.10 of the Anti-Dumping Agreement[175] in this regard, pointing to the use of these criteria by panels and the Appellate Body in the context of that provision in *Korea – Certain Paper* and in *EC – Fasteners (China)*[176] to determine the existence of a single economic entity. Turning to the present case, Indonesia submits that, contrary to the "implicit requirement" under Article 2.4 of the Anti-Dumping Agreement, the EU authorities did not assess whether PT Musim Mas and ICOF-S formed a single economic entity by reference to their corporate and structural links, but rather focused on the "functions" of the related trader in order to determine whether the mark-up granted to ICOF-S should be treated as a difference which affects price comparability.[177]

7.41. In addition to relying on an irrelevant factor, namely, the "functions" of the trader, the EU authorities also erred in their assessment of the facts and thus wrongly concluded that the functions of ICOF-S were similar to those of an "agent working on a commission basis" in the sense of Article 2) 10) i) of the Basic Anti-Dumping Regulation. Indonesia argues in particular that the EU authorities: (a) failed to consider certain evidence on the record that reveals that ICOF-S was not an independent trader, but operates instead as the internal sales department of PT Musim Mas; and (b) erroneously relied on factors which are, according to Indonesia "entirely meaningless".[178] These factors included, *inter alia*, that:

a. all domestic sales and certain export sales are invoiced directly by PT Musim Mas, which Indonesia describes as a technique aimed at avoiding the taxation of ICOF-S' activities in

[168] See Indonesia's first written submission, para. 4.67; and response to Panel question No. 1, para. 1.3.
[169] Indonesia's first written submission, para. 4.71. See also Indonesia's second written submission, para. 2.8.
[170] See Indonesia's second written submission, para. 2.9.
[171] Indonesia's first written submission, para. 4.67.
[172] Indonesia's response to Panel question Nos. 1, para. 1.11, 8, para. 1.41, 10, paras. 1.48 and 1.49, and 42(ii), para. 3.5; opening statement at the second meeting of the Panel, para. 5; and second written submission, paras. 2.6-2.8.
[173] Indonesia's first written submission, para. 4.120.
[174] Indonesia's first written submission, para. 4.127.
[175] Article 6.10 provides that the authorities "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation".
[176] Indonesia's first written submission, paras. 4.123-4.130.
[177] The "functions" of the related trader is the key criterion in Article 2(10)(i) of the European Basic Anti-Dumping Regulation. It provides that "[t]he term 'commissions' shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis."
[178] Indonesia's first written submission, para. 4.169.

Indonesia and a "mere formality driven by the wish to accommodate final customer preferences"[179];

b. PT Musim Mas and ICOF-S concluded a "Sale and Purchase Agreement" which pertains only to the exportation of goods manufactured by PT Musim Mas, and which sets out the rules for determining the transfer price of these goods through a margin (or mark-up) granted by the producer to the trader. Indonesia argues that this Agreement is merely a master agreement, or "a tool to approximate on paper … a relationship that would exist between two unrelated entities"[180]; and

c. ICOF-S purchases and resells third-party products, which, according to Indonesia, "per se says essentially nothing about the relationship between a producer (like PT Musim Mas) and a selling department (ICOF-S)".[181]

7.42. Indonesia contends that these factors, which formed the basis for the EU authorities' conclusion that an adjustment was warranted, were not relevant for assessing the functions of ICOF-S nor for determining whether the mark-up constituted a difference which affects price comparability. Rather, the EU authorities should have concluded from the facts on the record that ICOF-S was the internal sales department of PT Musim Mas and that all sales of the product under investigation (domestic and international sales) were organized by ICOF-S.

7.43. Indonesia's second argument is that the deduction for the mark-up led to an asymmetrical comparison between the export price and normal value since it resulted in elements being deducted from the export price (SG&A) that were not deducted from the normal value.[182] According to Indonesia, where a related trader forms a single economic entity with the producer in question, "nothing should be deducted, either by way of SG&A or by way of profit − just like no SG&A or profit would be deducted in the case of a formally-integrated company with a formally internal sales department".[183] This flows from Indonesia's understanding that, where two entities form a single economic entity, the ex-factory selling price at which a comparison is to be made under the provisions of Article 2.4 should include the SG&A and profit of both entities in relation to the product under consideration.[184] Indonesia notes, in this connection, that instead of deducting the actual value of the trading commission/mark-up from PT Musim Mas' export price, the EU authorities recalculated a notional commission composed of amounts for ICOF-S' indirect selling costs and profit. This notional commission was then deducted from the single economic entity's export price. In respect of the amount deducted for ICOF-S' profits, Indonesia contends that, beyond the narrow exception reflected in Article 2.3 of the Anti-Dumping Agreement, it is never permissible to deduct profit as a difference which affects price comparability because "[w]ithout profit, one no longer makes a price-to-price comparison but rather a cost-to-cost comparison on the basis of which it is no longer possible to identify dumping".[185] In respect of the amount deducted for ICOF-S' SG&A, Indonesia contends that indirect selling expenses − as distinct from direct selling expenses − are ordinarily included in arriving at an ex-factory price.[186] Accordingly, such expenses would not normally be the object of a difference which affects price comparability under Article 2.4. In any event, Indonesia submits that no such deduction should have been made because the EU authorities included SG&A in the ex-factory normal value. As a result of this asymmetrical establishment of the normal value and export price, the comparison was not made at the same level of trade, contrary to the requirements of Article 2.4 of the Anti-Dumping Agreement. According to Indonesia, "[t]his asymmetry further vitiates the Commission's comparison, renders it unfair, and contributes to the violation of Article 2.4".[187]

[179] Indonesia's first written submission, para. 4.170.
[180] Indonesia's first written submission, para. 4.192.
[181] Indonesia's first written submission, para. 4.246.
[182] Indonesia's response to Panel question No. 2, para. 1.25.
[183] Indonesia's response to Panel question No. 17, para. 1.81.
[184] See Indonesia's first written submission, paras. 4.69-4.71, 4.78, and 4.114; response to Panel question Nos. 1, paras. 1.10 and 1.13, 2, para. 1.25, 6, para. 1.32, 9, para. 1.44, 14, para. 1.69, and 31, paras. 1.37-1.39; second written submission, para. 2.39; and comments on the European Union's response to Panel question No. 41, para. 3.1.
[185] Indonesia's response to Panel question No. 7, para. 1.36.
[186] Indonesia's response to Panel question Nos. 9, para. 1.44, and 31, para. 1.37.
[187] Indonesia's first executive summary, para. 2.25.

7.44. Third, Indonesia submits that the EU authorities' determination with regard to the "functions" of the related trader is arbitrary. Indonesia points to the fact that the two Indonesian producers involved in the investigation (PT Musim Mas and Ecogreen) were in the same factual situation with respect to their export sales to the European Union − both had a related trader in Singapore remunerated by a trading commission. In spite of that, the conclusion reached by the EU authorities on price comparability was different: no adjustment for a trading commission was made in the case of Ecogreen, while a downward adjustment was made for PT Musim Mas. For Indonesia, the different outcomes for PT Musim Mas and Ecogreen demonstrate that the EU authorities used incorrect and arbitrary criteria under Article 2.4 in making the adjustment for PT Musim Mas.[188] Additionally, Indonesia points to the fact that the EU authorities changed their assessment of the facts after a judgment of the Court of Justice of the European Union which clarified the circumstances under which Article 2(10)(i) of the Basic Anti-Dumping Regulation could be applied. While the Final Determination treated both Singapore-based traders as "agents working on a commission basis", the EU authorities revised this conclusion more than a year after the end of the investigation and determined that the commission received by Ecogreen's trader no longer justified an adjustment to the export price. Indonesia argues that these "diametrically opposed conclusions" reached on the basis of the same facts demonstrate that the EU authorities' assessment of those facts was arbitrary and did not meet the standard of a reasoned and adequate explanation.[189]

7.45. Finally, Indonesia makes a consequential claim under Article 2.3 of the Anti-Dumping Agreement. Indonesia's claim is based on the close relationship between this provision and the third and fourth sentences of Article 2.4. Indonesia contends that if an allowance with respect to a constructed export price violates Article 2.4, then it may also be said that the export price was constructed in a way which is inconsistent with Article 2.3.[190]

#### 7.3.3.2 European Union

7.46. The European Union requests the Panel to reject Indonesia's claim under Article 2.4 as well as its consequential claim under Article 2.3 of the Anti-Dumping Agreement.

7.47. In relation to Indonesia's argument concerning the existence of a single economic entity, the European Union submits that whether or not two companies form such an entity is not a relevant consideration under Article 2.4.[191] Rather, for the European Union, the determinative question is whether there exists evidence of a difference which affects price comparability that requires an adjustment to be made.[192]

7.48. The European Union considers that the payment of commissions to a trader in relation to export sales and not domestic sales (or vice versa) is a relevant feature of the transactions that are compared. As a consequence the European Union argues that the only relevant question before the Panel is whether "there was evidence on the record that allowed the Commission to reach the reasonable and reasoned conclusion that commissions were paid with respect to export sales in which a trading company was involved whereas no commissions were demonstrated to have been paid in relation to domestic sales".[193] According to the European Union the underlying investigation showed, in fact, that a commission was paid by the exporting producer (PT Musim Mas) to the related trader (ICOF-S) and that it was paid only in relation to export sales. The EU authorities therefore had a sufficient evidentiary basis to adjust the export price.[194]

7.49. In any event, the European Union considers that the EU authorities did take into account − in an unbiased and objective manner − the corporate relationship between the producer/exporter and the trader, as part of their evaluation of the functions of ICOF-S. On the basis of this examination, the EU authorities did not find that ICOF-S was the sales department of PT Musim Mas. Instead, they concluded that ICOF-S' functions were similar to those of "an agent

[188] Indonesia's second written submission, para. 2.62.
[189] Indonesia's first written submission, para. 4.270.
[190] Indonesia's first written submission, paras. 4.282-4.285.
[191] European Union's second written submission, para. 17.
[192] European Union's second written submission, para. 26.
[193] European Union's first written submission, para. 69.
[194] European Union's response to Panel question No. 7, para. 1.34.

working on a commission basis". The EU authorities reached this conclusion on the basis of three main elements: (a) the high level of third-party sales in ICOF-S' turnover; (b) the fact that PT Musim Mas (rather than ICOF-S) invoiced directly all domestic sales and a significant portion of export sales; and (c) the existence of a Sale and Purchase Agreement between PT Musim Mas and ICOF-S which explicitly provided for a mark-up on export sales.[195]

7.50. The European Union likewise refutes Indonesia's second argument concerning the alleged asymmetry of the comparison as a result of the allowance for the mark-up. First, the European Union explains that, in view of the close corporate ties between the exporting producer and the related trader, the EU authorities assumed that the mark-up did not fully reflect the market value of the service rendered by ICOF-S. The EU authorities therefore evaluated what they considered to be the actual value of the trading commission on the basis of the trader's indirect selling expenses and a reasonable amount for profit, and then deducted this "notional commission" from the export price.[196] Second, the European Union disagrees with Indonesia's argument that, as a result of this deduction, the EU authorities compared an export price without SG&A and profit to a normal value which include those components. On the contrary, the European Union contends that the record demonstrates that the ex-factory export price calculated by the EU authorities did include an amount for SG&A and profit, even after the deduction had been made. The European Union thus submits that the comparison was made at the same level of trade, as required by Article 2.4 of the Anti-Dumping Agreement.[197]

7.51. Finally, in relation to the different outcome for the second Indonesian producer/exporter, the European Union argues that Ecogreen was in a different factual situation from PT Musim Mas, such that the allowance made was justified in the case of PT Musim Mas but not in the case of Ecogreen.[198]

### 7.3.4 Main arguments of the third parties

7.52. Turkey submits that Article 2.4 of the Anti-Dumping Agreement requires that allowances shall be made only for differences affecting price comparability and that the decision to make such allowances must be made on a case-by-case basis.[199]

7.53. The United States submits that the treatment of commissions is a complex task for investigating authorities and necessarily depends on the facts and circumstances of each case. The key question in deciding whether to make an adjustment is whether the factors considered affect price comparability.[200] The United States also considers that Article 2.4 does not contain a threshold requirement to analyse either the corporate relationship between a producer and a trader or the respective functions carried out by the producer and the trader. It is for an investigating authority to make a price adjustment if the facts on the record support it and regardless of whether affiliated or non-affiliated parties are involved.[201]

### 7.3.5 Evaluation by the Panel

7.54. Indonesia requests us to find that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by making an improper deduction for a factor that did not affect price comparability.[202] We begin our evaluation of Indonesia's request by setting out our understanding of the legal standard under Article 2.4 as relevant to the claim and arguments before us, taking into account relevant reports of prior panels and the Appellate Body.

7.55. We note first that the opening sentence of Article 2.4 mandates that a "fair comparison" be made between the export price and the normal value when determining whether dumping exists.

[195] European Union's first written submission, para. 95.
[196] European Union's second written submission, paras. 68 and 69.
[197] European Union's response to Panel question No. 41, p. 9.
[198] European Union's second written submission, paras. 90 and 101; response to Panel question No. 18, pp. 16-20.
[199] Turkey's third-party submission, para. 9.
[200] United States' third-party response to Panel question No. 1, para. 1.
[201] United States' third-party response to Panel question No. 2a, paras. 7-9.
[202] Indonesia's second written submission, para. 5.1.

The second and third sentences of Article 2.4 elaborate on the means of ensuring, in practical terms, that the "comparison" between the normal value and the export price is "fair". The third sentence specifically requires that "[d]ue allowance" be made "for differences which affect price comparability." According to the panel in *EU – Biodiesel (Argentina)*:

> [T]he ordinary meaning of making an "allowance" connotes "mak[ing] [an] addition or deduction corresponding to … tak[ing] into account mitigating or extenuating circumstances", and "due" connotes what is "just, proper, regular, and reasonable". That is, additions or deductions in appropriate amounts to the export price or normal value may be required to account for "differences" between the two if they affect price comparability, thereby ensuring the "fairness" of the comparison under Article 2.4.[203]

7.56. The third sentence of Article 2.4 contains an illustrative list of factors that could potentially affect price comparability. Although the alleged factor in the present case, namely a mark-up[204], is not included in this list, we note that the Appellate Body has construed this list as non-exhaustive:

> The text of that provision gives certain examples of factors which may affect the comparability of prices: "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences". However, Article 2.4 expressly requires that "allowances" be made for "*any other differences* which are also demonstrated to affect price comparability." … There are, therefore, no differences "affect[ing] price comparability" which are precluded, as such, from being the object of an "allowance".[205]

7.57. Prior panel and Appellate Body reports have provided guidance on how to determine whether an alleged factor constitutes a "difference which affects price comparability" for which an allowance must be made under Article 2.4 of the Anti-Dumping Agreement. For instance, the Appellate Body stated in *US – Zeroing (EC)* that:

> The illustrative list in the third sentence of Article 2.4 provides indications as to the nature of the differences covered by the principle set out in that sentence, which refers to differences that include "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics". The elements of this list are all features, or characteristics, of the transactions that are compared. Although the list is illustrative and not exhaustive, it suggests that the adjustments, or allowances, covered by the third sentence are those that are made to take into account the differences relating to characteristics of the compared transactions (export transactions and domestic transactions). Article 2.4 specifies that the differences for which due allowance shall be made are those "which affect price comparability". In our view, this refers to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transaction.[206]

7.58. We derive from this that the factors referred to in Article 2.4 are "features", "characteristics" or "identifiable components" of the transactions and prices in question that have, or are likely to have, an impact on the comparison of those prices.[207] We also understand that such factors must give rise to a "difference" between the normal value and export prices being compared such that those prices are not fairly comparable unless an allowance is made. As recognized by the panels in *EU – Biodiesel (Argentina)* and *US – Softwood Lumber V*, this aspect of the legal standard could be satisfied by evidence that the "feature", "characteristic" or "identifiable component" of the prices in

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[203] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.294. (fns omitted)

[204] We use the terms "mark-up" and "commission" as terms of convenience without prejudice to our analysis of the parties' arguments concerning the nature and existence of the "mark-up" or "commission". We note that the EU authorities used both terms to denote the amount referred to in the Sale and Purchase Agreement between ICOF-S and PT Musim Mas as the ICOF Margin. (See Final Determination, (Exhibit IDN-4), recital 31; and Revised Determination, (Exhibit IDN-5), recital 31).

[205] Appellate Body Report, *US – Hot-Rolled Steel*, para. 177. (emphasis original)

[206] Appellate Body Report*, US – Zeroing (EC)*, para. 157. We note that both parties cited this paragraph of the Appellate Body's Report as authority for the legal standard under Article 2.4. (European Union's first written submission, para. 63; European Union's response to Panel question No. 3; Indonesia's second written submission, para. 2.5; and Indonesia's response to Panel question No. 2, para. 1.23).

[207] See also Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.301 and 7.302.

question is linked exclusively either to the domestic sales or to relevant export sales subject to comparison, or to both sides of the comparison but in different amounts.[208] Conversely, if an alleged factor does not represent a difference affecting the comparability between the normal value and export prices, no allowances are permitted pursuant to the third sentence of Article 2.4.[209]

7.59. Beyond this, the Appellate Body and panels have recognized on a number of occasions that Article 2.4 does not prescribe a specific methodology for how to achieve a "fair" comparison.[210] For instance, the panel in *US – Softwood Lumber V* stated that:

> [B]earing in mind the text of Article 2.4, we consider that this provision does not impose on investigating authorities any particular method for examining whether any given difference affects price comparability.[211]

7.60. Textual elements of Article 2.4, such as the reference to due allowances being made "in each case, on its merits", and that in a given investigation, "[t]he authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison", suggest that allowances made under Article 2.4 involve a case-specific analysis of the particular evidence available in a given investigation. On that basis, the panel in *US – Softwood Lumber V* considered further that:

> [T]he requirement to make due allowance for such differences, in each case on its merits, means that the authority must *at least* evaluate identified differences … with a view to determining whether or not an adjustment is required to ensure a fair comparison between normal value and export price under Article 2.4, and make an adjustment where it determines this to be necessary on the basis of its evaluation. We consider that Article 2.4 does *not* require that an adjustment be made automatically in all cases where a difference is found to exist, but only where – based on the merits of the case – that difference is demonstrated to affect price comparability.[212]

7.61. We also consider it relevant to our analysis in the present case that the EU authorities made the downward adjustment for an identified difference affecting price comparability of their own volition based on a provision in the governing regulation.[213] This aspect differentiates our analysis from the evidentiary assessment of alleged differences affecting price comparability by past panels. In particular, past panels have assessed whether interested parties provided sufficient evidence to justify an allowance for differences affecting price comparability (or, at least, to require an investigating authority to take steps to achieve clarity in respect of the alleged difference).[214] In that regard, the Appellate Body has stated that "exporters bear the burden of

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[208] Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.301 and 7.302. The panel stated that the alleged factor in that case "does not relate to a difference in the characteristics of the … domestic vs. export transactions being compared" and that the alleged factor was not "an identifiable component of the constructed normal value itself". See also Panel Report, *US – Softwood Lumber V*, para. 7.176.

[209] Appellate Body Report, *US – Zeroing (EC)*, para. 156.

[210] See, e.g. Appellate Body Reports, *US – Zeroing (EC)*, para. 146; and *US – Softwood Lumber V*, para. 175; and Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.78; *EC – Fasteners (China)*, para. 7.297; *EC – Tube or Pipe Fittings*, para. 7.178; *US – Zeroing (EC)*, para. 7.260; and *US – Softwood Lumber V*, para. 7.167.

[211] Panel Report, *US – Softwood Lumber V*, para. 7.167.

[212] Panel Report, *US – Softwood Lumber V*, para. 7.165. (emphasis original)

[213] In particular, the original petition does not appear to contain a request for a downward adjustment for the mark-up (Anti-Dumping Complaint by Cognis GmbH and Sasol Olefins and Surfactants GmbH, 25 June 2010, (Exhibit IDN-37), pp. 12-14), nor do the relevant determinations provide an indication that the adjustment was made at the request of one or more interested parties during the investigation. (See Preliminary Determination, (Exhibit IDN-3), recital 38; and Final Determination, (Exhibit IDN-4), recitals 31-35). Rather, PT Musim Mas requested that no adjustment should be made for the mark-up and further argued that, if the EU authorities adjusted the export price, then at least an identical adjustment should be made to the normal value.

[214] See Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.83 and 7.84; *EC – Tube or Pipe Fittings*, paras. 7.162-7.164; *Argentina – Poultry Anti-Dumping Duties*, para. 7.238; *Egypt – Steel Rebar*, paras. 7.255-7.259; *Korea – Certain Paper*, para. 7.147; and *US – Softwood Lumber V*, paras. 7.173-7.176 and 7.352-7.365. See also Appellate Body Report, *EC – Fasteners (China)*, paras. 487 and 488.

substantiating, 'as constructively as possible', their requests for adjustments reflecting the 'due allowance' within the meaning of Article 2.4".[215] According to the Appellate Body, "[i]f it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment".[216] In these instances, the burden lay with the relevant interested party to demonstrate the existence of a difference affecting price comparability. In contrast, our assessment focuses on whether the EU authorities themselves had sufficient evidence to justify an allowance for a difference affecting price comparability, taking into account the argumentation and evidence provided by interested parties in rebuttal.[217]

7.62. With the foregoing understanding of the legal standard under Article 2.4 in mind, we now turn to an analysis of whether the EU authorities' explanations reveal a sufficient evidentiary basis for treating the mark-up in question as a "difference which affects price comparability".

#### 7.3.5.1 Analysis of the EU authorities' determination to make an adjustment to the export price for the "mark-up"

7.63. We recall that the EU authorities treated the mark-up[218] paid to ICOF-S on export sales to the European Union as a difference which affects price comparability for which a downward adjustment to the export price was warranted.[219] We begin with an overview of relevant aspects of the EU authorities' determinations, including as they evolved over the course of the investigation. We then assess the relevant evidence on the record to determine whether, in arriving at their conclusion, the EU authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.

##### 7.3.5.1.1 Treatment of the mark-up in the Preliminary Determination

7.64. The Preliminary Determination indicates that "adjustments for differences in … commissions have been made where applicable and justified".[220] Such adjustments were considered to reflect "differences affecting prices and price comparability" and were therefore intended to "ensur[e] a fair comparison between the normal value and export price". Beyond this, the Preliminary Determination does not elaborate upon the reasons or evidence relied upon for making such adjustments. However, the company-specific disclosure reveals that the adjustment for PT Musim Mas was made in respect of the "commission (mark-up) for ICOFS", which we understand to be a reference to the "ICOF Margin" described in **[***]** the Sale and Purchase Agreement between PT Musim Mas and ICOF-S.[221] The disclosure also reveals that the EU authorities did not consider a corresponding adjustment appropriate in respect of domestic sales since **[***[222]]** We understand this to be the reason the EU authorities' considered the mark-up

[215] Appellate Body Report, *EC – Fasteners (China)*, para. 488 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158). (fn omitted)

[216] Appellate Body Report, *EC – Fasteners (China)*, para. 488.

[217] This is, in part, the corollary of the responsibility of the investigating authority under Article 2.4 to ensure that the comparison is "fair" and that adjustments are only made for factors that are demonstrated to be differences affecting price comparability. (See Appellate Body Reports, *US – Hot-Rolled Steel*, para. 178; and *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.163; and Panel Report, *Argentina – Ceramic Tiles*, paras. 6.115-6.117).

[218] We reiterate that we use the terms "mark-up" and "commission" as terms of convenience without prejudice to our analysis of parties' arguments concerning the nature and existence of such a "mark-up". We note that the EU authorities used the term "commission" and the term "mark-up" to denote the amount referred to in the Sale and Purchase Agreement between ICOF-S and PT Musim Mas as the ICOF Margin. (See Final Determination, (Exhibit IDN-4), recital 31; and Revised Determination, (Exhibit IDN-5), recital 31).

[219] See Preliminary Determination, (Exhibit IDN-3), recital 38; Final Determination, (Exhibit IDN-4), recital 31; Revised Determination, (Exhibit IDN-5), recital 26; and Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI), pp. 3 and 4.

[220] Preliminary Determination, (Exhibit IDN-3), recital 38.

[221] Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI), p. 4.

[222] **[***]**

paid to ICOF-S to represent a "difference" between domestic sales and exports to the European Union.[223]

7.65. Our understanding on these points is corroborated by the minutes prepared by ICOF-S and PT Musim Mas during their respective verification visits submitted by Indonesia as evidence in this dispute.[224] In particular, these minutes indicate that the EU authorities obtained a copy of the Sale and Purchase Agreement between PT Musim Mas and ICOF-S during the verification visits, and appear to have enquired into the mark-up provided for in that agreement and whether it was also paid in respect of domestic sales.[225] According to these minutes, the EU authorities were informed that a margin of **[***]** to 5% applied to sales of fatty alcohols made through ICOF-S, and that although ICOF-S was not paid a mark-up for PT Musim Mas' domestic sales, it nonetheless operated as the sales and marketing arm for PT Musim Mas' domestic sales.[226] However, these minutes also show that the EU authorities expressed doubts over the alleged involvement of ICOF-S in domestic sales, noting the absence of any evidence documenting such involvement.[227]

#### 7.3.5.1.2 Treatment of the mark-up in the Final Determination

7.66. In response to the adjustment for a commission in the Preliminary Determination, PT Musim Mas argued before the EU authorities that they had "wrongly made a provisional downward adjustment to the export price for difference in commission in contravention with Article 2(10)(i) [of the] Basic Regulation" because they "failed to carry out a reasoned assessment of the functions of ICOF S and PTMM to ascertain whether they are a single economic entity" and "failed to conclude that PTMM and ICOF S are in fact in substance one single economic entity".[228] Further, even accepting the downward adjustment to the export price for the alleged differences in commissions, the EU authorities "failed to make a corresponding level of trade adjustment to the normal value" because "ICOF S carries out exactly the same functions for domestic sales as for export sales".[229]

7.67. PT Musim Mas thus argued on the basis of the criteria set out in the European Union's own Basic Anti-Dumping Regulation and the relevant case law of the Court of Justice of the European Union that the EU authorities had not provided sufficient justification for the downward adjustment.[230] In particular, PT Musim Mas contended that ICOF-S and PT Musim Mas form a "single economic entity" because ICOF-S is "merely the sales department of PTMM", which, in turn, suggested that no adjustment should have been made.[231]

7.68. In the Final Determination, the EU authorities responded to PT Musim Mas' arguments in this regard and provided further explanation of why they considered that the adjustment was warranted. In particular, the EU authorities rejected the argument that no adjustment should have been made due to the existence of a single economic entity, concluding instead that ICOF-S performs "functions which are similar to those of an agent working on a commission basis".[232] The EU authorities based this conclusion on the "commission mentioned in a contract covering export sales only", as well as on the fact that "domestic sales, as well as some export sales to third countries, are invoiced directly by [PT Musim Mas] in Indonesia" in contrast to the

[223] In particular, this conclusion was reached in response to PT Musim Mas's claim that there was no difference in respect of ICOF-S' involvement in its sales as between domestic and export sales. (See Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), pp. 43 and 44).
[224] These are documents authored by the interested parties but not placed on the record of the anti-dumping investigation at issue.
[225] PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010, (Exhibit IDN-27) (BCI), p. 9.
[226] PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010, (Exhibit IDN-27) (BCI), p. 9.
[227] PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010, (Exhibit IDN-27) (BCI), pp. 9, 13, and 15.
[228] PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), pp. 3 and 4.
[229] PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), p. 19.
[230] PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), pp. 14 and 15.
[231] PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), p. 14.
[232] Final Determination, (Exhibit IDN-4), recitals 31-33.

"specific commission" received by ICOF-S for sales it handles on behalf of PT Musim Mas, and the fact that ICOF-S also sells products manufactured by unrelated producers.[233]

7.69. The EU authorities also rejected the claim that ICOF-S "coordinate[s] domestic sales" and that therefore a concomitant adjustment should be made to the normal value, citing the Sale and Purchase Agreement between PT Musim Mas and ICOF-S which "only covers export sales" and the fact that "domestic sales are invoiced by [PT Musim Mas]".[234] The EU authorities considered further that the direct sales made by PT Musim Mas were "structural" and "permanent", as opposed to being an anomaly.[235]

#### 7.3.5.1.3 Treatment of the mark-up in the Revised Determination

7.70. In the Revised Determination, the EU authorities elaborated further upon their rebuttal of PT Musim Mas' claim that no adjustment should have been made due to the existence of a single economic entity between PT Musim Mas and ICOF-S. This elaboration flowed from both the EU authorities' differentiation between Ecogreen and PT Musim Mas, as well as the related nuances in judicial developments on the significance of the existence of a "single economic entity" in the municipal law of the European Union. In particular, the EU authorities considered that:

> The factual circumstances for Ecogreen are similar to those of Interpipe NTRP VAT in respect of the adjustment made pursuant to Article 2(10)(i) of the Basic Regulation, in particular the following factors in combination: volume of direct sales to third countries of less than 8% (1-5%) of all export sales; existence of common ownership/control of the trader and the exporting producer; the nature of functions of the trader and the exporting producer … .[236]

By contrast, the EU authorities considered in respect of PT Musim Mas that:

> There are a number of differences in the circumstances of [Ecogreen and PT Musim Mas], in particular the following in combination: the level of direct export sales made by the producer; the significance of the trader's activities and functions concerning products sourced from non-related companies; the existence of a contract between the trader and producer, which provided that the trader was to receive a commission for the export sales.[237]

7.71. The EU authorities' criteria for rebutting PT Musim Mas' argument were "whether the functions of a trader are not those of an internal sales department but comparable to those of an agent working on a commission basis", and whether there was a difference in commissions paid in respect of the sales under consideration.[238] In this connection, the EU authorities again rejected PT Musim Mas' assertions that "it has no marketing and sales division" and that the "functions of marketing and sales were carried out by [ICOF-S]", instead concluding that "given the level of direct export sales, it can only be concluded that PTMM's export sales are performed not only from [ICOF-S], but also from Indonesia".[239] The EU authorities also relied on the fact that ICOF-S' "overall activities were based to a significant extent on supplies originating from unrelated companies", and that "the very name and the modalities of the agreement [between PT Musim Mas and ICOF-S] justify the finding that the contract was intended to govern the relationship between PTMM and the trader and was not limited to the transfer pricing or tax issues".[240]

[233] Final Determination, (Exhibit IDN-4), recitals 31-33.
[234] Final Determination, (Exhibit IDN-4), recital 35.
[235] Final Determination, (Exhibit IDN-4), recital 33.
[236] Revised Determination, (Exhibit IDN-5), recital 5.
[237] Revised Determination, (Exhibit IDN-5), recital 12.
[238] Revised Determination, (Exhibit IDN-5), recitals 24-32.
[239] Revised Determination, (Exhibit IDN-5), recitals 24 and 27.
[240] Revised Determination, (Exhibit IDN-5), recitals 29-32.

#### 7.3.5.1.4 Analysis of the EU authorities' determination

7.72. In view of the foregoing review of relevant aspects of the EU authorities' explanations, we understand that they arrived at the conclusion that the factor at issue constituted a difference which affects price comparability on the basis of two factual findings. First, the EU authorities made a factual finding that there was a mark-up linked exclusively to export sales. Second, the EU authorities made the factual finding that ICOF-S had functions which were similar to those of an agent working on a commission basis, as opposed to operating as PT Musim Mas' internal sales department. Our review of the EU authorities' explanations follows this basic two-part structure. In reviewing these factual findings, we recall that we are not necessarily limited to the elements of evidence *expressly* relied upon by the investigating authority in its establishment and evaluation of the facts.[241] Rather, we may also take into consideration other elements of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination.

##### 7.3.5.1.4.1 The existence of a mark-up linked to export sales only that affects prices and price comparability

7.73. The EU authorities' explanations relied principally upon the Sale and Purchase Agreement between PT Musim Mas and ICOF-S to determine the existence of a mark-up on sales of the product at issue to the European Union. This agreement[242] provides for a "Transaction Price" between ICOF-S and PT Musim Mas based on the following formula:

**[***]**

The "Rebased Final Price" refers, in relevant part[243], to the final price paid by the buyer of the product. The "ICOF Margin" refers to either **[***]** or 5% of the "Rebased Final Price" depending on **[***[244]]**

7.74. Pursuant to the Sale and Purchase Agreement, **[***[245] [246] [247] [248]]**

7.75. These elements of the Sale and Purchase Agreement support the conclusion that the mark-up paid to ICOF-S is a factor that impacts the price of the product under consideration, which we recall can be one step in determining whether a given factor constitutes a difference which affects price comparability under Article 2.4.[249] In particular, it appears to represent a discrete, numerical portion of the price that reflects payment for certain "functions, obligations and risks" – and their associated expenses – assumed by ICOF-S in respect of the product under consideration. This understanding comports with PT Musim Mas' questionnaire response, in which PT Musim Mas stated that "ICOF Singapore *inter alia* assumes the financing, trading and customer default risk", and in which PT Musim Mas framed the "ICOF Margin" as "the value of the sales service rendered from ICOF to PT Musim Mas" and "the service fee ICOF Singapore receives for its sales services".[250] This corroborates the provisions of the Sale and Purchase Agreement that

[241] See above, para. 7.8.

[242] We note that there are two contracts between PT Musim Mas and ICOF-S on the record: Sale and Purchase Agreement between PT Musim Mas and ICOF-S (1 January 2009), (Exhibit IDN-24) (BCI); and Sale and Purchase Agreement between PT Musim Mas and ICOF-S (1 January 2010), (Exhibit IDN-25) (BCI). In all relevant aspects, these contracts are substantially the same. For expediency, therefore, we refer primarily to the 2009 Sale and Purchase Agreement between PT Musim Mas and ICOF-S, while cognisant that the same considerations apply with respect to the 2010 Sale and Purchase Agreement between PT Musim Mas and ICOF-S.

[243] Sale and Purchase Agreement between PT Musim Mas and ICOF-S (1 January 2009), (Exhibit IDN-24) (BCI), Article 3.1(a). **[***]**

[244] **[***]**

[245] **[***]**

[246] **[***]**

[247] **[***]**

[248] **[***]**

[249] See above, para. 7.58.

[250] Attachment D-1.1 to PT Musim Mas's questionnaire response, (Exhibit IDN-21) (BCI), p. 2; and Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), pp. 43 and 44. We recognize that these statements were made in the context of arguing for an identical adjustment to be made for domestic sales.

suggest the mark-up is a component of the price of sales made via ICOF-S, reflecting certain functions, obligations and risks − and their associated expenses − assumed by ICOF-S with respect to those sales. The prices that are compared are impacted because the expenses linked to these functions, obligations and risks must be recovered.

7.76. During the investigation, PT Musim Mas argued against the EU authorities' reliance on the Sale and Purchase Agreement between PT Musim Mas and ICOF-S as the basis for making a downward adjustment for the mark-up paid to ICOF-S on exports to the European Union[251], arguing that it was, in reality, a master agreement to regulate transfer prices between related entities. In other words, the function of the Sale and Purchase Agreement was to comply with tax rules on matters related to transfer pricing.[252] In that regard, PT Musim Mas drew the EU authorities' attention to, *inter alia*, OECD guidelines on transfer pricing.[253] For PT Musim Mas, this characteristic of the Sale and Purchase Agreement suggested that ICOF-S acted as a sales and marketing department for PT Musim Mas, rather than as a trader or agent.[254]

7.77. The EU authorities responded to this argument, noting that the use of the Sale and Purchase Agreement as a tool for complying with tax guidelines and its use as a tool to pay for "international and marketing sales activities" are not mutually exclusive.[255] On the contrary, the EU authorities considered that the very terms of the Sale and Purchase Agreement suggested that it was not limited to transfer pricing or tax issues.[256] This was not, in our view, an unreasonable conclusion. The OECD guidelines themselves describe transfer prices not only as "significant for … taxpayers and tax administrations because they determine in large part the income and expenses, and therefore taxable profits, of associated enterprises in different tax jurisdictions", but additionally as "the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises".[257] The purpose of enacting transfer pricing agreements in accordance with the OECD guidelines is to ensure that "the arm's length principle should govern the evaluation of transfer prices among associated enterprises".[258] Thus, the characterisation of the Sale and Purchase Agreement between PT Musim Mas and ICOF-S as a transfer pricing agreement does not negate the understanding that it reflects payments for a service provided by ICOF-S to PT Musim Mas and the associated transfer of title to ICOF-S for the products under consideration. Indeed, as mentioned above, this was the understanding implied by PT Musim Mas' questionnaire response.[259]

7.78. PT Musim Mas also referred to certain terms of the Sale and Purchase Agreement − including ICOF-S' assumption of financing, trading, and customer default risk − as evidence that ICOF-S and PT Musim Mas formed a single economic entity, and that therefore no adjustment should be made.[260] We recall in this regard that the Sale and Purchase Agreement states **[***]**.[261] We derive from this that the pricing component represented by the mark-up is intended to reflect

[251] See PT Musim Mas, "Impact of the Interpipe judgement on the fatty alcohol anti-dumping investigation (AD563), PTMM situation", presentation at the hearing at DG Trade, 16 August 2012 (PT Musim Mas presentation), (Exhibit IDN-26) (BCI), p. 20; and Summary of the meeting between PT Musim Mas and the European Commission related to case AD563 Fatty alcohols before the EU Hearing Officer, 4 October 2012, (Exhibit IDN-46) (BCI), p. 7.

[252] Summary of the meeting between PT Musim Mas and the European Commission related to case AD563 Fatty alcohols before the EU Hearing Officer, 4 October 2012, (Exhibit IDN-46) (BCI), p. 5.

[253] See PT Musim Mas presentation, (Exhibit IDN-26) (BCI), p. 17; and Summary of the meeting between PT Musim Mas and the European Commission related to case AD563 Fatty alcohols before the EU Hearing Officer, 4 October 2012, (Exhibit IDN-46) (BCI), pp. 5-7.

[254] See PT Musim Mas presentation, (Exhibit IDN-26) (BCI), pp. 17-20; and Summary of the meeting between PT Musim Mas and the European Commission related to case AD563 Fatty alcohols before the EU Hearing Officer, 4 October 2012, (Exhibit IDN-46) (BCI), pp. 5-7.

[255] Revised Determination, (Exhibit IDN-5), recitals 30 and 31.

[256] Revised Determination, (Exhibit IDN-5), recital 31.

[257] OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (22 July 2010), (Exhibit IDN-28), p. 19.

[258] OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (22 July 2010), (Exhibit IDN-28), p. 36.

[259] Attachment D-1.1 to PT Musim Mas's questionnaire response, (Exhibit IDN-21) (BCI), p. 2; Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), pp. 43 and 44.

[260] See PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), p. 13; and PT Musim Mas presentation, (Exhibit IDN-26) (BCI), p. 8.

[261] Sale and Purchase Agreement between PT Musim Mas and ICOF-S (1 January 2009), (Exhibit IDN-24) (BCI), preambular recital (E). (emphasis added)

the contractual functions, obligations, and risks assumed by ICOF-S, including those terms that could be described as **[***]** The terms of the Sale and Purchase Agreement therefore suggest to us that something of value with an associated expense was transferred between PT Musim Mas and ICOF-S pertaining to the product under consideration, which was reflected in its resale price to independent buyers. These terms do not contradict the understanding that the mark-up is an expense tied only to relevant export sales.

7.79. In our view, therefore, an unbiased and objective investigating authority could have found that the mark-up represents a factor that impacts the price of the compared transactions. The EU authorities' explanation, which relied on the terms of the Sale and Purchase Agreement between PT Musim Mas and ICOF-S and the factual understanding that ICOF-S was remunerated for a service performed on sales for which the mark-up was paid, provided sufficient support for this conclusion.

7.80. We now turn to the EU authorities' evidentiary basis for determining that the mark-up represented a "difference" between the sales to be compared, namely, that it was linked to export sales only. In particular, the EU authorities noted that **[***[262]]** that the Sale and Purchase Agreement between PT Musim Mas and ICOF-S covered export sales only[263]; and that PT Musim Mas invoiced domestic sales directly.[264] We understand the EU authorities to have inferred from this evidence that ICOF-S was not involved in domestic sales, and that its involvement in export sales to the European Union represented an additional expense as compared with the normal value.[265]

7.81. In contrast, PT Musim Mas argued that ICOF-S – as PT Musim Mas' internal sales department – was involved in all of PT Musim Mas' sales to the same degree. In practical terms, therefore, the value of the sales service reflected in the mark-up paid to ICOF-S was purportedly applicable to both domestic and export sales in the same amount.[266] PT Musim Mas thus submitted to the EU authorities that, should they make a downward adjustment to the *export price* for ICOF-S' SG&A and profit, the same adjustment should also be made to the *normal value*.[267] Since PT Musim Mas' argument in this regard was premised on its assertion that it does not have an active sales department and that ICOF-S undertakes the sales and merchandising work for all of PT Musim Mas' sales of the product under consideration (including the domestic and export sales that PT Musim Mas invoices directly)[268], the EU authorities appear to have solicited evidence to support this assertion.[269] They were provided with a copy of an email from an ICOF-S staff member to a PT Musim Mas staff member with a **[***[270]]**

7.82. The EU authorities rejected the assertion that PT Musim Mas had no active sales department and that ICOF-S coordinated all of PT Musim Mas' sales (both domestic and export).[271] The logical corollary of this is that, since PT Musim Mas made direct sales without the apparent involvement of ICOF-S, it therefore possessed its own sales and marketing capacity. We do not consider it unreasonable for the EU authorities to have concluded that, since **[***]** ICOF-S was not involved in domestic sales.

7.83. We also do not consider the EU authorities' reliance on the Sale and Purchase Agreement between PT Musim Mas and ICOF-S in its rejection of the assertion that PT Musim Mas had no

[262] **[***]**
[263] Final Determination, (Exhibit IDN-4), recitals 31 and 35.
[264] Final Determination, (Exhibit IDN-4), recital 35.
[265] Final Determination, (Exhibit IDN-4), recital 35; and Revised Determination, (Exhibit IDN-5), recitals 24 and 27.
[266] Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), pp. 43 and 44. According to PT Musim Mas, ICOF-S incurred the same costs for domestic sales, and the cost of having an effective marketing arm for both domestic and export sales was absorbed within ICOF-S.
[267] Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), pp. 43 and 44; and Final Determination, (Exhibit IDN-4), recital 35.
[268] See, e.g. Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), p. 43.
[269] PT Musim Mas Minutes Inspection Visit Medan, 25 November 2010, (Exhibit IDN-27) (BCI), pp. 9, 13, and 15.
[270] **[***]**
[271] See Final Determination, (Exhibit IDN-4), recitals 31 and 33-35; and Revised Determination, (Exhibit IDN-5), recitals 24 and 27.

active sales department and that ICOF-S coordinated all of PT Musim Mas' sales (both domestic and export) to be unreasonable. Various elements of the Sale and Purchase Agreement indicate that it is intended to cover exports only.[272] **[***[273] [274] [275]]** This undermines PT Musim Mas' assertion that ICOF-S is involved in domestic sales and marketing of the product concerned without any remuneration or documentary records of such involvement.

7.84. Further, we do not consider it unreasonable for the EU authorities to have inferred from PT Musim Mas' direct invoicing of domestic sales that PT Musim Mas possessed its own sales and marketing capacity.[276] Such an understanding is corroborated by the charts in PT Musim Mas' questionnaire response indicating that it had a marketing branch[277], as well as entries in its P&L for **[***[278]]** suggests that PT Musim Mas incurred internally the same type of costs for both categories of sales.[279] From this, it could be reasonably inferred that PT Musim Mas incurred the same costs for selling and marketing expenses for both its direct sales to domestic customers and its sales (or transfers) to ICOF-S. It follows that the pricing component referred to as the "ICOF Margin" in the Sale and Purchase Agreement between PT Musim Mas and ICOF-S could reasonably be understood to reflect an additional cost, for which there is no equivalent on the domestic side, thereby giving rise to a difference for which an adjustment was required.

7.85. We understand the only piece of evidence indicating any involvement by ICOF-S in PT Musim Mas' domestic sales was the document submitted to the EU authorities as "Attachment 18" pertaining to an email.[280] In our view, it was not unreasonable for the EU authorities to ascribe limited probative value to this document. The document does not reveal the nature, extent, or scope of ICOF-S' alleged involvement in domestic sales generally. **[***]** We cannot see how this demonstrates that ICOF-S undertakes all sales, marketing, and negotiating work on behalf of PT Musim Mas for domestic sales, nor how this demonstrates that PT Musim Mas has no active sales department. This is especially so when considered against the evidence of **[***]** in PT Musim Mas' questionnaire response, and entries for **[***]**

7.86. Thus, in our view, the ability of PT Musim Mas to discharge its own sales and marketing function in respect of domestic sales together with the absence of probative evidence that ICOF-S was involved in domestic sales militates against the view that ICOF-S undertook all sales and marketing work for PT Musim Mas on domestic sales. It follows that the pricing component referred to as the "ICOF Margin" in the Sale and Purchase Agreement between PT Musim Mas and ICOF-S could reasonably be understood to reflect an additional cost, for which there is no equivalent on the domestic side, thereby giving rise to a difference for which an adjustment was required.

7.87. Finally, the fact that, in its cost information in its questionnaire responses, PT Musim Mas **[***]** and that the EU authorities therefore did not include any such costs in the normal value calculation supports the view that the mark-up did not relate to domestic sales.[281]

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[272] Indonesia does not argue before the Panel that the Sale and Purchase Agreement between PT Musim Mas and ICOF-S is intended to cover anything other than export sales.

[273] **[***]**

[274] **[***]**

[275] **[***]**

[276] See Final Determination (Exhibit IDN-4), recitals 31 and 35 and Revised Determination, (Exhibit IDN-5), recitals 24 and 27.

[277] PT Musim Mas Business Organization Structure, (Exhibit EU-5) (BCI). We note that Indonesia argued at the first substantive meeting that **[***]** suggests that PT Musim Mas did not, in fact, possess its own "Marketing" department. We are not convinced by this argument. The chart referred to by Indonesia in that regard pertains specifically to **[***]** This reading accords with the chart in Exhibit EU-5, which clearly indicates **[***]** (PT Musim Mas, Organization Chart- Fatty Alcohol Division, (Exhibit EU-6) (BCI)).

[278] **[***]**

[279] Excel file "PTMM definitive disclosure.xls", (Exhibit EU-12) (BCI), rows 19 and 20/columns F and G **[***]**

[280] Verification Exhibit PTMM-18, (Exhibit IDN-47) (BCI).

[281] See Indonesia's response to Panel question Nos. 15(b), paras. 1.75-1.78, and 15(c), para. 1.79; and Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI), p. 4. Even if, as argued by Indonesia, ICOF-S provided domestic sales services without remuneration, there would still be costs associated with those services that would have to be taken into account in the normal value calculation.

7.88. On the basis of the foregoing, we consider that the EU authorities' factual finding of a mark-up and associated expenses linked to export sales only was proper and provided a sufficient basis for concluding that the factor at issue constituted a difference which affects price comparability. In particular, the EU authorities' explanation reveals an evidentiary basis for considering that the mark-up was a component of the price of exports to the European Union representing the payment for a service (i.e. for assuming certain risks, obligations, and functions), and that there was no concomitant pricing or expense component on the domestic side. We recall, in this regard, our view that the existence of a feature or characteristic of the prices to be compared that is linked exclusively either to domestic sales or to relevant export sales, or to both sides of the comparison but in different amounts, can demonstrate the existence of a difference which affects price comparability under Article 2.4.[282]

#### 7.3.5.1.4.2 The determination that ICOF-S has functions similar to an agent working on a commission basis

7.89. We now turn to the EU authorities' factual finding in the Final Determination that ICOF-S had functions similar to those of a trader working on a commission basis. We recall that the EU authorities based this determination on: (a) the direct sales made by PT Musim Mas; (b) ICOF-S' trade in products of unrelated entities; and (c) the terms of the Sale and Purchase Agreement between ICOF-S and PT Musim Mas.

7.90. We recall that this factual finding was reached, at first instance, in the Final Determination and in response to PT Musim Mas' attempt to rebut the EU authorities' adjustment for the mark-up in the Preliminary Determination. In particular, this factual finding was an element of the EU authorities' rejection of PT Musim Mas' argument that it formed a "single economic entity" with ICOF-S because ICOF-S is "merely the sales department of PT Musim Mas", which meant, according to PT Musim Mas, that no adjustment should have been made.[283]

7.91. Following the EU authorities' factual finding that ICOF-S had functions similar to an agent working on a commission basis in the Final Determination, PT Musim Mas challenged both the EU authorities' "look[ing] at the functions carried out by ICOF" since "ICOF-S is not a trader or agent but a sales and marketing department", as well as the evidence they relied upon in assessing these functions, namely, the direct sales made by PT Musim Mas, ICOF-S' trade in products of unrelated entities, and the terms of the Sale and Purchase Agreement between ICOF-S and PT Musim Mas.[284] Indonesia's arguments on these aspects of the EU authorities' explanation mirror, in broad terms, PT Musim Mas' arguments during the investigation in this regard.[285]

7.92. In respect of the EU authorities' reliance on the functions carried out by ICOF-S, we recall that the allowance for a commission was made on the basis of Article 2(10)(i) of the Basic Anti-Dumping Regulation. This provides that "[t]he term 'commissions' shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis." We recall that Article 2.4 does not prescribe a specific methodology for how to achieve a "fair" comparison.[286] In our view, so long as an investigating authority's method for identifying "differences which affect price

[282] See above, para. 7.58.

[283] See PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), pp. 14 and 15.

[284] Summary of the meeting between PT Musim Mas and the European Commission related to case AD563 Fatty alcohols before the EU Hearing Officer, 4 October 2012, (Exhibit IDN-46) (BCI), pp. 1-7; and PT Musim Mas presentation, (Exhibit IDN-26) (BCI), pp. 8-20.

[285] For the "functions" criterion, see Indonesia's first written submission, paras. 4.118 and 4.133-4.151, and Summary of the meeting between PT Musim Mas and the European Commission related to case AD563 Fatty alcohols before the EU Hearing Officer, 4 October 2012, (Exhibit IDN-46) (BCI), pp. 2-7; for PT Musim Mas' direct sales, see Indonesia's first written submission, paras. 4.182-4.186, and PT Musim Mas presentation, (Exhibit IDN-26) (BCI), pp. 6-10; for ICOF-S' trade in products of unrelated entities, see Indonesia's first written submission, paras. 4.234-4.256, and PT Musim Mas presentation, (Exhibit IDN-26) (BCI), pp. 14-16; and for the reliance on the terms of the Sale and Purchase Agreement, see Indonesia's first written submission, paras. 4.187-4.232.

[286] See, e.g. Appellate Body Reports, *US – Zeroing (EC)*, para. 146; and *US – Softwood Lumber V*, para. 175; and Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.78; *EC – Fasteners (China)*, para. 7.297; *EC – Tube or Pipe Fittings*, para. 7.178; *US – Zeroing (EC)*, para. 7.260; and *US – Softwood Lumber V*, para. 7.167.

comparability" is capable of comporting with the legal standard we have set out above for Article 2.4 of the Anti-Dumping Agreement, there is no basis to reject the EU authorities' approach. With that in mind, and within the parameters of the particular investigation at issue in these proceedings, we do not consider that an assessment of whether the "functions of such a trader are similar to those of an agent working on a commission basis" is necessarily inconsistent with the legal standard under Article 2.4 for determining whether an alleged factor affects price comparability. Rather, in our view, the performance of "functions … similar to those of an agent working on a commission basis" could suggest that the entity in question undertakes a sales and marketing service for the related producer, and that the mark-up in question is intended to remunerate that entity for the performance of that service. Thus, we do not consider that the consideration of this criterion by the EU authorities in the circumstances of the present case results, in and of itself, in a violation of Article 2.4 of the Anti-Dumping Agreement. Further, we recall that this aspect of the EU authorities' explanation was just one of a number of elements leading to their overall conclusion concerning the mark-up at issue, which also encompassed the factual findings and evidence canvassed in the previous section, as well as additional evidence in support of this aspect, to which we now turn.

7.93. In respect of the EU authorities' reliance on direct sales made by PT Musim Mas, we recall that the charts in PT Musim Mas' questionnaire response indicate that **[***]**, and that PT Musim Mas' P&L likewise indicates that **[***[287]]** PT Musim Mas and Indonesia have explained that the intervention of PT Musim Mas in sales of the product concerned was purely formal, but no probative record evidence has been brought to our attention in support of this explanation. Thus, it was not improper to conclude from the fact PT Musim Mas performs "direct" sales to certain export and domestic customers that it possessed its own sales and marketing capacity, and that ICOF-S is therefore not the "internal sales department" of PT Musim Mas.[288] Rather, as we have concluded above, it was not unreasonable for the EU authorities to conclude that ICOF-S' involvement in sales to the European Union and the consequent mark-up represented the payment for a service (i.e. for assuming certain risks, obligations, and functions), for which there was no concomitant pricing component on the domestic side. PT Musim Mas' direct sales to domestic and export customers supports this conclusion.

7.94. Regarding the EU authorities' reliance on the fact that a substantial proportion of ICOF-S' trade is in products of unrelated entities, we do not consider it implausible to infer from this that ICOF-S was not dependent to any significant degree on PT Musim Mas for its revenue stream or the operation of its business.[289] This, in turn, undermines the assertion that ICOF-S is "merely the internal sales department" of PT Musim Mas. In that regard, we do not consider it unreasonable for the EU authorities to have taken this evidence into account in support of their conclusion that the mark-up was a difference which affects price comparability.

7.95. The EU authorities' explanation for finding that ICOF-S has "functions … similar to those of an agent working on a commission basis" also rested on the Sale and Purchase Agreement between PT Musim Mas and ICOF-S. PT Musim Mas submitted, in this regard, that "the agreement is not a true agency agreement but a master agreement to regulate transfer prices between PTMM Group companies located in different countries" and that the EU authorities "failed to properly understand the purpose and effect of the agreement between PTMM and ICOF S was to regulate transfer prices between related companies".[290] Indonesia makes substantially the same argument before us in these proceedings.[291] In our view, it was not unreasonable for the EU authorities to have relied on the terms of the Sale and Purchase Agreement in their assessment of "whether the functions of a trader are not those of an internal sales department but comparable to those of an agent working on a commission basis".[292] The Sale and Purchase Agreement makes

[287] **[***]**

[288] Revised Determination, (Exhibit IDN-5), recitals 24 and 27. See also Final Determination, (Exhibit IDN-4), recitals 33 and 35.

[289] In particular, the European Union pointed to a domestic court decision indicating that 50% of ICOF-S' USD1.4 billion in total sales in 2009 related to products from unrelated producers. (See General Court, Case T-26/12, PT Musim Mas v Council (25 June 2015), (Exhibit EU-4), para. 54).

[290] Summary of the meeting between PT Musim Mas and the European Commission related to case AD563 Fatty alcohols before the EU Hearing Officer, 4 October 2012, (Exhibit IDN-46) (BCI), pp. 6 and 10.

[291] See Indonesia's first written submission, paras. 4.190-4.232.

[292] Revised Determination, (Exhibit IDN-5), para. 29.

explicit reference to PT Musim Mas **[***[293]]** These aspects suggest that ICOF-S has a functional capacity to provide certain services as an international trader that is lacking in PT Musim Mas.[294] Further, the Sale and Purchase Agreement stipulates that the services provided by ICOF-S – namely, the assumption of certain "functions, obligations, and risks" – are to be remunerated on individual sales through the "ICOF Margin", i.e. the mark-up.[295] Together, these aspects plausibly suggest that ICOF-S performs "functions … similar to those of an agent working on a commission basis". Other aspects of the Sale and Purchase Agreement also militate against the inference that ICOF-S operates as the "internal sales department" of PT Musim Mas. For instance, whereas PT Musim Mas engages in domestic sales, the Sale and Purchase Agreement explicitly refers only to export sales and stipulates that it "constitutes the entire agreement and understanding between the Parties in respect of its subject matter".[296] Moreover, the provision that "[n]othing in this Agreement shall create any partnership, joint venture or relationship of principal and agent between the Parties" contradicts the characterization of ICOF-S as PT Musim Mas' closely-intertwined internal sales department.[297]

7.96. On the basis of the foregoing, we consider that the EU authorities did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement by considering whether "ICOF-S had functions similar to an agent working on a commission basis" and by reaching this factual finding on the basis of PT Musim Mas' direct sales, ICOF-S' trade in products of unrelated entities, and the terms of the Sale and Purchase Agreement between PT Musim Mas and ICOF-S. On the contrary, as our review above demonstrates, these aspects of the EU authorities' explanation corroborate and confirm the initial factual finding on which they concluded that the factor at issue constituted a difference affecting price comparability.

7.97. In light of the foregoing, we conclude that the EU authorities had a sufficient evidentiary basis – encompassing both of the factual findings and their attendant evidence as discussed in the foregoing sections – for establishing that the mark-up was a factor that impacts the prices of the product and that was linked exclusively to the export side, therefore constituting a difference which affects price comparability under Article 2.4.

7.98. We now turn to the more particular arguments and evidence presented by Indonesia that the EU authorities acted inconsistently with Article 2.4, taking into account the European Union's arguments and evidence in rebuttal.

#### 7.3.5.2 Analysis of Indonesia's argument that the "mark-up" cannot be a difference which affects price comparability under Article 2.4 due to the relationship between PT Musim Mas and ICOF-S

7.99. We understand Indonesia to argue that, "typically", an internal allocation of funds within a single economic entity (or between "closely related or intertwined" parties) which does not reflect an actual or genuine expense and is not reflected in the producer's pricing decision cannot be a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement.[298] We consider that the European Union agrees that if a difference does not affect price comparability, no adjustment is necessary under Article 2.4.[299] We also understand the parties to agree that a component of the price of a transaction that is linked to either the export side or the

[293] **[***]**

[294] Although we concluded above that it was not unreasonable to infer that PT Musim Mas possessed its own sales and marketing capacity, we note that it does not automatically follow that such a capacity is sufficient to sell its product into *all* markets. Rather, it is not unreasonable to consider that, in respect of accessing some markets, the assistance of certain brokers or traders might be necessary.

[295] Sale and Purchase Agreement between PT Musim Mas and ICOF-S (1 January 2009), (Exhibit IDN-24) (BCI), preambular recitals (E) and section 3.1.

[296] Sale and Purchase Agreement between PT Musim Mas and ICOF-S (1 January 2009), (Exhibit IDN-24) (BCI), section 7.1.

[297] Sale and Purchase Agreement between PT Musim Mas and ICOF-S (1 January 2009), (Exhibit IDN-24) (BCI), section 7.3.

[298] Indonesia's second written submission, para. 2.8. See further Indonesia's response to Panel question Nos. 1, para. 1.11, 10, paras. 1.48 and 1.49, and 42(ii), para. 3.5; and opening statement at the second meeting of the Panel, para. 5. We refer to the terms "actual", "genuine", and "objective" expenses solely to respond to Indonesia's arguments.

[299] See European Union's first written submission, paras. 63 and 77.

domestic side − or to both sides but with different amounts − will ordinarily qualify as a difference which affects price comparability under Article 2.4.[300]

7.100. Indonesia asserts that the "dividing line at which a monetary flow ceases to be an objective expense and becomes an internal shifting of funds/allocation of profits without any implication for price comparability, is what Indonesia has chosen to label as the existence of a 'single economic entity'".[301] In Indonesia's view, the criteria for determining the existence of a single economic entity − and hence the "dividing line" − principally relate to "commonality in ownership and operational and managerial control".[302] For Indonesia, these criteria were fulfilled in the present case by evidence of:

a. the "relationship" between PT Musim Mas and ICOF-S, namely, their common ownership and control **[***[303]]**;

b. the "fact" that ICOF-S undertook work on PT Musim Mas' domestic (and some export) sales for no remuneration[304];

c. the purchase by ICOF-S of PT Musim Mas' products for resale on risk and liability conditions that would be "highly unusual" for an unrelated, independent trader[305];

d. the nature of the written agreement between PT Musim Mas and ICOF-S as a "transfer pricing agreement", and the appropriate inferences to be drawn in that regard[306]; and

e. the participation of ICOF-S staff in the onsite verifications by the EU authorities.[307]

7.101. For Indonesia, the EU authorities erred by either ignoring, or placing insufficient weight and drawing incorrect inferences from, this evidence.[308] Indonesia further contends that the EU authorities erred in their reliance on ICOF-S' trade in the products of unrelated entities, PT Musim Mas' direct sales without the involvement of ICOF-S, and the modalities of the Sale and Purchase Agreement between ICOF-S and PT Musim Mas, in arriving at the conclusion that PT Musim Mas and ICOF-S do not form a single economic entity.[309] The European Union rejects both the alleged relevance of the existence of a "single economic entity" to making allowances under Article 2.4[310], as well as Indonesia's assertions regarding the EU authorities' consideration of the evidence on the existence of a single economic entity between PT Musim Mas and ICOF-S.[311]

7.102. Our analysis follows the two-part structure of Indonesia's argument.[312] First, we address whether the existence of a single economic entity necessarily means that the payment of a

[300] For Indonesia, see: Indonesia's second written submission, para. 2.6 ("[f]actors that affect price comparability are actual expenses that can be expected to have affected the seller's pricing decision" (emphasis omitted)); and response to Panel question Nos. 31, paras. 1.12 and 1.13, and 1.34 ("[i]t should be noted that … an adjustment may be appropriate either where there is no similar expense incurred in the other market or where there is a difference in the amount of the adjustment in the two markets"), and 36, para. 1.93. For the European Union, see: European Union's first written submission, para. 64 ("[c]ommissions paid to trading companies for services rendered represent a direct selling expense that warrants an adjustment if no similar expense is demonstrated to exist on the domestic, normal value side"); and opening statement at the first meeting of the Panel, para. 17.

[301] Indonesia's second written submission, paras. 2.12 and 2.24. See also Indonesia's first written submission, paras. 4.9 and 4.71; and response to Panel question No. 42(ii), para. 3.5. See, in contrast, European Union's opening statement at the first meeting of the Panel, paras. 11-13.

[302] Indonesia's response to Panel question No. 32, para. 1.50. See also Indonesia's first written submission, paras. 4.128-4.130, 4.155, and 4.156.

[303] **[***]**

[304] Indonesia's first written submission, paras. 4.166-4.170 and 4.184-4.186.

[305] Indonesia's first written submission, paras. 4.171-4.175.

[306] Indonesia's first written submission, paras. 4.187-4.233.

[307] Indonesia's first written submission, paras. 4.178 and 4.179.

[308] Indonesia's first written submission, paras. 4.10, 4.154, and 4.157.

[309] Indonesia's first written submission, paras. 4.187-4.263.

[310] European Union's first written submission, para. 28; second written submission, paras. 17 and 18.

[311] European Union's first written submission, para. 29; second written submission, para. 58.

[312] See Indonesia's first written submission, paras. 4.9 and 4.10.

mark-up between related entities can never affect price comparability. Second, we address whether the EU authorities ignored certain evidence cited by Indonesia.

7.103. We are not convinced that the existence of what Indonesia denotes as a "single economic entity"[313] is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4. This is because we consider it possible that two entities could transact for goods and services at arms-length, regardless of how closely intertwined their control and ownership might be. This is confirmed by the material before us on transfer pricing agreements[314], as well as relevant elements of the WTO *acquis*.[315] Moreover, even for non-arms-length transactions, expenses incurred in the provision of services normally need to be recovered through pricing and therefore could affect price comparability. Therefore, in our view, it is possible that a transaction between two entities within what Indonesia denotes as a "single economic entity" could reflect an expense that must be recovered and thus would impact price comparability. If this expense is linked to either the export side or the domestic side of a transaction, or to both sides but with different amounts, we would anticipate that it could be found to be a difference which affects price comparability in a given anti-dumping investigation. Indeed, our understanding is not inconsistent with Indonesia's argument that:

> [A]djustments can only be made to the extent that they reflect actual expenses that can be expected to be reflected in the producer's pricing decision. Hence, to the extent that actual expenses were incurred by paying a third (independent) party, they will be adjusted for the corresponding amount. Similarly, to the extent that expenses were actually incurred *internally by the producer/exporter, they will also be adjusted for*.[316]

7.104. By this, we understand Indonesia to mean that an expense "internally incurred" – including one incurred within a single economic entity – could potentially be the subject of an adjustment so long as it reflects an "actual expense" that has an impact on the relevant price. Indonesia made similar comments in respect of "where the producer/exporter uses its own trucks or uses a closely related company to transport the goods"[317], and "where a seller has its own subsidiary/related customs broker that provides services related to customs clearance" in which case "the adjustment should be the actual expense, not the expense that might have been incurred under a very different way of doing business".[318] Moreover, although Indonesia asserts in the present case that ICOF-S and PT Musim Mas form a "single economic entity", Indonesia stated that:

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[313] Indonesia additionally used a number of other terms to denote this concept: "the dividing line could be labelled as a 'sufficiently close relationship' between two formally separate parties", and "[o]ne can also envisage the label 'relationship in which two companies are closely intertwined'". (Indonesia's second written submission, para. 2.13).

[314] OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (22 July 2010), (Exhibit IDN-28), pp. 19 and 36.

[315] In a number of disputes, panels and the Appellate Body have foreshadowed that related entities could transact goods or services between one another (for instance, as inputs in the production of a product). (See Appellate Body Report, *US – Hot-Rolled Steel*, paras. 141-143; and Panel Reports, *US – Softwood Lumber V*, paras. 7.322, 7323, 7.328, and 7.329; and *EC – Salmon (Norway)*, paras. 7.593-7.599). Further, in the context of disciplines for determining the customs value of imported goods, Article 1.2(a) of the Customs Valuation Agreement provides in relevant part:

> In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 *shall not in itself be grounds for regarding the transaction value as unacceptable.* In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price.

(emphasis added)
According to Article 1.2(a), the fact the legally distinct persons are commonly owned and controlled does not in and of itself provide a basis for disregarding the price of transactions between them. Rather, it permits the customs administration to examine "the circumstances surrounding the sale" with a view to determining whether "the relationship influenced the price".

[316] Indonesia's response to Panel question No. 10, para. 1.48. (underlining original, italics added, fn omitted)

[317] Indonesia's response to Panel question No. 33, para. 1.55.

[318] Indonesia's second written submission, para. 2.11. See also European Union's first written submission, para. 94: we agree with the European Union that the focus should be on the function (i.e. expense) – if any – undertaken.

> ICOFS records as revenue the amount received from the unrelated customer (€ 100) and PT Musim Mas records as revenue the amount received from ICOFS **[***]**. The balance **[***]** remains as revenue/profit in ICOFS' financial statements, *from which actual expenses, including actual SG&A, must be deducted.*[319]

We understand this to mean that the mark-up paid to ICOF-S in the present case was intended to compensate, at least to some extent, for the expenses incurred by ICOF-S for its involvement in relevant sales by PT Musim Mas.[320] Thus, even in Indonesia's own framework, a transaction between two entities in a "single economic entity" can involve an "actual expense".[321]

7.105. Based on the foregoing, we do not consider the existence of what Indonesia denotes as a "single economic entity" to be the "dividing line" between an "objective expense" and "an internal shifting of funds/allocation of profits without any implication for price comparability", and therefore to be dispositive of whether a given payment is a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement.[322] Accordingly, we do not share Indonesia's view that transactions between related parties, such as PT Musim Mas and ICOF-S, can never affect the price of the product at issue to a final buyer.[323] For the same reasons, we cannot accept the assertion that a payment cannot constitute a difference which affects price comparability simply because "the economic benefit of the sale accrues to the [single economic entity] as a whole".[324] The fact that the benefit of a sale to a final buyer might accrue to an overall entity does not negate the possibility that a given expense that is tied only to export or domestic sales (or to both in different amounts) could be incurred within that entity, with the potential to affect price comparability.

7.106. Rather, in our view, the "dividing line" between: (a) an internal allocation of funds within a single economic entity which is not reflected in the producer's pricing decision; and (b) an expense that is linked to either the export side or the domestic side or to both sides but with different amounts such that price comparability is affected, is dependent on the particular situation and evidence before an investigating authority in a given case where the proper characterization of the payment in question is at issue.[325]

7.107. We find support for our understanding in this regard in the text of Article 2.4, which we recall refers to due allowances being made "in each case, on its merits", and that in a given investigation, "[t]he authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison". As we have discussed above, this suggests to us that allowances made under Article 2.4 require a case-specific analysis of the evidence in a given investigation. In the absence of any textual reference in Article 2.4 to "single economic entity" or similar concepts, we see no support for the conclusion that Article 2.4 "implicitly requires" consideration of "single economic entity", and that its existence or not is the "dividing line" between payments that do or do not affect price comparability.[326]

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[319] Indonesia's response to Panel question No. 35, para. 1.66. (emphasis added)

[320] See also Indonesia's response to Panel question No. 35(i), para. 1.76.

[321] Although Indonesia initially appeared to argue that a transaction within a single economic entity could never reflect the incurring of an "expense" (see Indonesia's response to Panel question No. 15(a), para. 1.71), we understand Indonesia's position to have evolved in this regard, since Indonesia expressly recognized, in single economic entities, that "[t]he actual or genuine expenses actually incurred by the producer/exporter … are the expenses recorded in their financial statements". (See Indonesia's response to Panel question No. 33, para. 1.57). Further, our understanding that the existence of a "single economic entity" does not preclude two entities from engaging in a transaction that represents an "actual expense" is supported by Indonesia's statement at the second meeting of the Panel that "PT Musim Mas previously used an independent trader to provide the services *that are now provided by ICOFS which is the sales entity or trading arm of the Musim Mas Group*". (Indonesia's opening statement at the second meeting of the Panel, para. 12 (emphasis original)).

[322] See, in contrast, Indonesia's second written submission, para. 2.11.

[323] Indonesia's response to Panel question No. 2, para. 1.24.

[324] Indonesia's first written submission, paras. 4.69-4.71.

[325] See European Union's first written submission, para. 69.

[326] Indonesia's first written submission, paras. 4.9 and 4.120; second written submission, paras. 2.7-2.11. See also European Union's first written submission, paras. 81 and 84.

7.108. We now turn to the second part of Indonesia's argument under Article 2.4 concerning the relationship between PT Musim Mas and ICOF-S, namely, that the EU authorities erred in their consideration of certain evidence or criteria cited by Indonesia.

7.109. We recall that, in Indonesia's view, evidence pertaining to "commonality in ownership and operational and managerial control" is "critical" to an investigating authority's analysis.[327] We thus begin with Indonesia's assertions concerning the common ownership and control of PT Musim Mas and ICOF-S **[***[328]]** First, we note that no record evidence has been brought to our attention that supports the conclusion that **[***]** exercise joint ownership, control, and operational management over PT Musim Mas and ICOF-S.[329] The record evidence relied on by Indonesia indicates that PT Musim Mas and Musim Mas Holdings Pte (which owned ICOF-S in full) have **[***[330]]**, and that PT Musim Mas' shareholding consisted of **[***[331]]** This evidence does not expressly indicate whether the respective shareholders of ICOF-S and PT Musim Mas are identical with shareholdings of identical proportions, or whether these aspects are not identical but exhibit a degree of overlap (and if so, what the extent of such overlap might be). In Indonesia's own framework, the nature and extent of overlap in this regard appear to be important to identifying whether a payment can be said to affect price comparability.[332] Therefore, even assuming evidence of commonality in ownership, operational management and control is "critical", the evidence before the EU authorities did not, in our view, demonstrate the precise nature of the relationship between PT Musim Mas and ICOF-S as alleged by Indonesia.

7.110. The arguments made by Indonesia in respect of the other evidence that it asserts were ignored or accorded undue weight by the EU authorities largely mirror those made by PT Musim Mas during the investigation.[333] Based on our review of the EU authorities' explanation and the record evidence, we concluded that an unbiased and objective investigating authority could have found that ICOF-S was not involved in PT Musim Mas' domestic sales, and could have relied upon the Sale and Purchase Agreement between PT Musim Mas and ICOF-S in construing the mark-up as a difference which affects price comparability under Article 2.4.[334] We also considered the EU authorities' factual finding that ICOF-S undertakes functions similar to those of an agent working on a commission basis was not inconsistent with Article 2.4, nor were their reliance on evidence of PT Musim Mas' direct sales, ICOF-S' trade in products of unrelated entities, and the terms of the Sale and Purchase Agreement, an inappropriate basis for that factual finding.[335] Since Indonesia's arguments concerning this evidence are largely the same, we see no reason to set aside our earlier conclusions in that regard.

7.111. On the basis of the foregoing, we do not accept Indonesia's argument that for Article 2.4 of the Anti-Dumping Agreement, the existence or not of a single economic entity (as evidenced through common control, ownership, and management) is the "dividing line" between payments that do affect price comparability and those that do not, and that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in their treatment of the evidence

[327] Indonesia's response to Panel question No. 32, para. 1.50. See also Indonesia's first written submission, paras. 4.128-4.130, 4.155, and 4.156.

[328] **[***]**

[329] See Indonesia's first written submission, fn 116; opening statement at the first meeting of the Panel, para. 5; and response to Panel question No. 31, fn 15. The only evidence Indonesia points to in this regard is set out in Exhibit IDN-18 and Exhibit IDN-19, neither of which pertain to the alleged **[***]** nature of the ownership, control, or management of the respective companies.

[330] **[***]**

[331] **[***]**

[332] See Indonesia's response to Panel question No. 31, para. 1.24.

[333] For the evidence allegedly ignored concerning ownership and control, see Indonesia's first written submission, paras. 4.152-4.186, and PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011, (Exhibit IDN-34) (BCI), pp. 12-14; for the "functions" criterion, see Indonesia's first written submission, paras. 4.118 and 4.133-4.151, and Summary of the meeting between PT Musim Mas and the European Commission related to case AD563 Fatty alcohols before the EU Hearing Officer, 4 October 2012, (Exhibit IDN-46) (BCI), pp. 2-7; for PT Musim Mas' direct sales, see Indonesia's first written submission, paras. 4.182-4.186, and PT Musim Mas presentation, (Exhibit IDN-26) (BCI), pp. 6-10; for ICOF-S trade in products of unrelated entities, see Indonesia's first written submission, paras. 4.234-4.256, and PT Musim Mas presentation, (Exhibit IDN-26) (BCI), pp. 14-16; and for the reliance on the terms of the Sale and Purchase Agreement, see Indonesia's first written submission, paras. 4.187-4.232.

[334] See above paras. 7.79 and 7.82.

[335] See above para. 7.96.

and criteria cited by Indonesia relating to the mark-up and the relationship between PT Musim Mas and ICOF-S.

#### 7.3.5.3 Analysis of Indonesia's argument that the EU authorities incorrectly deducted ICOF-S' SG&A and profit

7.112. Indonesia argues that the adjustment made by the EU authorities to PT Musim Mas' export price created an asymmetry between the ex-factory export price and the normal value calculated for this producer. This is because the value of the adjustment was calculated on the basis of ICOF-S' SG&A and profit, which, according to Indonesia are necessary components of the export price of the product under investigation. Since the EU authorities made no such adjustment for SG&A and profit on the normal value side, the methodology used resulted in an unfair comparison in violation of Article 2.4 of the Anti-Dumping Agreement.

##### 7.3.5.3.1 Factual background

7.113. The record contains evidence on the EU authorities' method for establishing the value of the allowance made to PT Musim Mas' export price. In particular, the EU authorities explained in Annex 2 to the Preliminary Disclosure ("Calculation of dumping margin – PT MUSIM MAS") that:

> For sales made by ICOFS to unrelated customers in the Union, allowance in the form of adjustments to the export price were made for transport, insurance, handling, loading and ancillary costs, packing, and credit, on the basis of the amounts reported by ICOFS. … In respect of these sales, allowance in the form of an adjustment for commission (mark-up) for ICOFS, of **[***]** on turnover, was also made. This represents SG&A of **[***]** (excluding transport and insurance) and profit of **[***]**, on the basis of ICOFS-PL.[336]

The same method was used for indirect sales (via a related importer in the EU) of fatty alcohols to the European Union.[337] The Final Determination then describes the methodology as follows:

> In respect of the adjustment pursuant to Article 2(10)(i) of the basic regulation, it is considered appropriate to use a reasonable profit margin independent of the actual profit resulting from transfer prices in order to avoid any distorting effects that may arise from the transfer prices. Therefore, the actual profit margins of the traders in the third country which were used at the provisional stage were replaced by a profit of 5% which is considered a reasonable profit for the activities carried out by trading companies in the chemical sector, as was done in previous cases.[338]

Further, the European Union clarified that in response to questions from the Panel that:

> [T]he European Commission did not simply accept the 5% mark-up/commission of the Sale and Purchase Agreement as the level of the adjustment that was to be made but rather looked at the cost/profit of ICOF-S and constructed the amount for the commission/mark-up based on what was considered to be a reasonable profit for activities carried out by trading companies in the chemical sector which was added to the actual SG&A of ICOF-S.[339]

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[336] Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI), p. 4.

[337] Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI).

[338] Final Determination, (Exhibit IDN-4), para. 36. Exhibit EU-11 explains that the amount of the notional commission deducted from the export price varied according to the sales channels used to sell the product in the EU. For sales made via the related importer, the notional commission was composed of a **[***]** amount for ICOF-S' SG&A and a **[***]** for ICOF-S. For sales made directly by ICOF-S the amounts used were respectively **[***]** SG&A for ICOF-S and **[***]** notional profit. The European Union explains that the percentage of SG&A used is higher for direct sales made by ICOF-S than for sales made via the related importer because ICOF-S incurs higher SG&A when directly selling to unrelated customers. (Detailed breakdown of the calculation PTMM's export price, (Exhibit EU-11) (BCI)).

[339] European Union's response to Panel question No. 12, p. 13.

7.114. In view of the foregoing, we understand that, due to the close ties between PT Musim Mas and ICOF-S, which had the potential to affect the reliability of the mark-up, the EU authorities assessed the amount for the mark-up on the basis of ICOF-S' P&L and what they considered to be a reasonable profit margin for this particular sector, rather than on the basis of the actual margin reflected in the Sale and Purchase Agreement between PT Musim Mas and ICOF-S.[340] The EU authorities then deducted this amount from the export price as required under Article 2(10) of the Basic Anti-Dumping Regulation.

#### 7.3.5.3.2 Analysis of the Panel

7.115. Indonesia's argument consists of two parts.

7.116. First, Indonesia contends that there is an "asymmetry" between the ex-factory export price and the ex-factory normal value established by the EU authorities for the purpose of determining the dumping margin of PT Musim Mas. This argument is premised on the following assertions:

a. Since ICOF-S acts as the sales department of PT Musim Mas, the SG&A expenses for PT Musim Mas' export sales were, in fact, the SG&A expenses incurred by ICOF-S. Relatedly, the profit obtained from export sales of the product concerned was split between ICOF-S and PT Musim Mas. Therefore, by deducting ICOF-S' SG&A and profit from the export price, the EU authorities obtained an ex-factory export price for sales of the product under investigation which included no amount for SG&A and which included only a share of the profits accrued in respect of these sales.

b. By contrast, the ex-factory normal value included both PT Musim Mas' full profits on sales of the product concerned and any indirect selling expenses relating to these sales.[341]

Second, Indonesia contends that, as a matter of law, no allowance for profit and SG&A can be made under the third sentence of Article 2.4, as profit and SG&A are essential components of the prices being compared.[342]

7.117. Although Indonesia initially described this issue as a violation of the second sentence of Article 2.4 (the obligation to make a comparison at the same level of trade)[343], it later clarified that this case does not involve a "level of trade" issue concerning sales made to different types of customers which might involve different or additional costs to the producer.[344] We therefore confine our analysis to whether the deduction for the mark-up was impermissible under Article 2.4 for the two aforementioned reasons advanced by Indonesia.

[340] The European Union notes that: "that number was actually very close to the mark-up ICOF-S was entitled to according to the Sale and Purchase Agreement." (European Union' s second written submission, para. 69).

[341] Indonesia's response to Panel question No. 14, paras. 1.68-1.70, contains a detailed explanation of this alleged asymmetry.

[342] Indonesia's response to Panel question Nos. 7, para. 1.36, and 31, para. 1.37.

[343] See for example Indonesia's response to Panel question No. 2, para. 1.25. We also note that during the underlying investigation, PT Musim Mas specifically requested a level of trade adjustment to the normal value on the basis of Article 2(10)(d)(ii) of the Basic Anti-Dumping Regulation, which provides that: "when an existing difference in level of trade cannot be quantified because of the absence of the relevant levels on the domestic market of the exporting countries, or where certain functions are shown clearly to relate to levels of trade other than the one which is to be used in the comparison, a special adjustment may be granted." The Panel understands that this request aimed at compensating a possible asymmetry between the sales functions reflected in the adjusted export price (namely, the sales functions undertaken by PT Musim Mas without the intervention of ICOF-S) and the sales functions reflected in the normal value (namely, the sales functions undertaken by PT Musim Mas for domestic sales). In our view, this claim is different from the argument made before the Panel by Indonesia in the present proceedings.

[344] Indonesia's comments on the European Union's response to Panel question No. 41, para. 3.2.

#### 7.3.5.3.2.1 Whether the allowance for the mark-up led to an asymmetry between the export price and the normal value

7.118. Indonesia asserts that, by making the allowance for the mark-up, the EU authorities "establish[ed] an export price that was not at the same level of trade as the normal value because it had elements deducted (profit and SG&A) that were not deducted from the normal value".[345] In our view, this assertion raises a question of fact, namely, whether the export price to the European Union that the EU authorities compared with the normal value excluded certain elements (profit and SG&A) that were included in the normal value.

7.119. We begin by analysing the pertinent elements of the export price and normal value that were compared. The P&L submitted by PT Musim Mas as part of its response to the EU authorities' anti-dumping questionnaire provides a breakdown of the prices which were compared. This document includes entries for SG&A pertaining to the product under consideration **[*****[346]**]** The amounts of SG&A reported for each category of sale are identical, namely **[***]**.[347] These reported amounts included components for **[***]**, which were also identical, namely, **[***]**. The fact that the **[***]** expenses reported in PT Musim Mas' P&L are identical for both domestic sales and exports to the European Union suggests that PT Musim Mas incurred internally the same level and type of costs for both categories of sales, which were reflected in the respective prices to domestic buyers and to ICOF-S.[348]

7.120. Thus, we cannot accept Indonesia's argument that the export price lacked components of SG&A – namely, those represented by ICOF-S' involvement on sales to the European Union – that were included in the normal value with which it was compared.[349] On the contrary, both the export price and the normal value that were compared included similar allocations of amounts for SG&A, encompassing identical percentage amounts for marketing and selling expenses. Further, the available evidence suggests that ICOF-S' involvement in export sales to the European Union represented an additional cost, for which there was no equivalent on the domestic side, thereby giving rise to a difference for which an adjustment was required.[350]

7.121. We likewise cannot accept Indonesia's argument that the export price that was compared to the normal value excluded a profit component. The P&L submitted by PT Musim Mas recorded amounts of profit pertaining to the product concerned for both direct domestic sales to final buyers and for sales to ICOF-S that were destined for the European Union.[351] The reported amounts of profit for the respective sales channels were **[*****[352]**]**

7.122. Indonesia disputes the reliance on PT Musim Mas' P&L, stating that the reported SG&A and profit figures were provided for the purpose of the "profitability test" and for constructing the normal value and "had nothing to do with the issue of the sales process for domestic or export sales".[353] Indonesia also questions the reliability of the figures in the P&L for the purposes of ensuring a fair comparison because "PTMM's SG&A expenses were reported on an aggregate, company-wide basis, covering all SG&A-related activities with respect to all products, and allocated in Table 2.3 on the basis of the value of sales of different products to different markets" and, therefore, "the 'identical percentages' are the result of a simple mathematical calculation and not a determination of the level of involvement of the two arms of the producer/exporter in the sales

[345] Indonesia's response to Panel question No. 2, para. 1.25.
[346] **[***]**
[347] We note however, that the SG&A figure ultimately used by the EU authorities for the normal value was slightly different, namely **[***]**. This was because, in order to exclude transport and insurance from the average cost of production, SG&A had to be reallocated. (See Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI), p. 2).
[348] See above paras. 7.84 and 7.86.
[349] Indonesia's response to Panel question No. 2, para. 1.25.
[350] See above para. 7.84.
[351] Excel file "PTMM definitive disclosure.xls", (Exhibit EU-12) (BCI), spreadsheet 2.3 (TABLE G - PL - (Profit and Loss) - of the exporting producer and each related company), row 44 /columns F and G (indicating **[***]** for "DOMESTIC MARKET - PRODUCT CONCERNED - INDEPENDENT CUSTOMERS"), and row 44 /columns V, W, X and Y (indicating **[***]** for "EXPORT TO OTHER COUNTRIES - PRODUCT CONCERNED - INDEPENDENT CUSTOMERS" and "EXPORT TO OTHER COUNTRIES - PRODUCT CONCERNED - RELATED CUSTOMERS").
[352] **[***]**
[353] Indonesia's comments on the European Union's response to Panel question No. 44, para. 4.13.

process".[354] Finally, Indonesia argues that "the concept of 'profit' in transactions between closely related parties has little commercial sense. … Neither the artificial value assigned by the two units of the seller to their internal transaction nor any 'profit' that accrues to either company as a result is meaningful in determining the ex factory price."[355]

7.123. As noted by Indonesia, "it is not for the Panel to step into the shoes of the investigating authority and make a determination in lieu of the investigating authority", but rather, "it is for the Panel to review the plausibility of the investigating authority's explanation in the light of the facts on the record".[356] In addition, our task is not to assess whether the value of the allowance calculated by the EU authorities was correct: in fact, Indonesia has repeated several times in the course of the proceedings that the value of the allowance is not at issue in the present dispute.[357] Rather, in order to accept Indonesia's argument that the allowance resulted in an asymmetrical comparison, we need to determine that the evidence on the record demonstrates that the export price used by the EU authorities for the comparison lacked the components alleged by Indonesia that are otherwise reflected in the normal value used for the comparison.

7.124. We consider that PT Musim Mas' questionnaire response is useful evidence for the purpose of assessing Indonesia's argument. In our view, even if PT Musim Mas' P&L was not prepared specifically for the purpose of making allowances under Article 2.4, its depiction of PT Musim Mas' costs, expenses, and profits is relevant and probative for establishing if the ex-factory export price reflected SG&A and profit. This is all the more the case as it was prepared and provided by the producer itself as part of its response to the EU authorities' anti-dumping questionnaire and it was verified by the investigating authority.[358] In addition, we note that Indonesia does not point to any document on the record evidencing that the ex-factory export price determined by the EU authorities did not include an amount for SG&A and profit.

7.125. We therefore conclude that Indonesia has not demonstrated that the EU authorities created an asymmetry between the ex-factory normal value and the ex-factory export price by making an adjustment to PT Musim Mas' export price. For the same reasons, we also conclude that Indonesia has not demonstrated that the comparison was not made at the same level of trade.

#### 7.3.5.3.2.2 Whether it was permissible to calculate the value of the allowance on the basis of ICOF-S' SG&A and profit

7.126. Indonesia argues that the allowance made by the EU authorities was in fact an impermissible deduction of the SG&A and profit from the export price of the "seller", namely, the "single economic entity" formed by PT Musim Mas and ICOF-S.

7.127. We agree with Indonesia that the normal value and the export price to be compared in the establishment of the dumping margin should, in principle, both reflect − on top of the cost of manufacturing − a reasonable amount for administrative, selling, and general costs and for profits. As stated by the panel in *China − Broiler Products*, the price of a product:

> [I]s made of different pricing components that reflect the particular conditions or circumstances of the sale, starting with an amount that represents the cost of production and sale of the product, to which is added an amount for profit. Depending on the particular realities of the relevant market, additional pricing elements − generally an amount for additional costs and profit for each of the successive participant in the distribution chain − are added as the product gets traded further

[354] Indonesia's comments on the European Union's response to Panel question No. 44, para. 4.13. (fn omitted)
[355] Indonesia's response to Panel question No. 31, para. 1.44.
[356] Indonesia's response to Panel question No. 42, para. 3.8.
[357] See Indonesia's response to Panel question No. 38, para. 1.108.
[358] As noted by Indonesia, "the Commission made some adjustments to these figures". (Indonesia's comments on the European Union's response to Panel question No. 41, para. 3.4).

> down the distribution chain, from producer to wholesaler, from wholesale to retailer, and from retailer to end-user.[359]

7.128. However, we disagree that the SG&A and profit of an entity involved in the sale of a product under investigation cannot, in any circumstance, be treated as a difference which affects price comparability. In particular, we consider that the intervention of downstream participants in the sales chain may result in "additional costs and profit" which are likely to affect price comparability across markets. From an accounting point of view, these elements of the price would be characterized as the SG&A and profit of the downstream participant, but they would also be characterized as a direct selling expense for the producer/exporter concerned. We also recall the Appellate Body's statement in *US − Hot-Rolled Steel* that "[t]here are … no differences 'affect[ing] price comparability'" which are precluded, as such, from being subject to an allowance.[360] In the context of Indonesia's claim, the mark-up must be viewed as a whole and not from the perspective of its constituent elements. In addition, it is apparent from the record that the EU authorities only disaggregated the mark-up into components for profit and SG&A in order to quantify the proper amount of the adjustment, having already concluded that the adjustment for the mark-up was warranted.[361] We note that Indonesia recognizes this distinction between: (a) identifying where an allowance should be made; and (b) identifying the proper amount for that allowance:

> Having identified that an adjustment should be made, the investigating authority must next identify or quantify the *amount* of the adjustment.[362]

7.129. The question before us is not therefore whether it was permissible for the EU authorities to deduct the SG&A and profit of the related trader, but rather whether − in the process of making an allowance for a commission − the EU authorities were allowed to use the SG&A and profit as a basis for calculating the value of the adjustment. In this regard, we note the United States' view that an investigating authority is allowed to calculate the value of an adjustment for commission on the basis of the affiliated trader's selling expenses:

> [I]f the producer/exporter and the trading company are affiliated, the price for comparison purposes could be calculated at the ex-factory level by making an appropriate adjustment based on the selling expenses that the affiliated trader incurred.[363]

We agree. When a transfer of funds occurs between two related entities, an investigating authority would be justified in examining whether the actual value of the expense differs from its reported value. Such an examination would, in our view, assist in identifying the proper amount of the adjustment to be made.[364] Since there is evidence on the record that the mark-up was designed to cover the cost of the service rendered by ICOF-S, we consider that its SG&A and profit represent a reasonable basis for calculating the actual value of this service.[365]

7.130. For these reasons, we do not accept Indonesia's argument that the EU authorities were precluded from deducting an allowance that was calculated based on ICOF-S' P&L and what they considered to be a reasonable profit margin for this particular sector.[366]

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[359] Panel Report, *China − Broiler Products*, para. 7.480. Although the panel made these statements in the context of Article 3.1 of the Anti-Dumping Agreement, we see no reason why they should not be equally relevant in the context of Article 2.4.

[360] Appellate Body Report, *US − Hot-Rolled Steel*, para. 177.

[361] Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI), p. 4.

[362] Indonesia's response to Panel question No. 31, para. 1.4. (emphasis original)

[363] United States' third-party response to Panel question No. 1, para. 3.

[364] Although we do not understand Indonesia to challenge the EU authorities' methodology for calculating the allowance in the present case, we note that Indonesia appears to endorse an approach whereby actual expenses are verified in a context of common ownership/control by reference to the relevant entity's P&L. (See, e.g. Indonesia's response to Panel question No. 31, fns 5 and 7, and paras. 1.20-1.23).

[365] See for example the statement made by PT Musim Mas in the anti-dumping questionnaire: **[***]** (Excerpt from PT Musim Mas' questionnaire response, (Exhibit IDN-22) (BCI), pp. 43 and 44).

[366] In our view, contrary to Indonesia's arguments, it was not internally-inconsistent for the EU authorities to have, on the one hand, questioned the reliability of the reported value of the mark-up due to

#### 7.3.5.4 Analysis of Indonesia's argument regarding the different outcome for Ecogreen

##### 7.3.5.4.1 Factual background

7.131. The record shows that two exporting producers in Indonesia cooperated in the original anti-dumping investigation: Ecogreen and PT Musim Mas. Both producers and their related traders responded to the anti-dumping questionnaire and the EU authorities conducted verification visits at the premises of both producers and their related traders.[367] The investigation showed that both producers sold fatty alcohols to the European Union and other destinations, including through related traders based in Singapore (EOS and ICOF-S respectively).

7.132. The record also contains evidence that the remuneration of the Singapore-based traders took the form of trading commissions or mark-ups granted by the producing exporters on sales of the product concerned. Both PT Musim Mas and Ecogreen claimed during the investigation that no allowance should be made to the export price because they formed single economic entities with their related traders. In the Final Determination, the EU authorities noted that:

> Following provisional disclosure both Indonesian exporters pointed out that no adjustment should have been made for differences in commissions pursuant to Article 2(10)(i) for sales via the respective related traders in a third country. Both companies argued that their production companies in Indonesia and the respective related traders in Singapore form a single economic entity and that the traders in the third country act as the export department of their related Indonesian companies.[368]

The EU authorities initially rejected this claim, concluding that:

> [I]n both cases domestic sales, as well as some export sales to third countries, are invoiced directly by the manufacturer in Indonesia, and the traders in Singapore receive a specific commission. For one of the Indonesian companies this commission is mentioned in a contract covering only export sales. Moreover, the traders in the third country also sell products manufactured by other producers, in one case also from unrelated producers. Both related traders in Singapore therefore clearly have functions which are similar to those of an agent working on a commission basis.[369]

As a result of this factual determination, an adjustment for the commissions paid to their respective traders was made to the export prices of Ecogreen and PT Musim Mas, and a dumping margin above the *de minimis* level was calculated for both producers at the provisional and definitive stage.

7.133. In response to the imposition of anti-dumping duties following the Final Determination, Ecogreen filed an action for annulment[370] before the General Court of the European Union, citing in particular the adjustment made to its export price for commissions paid to its related trader. PT Musim Mas filed a similar action for annulment before the Court on 20 January 2012.[371]

7.134. Separately, on 10 March 2009 in unrelated proceedings (Interpipe v. Council of the European Communities[372]) the Court of First Instance of the European Union found in favour of a

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the relationship between ICOF-S and PT Musim Mas, and, on the other, determined that PT Musim Mas and ICOF-S do not form a single economic entity such that payments between them do not affect price comparability. (See Indonesia's first written submission, paras. 4.257-4.263). In a similar vein, we do not accept Indonesia's conception that the EU authorities treated ICOF-S and PT Musim Mas as the collective "seller" of the product for the purposes of determining the dumping margin. (Indonesia's response to Panel question No. 31, para. 1.28). Rather, we understand the EU authorities to have used the price of the product "when destined for consumption in the" European Union as required under Article 2.1 of the Anti-Dumping Agreement, which happened to be the price from ICOF-S.

[367] Preliminary Determination, (Exhibit IDN-3), recitals 7 and 8.
[368] Final Determination, (Exhibit IDN-4), recital 31.
[369] Final Determination, (Exhibit IDN-4), recital 31.
[370] General Court, Case T-28/12, PT Ecogreen Oleochemicals and Others v Council (2013).
[371] General Court, Case T-26/12, PT Musim Mas v Council (25 June 2015), (Exhibit EU-4).
[372] Court of First Instance, Case T-249/06, Interpipe Niko Tube and Interpipe NTRP v Council (2009) ECR II, (Exhibit IDN-49).

claim by exporters of steel tubes in respect of an analogous adjustment.[373] This judgment was confirmed on appeal by the Court of Justice of the European Union on 16 February 2012, i.e. less than a month after the introduction of Ecogreen's action for annulment in the fatty alcohols case. Following the confirmation of the Interpipe judgment on appeal, and in light of this new jurisprudence, the EU authorities decided to reassess their conclusions concerning the impugned allowances in the present case. As a result of this reassessment, the EU authorities adopted an amendment to the Final Determination imposing anti-dumping duties on imports of fatty alcohols from Indonesia on 11 December 2012. This amendment concluded that:

> Given that the factual circumstances for Ecogreen are similar to those of Interpipe NTRP VAT in respect of the adjustment made pursuant to Article 2(10)(i) of the basic Regulation, in particular the following factors in combination: volume of direct sales to third countries of less than 8 % (1-5 %) of all export sales; existence of common ownership/control of the trader and the exporting producer; the nature of functions of the trader and the exporting producer, it is considered appropriate to recalculate the dumping margin of Ecogreen without making an adjustment pursuant to Article 2(10)(i) and to amend the definitive Regulation accordingly.[374]

7.135. As a consequence of this amendment to the Final Determination, the dumping margin established for Ecogreen was recalculated and was found to be *de minimis*. The investigation was therefore terminated in respect of Ecogreen and the anti-dumping measures in force were withdrawn. With regard to PT Musim Mas however, EU authorities considered that:

> There are a number of differences in the circumstances of the two Indonesian exporting producers, in particular the following in combination: the level of direct export sales made by the producer; the significance of the trader's activities and functions concerning products sourced from non-related companies; the existence of a contract between the trader and producer, which provided that the trader was to receive a commission for the export sales.[375]

On this basis, EU authorities concluded that the functions of ICOF-S were similar to those of "an agent working on a commission basis" and that the adjustment made for the mark-up was still justified in the case of PT Musim Mas. Anti-dumping duties thus continued to apply to PT Musim Mas' exports of fatty alcohols.

7.136. Finally, on 25 June 2015, the General Court of the European Union rejected the action for annulment introduced by PT Musim Mas. The General Court of the European Union ruled in particular that the EU authorities had not made an error in finding that ICOF-S had functions similar to those of "an agent working on a commission basis" and that the EU authorities had not breached the principle of equality and non-discrimination in distinguishing PT Musim Mas' situation from that of Ecogreen as regards the application of Article 2(10)(i) of the Basic Regulation, pursuant to which the adjustment was made.

#### 7.3.5.4.2 Main arguments of the parties

##### 7.3.5.4.2.1 Indonesia

7.137. Indonesia submits that the EU authorities failed to provide a reasoned and adequate explanation for eventually treating the two Indonesian exporting producers differently in relation to the trading commission received by their respective traders. Indonesia takes issue both with: the alleged fact (a) that two companies which were allegedly in an "identical situation" for "all relevant purposes"[376] were treated differently; and with the alleged fact (b) that the authority completely changed its appreciation of Ecogreen's factual situation following the Interpipe judgment. With respect to the latter:

[373] Court of Justice, Joined Cases C-191/09 and C-200/09, Council and Commission v Interpipe Niko Tube and Interpipe NTRP (2012).
[374] Revised Determination, (Exhibit IDN-5), recital 5.
[375] Revised Determination, (Exhibit IDN-5), recital 12.
[376] Indonesia's first written submission, para. 4.11.

> Indonesia acknowledges that an investigating authority enjoys a degree of discretion in its assessment of the facts. However, the required "reasoned and adequate explanation" is seriously undermined where the investigating authority, within a span of a few months, goes from emphasizing the commonality between two companies for purposes of an adjustment to arguing that these companies are so fundamentally differently situated that they should be treated differently. Where the investigating authority has itself, merely a few months earlier, espoused an entirely different explanation and interpretation of the record evidence, it is particularly important to explain, in compelling terms, the plausibility of its now diametrically opposed conclusions.[377]

Indonesia argues that these developments demonstrate that the criteria applied to assess whether an allowance was justified or not were "a meaningless set of criteria that fail to address the core issue – namely, whether the transfer of funds at hand does or does not affect price comparability."[378] Indonesia goes on to state that the analysis of the EU authorities was "arbitrary".[379]

7.138. In its first written submission Indonesia submits that this lack of a reasoned and adequate explanation gives rise to a violation of Article 2.4 of the Anti-Dumping Agreement, "independently and jointly [with the argument that no adjustment for commission should be made in the context of a single economic entity]."[380] Indonesia challenges in particular the relevance of the three main criteria[381] used by EU authorities to determine if ICOF-S had functions similar to those of a trader working on a commission basis:

a. the importance of direct sales made by the exporting producer vs sales made through the related trader;

b. the importance of third-party sales made by the related trader; and

c. the existence of a "Sale and Purchase Agreement" between the exporting producer and the related trader.

We set out below the arguments put forward by Indonesia with respect to each of these criteria during the investigation and before this Panel.

7.139. First, in relation to the percentage of direct sales made by PT Musim Mas and Ecogreen, the EU authorities found that the volume of sales to third countries made directly by Ecogreen was less than 8% (1-5%) of all export sales[382], while "the level of direct export sales made by PTMM [was] higher than that of Interpipe NTRP VAT and … this fact distinguishes PTMM from Ecogreen."[383] Indonesia argues that this criterion is irrelevant to a determination of whether ICOF-S had the same functions as "an agent working on a commission basis" and of whether

[377] Indonesia's first written submission, para. 4.270.
[378] Indonesia's response to Panel question No. 42, para. 3.7.
[379] Indonesia's first written submission, para. 4.37.
[380] Indonesia's first written submission, para. 4.48.
[381] The General Court of the European Union mentions these three criteria at recital 50 of its Judgement in case T-26/12 (PT Musim Mas vs Council): "it is apparent from recital 31 of the contested regulation that the Council based its conclusion, in particular, that ICOF S did not carry out the functions of an internal sales department, on three factors, namely, first, on the fact that ICOF S also sold products manufactured by other producers, including by unrelated producers; secondly, on the fact that the applicant paid ICOF S a commission, mentioned in a contract, only on the export sales made by ICOF S; and, thirdly, on the fact that the applicant invoiced directly domestic sales and some export sales to third countries." (General Court, Case T-26/12, PT Musim Mas v Council (25 June 2015), (Exhibit EU-4)).
[382] Revised Determination, (Exhibit IDN-5), recital 5.
[383] Revised Determination, (Exhibit IDN-5), recital 27. The relevant determinations made by the EU authorities during the investigation do not specify what is the exact level of PT Musim Mas' direct sales. But the General Court of the European Union in PT Musim Mas vs Council notes at recital 69 that: "it is apparent from the documents before the Court that the applicant acted as the contracting party in respect of 27.08% of export sales." In paragraph 42 of its opening statement at the first meeting of the Panel with the parties, the European Union indicated that "PT Musim Mas made a significant amount of export sales (about 20% of all export sales)".

PT Musim Mas and Ecogreen were in a different situation in this regard. More specifically, Indonesia submits that:

a. the EU authorities' reliance on a quantitative threshold to differentiate between PT Musim Mas and Ecogreen is "arbitrary".[384] Indonesia adds that given the fluctuating level of these sales, the conclusion could differ for a given company from one year to the next, without any change in the underlying corporate structure. This would be an "absurd outcome"[385]; and

b. in addition, according to Indonesia, it was established during the investigation that the invoicing of certain export sales by PT Musim Mas occurred only at the request of specific clients for reasons pertaining to the application of rules of origin; in spite of this, all sales were "'performed' from Indonesia", in the sense that the goods were manufactured and shipped from Indonesia.[386]

7.140. Second, in relation to third-party sales, the EU authorities noted that, in the case of ICOF-S, the trader's overall activities were based "to a significant extent" on supplies originating from unrelated companies. The trader's functions were therefore similar to those of "an agent working on a commission basis".[387] Before us, Indonesia argues that "the existence or extent of trading third-party produced goods *per se* says essentially nothing about the relationship between a producer (like PT Musim Mas) and a selling department (ICOF-S)".[388] It also submits that the EU authorities' criterion appears to suggest that an entity consisting of a production company and a selling company constitutes a SEE "only if the selling entity does not trade more than a *de minimis* amount of third party products".[389] For these reasons, Indonesia also considers that this criterion was irrelevant to a determination of whether ICOF-S functions were similar to those of "an agent working on a commission basis" and whether PT Musim Mas and Ecogreen were in a different situation in this regard.

7.141. Finally, in relation to the Sale and Purchase Agreement between PT Musim Mas and ICOF-S, the EU authorities found that its existence was an important difference between PT Musim Mas and Ecogreen, the latter of which had no such contract.[390] Indonesia considers however that:

a. The fact that one company provided such a "commission" on the basis of a written agreement and the other company without a written agreement "can hardly be the basis for drawing a bright line of distinction between the companies".[391] Indonesia considers that it was incumbent upon EU authorities to explain in which regard the relationship between PT Musim Mas and ICOF-S was different from the relationship between Ecogreen and EOS.[392]

b. PT Musim Mas demonstrated during the investigation that the Sale and Purchase Agreement was merely a "master agreement" aimed at complying with applicable tax guidelines and internationally accepted guidelines on transfer pricing. As a consequence, this agreement was irrelevant for assessing whether the trader's functions were similar to those of an agent working on a commission basis.[393]

#### 7.3.5.4.2.2 European Union

7.142. The European Union responds that Indonesia has not demonstrated that the different conclusions reached by the investigating authority in the case of PT Musim Mas and Ecogreen

[384] Indonesia's first written submission, para. 4.275.
[385] Indonesia's first written submission, fn 211.
[386] Indonesia's first written submission, para. 4.274
[387] Revised Determination, (Exhibit IDN-5), recital 29.
[388] Indonesia's first written submission, para. 4.246.
[389] Indonesia's first written submission, para. 4.246.
[390] See for example Final Determination, (Exhibit IDN-4), recital 31; and Revised Determination, (Exhibit IDN-5), recital 31.
[391] Indonesia's first written submission, para. 4.274.
[392] Indonesia's first written submission, para. 4.279.
[393] Indonesia's second written submission, paras. 2.46 and 2.53; first written submission, para. 4.195.

respectively, led to a violation of specific provisions of the Anti-Dumping Agreement. The only relevant question is whether the EU authorities reached a reasoned conclusion that the commission paid to ICOF-S was a difference which affects price comparability. According to the European Union, this question "has nothing to do with Ecogreen".[394]

7.143. In fact, the European Union submits that the EU authorities applied the same relevant provisions of the Basic Anti-Dumping Regulation − Article 2(10)(i) − to the facts of each exporting producer and relied on the same criteria for conducting this analysis.[395] On this basis the authorities found that the respective circumstances of each trader justified a different outcome for PT Musim Mas and Ecogreen, and, according to the European Union, this conclusion was reached after an extensive discussion of both producers' argument and factual circumstances. The European Union noted the following key differences:

a. PT Musim Mas had more significant amounts of direct export sales as compared to Ecogreen;

b. ICOF-S has no exclusive relationship with PT Musim Mas but also sells many other products from unrelated parties; and

c. The relationship between PT Musim Mas and ICOF-S was governed by a comprehensive, formal Sale and Purchase Agreement which contemplates a mark-up for ICOF-S international activities, while no such contracts existed for Ecogreen.

d. In light of these criteria, ICOF-S appeared to have functions similar to those of "an agent working on a commission basis", while Ecogreen did not.

7.144. With regard to the Revised Determination, the European Union explains that the similarity between the facts concerning Ecogreen and those concerning Interpipe prompted the EU authorities to review the factual findings made during the investigation:

> Because the factual circumstances concerning Ecogreen were similar to those giving rise to a judgment of the CJEU that no adjustment was warranted under those factual circumstances, the European Union concluded that it could not make an adjustment with respect to Ecogreen.[396]

The European Union however disagrees with the characterization that different criteria were used by the EU authorities in the amended version of the Final Determination.

#### 7.3.5.4.3 Analysis of the Panel

7.145. In view of the European Union's assertion that Indonesia's argument varied in the course of the proceedings[397], we consider useful to set out our understanding of Indonesia's argument in relation to Ecogreen.

7.146. We understand Indonesia's argument in relation to Ecogreen to have been made in support of its claim under Article 2.4 that, in calculating PT Musim Mas' dumping margin, the EU authorities made an allowance for a factor which did not affect price comparability. More specifically, Indonesia argues that the case of Ecogreen shows that EU authorities used irrelevant criteria in their analysis under Article 2(10)(i) of the Basic Anti-Dumping Regulation and applied them in an arbitrary manner to the facts of the case. This flawed analysis vitiates the conclusion that an adjustment was warranted for PT Musim Mas. Indonesia thus requests the Panel to assess the consistency of the adjustment made for PT Musim Mas with Article 2.4 in light of the explanations given to justify the different results for PT Musim Mas and Ecogreen and a revision of the determination concerning Ecogreen.

[394] European Union's second written submission, para. 103.
[395] European Union's response to Panel question No. 43, para. 21 (lists the criteria reviewed by the EU authorities for PT Musim Mas and Ecogreen).
[396] European Union's response to Panel question No. 43, para. 20.
[397] European Union's response to Panel question No. 43, para. 20.

7.147. In considering Indonesia's argument, we find particularly salient Article 6.10 of the Anti-Dumping Agreement which requires investigating authorities, as a general rule, to determine an individual margin of dumping for each known producer/exporter concerned of the product under investigation. This, in turn, suggests to us that the relevant facts and evidence will vary from producer to producer and that each producer's circumstances should be evaluated individually and independently in an anti-dumping investigation. That notwithstanding, we do not exclude that the treatment accorded to other exporters could, in some circumstances, be potentially relevant to whether the explanation for a particular outcome given by the authorities is reasoned and adequate.[398] For instance, where an investigating authority uses radically different reasoning in respect of very similar fact patterns, this could potentially indicate that the reasoning itself is somehow flawed or biased.

7.148. We recall, however, our conclusion that the explanation given by the EU authorities for their determination that an adjustment for the mark-up in question was warranted in the case of PT Musim Mas is reasoned and adequate. This conclusion was based on our finding that the EU authorities had a sufficient evidentiary basis for their factual findings that[399]:

a. the mark-up was a factor that had an impact on the price to be compared and was granted on export sales but not on domestic sales; and

b. ICOF-S had functions similar to an agent working on a commission basis in the sense of Article 2) 10) i) of the Basic Anti-Dumping Regulation.

We thus considered the EU authorities had a sufficient evidentiary basis − encompassing both of these factual findings and their underlying evidence − for establishing that the mark-up was a factor having an impact on the prices to be compared that was linked exclusively to the export side. On that basis, we considered that an unbiased and objective investigating authority could have found the mark-up to constitute a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement.[400]

7.149. We will now assess whether the different outcome for Ecogreen affects our conclusion in this regard. In particular, we proceed to review whether Indonesia has demonstrated that: (a) the factual findings on which the EU authorities based their conclusion were irrelevant to an analysis of the comparability between the normal value and the export price; (b) the revised determination made following the Interpipe judgment was not reasoned and adequate; and (c) the EU violated Article 2.4 of the Anti-Dumping Agreement by failing to give a reasoned and adequate explanation of the different results for Ecogreen and PT Musim Mas.

#### 7.3.5.4.3.1 Whether Indonesia has demonstrated that the criteria used by the EU authorities were irrelevant to an analysis of price comparability

7.150. Indonesia argues that the different outcomes for Ecogreen and PT Musim Mas and the Revised Determination concerning Ecogreen demonstrate that the criteria used by the EU authorities in their application of Article 2(10)(i) of the Basic Anti-Dumping Regulation were irrelevant.

7.151. We begin by recalling that Article 2.4 prescribes no method and no specific criteria for assessing whether a particular factor can be characterized as a difference which affects price comparability. We also recall that our assessment focuses on whether the EU authorities had sufficient evidence to justify an allowance for a difference which affects price comparability, including when such evidence is viewed against the argumentation and evidence provided by the investigated producers in rebuttal.

7.152. Like Indonesia, we consider that "generally", the EU authorities have applied the same criteria under EU law to both PT Musim Mas and Ecogreen.[401] In the Revised Determination

[398] See, e.g. Panel Report, *US − Softwood Lumber V*, para. 7.320; and Appellate Body Report, *US − Softwood Lumber V*, paras. 173 and 174.
[399] See above, section 7.3.5.1.4.1.
[400] See above, section 7.3.5.1.4.2.
[401] Indonesia's response to Panel question No. 43, para. 3.15.

however, the EU authorities introduced a quantitative criterion for direct sales made by the producers, in order to reflect the findings of the Court of Justice of the European Union in the Interpipe case. While the Final Determination notes that "some export sales to third countries are invoiced directly by the manufacturer in Indonesia", the Revised Determination indicates that the volume of direct sales to third countries is less than 8% (1-5%) of all export sales for Ecogreen. The Revised Determination also introduced a quantitative benchmark for third-party sales made by the related trader.[402]

7.153. It is unclear to us why the introduction of a quantitative benchmark relating to the level of direct sales made by the producers and the level of third-party sales made by their related traders in the Revised Determination would vitiate the EU authorities' analysis with respect to PT Musim Mas. In particular, Indonesia does not dispute that an investigating authority enjoys a certain degree of discretion in its assessment of the facts, "which may also entail a change in the analytical framework applied during the investigation".[403] Indeed, in our view, it stands to reason that a high level of direct sales made by the producer (we understand that this level reached 20% or more in the case of PT Musim Mas) as well as a high level of third-party sales could be relevant factors in assessing the functions of the trader, which may, in turn, shed light on the nature of the mark-up as an expense or as a mere tool to allocate profits between subsidiaries.

7.154. Similarly, with regard to the existence and content of the written Sale and Purchase Agreement between PT Musim Mas and ICOF-S, we do not see how the analysis made in the case of Ecogreen affects the relevance of the factual findings made by the EU authorities in the case of PT Musim Mas. We found that it was reasonable for the EU authorities to rely − *inter alia* − on the Sale and Purchase Agreement for their findings that the mark-up was a factor having an impact on the prices to be compared and tied to export sales and that ICOF-S had functions similar to those of a trader working on a commission basis.[404] The relevance of these factual findings is in no way affected by the fact that the EU authorities may (or may not) have disregarded whether a similar arrangement existed between Ecogreen and EOS, albeit under a different form.

7.155. Therefore, we are not convinced by Indonesia's argument that, in light of the analysis conducted for Ecogreen, the explanations which support the determination made for PT Musim Mas are not reasoned or adequate.

#### 7.3.5.4.3.2 Whether the explanation given for the different outcomes for Ecogreen and PT Musim Mas was reasoned and adequate

7.156. We recall that in their initial assessment of the facts, the EU authorities considered that, in relation to trading commissions, the characteristics of the export sales made to the European Union by the two exporting producers justified an allowance to their respective export prices. In particular, the EU authorities indicated in the Final Determination that:

> [I]n both cases domestic sales, as well as some export sales to third countries, are invoiced directly by the manufacturer in Indonesia, and the traders in Singapore receive a specific commission. … Moreover, the traders in the third country also sell products manufactured by other producers, in one case also from unrelated producers. Both related traders in Singapore therefore clearly have functions which are similar to those of an agent working on a commission basis.[405]

With regard to the level of direct sales made by the producers, the Final Determination stated that "for each producer concerned, those sales represent a considerable percentage of its domestic sales".[406]

7.157. The EU authorities therefore considered that the factual situation of the respective producers justified an adjustment under Article 2(10)(i) of the Basic Anti-Dumping Regulation. Although we do not have sufficient information before us to assess whether the circumstances of

[402] Revised Determination, (Exhibit IDN-5), recital 29.
[403] Indonesia's response to Panel question No. 43, para. 3.11.
[404] See for example, section 7.3.5.1.4.1 and section 7.3.5.1.4.2 above.
[405] Final Determination, (Exhibit IDN-4), recital 31.
[406] Final Determination, (Exhibit IDN-4), recital 33.

the two companies were identical or similar in all aspects, the record shows that the EU authorities considered that the respective producers were in a similar situation for the purposes of Article 2(10)(i), i.e. both of their related traders had functions similar to those of "an agent working on a commission basis" and received a commission for their involvement in export sales.

7.158. In its revised assessment of the facts however, the EU authorities – applying the same criteria – reached a different conclusion for EOS, namely that EOS did not have functions similar to those of "an agent working on a commission basis". The Revised Determination only provides limited explanation as to why the commission granted by Ecogreen should no longer be treated as a difference which affects price comparability, stating that:

> Given that the factual circumstances for Ecogreen are similar to those of Interpipe NTRP VAT in respect of the adjustment made pursuant to Article 2(10)(i) of the basic regulation, in particular the following factors in combination: volume of direct sales to third countries of less than 8 % (1-5 %) of all export sales; existence of common ownership/control of the trader and the exporting producer; the nature of functions of the trader and the exporting producer, it is considered appropriate to recalculate the dumping margin of Ecogreen without making an adjustment pursuant to Article 2(10)(i) and to amend the definitive Regulation accordingly.[407]

We find this somewhat lacking as an explanation of why the commission granted by Ecogreen to EOS should not be treated as a difference which affects price comparability. We agree with Indonesia that "the Commission did not explain how the similarities between how the two producers/exporters structured their operations that compelled identical treatment in the Definitive Regulation were no longer relevant".[408]

7.159. However, while we have concerns as to the reasonableness and adequacy of the revised determination concerning Ecogreen, it is not clear to us that this is sufficient to demonstrate a violation of Article 2.4 of the Anti-Dumping Agreement in respect of PT Musim Mas. This is because Indonesia's claim under Article 2.4 is "based on an improper deduction from the export price of the Indonesian exporter-producer PT Musim Mas". Indonesia is not making a claim that EU authorities violated Article 2.4 by not making an allowance to Ecogreen's export price or by changing their assessment after the end of the investigation.[409] In that context, we do not consider that an insufficient explanation for the different outcome with respect to Ecogreen affects the EU authorities' determination that the mark-up granted to ICOF-S was a difference which affects price comparability.

### 7.3.6 Conclusion on Indonesia's claims under Articles 2.3 and 2.4 of the Anti-Dumping Agreement

7.160. Based on the foregoing analysis of the three grounds on which Indonesia bases its claim under Article 2.4 of the Anti-Dumping Agreement, we conclude that Indonesia has not demonstrated that the EU authorities acted inconsistently with that provision by making an improper deduction for a factor that did not affect price comparability.

7.161. Since Indonesia's claim under Article 2.3 of the Anti-Dumping Agreement is consequential on a finding of inconsistency with Article 2.4, we likewise conclude that Indonesia has not demonstrated that the EU authorities acted inconsistently with Article 2.3.

[407] Revised Determination, (Exhibit IDN-5), recital 5.
[408] Indonesia's response to Panel question No. 43, para. 3.15
[409] See for example para. 3.11 of Indonesia's response to Panel question No. 43: "Indonesia does not argue that an investigating authority may not change its assessment criteria after the end of the investigation." Moreover, although the request for the establishment of a panel presented by Indonesia contains a reference to an alleged violation of GATT Article X.3(a) by the European Union, Indonesia has not provided any argument during the proceedings in support of such a claim. The Panel therefore considers that Indonesia has not made a *prima facie* case that the European Union has violated GATT Article X.3(a).

## 7.4 Indonesia's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement

### 7.4.1 Introduction

7.162. Indonesia claims that the EU authorities acted inconsistently with Article 3.5 of the Anti-Dumping Agreement by failing to conduct a proper non-attribution analysis with respect to two "known factors" within the meaning of the third and fourth sentences of that provision, namely, the "economic crisis" and "issues related to the European Union's domestic industry's access to raw materials".[410] As a consequence, Indonesia claims that the EU authorities also acted inconsistently with Article 3.1 by failing to conduct an "objective examination" on the basis of "positive evidence".[411]

7.163. We begin by addressing Indonesia's arguments concerning the "economic crisis" factor, before turning to its arguments concerning the alleged "access to raw materials" factor.

### 7.4.2 Relevant provisions of the covered agreements

7.164. Article 3.1 of the Anti-Dumping Agreement provides:

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

7.165. Article 3.5 of the Anti-Dumping Agreement provides:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

### 7.4.3 The EU authorities' analysis of the economic crisis factor

#### 7.4.3.1 Main arguments of the parties

##### 7.4.3.1.1 Indonesia

7.166. Indonesia submits that the EU authorities' analysis of the "economic crisis" factor was inconsistent with Article 3.5 for three reasons. First, Indonesia argues the EU authorities incorrectly assumed that the effects of the financial crisis began only in 2009, which led to the erroneous assumption that any injury suffered by the domestic industry in 2008 must have been caused only by the effects of the dumped imports to the exclusion of any effects of the crisis.[412] In particular, Indonesia asserts that the EU authorities failed to provide a reasoned and adequate explanation for its overall analysis of the "economic crisis" factor because:

[410] Indonesia's first written submission, paras. 5.1-5.3 and 7.1; second written submission, paras. 3.1 and 5.1.
[411] Indonesia's first written submission, paras. 5.2 and 7.1; second written submission, paras. 3.1 and 5.1.
[412] Indonesia's first written submission, paras. 5.32 and 5.34-5.43.

a. the apparent central assumption (that the crisis began in 2009, as reflected in paragraph 96 of the Definitive Determination) is incorrect because this assumption is contradicted by record evidence and by evidence of which judicial notice can be taken;

b. the EU authorities failed to explain in paragraph 96 of their Definitive Determination why, despite there being multiple pieces of evidence on the record that suggest that the crisis began and its effects were felt already in 2008, their central assumption that the crisis began in 2009 could nevertheless be sustained; and

c. while paragraph 96 is premised on the assumption that the crisis began only in 2009, other statements by the EU authorities in other sections of their determinations suggest that they considered that the crisis began in 2008, which makes their analysis internally inconsistent, because the same crisis cannot start both in 2008 and in 2009.

7.167. Second, Indonesia contends that the EU authorities failed to separate and distinguish the injurious effects of the economic crisis − despite acknowledging expressly that the crisis had such effects − and thus did not properly conclude that a causal link existed between the dumped imports and injury within the meaning of Article 3.5.[413] For Indonesia, since the economic crisis injured both the domestic industry and the dumped imports contemporaneously in the same channels (namely prices and demand reduction), it was incumbent on the EU authorities to separate and distinguish the *extent* of the injurious effects of the two respective factors.[414] Third, Indonesia argues that the EU authorities failed to provide a reasoned and adequate explanation for their conclusion on injury because they failed to address interested parties' arguments and record evidence that contradicted their conclusion, including evidence on the temporal coincidence of an increase in imports and improvements in the domestic industry's profitability, and arguments concerning a decrease in captive demand.[415]

#### 7.4.3.1.2 European Union

7.168. The European Union argues the legal standard under Article 3.5 does not prescribe a methodology for separating and distinguishing the effects of other known factors from the effects of the dumped imports.[416] On that basis, the European Union argues that, contrary to Indonesia's claim, it was not required to use a quantitative methodology for separating and distinguishing the effects of the economic crisis.[417] Rather, it is permissible under Article 3.5 to conduct a qualitative analysis. Therefore, the key question is whether the EU authorities properly established the facts with respect to the economic crisis and evaluated the evidence in an objective and unbiased manner.

7.169. In that regard, the EU authorities expressly acknowledged that the economic crisis was a known factor that contributed to the contraction in demand and to price pressure, and that indicators of injury such as capacity utilization and sales volume showed that the situation of the domestic industry worsened with the crisis and somewhat improved with the recovery in the market.[418] However, the improvement of the economic situation, which saw demand going back to 2007 levels, did not bring the industry performance back to the same 2007 levels.[419] Thus, the EU authorities determined that the coincidence of the economic crisis was not sufficient to break the causal link between the dumped imports and injury.[420] In that regard, the European Union notes that the correlation/coincidence approach is very common in trade remedies investigations and was expressly upheld as a proper causation methodology by the Appellate Body in *Argentina – Footwear (EC)*.[421] The European Union rejects Indonesia's argument that the correlation/coincidence approach is applicable only to the causation analysis and not to the

[413] Indonesia's first written submission, paras. 5.32 and 5.44-5.58.
[414] Indonesia's opening statement at the first meeting of the Panel, paras. 77 and 78.
[415] Indonesia's first written submission, paras. 5.32 and 5.59-5.66; opening statement at the second meeting of the Panel, paras. 24 and 25.
[416] European Union's first written submission, para. 122.
[417] European Union's first written submission, para. 126.
[418] European Union's first written submission, paras. 131 and 146.
[419] European Union's first written submission, para. 146.
[420] European Union's first written submission, para. 131.
[421] European Union's first written submission, para. 144 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 144).

non-attribution analysis, instead asserting that it is also a useful tool for examining a possible causal contribution to the injury resulting from other factors.[422]

#### 7.4.3.2 Main arguments of the United States as third party

7.170. The United States submits that the question of whether an investigating authority's analysis is consistent with Article 3 should turn on whether the authority has in fact evaluated the known factors causing injury, and whether its evaluation is supported by positive evidence and reflects an objective examination. It thus disagrees with Indonesia that a quantitative analysis is necessarily required.[423] While the United States does not take a view on the weight the European Union gave to certain evidence, such as the economic downturn and the availability and costs of raw materials, the European Union must demonstrate that it examined these factors in its analysis. Whether or not, as Indonesia claims, the European Union was required specifically to consider these factors under the third sentence of Article 3.5 would depend on whether these factors were known to the investigating authority and whether they were in fact contributing at the same time as the imports to any difficulties experienced by the domestic industry.[424]

#### 7.4.3.3 Evaluation by the Panel

7.171. Indonesia's argument that the EU authorities acted inconsistently with Article 3.5 in their consideration of the "economic crisis" factor comprises three strands, namely, that the EU authorities: (a) failed to adequately separate and distinguish the injurious effects of the economic crisis from those of the dumped imports; (b) erred in determining the year of commencement of the economic crisis; and (c) failed to address certain arguments and evidence presented during the investigation by interested parties. We address each in turn.

##### 7.4.3.3.1 Whether the EU authorities adequately separated and distinguished the injurious effects of the economic crisis from those of the dumped imports

7.172. As a threshold matter, Indonesia and the European Union dispute which aspects of the EU authorities' determination are appropriate for us to review in assessing whether the EU authorities provided a reasoned and adequate explanation of how they separated and distinguished the injurious effects of the economic crisis from those of the dumped imports. In effect, Indonesia argues that we should limit ourselves to the section entitled "Causation" in the Provisional and Final Determinations, rather than seeking to "piece together various disjointed statements scattered across the record".[425] The European Union argues that such an approach would be overly formalistic, and disagrees that the section entitled "Injury" is an "unrelated section" for purposes of examining the effects of other factors on injury.[426]

7.173. We see no obligation in Article 3.5, nor in Article 3 more generally, that requires a determination to address certain matters only under certain headings. On the contrary, Article 3.5 – which sets out the requirement to demonstrate a causal relationship between the dumped imports and injury – expressly references Article 3.4 through its requirement that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement". In turn, Article 3.4 requires "[t]he examination of the impact of the dumped imports on the domestic industry concerned [including] an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". Therefore, the text of Article 3.5 itself recognizes the interrelationship between the analysis of the alleged effects of dumping and the alleged effects of other known factors that might be causing injury to the domestic industry. Further, insofar as the relevant other "known factor" pertains to a general economic crisis, that factor will necessarily imbue the "evaluation of all relevant economic factors and indices having a bearing on the state of the industry" under Article 3.4.

[422] European Union's second written submission, para. 123.
[423] United States' third-party submission, para. 36.
[424] United States' third-party submission, para. 37.
[425] Indonesia's opening statement at the first meeting of the Panel, paras. 74-76; opening statement at the second meeting of the Panel, para. 26.
[426] European Union's second written submission, paras. 118-121.

7.174. Accordingly, on the basis of both the text of Articles 3.4 and 3.5 and the nature of the factor at issue in the present case, namely, a general economic crisis, it is not unreasonable for an investigating authority's analysis of that factor to appear in both the context of the impact of the dumped imports on the domestic industry and in the context of ensuring injurious effects of other "known factors" are not attributed to the dumped imports. We therefore do not consider it inappropriate in the present case to take into account the EU authorities' analysis of the economic crisis in the context of the impact of the dumped imports on the domestic industry as part of our assessment whether the EU authorities' adequately separated and distinguished the injurious effects of the economic crisis from the dumped imports.[427]

7.175. We now turn to what is required of the EU authorities in separating and distinguishing the injurious effects of other "known factors" from those of the dumped imports. Article 3.5 requires the demonstration of a causal link between the dumped imports and injury for the imposition of anti-dumping measures, and requires the authorities to also examine any other known factors simultaneously causing injury to the domestic industry and ensure that the injury caused by those other factors is not attributed to the dumped imports. Accordingly, the Appellate Body in *US – Hot-Rolled Steel* clarified that an investigating authority "must appropriately assess the injurious effects of those other factors" and that "such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports".[428] The Anti-Dumping Agreement does not provide any further guidance or specify any method as to how the injury caused by other known factors may be separated and distinguished from the injury caused by the dumped imports.[429] Nevertheless, prior panels have taken the view that it is appropriate "to undertake a careful and in depth scrutiny" of a determination in order to evaluate whether the explanations given by an investigating authority are "such reasonable conclusions as could be reached by an unbiased and objective investigating authority in light of the facts and arguments before it and the explanations given".[430] With this in mind, we now review the EU authorities' determination to ascertain whether they adequately separated and distinguished the injurious effects of the economic crisis from the dumped imports.

7.176. The EU authorities addressed the injurious effects of the economic crisis, as distinguished from the dumped imports, in two ways. First, the EU authorities assessed the impact of the dumped imports on the domestic industry before and after the crisis occurred, that is, at times when the economic crisis was not affecting the domestic industry. Before the economic crisis, the market share of the dumped imports from the countries concerned had increased by 54% and their sales had increased by 57%.[431] This corresponded with a 12% decline in the domestic industry's market share and a 15.4% decline in its sales.[432] These figures can be juxtaposed with an increase in domestic consumption during this period of 2.2%.[433] The domestic industry's prices increased by 22.6% during this period while dumped import prices increased comparatively less, by 8%.[434] After the economic crisis (i.e. during the economic recovery), when domestic

[427] This does not mean that we consider it appropriate to "cobble together" disparate or vague references in an investigating authority's determination in order to fashion a coherent analysis that satisfies the "reasoned and adequate" standard. (See Appellate Body Report, *US – Steel Safeguards*, para. 326; and Indonesia's opening statement at the first meeting of the Panel, para. 72). However, we do consider that an investigating authorities' analysis need not be repetitive, and that if something relevant to the assessment of other known factors causing injury is addressed by the investigating authority in its assessment of the economic factors and indices having a bearing on the state of the industry, it is appropriate for a reviewing panel to take the entirety of the determination in this regard into consideration on review.

[428] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

[429] Both Indonesia and the European Union accept that Article 3.5 does not prescribe how the non-attribution analysis is to be conducted. See Indonesia's second written submission, para. 3.3; and European Union's first written submission, para. 122. See also Appellate Body Report, *US – Hot-Rolled Steel*, paras. 223 and 224.

[430] See Panel Report, *EU – Footwear (China)*, para. 7.483.

[431] Preliminary Determination, (Exhibit IDN-3), recitals 70-73 (confirmed in Final Determination, (Exhibit IDN-4), recital 65).

[432] Preliminary Determination, (Exhibit IDN-3), recitals 80 and 81 (confirmed in Final Determination, (Exhibit IDN-4), recital 71).

[433] Preliminary Determination, (Exhibit IDN-3), recitals 64-66 (confirmed in Final Determination, (Exhibit IDN-4), recital 62).

[434] Preliminary Determination, (Exhibit IDN-3), recitals 70-72 (confirmed in Final Determination, (Exhibit IDN-4), recital 65); and Final Determination, (Exhibit IDN-4), recitals 72 and 73.

consumption increased by 4.6%[435], sales of the dumped imports increased by 6.6% and their market share increased by 1.9%, while sales of the domestic industry increased by only 4.3% and its market share by only 1%.[436] At the same time, the domestic industry's prices decreased by 5.3% *vis-à-vis* an increase in the dumped imports' prices of 5%.[437] In our view, it was not unreasonable for the EU authorities to conclude from these indicators that the position of the domestic industry deteriorated in the face of the dumped imports during the portions of the period of investigation unaffected by the economic crisis.[438]

7.177. Second, the EU authorities assessed the impact of the crisis on the dumped imports and the domestic industry respectively. In particular, during the economic crisis, the EU authorities found that the domestic industry's sales decreased by 6.5%, and the dumped imports' sales decreased by 6.7%.[439] The domestic industry's market share declined by 1%, and the dumped import's market share declined by 2%[440], while domestic consumption decreased by 4.8%.[441] The domestic industry's prices decreased by 16.9%, and the dumped imports' prices decreased by 18%.[442] Thus, the EU authorities recognized that both the domestic industry and the dumped imports showed similar downward trends during the crisis. The EU authorities did not, however, attribute these downward effects in the domestic industry to the presence of the dumped imports in the European Union.[443] On the contrary, the EU authorities recognized that:

> The crisis played a role in the performance of the Union industry. Trends in injury factors such as capacity utilisation and sales volume show that the situation of the Union industry worsened with the crisis and somewhat improved with the recovery in the market.[444]

The EU authorities made similar observations in respect of the impact of the crisis on the profitability of the domestic industry, the domestic industry's prices, and the domestic industry's reduced level of demand and decreased production.[445] In our view, the EU authorities clearly recognized that the economic crisis had an adverse impact on the domestic industry independent of the impact of the dumped imports.

7.178. We now turn to the question of whether the conclusion reached by the EU authorities based on this two-part approach satisfies the requirement of Article 3.5 to separate and distinguish the injurious effects of the other known factor, namely, the economic crisis in the present case, from those of the dumped imports. We recall that Indonesia argues that, in order to "separate and distinguish" the effects of the dumped imports from the economic crisis, the EU authorities were required to examine the respective extent of the effects of these factors, because both factors

[435] Preliminary Determination, (Exhibit IDN-3), recitals 64-66 (confirmed in Final Determination, (Exhibit IDN-4), recital 62).
[436] Preliminary Determination, (Exhibit IDN-3), recitals 70-73 and 80-82 (confirmed in Final Determination, (Exhibit IDN-4), recitals 65, 71, and 73).
[437] Preliminary Determination, (Exhibit IDN-3), recitals 70-72 (confirmed in Final Determination, (Exhibit IDN-4), recital 65); Final Determination, (Exhibit IDN-4), recitals 72 and 73.
[438] Final Determination, (Exhibit IDN-4), recitals 87 and 96. While the figures referred to in this and the next paragraph appear to relate principally to calendar years in the period of investigation, it is apparent from the determination that the EU authorities also evaluated these figures in view of the economic crisis. (See, in particular, Preliminary Determination, (Exhibit IDN-3), recitals 73, 77, 79, 87, and 108). We also observe that Indonesia does not take issue with the EU authorities' evaluation of movements in these figures *vis-à-vis* the economic crisis. (See Indonesia's opening statement at the first meeting of the Panel, para. 76).
[439] Preliminary Determination, (Exhibit IDN-3), recitals 70, 71, 80, and 81 (confirmed in Final Determination, (Exhibit IDN-4), recitals 65 and 71).
[440] Preliminary Determination, (Exhibit IDN-3), recitals 70, 73, 80, and 81 (confirmed in Final Determination, (Exhibit IDN-4), recitals 65 and 71).
[441] Preliminary Determination, (Exhibit IDN-3), recitals 64-66 (confirmed in Final Determination, (Exhibit IDN-4), recital 62).
[442] Preliminary Determination, (Exhibit IDN-3), recitals 70-72 (confirmed in Final Determination, (Exhibit IDN-4), recital 65); and Final Determination, (Exhibit IDN-4), recitals 72 and 73.
[443] Final Determination, (Exhibit IDN-4), para. 96; and Preliminary Determination, (Exhibit IDN-3), recitals 104, 105, and 108.
[444] Final Determination, (Exhibit IDN-4), para. 96.
[445] See Preliminary Determination, (Exhibit IDN-3), recitals 87 and 104.

affected the domestic industry in the same manner, namely, lower prices and reduced demand.[446] Indonesia's argument implies, in effect, that the failure to use "quantitative assessment tools" or a "basic quantitative method" in the present case leads to an inconsistency with Article 3.5.[447] In Indonesia's view, by failing to examine the extent of injury caused by the economic crisis *vis-à-vis* the extent of injury caused by the dumped imports, the EU authorities failed to "separate and distinguish" these factors under Article 3.5 of the Anti-Dumping Agreement.[448]

7.179. We disagree. As both parties acknowledge, Article 3.5 does not prescribe a particular methodology for separating and distinguishing the injurious effects of the dumped imports from other known factors.[449] The EU authorities assessed the impact of the dumped imports on the domestic industry during periods when the economic crisis was not affecting the industry, and found downward trends during those periods. In our view, this provided a sufficient basis for them to consider the impact of the dumped imports on the domestic industry and assess whether they were causing injury independently of the effects of the crisis. The EU authorities also assessed the impact of the economic crisis on both the domestic industry and the dumped imports, which showed that the crisis had similar negative effects for both the domestic industry and the dumped imports. As we have explained above, the EU authorities consequently did not attribute the injurious effects experienced by the domestic industry as a result of the crisis to the dumped imports.[450] The EU authorities concluded that:

> [T]he investigation showed that the improvement [after the crisis] did not allow the recovery of the Union industry which was far from its economic situation that prevailed at the beginning of the period considered. Furthermore, as mentioned in recital 89, 2008, just before the financial crisis started, was the year with the highest increase in dumped imports from the countries concerned and the sharpest decrease in sales volume of the Union industry. After that year the Union industry did not recover and the dumped imports continued to be massively present in the Union market. For these reasons it is clear that, regardless of other factors, dumped imports largely contributed to the material injury suffered by the Union industry during the IP.[451]

Therefore, the EU authorities inferred − both from the decline in the domestic industry's market share in the face of the dumped imports *before* the crisis, and from the persistence of this reduced market share *after* the crisis − that the dumped imports largely contributed to material injury suffered by the domestic industry regardless of the economic crisis.[452] We do not consider this conclusion to be unreasonable. If the economic crisis were the cause of injury to the domestic industry during the period of investigation, we would expect to see the domestic industry recover after the crisis abated and its market position to approach what it had been before it suffered the effects of both the crisis *and* the dumped imports. This was not the case. Although domestic consumption increased by 4.6% after the crisis, sales of the dumped imports increased by 6.6%[453], while sales of the domestic industry increased by only 4.3%, and this despite reductions in domestic industry prices at a time when the prices of the dumped imports were increasing.[454] The dumped imports thus performed better than the domestic industry after the crisis, and the domestic industry's market share remained stagnant at the level to which it had fallen as a result of the dumped imports before the crisis.

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[446] Indonesia's first written submission, paras. 5.48 and 5.49; opening statement at the first meeting of the Panel, paras. 77 and 78.

[447] See Indonesia's first written submission, fn 266, paras. 5.95 and 5.96; and opening statement at the first meeting of the Panel, para. 60. Indonesia moved away from this emphasis on quantitative tools during the proceedings (see Indonesia's second written submission, paras. 3.2 and 3.3).

[448] Indonesia's opening statement at the first meeting of the Panel, paras. 77 and 78; first written submission, paras. 5.48 and 5.49.

[449] See Indonesia's second written submission, para. 3.3; and European Union's first written submission, para. 122. See also Appellate Body Report, *US − Hot-Rolled Steel*, paras. 223 and 224; and Panel Report, *EU − Biodiesel (Argentina)*, para. 7.439.

[450] See Final Determination, (Exhibit IDN-4), para. 96; and Preliminary Determination, (Exhibit IDN-3), recitals 87 and 104.

[451] Final Determination, (Exhibit IDN-4), recital 96.

[452] See also Preliminary Determination, (Exhibit IDN-3), recitals 81, 98, and 106.

[453] See above para. 7.176.

[454] See above para. 7.176.

7.180. On the basis of the foregoing, we conclude that Indonesia has not demonstrated that the EU authorities acted inconsistently with Article 3.5 by failing to adequately separate and distinguish the injurious effects of the economic crisis from those of the dumped imports.

#### 7.4.3.3.2 Whether the EU authorities erred in determining the year of commencement of the economic crisis

7.181. Indonesia takes issue with the EU authorities' statement in recital 96 of the Final Determination that "[f]urthermore, as mentioned in recital 89, 2008, just before the financial crisis started, was the year with the highest increase in dumped imports from the countries concerned".[455] Indonesia derives from this statement that the EU authorities assumed that the crisis started in 2009 − not 2008 − and therefore relied on 2008 as a year in which injury could have been caused only by the dumped imports, rather than by the dumped imports together with the economic crisis.[456]

7.182. The European Union points to a series of other references in the Provisional and Final Determinations that it contends demonstrate the EU authorities understood the economic crisis to have begun in 2008.[457] As we have stated above, we do not consider it inappropriate to take into account passages of the determinations other than those in the section entitled "Causation" in evaluating the consistency of the determinations with the European Union's obligations.[458] With that in mind, we consider that the following passages from the EU authorities' determination show that they understood that the injurious effects of the economic crisis on the domestic industry began at some point in 2008:

> The *economic downturn has contributed to the decrease in consumption from 2008*, during which users of the product concerned experienced a drop in demand for their products.[459]
>
> The biggest increase [of market share of the countries concerned] took place between 2007 and 2008. There was a slight decrease of imports *during the economic crisis*, which reduced the market share of the countries concerned by 2%, *between 2008 and 2009*.[460]
>
> Furthermore, *starting from 2008, with the overall economic slowdown* and Union consumption decrease, the exporters from the countries concerned managed to maintain their market share, by reducing prices, still undercutting Union price.[461]

In light of these extracts, we do not accept Indonesia's factual assertion that the EU authorities relied on 2008 as a year in which injury could have been caused only by the dumped imports, rather than by the dumped imports together with the economic crisis.[462] We therefore conclude that Indonesia has not demonstrated that the EU authorities acted inconsistently with Article 3.5 by erroneously attributing injury caused by the economic crisis in 2008 to the dumped imports.[463]

[455] Indonesia's first written submission, para. 5.34; opening statement at the first meeting of the Panel, paras. 63-71.
[456] Indonesia's first written submission, paras. 5.35 and 5.41.
[457] European Union's first written submission, paras. 140-142; second written submission, para. 115.
[458] See above, para. 7.174.
[459] Preliminary Determination, (Exhibit IDN-3), recital 66 (confirmed in Final Determination, (Exhibit IDN-4), recital 62). (emphasis added)
[460] Preliminary Determination, (Exhibit IDN-3), recital 73 (confirmed in Final Determination, (Exhibit IDN-4), recital 65). (emphasis added)
[461] Preliminary Determination, (Exhibit IDN-3), recital 108 (confirmed in Final Determination, (Exhibit IDN-4), recital 102). (emphasis added)
[462] See Indonesia's first written submission, para. 5.35.
[463] In the light of this conclusion, we do not consider it necessary, for the effective resolution of the dispute, to address other aspects of Indonesia's argument in this regard.

#### 7.4.3.3.3 The EU authorities' alleged failure to address certain arguments and evidence

7.183. Indonesia argues that the EU authorities' analysis of the economic crisis failed to address two matters raised by the interested parties during the investigation, namely, the arguments and evidence presented on captive demand[464] and improvements in Cognis' profitability.[465]

7.184. We observe at the outset that both parties relied on paragraph 7.267 of the panel report in *China – X-Ray Equipment* during the proceedings, which states:

> As a general proposition, we agree with China that if there is no relevant evidence before an investigating authority to indicate that a factor is injuring the domestic industry, there is no requirement for the investigating authority to make a finding regarding whether the factor is indeed causing injury, and subsequently to proceed to conduct a non-attribution analysis. In our view, where an interested party has raised an "other factor", it would be preferable for an investigating authority to expressly state that the party has not presented evidence that the factor is injuring the domestic industry, rather than not mentioning the factor at all in its determination. However, where there is indeed no such evidence before the investigating authority, we agree that there can be no inconsistency with Article 3.1 and 3.5 in failing to conduct a non-attribution analysis.[466]

Indonesia also makes reference to paragraph 7.279 of that panel report, which states, in pertinent part, that "an investigating authority's reasoning does not need to refer to the precise terminology used by parties to an investigation to describe a causal factor" and, further, that "it does not need *expressly* to refer to all elements relevant to a particular causal factor, where it is evident that the elements at issue have been implicitly considered".[467] In the context of the issue at hand, we take these principles to stand for the proposition that an investigating authority's determination need not expressly address a particular argument or piece of evidence raised by an interested party during an investigation where: (a) the arguments or evidence at issue have been "implicitly considered" in the authorities' determination; or (b) the arguments or evidence at issue are of insufficient probative value to warrant their express consideration in the determination. We do not understand the parties to contest this proposition in the present case.[468] With that in mind, we now address whether the EU authorities were required to expressly address the two matters referred to by Indonesia.

7.185. We begin with the European Union's alleged failure to address the argument that the injury to the domestic industry in 2008 was caused by the economic crisis, rather than the dumped imports, because in late 2009 and early 2010 dumped imports from the countries concerned (India, Indonesia, Malaysia) increased at the same time as Cognis' profit improved considerably. We observe in this respect that the EU authorities expressly acknowledged that there was some degree of improvement in the domestic industry's position following the economic crisis. For instance, the EU authorities acknowledged that there was an improvement in production and sales

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[464] Indonesia's first written submission, para. 5.64.
[465] Indonesia's first written submission, paras. 5.61 and 5.62.
[466] Indonesia's first written submission, para. 5.74; European Union's second written submission, para. 112; and European Union's opening statement at the second meeting of the Panel, para. 36.
[467] See Indonesia's first written submission, fn 288 (referring to Panel Report, *China – X-Ray Equipment*, paras. 7.276-7.280); and Panel Report, *China – X-Ray Equipment*, para. 7.279. (emphasis original)
Paragraph 7.282 of the panel report in *Thailand – H-Beams* referred to by the panel in this passage of *China – X-Ray Equipment* states:

> While we would certainly have preferred a more robust examination of global demand in the documents forming the basis for our review, including an explicit evaluation of the Kobe earthquake and its effect on world prices and demand as a possible other causal factor of injury, we do not consider that Article 3.5 requires that the documents forming the basis for our review expressly use the *precise terminology* with which a given factor was raised during the investigation, nor an express indication that the investigating authorities have examined all underlying or contributory causal elements which may comprise or influence a given causal factor (in this case, global demand).

(emphasis original)
[468] See, e.g. Indonesia's first written submission paras. 5.74 and 5.78 (citing these aspects of the panel report in *China – X-Ray Equipment*); opening statement at the first meeting of the Panel, para. 86; European Union's first written submission, paras. 118-121; and second written submission, para. 112.

in line with increased domestic consumption[469], and that economic recovery "allowed the … [domestic] industry to reduce its losses with respect to turnover".[470] However, the EU authorities found that the domestic industry was not able to benefit from the recovery of consumption and that its market share remained unchanged from the level to which it fell upon the onset of dumping prior to the crisis.[471] Further, the dumped imports outperformed the domestic industry with respect to market share and sales following the crisis.[472]

7.186. The EU authorities' express consideration of the relevance and significance of positive indicators in the domestic industry's performance following the economic crisis suggests that they did take into account Cognis' improved profit margins, which of course were part of the performance of the domestic industry.[473] We therefore conclude that their omission to explicitly discuss this in their determination does not constitute a violation of Article 3.5.

7.187. Turning to the second matter referred to by Indonesia, Indonesia points to PT Musim Mas' comments on the complaint and tables 5 and 6 of the Complaint to assert that PT Musim Mas "made extensive arguments, supported by record evidence" on captive demand.[474] We have reviewed these exhibits and do not accept Indonesia's assertion that extensive arguments supported by record evidence were made. Table 5 of the Complaint indicates that "EU apparent consumption", including captive consumption, decreased progressively from 2007-2009. Table 6, on the other hand, indicates that "EU apparent consumption" on the "free market" increased between 2007 and 2008, before decreasing between 2008 and 2009. Although PT Musim Mas asserted that this demonstrates that the "real problem" for the domestic industry was decreased captive use, it did not accompany this assertion with evidence or data on the respective proportions of captive consumption *vis-à-vis* "free market" consumption for the product concerned, and therefore it is not possible to ascertain whether discrepancies between captive demand and "free market" consumption are the "real problem" for the domestic industry. Further, although PT Musim Mas asserted that the decrease in captive demand is due to downstream consumers switching from premium branded products to other less expensive equivalent products, no probative record evidence has been brought to our attention that would substantiate this assertion.[475]

7.188. We recall that the panel in *Thailand – H-Beams* stated "we do not consider that Article 3.5 requires … an express indication that the investigating authorities have examined all underlying or contributory causal elements which may comprise or influence a given causal factor".[476] In the light of the lack of supporting evidence proffered by PT Musim Mas, we do not consider that the EU authorities acted inconsistently with Article 3.5 by failing to explicitly address captive demand.

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[469] Preliminary Determination, (Exhibit IDN-3), recitals 79 and 81 (confirmed in Final Determination, (Exhibit IDN-4), recital 71).

[470] Preliminary Determination, (Exhibit IDN-3), recital 87 (confirmed in Final Determination, (Exhibit IDN-4), recital 78).

[471] Preliminary Determination, (Exhibit IDN-3), recital 98 (confirmed in Final Determination, (Exhibit IDN-4), recital 94).

[472] Preliminary Determination, (Exhibit IDN-3), recital 98 (confirmed in Final Determination, (Exhibit IDN-4), recital 94).

[473] Moreover, we recall that the determination to be made is whether dumped imports caused injury to the domestic industry. While the performance of individual producers of course drives the assessment of injury to the domestic industry, and may be relevant in the assessment of causation, the mere fact that one producer's performance improved, even if it improved more than that of other producers in the domestic industry, does not necessarily require separate consideration by the investigating authority.

[474] Indonesia's first written submission, para. 5.64 (referring to PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), pp. 8 and 9); response to Panel question No. 47, paras. 4.1 and 4.3 (referring to PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), pp. 8-10; and Anti-Dumping Complaint before the European Commission against imports of Fatty Alcohol originating in India, Indonesia and Malaysia, submitted by Cognis GmbH, Sasol Olefins & Surfactants GmbH, 25 June 2010, (Exhibit IDN-58), pp. 16 and 17).

[475] We asked Indonesia to explain further how PT Musim Mas' argumentation and evidence suffices to require an investigating authority to investigate the matter. In its response, Indonesia did not point to any *evidence* to substantiate the assertion that the different patterns of consumption reflected in tables 5 and 6 of the Complaint pertain to downstream consumers switching between premium and non-premium products, nor how this, in turn, related to the assessment of injury in the context of the investigation. (See Indonesia's response to Panel question No. 47, paras. 4.2-4.4).

[476] Panel Report, *Thailand – H-Beams*, para. 7.282.

#### 7.4.3.4 Conclusion on the economic crisis factor

7.189. We have concluded above that Indonesia has not demonstrated that the EU authorities acted inconsistently with Article 3.5 in their analysis of the economic crisis factor by: (a) failing to adequately separate and distinguish the injurious effects of the economic crisis from those of the dumped imports; (b) erring in their determination of the year of commencement of the economic crisis; or (c) failing to address certain arguments and evidence presented during the investigation by interested parties. Since Indonesia has not demonstrated a violation of Article 3.5 in respect of the economic crisis factor, we likewise consider that Indonesia has not demonstrated a consequential violation of Article 3.1 in respect of this factor.[477]

### 7.4.4 The EU authorities' analysis of "access to raw materials"

#### 7.4.4.1 Main arguments of the parties[478]

##### 7.4.4.1.1 Indonesia

7.190. Indonesia submits that PT Musim Mas provided detailed arguments and evidence on the domestic industry's access to raw materials and the effects of fluctuations in the price of those materials which the EU authorities disregarded with the cursory statement: "the above parties were not able to substantiate their claims".[479]

7.191. In Indonesia's view, it is unclear from this statement whether the EU authorities did not find it necessary to consider these issues, or whether they believed that they had addressed them and concluded that they did not cause injury to the domestic industry.[480] However, Indonesia submits that this represents a failure to provide a reasoned and adequate explanation, and further, that although it is for an investigated producer to substantiate that a particular factor is causing injury, it is subsequently for an investigating authority to investigate and make a determination of non-attribution.[481] In Indonesia's view, the arguments and evidence provided by the investigated producers were sufficient to satisfy the relevant threshold that triggers the obligation on an investigating authority to analyse a factor allegedly causing injury and to provide a reasoned and adequate explanation for its analysis, including why it considered the assertion unsubstantiated.[482] In that regard, Indonesia emphasizes that it does not argue that the EU authorities violated Article 3.5 because they did not conclude that this factor contributed to the injury, or because they failed to separate and distinguish its injurious effects. Rather, Indonesia submits that the violation flows from the EU authorities' refusal to even examine whether this factor was a contributor to the injury suffered by the industry in the first place.[483]

7.192. Indonesia submits that PT Musim Mas raised this factor separately from the economic crisis factor.[484] In particular, PT Musim Mas explained that the EU industry faced a "structural disadvantage" *vis-à-vis* Indonesian industry given their respective geographic proximity to sources of the raw material, and the EU industry's resulting exposure to longer lead-times for delivery and price fluctuations.[485] According to Indonesia, this structural disadvantage manifested "in particular during the financial crisis"[486], as evidenced by price data referred to by PT Musim Mas on the significant price fluctuations during the 2008-2009 period.[487]

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[477] See Indonesia's first written submission, para. 5.66.
[478] The arguments made by the United States as a third party pertaining to this factor are summarized above in section 7.4.3.2. The other third parties did not make submissions on this point.
[479] Indonesia's first written submission, paras. 5.75 and 5.76 (quoting Final Determination, (Exhibit IDN-4), recitals 97 and 98). (emphasis original)
[480] Indonesia's first written submission, para. 5.78.
[481] Indonesia's first written submission, paras. 5.78 and 5.79.
[482] Indonesia's first written submission, paras. 5.82 and 5.91.
[483] Indonesia's response to Panel question No. 24, para. 1.101; second written submission, para. 3.5.
[484] Indonesia's response to Panel question No. 20, para. 1.89.
[485] Indonesia's response to Panel question No. 20, para. 1.91.
[486] Indonesia's response to Panel question No. 20, para. 1.91.
[487] Indonesia's response to Panel question No. 24, para. 1.96.

#### 7.4.4.1.2 European Union

7.193. The European Union argues that the legal standard under Article 3.5 only requires examination of factors other than dumping that are "known", which means that interested parties must clearly raise and substantiate such factors with evidence during the investigation.[488] In respect of the factor concerning access to raw materials and price fluctuations, the European Union submits that it was clearly a matter pertaining to the conditions of competition and an element of the price of the product, rather than a separate cause of injury. This is because the Indonesian producers' easier access to raw materials is a geographically-determined constant that exists in general, rather than a matter that materializes at some point in time and is not a structural characteristic of the market.[489] In that regard, the European Union argues that the EU authorities were entitled to reject further evaluation of the alleged injury factor concerning access to raw materials and price fluctuations for lack of substantiation.[490] Rather, the EU authorities examined this factor as one of the price-related elements of the conditions of competition that is addressed in the injury analysis.[491]

7.194. The European Union also argues that PT Musim Mas did not provide sufficient argumentation and evidence on this factor to warrant examination by the investigating authorities.[492] In that regard, the European Union points to the brevity of PT Musim Mas' submissions on this point[493], the fact that a time lag between ordering raw materials and actual delivery would not have had a determining impact on the profitability of the domestic industry since raw materials are traded at world market prices[494], and the fact that differing sources of raw material are substitutable but their prices did not correlate or develop in parallel over time.[495]

7.195. Finally, the European Union argues that PT Musim Mas raised this factor only as a part of the economic crisis factor and the distinction between the two is "entirely artificial".[496] In the European Union's view, any possible developments in prices to which the interested parties referred related to the economic crisis, and this factor was examined by the EU authorities.[497]

### 7.4.4.2 Evaluation by the Panel

7.196. We begin by setting out our understanding of what constitutes a "known factor" under Article 3.5 that must be addressed by an investigating authority in its explanation. We recall, in this regard, that both parties have referred to paragraph 7.267 of the panel report in *China – X-Ray Equipment*, which states, *inter alia*, that "if there is no relevant evidence before an investigating authority to indicate that a factor is injuring the domestic industry, there is no requirement for the investigating authority to make a finding regarding whether the factor is indeed causing injury".[498] Thus, an investigating authority need only address an alleged factor raised by an interested party where sufficient evidence has been provided that the factor causes injury. We further recall that Indonesia refers to paragraph 7.279 of the panel report in *China – X-Ray Equipment*, which states, *inter alia*, that "an investigating authority's reasoning does not need to refer to the precise terminology used by parties to an investigation to describe a causal factor" and, further, that "it does not need *expressly* to refer to all elements relevant to a particular causal factor, where it is evident that the elements at issue have been implicitly

[488] European Union's first written submission, paras. 118-121.
[489] European Union's first written submission, para. 155.
[490] European Union's first written submission, para. 158.
[491] European Union's first written submission, para. 157.
[492] European Union's response to Panel question No. 22, p. 23; second written submission, paras. 112 and 127-129.
[493] European Union's response to Panel question Nos. 21, p. 22, and 23, pp. 25-27.
[494] European Union's response to Panel question No. 22, pp. 24 and 25.
[495] European Union's response to Panel question No. 22, pp. 23-25; first written submission, para. 156.
[496] European Union's response to Panel question No. 23, pp. 26 and 27; second written submission, para. 133.
[497] European Union's response to Panel question No. 45, para. 28.
[498] See Panel Report, *China – X-Ray Equipment*, para. 7.267; Indonesia's first written submission, para. 5.74; European Union's second written submission, para. 112; and European Union's opening statement at the second meeting of the Panel, para. 36.

considered".[499] We agree with this understanding of "known factors" under Article 3.5 and see no reason to deviate from it in the present case.[500]

7.197. The parties did, however, dispute whether the concept of "other known factors" causing injury can encompass "structural disadvantage[s]"[501] in conditions of competition between the domestic industry and the producers/exporters under investigation. On one hand, the European Union argued that "access to raw materials … is not a factor causing injury but simply an aspect of the conditions of competition that may be reflected in price differences between the imported products from Indonesia and domestic products".[502] For the European Union, "[t]he cause of injury should be a change that materializes at some point in time and not a structural characteristic of the market which is not subject to changes".[503] On the other hand, Indonesia acknowledged that "'[r]aw materials' may indeed be an element within the competitive relationship between the domestic and foreign producers", but asserted that this "should [not] preclude this factor from being a non-attribution factor in its own right within the meaning of Article 3.5".[504]

7.198. The question of whether "known factors" can encompass "structural disadvantages" in conditions of competition between the domestic industry and the producers/exporters under investigation was recently addressed by the panel in *EU – Biodiesel (Argentina)*. The panel in that case reached the following conclusion[505]:

> The two factors, namely lack of vertical integration and lack of access to raw materials, identified by Argentina, essentially are inherent features of the EU domestic industry that, according to Argentina, render it less competitive than the Argentine producers. In our view, however, this line of argument is premised on a misreading of Article 3 of the Anti-Dumping Agreement and its various paragraphs, including Article 3.5. The concept of injury envisaged by Article 3 relates to negative *developments* in the state of the domestic industry.[*] Article 3 is not intended to address differences in the structure of the domestic industry as compared to that of the exporting Member. Rather, it is clear from the text of Article 3.5 and from its indicative list of such "other factors" – which all pertain to *developments* in the situation of the domestic industry – that the authority is not required to conduct a non-attribution analysis with respect to features that are inherent to the domestic industry and have remained unchanged during the period considered by the investigating authority for purposes of its injury analysis.
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> [*fn original][906] This is particularly clear from the text of Article 3.4, which requires consideration of the evolution of the state of the domestic industry and calls upon the authority to consider, inter alia, "declines" in various factors or indices.

We agree with this understanding of "known factors" as used in Article 3.5 of the Anti-Dumping Agreement. Indonesia contends that several factors listed in Article 3.5 can be characterized as aspects of conditions of competition, such as "competition between the foreign and domestic

[499] See Indonesia's first written submission, fn 288 (referring to Panel Report, *China – X-Ray Equipment*, paras. 7.276-7.280); and Panel Report, *China – X-Ray Equipment*, para. 7.279. (emphasis original)

[500] We note that Indonesia referred elsewhere to the statement of the Appellate Body in *US – Line Pipe* that "[t]o be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous". (See Indonesia's comments on the European Union's response to Panel question No. 46, para. 5.9). This statement was a general reference to the "reasoned and adequate" standard, and we do not consider it to stand for the principle that an investigating authority must explicitly address every argument or piece of evidence in its explanation. Rather, as the Appellate Body stated at paragraph 164 of *US – Countervailing Duty Investigation on DRAMS*, "we are of the view that Article 22.5 does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination" (emphasis original). This accords with the statements of the panels in *China – X-Ray Equipment* and *Thailand – H-Beams* to the effect that not every argument or piece of evidence concerning a "known factor" need be explicitly addressed in an explanation when they are implicitly considered or when insufficient evidence has been presented to warrant their consideration. (See Panel Reports, *China – X-Ray Equipment*, paras. 7.267 and 7.279; and *Thailand – H-Beams*, para. 7.282).

[501] Indonesia's response to Panel question No. 20, para. 1.91.

[502] European Union's first written submission, para. 155.

[503] European Union's first written submission, para. 155.

[504] Indonesia's second written submission, para. 3.19.

[505] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.522. (emphasis original)

producers", "changes in the patterns of consumption", "export performance", and "productivity of domestic industry".[506] While those factors may exhibit features relating to conditions of competition, they do not, in our view, relate to *inherent* disadvantages between the domestic industry and the producers/exporters under investigation that are unchanged during the period considered by the investigating authority for its injury analysis. Rather, the factors listed in Article 3.5 all pertain to *developments* in the situation of the domestic industry. Matters such as geographical proximity to raw materials are inherent features of the domestic industry, as opposed to something that can develop or change and thereby cause injury.

7.199. Indonesia acknowledges that access to raw materials represented a "structural disadvantage" to the domestic industry in the present case.[507] We agree with the European Union that it does not constitute a "known factor" causing injury to the domestic industry and therefore requiring examination pursuant to Article 3.5. Further, since access to raw materials was not a matter that the EU authorities were required to examine under Article 3.5, we do not accept Indonesia's view that the EU authorities acted inconsistently with Article 3.5 by their "refusal to even examine in the first place whether this factor was a contributor to the injury suffered by the industry".[508] If a matter does not qualify as a "known factor" in the first place, there is no requirement to examine it under Article 3.5, regardless of the evidence and argumentation presented pertaining to that matter.[509]

7.200. We recall, however, that PT Musim Mas' argument concerning "access to raw materials" was augmented by evidence and argumentation concerning "significant fluctuations in [the main input] prices" paid by the domestic industry.[510] In particular, PT Musim Mas asserted that the main input material accounts for between 80% and 90% of the price of the product under consideration, and that the price of the main input material dropped from USD 1241/MT in July 2008 to USD 899/MT in September 2008 before reaching USD 465/MT in December 2008.[511] We do not exclude the possibility that this kind of price collapse could conceivably represent a "*development*[] in the situation of the domestic industry"[512] and could thus qualify as a "known factor" under Article 3.5, particularly where it leads to negative effects for the domestic industry. However, even assuming that this could qualify as a factor under Article 3.5, we recall that an investigating authority need only examine such factors upon the presentation of sufficient evidence and argumentation by an interested party, and further, that an investigating authority need not use the precise terminology or framing used by an interested party, nor explicitly address certain evidence or argumentation where it has been implicitly considered in the determination.[513] On that basis, as we explain below, we consider that the EU authorities did not act inconsistently with Articles 3.1 and 3.5 by failing to explicitly address fluctuations in the price of the main input material as a standalone factor.

7.201. Our review of the record satisfies us that PT Musim Mas explicitly linked price fluctuation to the economic crisis. PT Musim Mas explained that the exposure of the domestic industry to price fluctuations was, in the present case, "*particularly crucial in times such as the crisis in 2008 and 2009* when there were significant fluctuations in CPKO prices from US$1241/MT in July 2008 to

[506] Indonesia's second written submission, para. 3.19; opening statement at the first meeting of the Panel, para. 85.
[507] Indonesia's response to Panel question No. 20, para. 1.91.
[508] Indonesia's response to Panel question No. 24, para. 1.101; opening statement at the first meeting of the Panel, para. 87.
[509] This flows from the text of Article 3.5, which states, in relevant part, "[t]he authorities shall also *examine any known factors other than the dumped imports* which at the same time are injuring the domestic industry" (emphasis added). While it is implicit that an investigating authority would need to assess, at first instance, whether an alleged factor qualifies as a "known factor" within the meaning of Article 3.5, the only *requirement* under Article 3.5 is to examine "known factors". There is no requirement to examine anything other than "known factors", such as inherent features of the domestic industry affecting conditions of competition. We therefore disagree with Indonesia's assertion that the third sentence of Article 3.5 imposes duties on investigating authorities regarding matters that do not qualify as a "known factor". (See Indonesia's opening statement at the second meeting of the Panel, para. 32).
[510] PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 13.
[511] PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 13.
[512] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.522. (emphasis original)
[513] See above para. 7.184.

US$899/MT in September 2008 and touching US$465/MT in Dec[ember] 2008".[514] PT Musim Mas likewise stated that "*when market conditions are as volatile as in 2008 and 2009,* synthetic FOH [Fatty Alcohols] producers and natural FOH producers in the targeted countries with integration into CPKO supply fared better than the complainants".[515] According to PT Musim Mas, therefore, the price fluctuations that allegedly caused injury to the domestic industry in the present case were a function of the economic crisis. Indeed, the main section in which PT Musim Mas raised these issues in its comments on the complaint is entitled "Raw materials access *particularly important during the economic crisis*".[516]

7.202. In our view, it was not improper for the EU authorities to address the price fluctuations in the context of their assessment of the effects of the economic crisis rather than as a standalone factor. It is undisputed that the EU authorities' explanation does not *explicitly* address price fluctuation, including as a facet of the economic crisis factor.[517] The question before us, therefore, is whether PT Musim Mas presented sufficient evidence and argumentation to warrant explicit discussion of price fluctuation as a facet of the economic crisis factor, and whether this facet was nonetheless implicitly considered in the EU authorities' explanation of the economic crisis factor.

7.203. Our review of the evidence and argumentation provided by PT Musim Mas on price fluctuations reveals that it was not sufficient to require their consideration as a separate other known factor allegedly causing injury. PT Musim Mas asserted that many investigated producers of the product under consideration enjoy a "formidable advantage as they are often integrated producers with supply chain links all the way to oil palm plantation", without providing evidence for that assertion.[518] PT Musim Mas also stated that "[t]ypically, the complainants would purchase their raw material in Q1 for production in Q2 and subsequent FOH sales in Q3", which formed the basis of their exposure to "greater market risk" – again without any supporting evidence substantiating this assertion.[519] PT Musim Mas further mentioned "the fact that [the complainants] have to buy [the main input material] from FOH producers in Indonesia and Malaysia who have controls over [its] supply" – again without any supporting evidence substantiating this assertion[520], and contrary to the complainants' assertion that crude palm kernel oil is not the only source of the main input for the product under consideration.[521]

7.204. Therefore, a number of key aspects of PT Musim Mas' argument concerning price fluctuations were not accompanied by the kind of evidence and data that we would expect an interested party to adduce in order to warrant an explicit examination of an alleged known other factor causing injury and explanation in the authorities' determination. Indeed, it is questionable whether PT Musim Mas' argumentation and evidence on this point sufficed to warrant *any* consideration by the EU authorities. We need not resolve that question, since it is evident from the explanation in the present case that the injurious effects of price fluctuations during the economic crisis were considered by the EU authorities, at least implicitly. In particular, the EU authorities stated that[522]:

> It was established that the profitability of the Union industry has been negative since the beginning of the period concerned in 2007 and during the period considered the losses increased significantly. After a reduction in losses in 2008, *they increased again significantly in 2009, at the time of the general economic crisis*. The economic

[514] PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 13. (emphasis added)
[515] PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 17. (emphasis added)
[516] PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), pp. 12 and 13. (emphasis added)
[517] European Union's first written submission, para. 153; second written submission, para. 130; response to Panel question No. 46, para. 34; and Indonesia's first written submission, para. 5.76.
[518] PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 12.
[519] PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 12.
[520] PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 17.
[521] Anti-Dumping Complaint before the European Commission against imports of Fatty Alcohol originating in India, Indonesia and Malaysia, submitted by Cognis GmbH, Sasol Olefins & Surfactants GmbH, 25 June 2010, (Exhibit IDN-58), p. 30; and Sasol letter to the EU Commission, 28 January 2011, (Exhibit IDN-60), p. 2.
[522] Preliminary Determination, (Exhibit IDN-3), recital 87 (confirmed in Final Determination, (Exhibit IDN-4), recital 78). (emphasis added)

> recovery felt during the IP, however, allowed the Union industry to reduce its losses with respect to turnover, but it remained still far away from returning to positive profit levels.

From this, it is apparent that the EU authorities considered that the profitability of the domestic industry was negatively affected during the economic crisis. This corresponds to PT Musim Mas' explanation that the "lack of direct access to raw material has played a crucial role in the complainants' competitiveness and *profitability, or the lack of it, in 2008/2009*".[523] In other words, PT Musim Mas asserted that the price fluctuations caused by the economic crisis affected the domestic industry's profitability, and the EU authorities explicitly addressed and took into account the negative impact of the economic crisis on the domestic industry's profitability. In our view, this demonstrates at least implicit consideration of price fluctuations, and is sufficient to comport with the requirements of Article 3.5 in the present case, particularly in view of the minimal evidence provided by PT Musim Mas on this point. Therefore, even assuming that price fluctuations can qualify as another "known factor" within the meaning of Article 3.5, and even assuming that PT Musim Mas provided sufficient evidence and argumentation to warrant some consideration of this point by the EU authorities, we consider that the EU authorities' explanation suffices through its implicit consideration of that facet of the economic crisis.

7.205. In summary, Indonesia has not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to address the domestic industry's access to raw materials, since this does not constitute an other "known factor" within the meaning of Article 3.5. Further, in view of the quality and quantity of the evidence provided by PT Musim Mas, Indonesia has not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 by failing to address explicitly the raw material price fluctuations during the economic crisis. Accordingly, we find that Indonesia has not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement in respect of the alleged "access to raw materials and price fluctuations" factor.

## 7.5 Indonesia's claim under Article 6.7 of the Anti-Dumping Agreement

7.206. Indonesia claims that the European Union acted inconsistently with Article 6.7 of the Anti-Dumping Agreement by failing to disclose to interested parties the results of on-the-spot investigations conducted at the premises of two Indonesian producers under investigation.[524]

### 7.5.1 Relevant provisions of the covered agreements

7.207. Article 6.7 of the Anti-Dumping Agreement authorizes investigating authorities, in order to verify information or obtain further details, to carry out investigations in the territory of other Members, subject to certain conditions. The relevant part of Article 6.7 at issue in this case is its final sentence, which provides that:

> Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

Article 6.9 of the Anti-Dumping Agreement states, in turn, that:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

[523] PT Musim Mas' comments on the complaint, 4 October 2010, (Exhibit IDN-35), p. 12. (emphasis added)

[524] Indonesia's first written submission, para. 7.1.

### 7.5.2 Main arguments of the parties

#### 7.5.2.1 Indonesia

7.208. For Indonesia, the information communicated by the EU authorities to the two Indonesian producers under investigation (PT Musim Mas and Ecogreen) following the verifications conducted at their premises, does not meet the standard set out in Article 6.7 of the Anti-Dumping Agreement. Indonesia's claim focuses on "the substance of the EU's reporting of the results − rather than on the manner in which the results were disclosed − that is, the procedural means by which the EU complied with its obligation".[525]

7.209. Indonesia first contends that the term "results of any such investigations" in the context of Article 6.7 must be interpreted consistently with the objective of on-the-spot investigations, which is "to verify the information provided or to obtain further details".[526] In this regard, Indonesia submits that the panel in *Korea − Certain Paper* set out an appropriate standard for the scope of the disclosure obligation contained in Article 6.7. That panel stated that the information communicated by the authorities to the respondents must include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".[527] In the case at hand, Indonesia submits that EU authorities failed to meet this standard because:

a. No separate report was made available to the Indonesian producers following the verification visit[528]; and

b. no disclosure of the verification results was made as part of the disclosure of essential facts, which instead contained only general and cursory statements that did not properly disclose these "results".[529]

7.210. In particular, for Indonesia, the EU authorities failed to disclose properly:

a. Which specific types of information, documents, or issues were addressed in the verifications;

b. which particular documents were examined; and

c. what questions were asked by the EU authorities' officials or what answers were provided by the producers under investigation.[530]

7.211. Further, Indonesia considers that the European Union conflates the obligations contained in Article 6.9 ("to inform all interested parties of the essential facts under consideration which form the basis for t[heir] decision") with the obligation contained in Article 6.7 (to "make the results [of the verification visits] available or to provide disclosure thereof pursuant to [Article 6.9]"). Indonesia contends that disclosing the essential facts consistently with Article 6.9 is not sufficient to comply with the "separate and distinct" obligation under Article 6.7 to disclose the results of the on-the-spot investigation.[531] Indonesia specifically requests the Panel "[i]n its legal analysis, therefore, bearing in mind the ordinary meaning, purpose, and context of the terms … [to] take care to define the 'results' separately from the 'essential facts'."[532]

7.212. Indonesia points to specific issues which were allegedly not disclosed by the EU authorities to interested parties although they were addressed during the visits: these issues include "the close corporate, management, organizational and operational links between PT Musim Mas and

[525] Indonesia's response to Panel question No. 27, para. 1.116.
[526] Article 6.7 and Annex I(7) of the Anti-Dumping Agreement. See also Indonesia's first written submission, paras. 6.21 and 6.22.
[527] Panel Report, *Korea − Certain Paper*, para. 7.192. (emphasis added)
[528] Indonesia's first written submission, para. 6.50; second written submission, para. 4.3.
[529] Indonesia's first written submission, paras. 6.6-6.12 and 6.52-6.54.
[530] Indonesia's second written submission, para. 4.24.
[531] Indonesia's first written submission, para. 6.62.
[532] Indonesia's second written submission, para. 4.5.

ICOF-S; transfer pricing policy; the so-called 'direct' export sales by PT Musim Mas; the manner in which ICOF-S and PT Musim Mas co-operate on such export sales as well as for domestic sales; and the fact that ICOF-S was involved in negotiating, preparing and executing each and every sale of PT Musim Mas' products, including domestic sales".[533]

7.213. Finally, Indonesia submits that the lack of a proper disclosure prevented the investigated producers from defending their interests during the subsequent stages of the proceedings.[534] In particular, PT Musim Mas was allegedly unable to defend its interests effectively on the issue of the existence of a single economic entity.[535]

#### 7.5.2.2 The European Union

7.214. The European Union responds that Indonesia's assertions are based on an erroneous reading of the obligation contained in Article 6.7 of the Anti-Dumping Agreement and are not supported by the facts on the record.[536]

7.215. For the European Union, although Articles 6.7 and 6.9 set out two separate obligations, the context afforded by Articles 6.6, 6.8, and 6.9 indicates that the term "results" in Article 6.7 refers to the "essential factual outcome of the verification [visit]", and does not require a full report on everything that happened during the on-the-spot verification.[537] According to the European Union therefore, the EU authorities were not required under Article 6.7 to prepare minutes of the verification or lengthy explanations and descriptions on aspects of the verification which had no further consequences.[538]

7.216. In fact, the European Union argues that it complied with both disclosure methods provided for by Article 6.7 to either "make available" or "disclose" the results of the verifications to the investigated producers[539]:

a. by informing the Indonesian interested parties beforehand about the information that was going to be verified;

b. by providing a list of exhibits collected during on-the-spot verifications; and

c. by providing the results of the verification visits as part of the general disclosure of essential facts to Indonesian exporters and through the communication of a company-specific report.[540]

The European Union submits in particular that the company-specific disclosure contains evidence that "during the verification process mistakes and errors in the submission were corrected in agreement with the company".[541] The European Union considers that the "result" of the verification "is the corrected information that was agreed upon with the interested parties in the context of the on-site verification."[542]

7.217. Further, the European Union highlights that Indonesian producers were themselves present during the verifications. As a consequence, Indonesia cannot claim that the producers were unaware of the developments which took place during the on-the-spot verifications.[543] The

[533] Indonesia's second written submission, para. 4.25.
[534] Indonesia's first written submission, paras. 6.34-6.39 and 6.46-6.48.
[535] Indonesia's first written submission, para. 6.60.
[536] European Union's first written submission, para. 165; second written submission, para. 198.
[537] European Union's first written submission, para. 185; second written submission paras. 189 and 191.
[538] European Union's first written submission, para. 167; response to Panel question No. 26, pp. 28-30.
[539] European Union's second written submission, para. 196; response to Panel question No. 48, para. 38.
[540] Paras. 190 to 195 of the European Union's first written submission and para. 168 and fns 121 and 123 of the European Union's second written submission refer to specific recitals which allegedly aim at complying with the obligation contained in Article 6.7.
[541] European Union's first written submission, para. 174.
[542] European Union's response to Panel question No. 49, para. 43; second written submission, para. 169 and fn 125.
[543] European Union's second written submission, para. 171.

European Union notes that, throughout the proceedings, the investigated producers never complained about a lack of transparency concerning the results of the verifications. On the contrary, they engaged in a dialogue with the EU authorities in relation to all key aspects of their determinations. The written and oral comments made by PT Musim Mas in its responses demonstrate that the information provided by the EU authorities was sufficient to allow PT Musim Mas to defend its interests.[544]

### 7.5.3 Main arguments of the United States as third party

7.218. The United States submits that the ordinary meaning of the term "results" in Article 6.7 refers to the "outcomes" of the verification process.[545] While the United States does not believe that trivial or immaterial aspects of what occurred at the verification must be included in the report, at a minimum it should include discussion of information that was verified, not verified, or corrected with respect to the essential facts referenced in Article 6.9.[546] The United States agrees with Indonesia that failing to disclose information under Article 6.7, particularly as it relates to the "essential facts" of an investigation under Article 6.9, would deprive parties of the full opportunity to defend their interests.[547]

### 7.5.4 Evaluation by the Panel

7.219. We begin by setting out our understanding of the legal standard under Article 6.7 of the Anti-Dumping Agreement as relevant to the claim before us, before applying our understanding in this regard to the relevant evidence on the record in the underlying investigation.

#### 7.5.4.1 Legal standard under Article 6.7 of the Anti-Dumping Agreement: the "results" of the on-the-spot investigations

7.220. We recall that the Anti-Dumping Agreement does not impose an obligation on investigating authorities to conduct verification visits in the territory of other WTO Members.[548] However, when authorities do so, they are required by Article 6.7 to communicate the "results of any such investigations" to "the firms to which they pertain", that is, the companies subject to verification visits. On its face, Article 6.7 provides for two possible methods to satisfy this disclosure obligation. An investigating authority can decide to either:

a. make the results of the verification visit(s) available to the companies concerned, or

b. include the results of the verification in the disclosure of essential facts provided for under Article 6.9.

7.221. The main point of contention between the parties in the present dispute concerns the meaning of the term "results of any such investigations", which is common to both disclosure methods provided for by Article 6.7. We thus begin our analysis with the ordinary meaning of the term "results" in the context of Article 6.7. Black's Law Dictionary defines the term "result" as[549]:

1. A consequence, effect, or conclusion.

2. That which is achieved, brought about, or obtained, esp. by purposeful action.

Similarly, the Oxford English Dictionary defines the term "result" as[550], *inter alia*:

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[544] European Union's first written submission, para. 196; second written submission, para. 172; and response to Panel question No. 49, para. 50.
[545] United States' third-party submission, para. 41.
[546] United States' third-party submission, para. 42.
[547] United States' third-party submission, para. 46.
[548] See for example: Panel Report, *Argentina – Ceramic Tiles*, fn 65.
[549] *Black's Law Dictionary*, 10th edn, B. A. Garner (ed.) (Rhomson Reuters, 2004), p. 1509.
[550] Oxford English Dictionary, definition of "result", available at: <http://www.oed.com/view/Entry/164061?isAdvanced=false&result=1&rskey=UhqxfU&>, accessed 14 July 2016.

> a. The effect, consequence, or outcome of some action, process, or design, etc.

We thus understand the term "results" as used in Article 6.7 to refer to what is achieved, brought about or obtained in the course of the on-the-spot verifications. The meaning of the term "results" in this context is therefore directly connected to the purpose of such verifications, which is described by the Anti-Dumping Agreement as: "to verify information provided or to obtain further details."[551]

7.222. We turn next to the meaning of the term "verify", which is defined in Black's Law Dictionary as[552]:

> 1. To prove to be true; to confirm or establish the truth or truthfulness of; to authenticate.

and in the Oxford English Dictionary as[553]:

> 2. To show to be true by demonstration or evidence; to confirm the truth or authenticity of; to substantiate.
>
> 3.a. *In passive*: To be proved true or correct by the result or event, or by some confirming fact or circumstance; to be fulfilled or accomplished in this way.

In view of the ordinary meaning of the term "verify", we consider that the purpose of the verification is therefore to enable the investigating authorities to confirm the accuracy of the information supplied by the verified companies in, *inter alia*, their questionnaire response.

7.223. We find support for this view in the immediate context of Article 6.7. In particular, we consider Article 6.6 highly relevant in this regard. While Article 6.6 is not at issue in this dispute, we note that it establishes a general obligation on investigating authorities, except where facts available are relied upon, to "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." Article 6.7[554] is immediately preceded by this general obligation, and in our view elaborates upon it by setting out more specific guidance in the particular context of on-the-spot investigations in the territory of other Members. As the panel in *US – DRAMS* stated:

> Members could "satisfy themselves as to the accuracy of the information" in a number of ways without proceeding to some type of formal verification, including for example reliance on the reputation of the original source of the information. Indeed, we consider that anti-dumping investigations would become totally unmanageable if investigating authorities were required to actually verify the accuracy of all information relied on.[555]

Further, the panel in *Argentina – Ceramic Tiles* stated[556]:

> Article 6.6 of the AD Agreement thus places the burden of satisfying oneself of the accuracy of the information on the investigating authority. As a general rule, the exporters are therefore entitled to assume that unless otherwise indicated they are not required to also automatically and in all cases submit evidence to demonstrate the accuracy of the information they are supplying … We believe that if no on-the-spot verification is going to take place but certain documents are required for verification purposes, the authorities should in a similar manner inform the exporters of the nature of the information for which they require such evidence and of any further documents they require.

[551] Article 6.7, first sentence and Annex I(7) of the Anti-Dumping Agreement.
[552] Black's Law Dictionary, 10th edn, B. A. Garner (ed.) (Rhomson Reuters, 2004), p. 1793.
[553] Oxford English Dictionary, definition of "verify", available at: <http://www.oed.com/view/Entry/222511?redirectedFrom=verify&>, accessed 14 July 2016.
[554] Including Annex 1 of the Anti-Dumping Agreement.
[555] Panel Report, *US – DRAMS*, para. 6.78.
[556] Panel Report, *Argentina – Ceramic Tiles*, para. 6.57.

7.224. These statements support the view that on-the-spot verifications involve a specific means by which the authorities request the exporter to supply evidence of the accuracy of the information supplied by the entity or entities subject to verification. The "results" of the verification should thus reflect the outcome of this process. At a minimum, the authorities should disclose the part of the questionnaire response or other information supplied for which supporting evidence was requested, whether any further information was requested, and whether documents were collected by the authorities. Further, the results of the verification should state whether the producer made available the evidence and additional information requested and indicate whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies in, *inter alia*, their questionnaire responses.

7.225. We find support for our understanding in this regard in the report of the panel in *Korea – Certain Paper*, in which the panel stated that:

> [T]he purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results. It is therefore important that such disclosure contain adequate information regarding *all aspects of the verification*, including a description of the information which was not verified as well as of information which was verified successfully. This is because, in our view, information which was verified successfully, just as information which was not verified, could well be relevant to the presentation of the interested parties' cases.[557]

Although – as pointed out by the European Union[558] – this statement must be read in the light of the specific dispute between Korea and Indonesia in that case, we are of the view that it provides a correct assessment of the obligation contained in Article 6.7 in two important respects.

7.226. First, by referring to "information regarding *all aspects of the verification*", the panel made clear that the scope of the results which must be made available or disclosed to the interested parties is not limited. We read this to mean that the only limitation is that the information must relate to the results of the verification. This is in contrast to the scope of the disclosure obligation in Article 6.9 of the Anti-Dumping Agreement, which is limited to the "*essential facts* under consideration which form the basis for the decision whether to apply definitive measures".[559] The term "results" in Article 6.7 is only qualified by the term "of any such investigations". This implies that the obligation to make available the results of the on-the-spot investigations is not limited to the "essential" results of such investigations. Nor is it limited to facts which will eventually form the basis of the decision to impose anti-dumping measures. With respect to the cross-reference "shall provide disclosure thereof pursuant to paragraph 9", we read "disclosure thereof" as referring to the "results" of the on-the-spot verification and the phrase "pursuant to paragraph 9" as referring to the date by which the disclosure must have been made, i.e. "before a final determination is made" and with "sufficient time for the parties to defend their interests". We thus disagree with the European Union that the cross reference to Article 6.9 suggests that the term "results" refers only to the essential factual outcome of the verification.[560]

7.227. Second, the panel in *Korea – Certain Paper* describes the disclosure obligation of Article 6.7 as an important aspect of the due process rights of interested parties. In the present dispute, Indonesia also submits that[561]:

> It is in the light of this knowledge that the firm may subsequently decide to focus its submissions on other issues, for instance, on topics for which information may not have been successfully verified. This will enable the firm effectively to allocate its scarce resources in the course of the investigation.

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[557] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added)
[558] European Union's response to Panel question No. 48, para. 36.
[559] Emphasis added. The "essential facts" contemplated in Article 6.9 were described by the Appellate Body in *China – GOES* as "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures". (Appellate Body Report, *China – GOES*, para. 240).
[560] European Union's first written submission, para. 185.
[561] Indonesia's first written submission, para. 6.38.

We agree. However, we consider that the disclosure obligation of Article 6.7 serves more than the due process rights of the investigated firm. Indeed, as pointed out by the European Union in the present case, the representatives of the investigated firm are normally present during the on-the-spot verification and may therefore be presumed to be aware of the developments which took place during the visit.[562] However, Article 6.7 specifically provides that the results of verifications may be made available to the applicants, that is, the domestic producers seeking the imposition of anti-dumping measures. These interested parties may well have an interest in the results of the on-the-spot verification, for instance with respect to allowances that might be made under Article 2.4 of the Anti-Dumping Agreement.

7.228. We do not mean to suggest that investigating authorities must address each argument or each piece of evidence presented by the respondent during the verification. Nor do we mean to suggest that "Article 6.7 require[s] the [investigating authorities] to prepare minutes of the verification … or to prepare lengthy explanations and descriptions on aspects of the verification which had no further consequences or to draft a document setting out the verification team's evaluation of the evidence and explanations that the company provided on the spot."[563] The results made available or disclosed must nevertheless be sufficiently specific for the interested parties to understand at a minimum those parts of the questionnaire response or other information supplied for which supporting evidence was requested and whether:

a. any further information was requested;

b. the producer made available the evidence and additional information requested;

c. the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies, *inter alia* in their questionnaire response.

7.229. Finally, we note that the disclosure obligation in Article 6.7 is unqualified and rests entirely on the investigating authorities. The fact that the exporter did not request access to the results of the investigation, or the absence of a demonstrated impact on the due process rights of the exporter, are irrelevant to an evaluation of whether the authorities have complied with Article 6.7. Compliance with the provisions of Article 6.7 must be assessed solely on the basis of actions taken by the investigating authorities to comply with this provision throughout the anti-dumping investigation.

7.230. We now turn to the facts on the record in order to assess whether the information provided by the EU authorities following the on-the-spot investigations was sufficient to comply with Article 6.7 of the Anti-Dumping Agreement.

#### 7.5.4.2 Whether the information provided to the producers under investigation complies with Article 6.7

7.231. The European Union does not assert that a verification report was provided to the Indonesian companies investigated.[564] In response to Indonesia's argument that the EU authorities provided to the interested parties only "one general statement in the Disclosure of Provisional Findings"[565], the European Union has drawn our attention to three documents:

a. The final disclosure document of August 2011.[566]

[562] European Union's second written submission, para. 171.
[563] European Union's second written submission, para. 159.
[564] The Panel understands that this is consistent with the practice of EU authorities. See Committee on Anti-Dumping Practices, Working Group on Implementation, Article 6.7, *Conduct of Verification*, Paper by the European Communities, G/ADP/AHG/W/156 (10 March 2004), p. 3: "It is not the Commission's practice to provide the companies with specific reports on verification visits. Rather, parties concerned receive, in accordance with the last sentence of Article 6.7 of the Anti-Dumping Agreement and Article 20 of the Basic Regulation the results of the verification visits as part of the disclosure of the findings of the investigation."
[565] Indonesia's first written submission, para. 6.61.
[566] Letter regarding disclosure of definitive findings, 2 August 2011, (Exhibit EU-10) (BCI). The Final Disclosure sent to PT Musim Mas on 2 August 2011 included three annexes: The General Disclosure Document, which is attached as Exhibit IDN-39 (General Disclosure Document, 26 August 2011, (Exhibit IDN-39)); the

b. The (provisional) company-specific disclosure concerning PT Musim Mas of May 2011.[567]

c. The list of exhibits collected on site by the EU authorities during the on-the-spot investigations conducted at the headquarters of PT Musim Mas.[568]

The European Union submits that the information contained in these three documents reflects the "results" of the investigations in the sense of Article 6.7. We note at the outset that, although Indonesia's arguments pertain to both PT Musim Mas and Ecogreen, it only submitted evidence in respect of PT Musim Mas. We therefore confine our analysis to the evidence relating to PT Musim Mas. We will examine each of these three documents in turn and assess whether they contain (individually or in combination) information which can be characterized as the results of the verifications of PT Musim Mas.

7.232. We begin with the General Disclosure Document of August 2011. We note first that this document contains very little information about the verifications carried out at the premises of respective producers under investigation, including PT Musim Mas. During the panel proceedings, the European Union drew the Panel's attention to specific sections of this document[569] which allegedly demonstrate compliance with the obligation to disclose the results of the verification visits. However the specific recitals cited by the European Union do not refer to the verification visits conducted at the premises of Indonesian producers and exporters − which are the focus of Indonesia's claim. Only one of these recitals refers, in passing, to the verification of PT Musim Mas. Instead, they refer to the verifications conducted in other countries (Malaysia and India) and to the verifications conducted at the premises of the domestic branch of industry.[570] We consider therefore that this evidence is either unrelated to the claim made by Indonesia in this case or insufficient to satisfy the requirements of Article 6.7.

7.233. We turn next to the company-specific disclosure documents provided to PT Musim Mas at the provisional stage of the investigation and to the list of exhibits agreed with PT Musim Mas at the end of the verification visit. The European Union explains that the results of the verification visit were provided to PT Musim Mas, *inter alia*, in the form of a list of exhibits collected during the verification visit at the company's premises and in the form of a confidential appendix attached to the Provisional Disclosure of essential facts.[571] This confidential appendix comprises two parts:

a. The first part is an explanation of the calculation of PT Musim Mas' dumping margin.

b. The second part is a CD-Rom containing an electronic copy of the company's response to the anti-dumping questionnaire.[572] This copy reflects the corrections made to PT Musim Mas' electronic response during and following the verification by PT Musim Mas itself and by the EU authorities. The precise content of the CD-Rom is reflected in a table of contents ("List of electronic files") attached to the company-specific disclosure.[573]

Definitive dumping calculation; and Company specific reply to arguments not addressed in detail in the General Disclosure Document. See also European Union's response to Panel question No. 49, paras. 51 and 52; and second written submission, paras. 167 and 168.

[567] European Union's response to Panel question No. 49, para. 44; second written submission, para. 166; and Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI).

[568] List of exhibits provided to PTMM at the conclusion of the verification visit, (Exhibit EU-14) (BCI).

[569] European Union's second written submission, para. 168 and fns 121 and 123.

[570] Recital 20 of the General Disclosure Document attached as Exhibit IDN-39 refers to the verification of Indian exporters; recital 36 refers to a claim made by Indonesian exporters after the on-the-spot investigation; recitals 41 and 48 refer to Malaysian exporters; recitals 59, 65, and 66 refer to the verification of domestic producers and importers; recital 99 refers to a product not covered by the investigation and recital 117 refers to the profit target claimed by the complainants. In fact, only recital 29 refers to the verification of Indonesian exporters at issue in this case. (General Disclosure Document, 26 August 2011, (Exhibit IDN-39)).

[571] European Union's response to Panel question Nos. 28, p. 31, and 49, paras. 43-53.

[572] Excel file "PTMM definitive disclosure.xls", (Exhibit EU-12) (BCI).

[573] Annex 2 to the Provisional Company-Specific Disclosure to PT Musim Mas, Calculation of Dumping Margin, (Exhibit IDN-33) (BCI), p. 5.

The European Union further explains that the corrected response of the company must be read in conjunction with the list of exhibits collected during the verification.[574]

7.234. Indonesia does not dispute that this information was made available to the Indonesian producers under investigation by the EU authorities. However, Indonesia asserts that the European Union attempts to "piece together a WTO-consistent disclosure of the results of the verification visits from scattershot sources and references in the record of the investigation".[575] We recall in this regard that Article 6.7 prescribes no particular format for the disclosure of the verification results. As stated by the panel in *Korea – Certain Paper*, Article 6.7 "requires that the verification results be disclosed to the … [producers] without specifying the format in which such disclosure is to be made".[576] The fact that the information provided by the authorities appears in separate documents does not matter as long as the information supplied allows interested parties to understand the results of the verification.

7.235. We agree with the European Union that the corrections made to original response and the lists of exhibits collected on-the-spot are "outcome[s]"[577] of the verification visit. Taken together however, these documents do not comprise the full extent of the "results" of the on-the-spot investigation, as they fail to put the investigated producer (PT Musim Mas) – and this Panel – in a position to understand in respect of which part of the questionnaire response or other information supplied supporting evidence was requested, whether any further information was requested, whether the exporter made available the evidence and additional information requested, and whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified producers in, *inter alia* their questionnaire responses. By looking at the "List of electronic files" attached to the confidential company-specific disclosure one can understand that some of the original worksheets provided by PT Musim Mas were corrected during the verification visit.[578] However, we are unable to relate the corrections made to any evidence that was verified or not verified by the EU authorities during on-the-spot verifications.[579]

7.236. We consider that the EU authorities did not make available or disclose the "results of any such investigations" to PT Musim Mas, as required by Article 6.7, because they failed to explain those parts of the questionnaire response or other information supplied for which supporting evidence was requested and they also failed to explain whether:

a. any further information was requested;

b. the producer made available the evidence and additional information requested;

c. the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified company, *inter alia* in its questionnaire response.

## 8 CONCLUSIONS AND RECOMMENDATIONS

8.1. For the reasons set forth in this Report, we conclude as follows:

a. With respect to the European Union's request for a preliminary ruling:

[574] European Union's response to Panel question No. 49, paras. 48 and 49.
[575] Indonesia's comments on the European Union's response to Panel question No. 49, para. 6.14.
[576] Panel Report, *Korea – Certain Paper*, para. 7.188.
[577] European Union's response to Panel question No. 49, para. 43.
[578] We understand that worksheets 2.2, 2.3, 2.4, 2.9, 2.12, and 2.13 were amended on the basis of "Exhibit 1", which is described in Exhibit EU-14 as "Corrections to Tables (hard copy + CD-ROM with 6 Excel files)". We also understand that "Exhibits 8, 17 and 21" collected during the on-the-spot verifications are the corrected versions of PT Musim Mas original response for worksheets 2.6, 2.4, and 2.2 respectively. (List of exhibits provided to PTMM at the conclusion of the verification visit, (Exhibit EU-14) (BCI)).
[579] For example, worksheet 2.2 of Exhibit EU-12, which is the Cost of Production table for PT Musim Mas shows corrections made "from the combined exhibits 1 + 21": we cannot discern however if these corrections were made by the company itself, or if they result from the verification by EU authorities of the company's cost of production, or from the correction of mathematical errors made in the original submission. The same is true for other worksheets included in Exhibit EU-12. (Excel file "PTMM definitive disclosure.xls", (Exhibit EU-12) (BCI)).

i. the European Union has not demonstrated sufficiently that the correspondence sent by the Permanent Mission of Indonesia to the WTO Secretariat on 11 July 2013 constituted a request to suspend the work of the Panel in the sense of DSU Article 12.12;

ii. the work of the Panel was not suspended; and

iii. the authority for the establishment of this Panel has not lapsed.

b. With respect to Indonesia's claims under Articles 2.3 and 2.4 of the Anti-Dumping Agreement:

i. Indonesia has not demonstrated that the EU authorities acted inconsistently with Article 2.4 by making an improper deduction for a factor that did not affect price comparability; and

ii. Indonesia has therefore not demonstrated that the EU authorities consequently acted inconsistently with Article 2.3.

c. With respect to Indonesia's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement:

i. Indonesia has not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 in their analysis of the economic crisis factor; and

ii. Indonesia has not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 in respect of the alleged "access to raw materials and price fluctuations" factor.

d. With respect to Indonesia's claim under Article 6.7 of the Anti-Dumping Agreement, the EU authorities failed to make available or disclose the "results of any such investigations" to PT Musim Mas, and therefore acted inconsistently with of Article 6.7 of the Anti-Dumping Agreement.

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

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

WORLD TRADE ORGANIZATION

WT/DS442/R/Add.1

16 December 2016

(16-6862)

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Original: English

# EUROPEAN UNION – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN FATTY ALCOHOLS FROM INDONESIA

REPORT OF THE PANEL

*Addendum*

*BCI deleted, as indicated **[***]***

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS442/R.

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## WORKING PROCEDURES OF THE PANEL


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## ANNEX A-1

WORKING PROCEDURES OF THE PANEL

*Adopted on 13 July 2015*

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

### General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

### Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Indonesia requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, Indonesia shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this

procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Indonesia could be numbered IDN-1, IDN-2, etc. If the last exhibit in connection with the first submission was numbered IDN-5, the first exhibit of the next submission thus would be numbered IDN-6.

10. Each party and third party should make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1.

**Questions**

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

**Substantive meetings**

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Indonesia to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Indonesia presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by Indonesia. If the European Union chooses not to avail itself of that right, the Panel shall invite Indonesia to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any,

preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

**Third parties**

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

**Descriptive part**

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

**Interim review**

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

**Service of documents**

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 2 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx@wto.org, xxxxx@wto.org and xxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance

of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

## ANNEX A-2

### ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

*Adopted on 13 July 2015*

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS442.

1. For the purposes of these Panel proceedings, BCI is any information that has been designated as such by the party submitting the information and that was previously treated as confidential within the meaning of Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 by the Commission of the European Union in the anti-dumping investigation at issue in this dispute. However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. As required by Article 18.2 of the DSU, a party or third party having access to BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these working procedures to protect BCI. An outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party under the terms specified in these procedures, or an outside advisor to a party or third party for the purposes of this dispute.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 4.

7. If a party or third party considers that information submitted by the other party or a third party contains information which should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection as appropriate. Similarly, if a party or third party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate.

8. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

10. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

# ANNEX B

## ARGUMENTS OF THE EUROPEAN UNION


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## ANNEX B-1

### FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

## 1. Introduction

1. Indonesia has presented three sets of legal claims in respect of the EU's anti-dumping duty on fatty alcohols from Indonesia, which was imposed in 2011. Indonesia considers that the European Union acted inconsistently with several obligations under the *Anti-Dumping Agreement* when adopting the measure relating to (1) the requirement to make adjustments for differences affecting price comparability in order to make a fair comparison between the normal value and the export price; (2) the establishment of causal link between the dumped imports and the injury to the domestic industry; and (3) the procedural requirement to inform interested parties of the results of a verification.[1]

2. The European Union considers that Indonesia's claims are without merit and constitute an unwarranted attempt at obtaining from the Panel a *de novo* review of the facts. They are not supported by the text of the *Anti-Dumping Agreement* and relevant jurisprudence and they are based on an inaccurate reflection of the facts on the record. Therefore, all of the claims must be rejected.

3. Indonesia is effectively asking the Panel to re-do the investigation based on legal concepts that are nowhere to be found in the *Anti-Dumping Agreement.* However, the standard of review of panels in relation to anti-dumping measures is limited to examining whether the EU's interpretation of the relevant provisions is permissible, whether the investigating authority's establishment of the facts was proper and whether the evaluation of those facts was unbiased and objective. It is equally well-established in WTO jurisprudence that a panel's analysis of the legal obligations imposed on Members of the WTO is to be based on the text of the Agreement, and that panels may not read into the WTO Agreements words or concepts that are not there.[2]

## 2. Indonesia's erroneous interpretation and application of Article 2.4 of the *Anti-Dumping Agreement*

4. Indonesia argues that the European Union violated Article 2.4 of the *Anti-Dumping Agreement* when adjusting PT Musim Mas' export price for the sales commissions received by the related trading company in Singapore, ICOF-S, through which its export sales to the EU were made, on the basis (i) that no adjustment was warranted because ICOF-S and PT Musim Mas formed a single economic entity, and (ii) that the European Union's adjustment was inconsistent with Article 2.4 because it treated two Indonesian exporters in identical situations differently and that this distinction was legally unfounded and unsupported by the facts.

### A. The relevant consideration of Article 2.4 is whether there is a difference affecting price comparability

5. Article 2.4 of the *Anti-Dumping Agreement* requires adjustments to be made for differences affecting price comparability in order to make a fair comparison between normal value and export price. The purpose of this provision is to ensure that the ultimate determination identifies whether or not there is international price discrimination. If the starting domestic and export prices are different for some other objective reason, then it is that other reason or countervailing explanation

[1] It is important to remember that PT Musim Mas has brought proceedings on most of the issues raised in the present dispute also in the courts of the European Union and lost. The General Court of the EU in its judgment of June 2015 made a number of relevant findings that Indonesia seeks to have re-litigated, notably in relation to the existence of a single economic entity and the alleged discrimination between two Indonesian producers. Although the EU Court made its findings based on EU law, many of its factual findings rejecting provide important context for a number of the claims and assertions made in the present dispute (See in particular paras. 40−84, 92-97, 115-118 and 123−138 of the EU General Court's judgment, Exhibit EU−4).

[2] Appellate Body Report, *Japan − Alcoholic Beverages II*, pp. 11−12; see also Appellate Body Report, *India − Patents (US)*, para. 45.

that explains what is happening − not the existence of international price discrimination by the producer. Indonesia shares this understanding of Article 2.4.[3]

6. The main obligation in Article 2.4 is therefore for investigating authorities to adjust for any difference which affects the price comparability of the export price and normal value. Failing to make such adjustments could result either in a false positive (a finding of dumping when none exists) or a false negative (a finding of no dumping when it is in fact occurring). Indonesia correctly acknowledges that "the ultimate litmus test"[4] of Article 2.4 is whether a factor affects price comparability and that, if there is such a factor, Article 2.4 requires that the investigating authority makes an adjustment to ensure a fair comparison. Following the same line of reasoning, Indonesia admits that if a sales commission is paid by an exporting producer to a trading company through which it sells the goods, an adjustment is due.[5]

7. However, for commissions paid to trading companies, Indonesia argues that Article 2.4 contains an implicit obligation to consider whether or not a single economic entity exists between the producer and a related trading company, or whether the producer/exporter and the trader can be regarded as two economically independent entities operating at arm's length. Where a single economic entity exists, Article 2.4 would not allow the authority to make any adjustments for a commission paid even when, for example, there is evidence that such commissions were paid only in relation to export sales and not for domestic sales transactions.[6] Indonesia also proposes to read into Article 2.4 the principle it calls "follow the money", i.e. what ultimately goes into the pocket of the exporting producer when it sells to the importing country compared to what it gets into the pocket when selling the same product domestically. There is of course no textual basis for Indonesia's propositions and none has been referred to by Indonesia.

8. First, Article 2.4 does not mention "related parties" or a "single economic entity". The concept of a single economic entity is nowhere to be found in the *Anti-Dumping Agreement*. In any case, even Indonesia agrees that within a single economic entity adjustments must be made for costs which objectively are generated by specific transactions.[7] A commission, which by contractual arrangement is paid in relation only to export sales and not in relation to domestic sales, is such a cost that must be adjusted for irrespective of the relationship. Second, the AD Agreement concerns the "product", not the producer. Article 2.1 provides that there is dumping if the product "is introduced" into the commerce of another country at a price that is less than its normal value and states that this is the case "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The concept of dumping is not about "following the money" and is not about establishing who ultimately benefits from certain sales transactions or the profitability of those transactions; it is about ensuring a fair and correct comparison between two types of transactions that are comparable or that are made comparable such that it can be determined whether the product was introduced into the commerce of another country at less than its normal value.[8] The EU also considers that the fourth sentence of Article 2.4 is evidence of the fact that Article 2.4 does not embody the "follow the money principle".[9]

9. Indonesia also argues that the European Union violated Article 2.4 for treating two Indonesian producers in similar situations in different ways. However, also this argument is divorced from the text of Article 2.4 which contains the general obligation to make a fair comparison and to adjust for factors affecting price comparability. In any case, the differences in the situation of the two Indonesian exporters justified a different treatment.

10. The essential question under Article 2.4 is whether there is an objective difference affecting price comparability between the export price and the normal value. It is immaterial whether the difference affecting price comparability is, for example, a cost of additional material sourced from a related or integrated company or from a third party supplier.[10] Thus, the question is not whether the commission is paid to a related party or not. The focus of Article 2.4 is on the price

[3] Indonesia's first written submission, paras. 4.51−4.52.
[4] Indonesia's first written submission, para. 4.57.
[5] Indonesia's first written submission, para. 4.67.
[6] Indonesia's first written submission, paras. 4.67−4.71.
[7] Indonesia's first written submission, paras. 4.119 and 4.278.
[8] See European Union's response to Panel Question 7.
[9] See European Union's response to Panel Question 13.
[10] See European Union's response to Panel Question 10.

discrimination and the need to ensure a proper apples-to-apples comparison between the export price and the normal value, adjusted for differences that affected the prices paid by the consumer in one context that were not affecting the price in another context.

11. The European Union, like many other Members, considers that sales commissions can constitute an objective difference affecting price comparability and has included "commissions" in the list of factors that may require an adjustment.[11] In that sense, the EU Basic Anti-Dumping Regulation goes beyond Article 2.4 that does not expressly refer to commissions. The interference of a sales agent in the export sale of a product may introduce an element that can affect price comparability. This is particularly the situation where there is no sales commission paid for the like product on the domestic market, but a commission is paid in relation to export sales, or *vice versa* of course. Just like differences between domestic sales and export sales in terms of insurance or credit costs need to be adjusted, a difference in commissions paid to trading companies that are involved in the sale of the product require an adjustment if the commission is lower or non-existent on either the normal value or the export price side, regardless of the degree of closeness between the trading company and the producer.

12. In the present dispute, the European Union examined all the relevant facts in relation to PT Musim Mas' export of the product concerned and domestic sales of the like product and concluded that the commission paid to ICOF−S for export sales affected price comparability as no similar expense was incurred by PT Musim Mas for the domestic sales. The record evidence clearly shows that PT Musim Mas and ICOF−S signed a Sale and Purchase Agreement, a contract that undisputedly only concerns export sales and which stipulated that ICOF−S receives a commission (in the form of a mark-up) for every export sale it intervenes in.[12] Neither the contract nor any other piece of evidence presented to the European Union showed that a similar direct selling expense was incurred for the domestic sales made by PT Musim Mas.[13] All other things being equal, if there were no export sales, ICOF−S would receive neither a commission nor other forms of remuneration from PT Musim Mas that could be equated to that commission.

13. However, Indonesia argues that the Sale and Purchase Agreement, despite its name and terms, was drafted for complying with tax laws in Singapore and Indonesia and in order to show that transfer prices between the two entities reflect the arm's length principle.[14] Indonesia invites the Panel to ignore what the contract says in clear terms, and suggests that the Panel should conduct a *de novo* review. Indonesia logically fails to show that by accepting the terms of the Sale and Purchase Agreement, the European Commission acted in an unreasonable and biased manner.

14. In summary, Indonesia has failed to establish a *prima facie* case that the adjustment is inconsistent with Article 2.4. In fact, the European Union was not only entitled to reach this reasonable and reasoned conclusion that the ICOF−S' sales commission affected price comparability, it was "required" by Article 2.4 to adjust for this difference.

## B. The existence of a single economic entity is not a relevant consideration under Article 2.4

15. Indonesia acknowledges that a commission paid to a trader may warrant an adjustment because it may affect price comparability.[15] It disputes instead the adjustment because of the European Union's failure to recognize the single economic entity allegedly formed by PT Musim Mas and ICOF−S. The European Union has already demonstrated that whether or not a single economic entity exists is not the relevant question for the application of Article 2.4. In fact, the claim that no adjustment is warranted where a single economic entity exists between the producer and its trader lacks a legal basis in Article 2.4.

16. The lack of a legal basis in the *Anti-Dumping Agreement* is evident from Indonesia's first written submission where, in over 50 pages, it is unable to substantiate a relevant legal obligation that the European Union would have violated when making the adjustment. Indeed, the "single economic entity" concept does not even exist in the *Anti-Dumping Agreement* and it certainly is not part of Article 2.4. Indonesia duly acknowledges that "there is no provision of the

[11] This is reflected in Article 2(10)(i) of the EU Basic Anti-Dumping Regulation, Exhibit EU−3.
[12] Exhibit IDN−25; see also Indonesia's first written submission, para. 4.201.
[13] See Exhibit IDN-21, pp. 2 and 3.
[14] Indonesia's first written submission, para. 4.227.
[15] Indonesia's first written submission, para. 4.67.

*Anti-Dumping Agreement* that explicitly references or defines a [single economic entity]".[16] Indonesia merely cites to WTO jurisprudence in relation to Article 6.10 of the *Anti-Dumping Agreement* to argue that the concept of a single economic entity is "well-engrained in WTO case law".[17] It also loosely argues that "several provisions in the Anti-Dumping Agreement − in particular Articles 2.4 and 6.10 − implicitly require consideration whether two or more formally separate entities form an [single economic entity]".[18]

17. Indonesia is wrong for many reasons. First of all, the fact that Indonesia has to rely from the beginning on an "implicit" requirement is telling. It is undisputed in the WTO that a panel's analysis of the legal obligations imposed on Members of the WTO is to be based on the text of the Agreement. We recall the Appellate Body's statement in *India − Patents* that "principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[19]

18. Second, Indonesia's reference to the WTO jurisprudence on Article 6.10 of the *Anti-Dumping Agreement* does not suggest that authorities are "implicitly required" to examine whether companies form a single economic entity. The question addressed in the two cases referred to by Indonesia, *Korea − Certain Paper* and *EC − Fasteners (China)*, considered whether the authorities could deviate from the general rule in Article 6.10 of calculating separate dumping margins when several companies can be considered as a single "exporter" because of the corporate and functional links between them. At no point in these two cases did the panels or the Appellate Body impose a "requirement" to examine this relationship. They merely considered whether the language of Article 6.10 allowed investigating authorities to impose a single dumping margin on closely related entities.

19. Third, in neither *Korea − Certain Paper* nor *EC − Fasteners (China)* did the panels or the Appellate Body consider the existence of a single economic entity in relation to the application of Article 2.4. It was only considered in relation to Article 6.10 and for obvious reasons given that the calculation of individual dumping margins for entities that are actually part of the same economic entity could lead to circumvention and avoidance of the payment of duties thus undermining the protection to be afforded to the domestic industry. The willingness to entertain this concept in both cases made perfect sense in the logic of Article 6.10; it does not make sense in the price comparability logic of Article 2.4.

20. The European Union notes with particular interest Indonesia's frequent references to the *Korea − Certain Paper* dispute in support of its single economic entity argument. What is interesting about the panel's findings in that dispute is that, in so far as the panel dealt with claims under Article 2.4 of the *Anti-Dumping Agreement*, its findings actually go against Indonesia's arguments in this dispute.

21. First, the panel acknowledged in the context of its Article 6.10 analysis that the trading company and the relevant Indonesian producers formed a single economic entity, the "Sinar Mas Group".[20] However, this fact played no role in the panel's analysis under Article 2.4 as to whether any adjustments were required to ensure price comparability. Instead, the panel rightly focused solely on whether evidence had been presented of a difference between normal value sales and export sales that required an adjustment. So, the very same panel that for the first time discussed the concept of a single economic entity in the context of Article 6.10 and made findings that such a single economic entity existed between the trader and the producing companies in Indonesia did not even refer to this relationship when examining whether adjustments under Article 2.4 were warranted. Under Article 2.4, the existence or not of a single economic entity was a completely irrelevant consideration for the panel. It should be the same in the current dispute.

22. Second, the panel in *Korea − Certain Paper* rejected Indonesia's claim that an adjustment was required because Indonesia had failed to present evidence of such a difference affecting price comparability.[21] The panel expressly rejected the notion that the intervention of a trading company

[16] Indonesia's first written submission, para. 4.120.
[17] Indonesia's first written submission, para. 4.120.
[18] Indonesia's first written submission, para. 4.120.
[19] Appellate Body Report, *Japan − Alcoholic Beverages II*, pp. 11 − 12; see also Appellate Body Report, *India − Patents (US)*, para. 45.
[20] Panel Report, *Korea − Certain Paper*, paras. 7.165−7.168.
[21] Panel Report, *Korea − Certain Paper*, para. 7.147.

was relevant as such but rather focused on whether there was evidence of any difference affecting price comparability. It was not convinced that there were sales-related services rendered by the trading company in the Indonesian market which were not rendered in the context of export sales to Korea and thus considered that Indonesia had failed to make a *prima facie* case that adjustments were necessary. In the Fatty Alcohol investigation, the European Union did have such evidence before it, notably in the form of the Sale and Purchase Agreement that refers to the payment of commissions only for export sales. No evidence was presented by Indonesia or the Indonesian producers that similar commissions were also paid for domestic sales related support by the trading company.

23. Third, the dispute in *Korea – Certain Paper* is also interesting because Indonesia was one of the disputing parties and it is striking to note that its position in that dispute is the exact opposite of what it argues in the present dispute. In *Korea – Certain Paper*, Indonesia argued that an adjustment was required for the interference of the trader that formed a single economic entity with the producing company because the trader was only involved in the domestic sales and not in the export sales. Thus, Indonesia considered that an adjustment should have been made for the costs of the additional sales-related services of the trader in the domestic market. However, because the Korean authority failed to adjust for lack of evidence of such a difference, Indonesia alleged a violation of Article 2.4 of the *Anti-Dumping Agreement*.[22]

24. Indonesia's argument in the present dispute is the exact opposite where it considers that no adjustment shall be made because of the existence of a single economy entity between PT Musim Mas and ICOF–S. Although these positions on the same issue are diametrically opposed to each other, the European Union understands the reason for this opportunistic shift in position:

In *Korea – Certain Paper*, Indonesia wanted to reduce the normal value to avoid a dumping determination and thus argued for a downward adjustment of the normal value because of the involvement of the related trader in the domestic sales; and

In the present dispute, Indonesia wants to maintain the export price as high as possible to avoid a dumping determination by arguing that no adjustment is required for the involvement of the related trader in the export sales.

25. The opportunistic shift in positions is strategically understandable but does at the same time reveal the weakness of Indonesia's present claim under Article 2.4.

26. In sum, the European Union considers that Indonesia has not demonstrated any legal basis for its claim that the European Union violated Article 2.4 by failing to account for the alleged single economic entity between PT Musim Mas and ICOF–S. Indonesia opportunistically attempts to create an obligation in Article 2.4 that simply does not exist in the text of the *Anti-Dumping Agreement* and that is not supported by the WTO jurisprudence it refers to. For this reason as well, Indonesia's claim under Article 2.4 as well as its purely consequential claim of violation of Article 2.3 should be rejected.

## C. Even accepting *arguendo* the relevance of a single economic entity in Article 2.4, Indonesia has failed to demonstrate that the European Union failed to take this into consideration

27. Even accepting *arguendo* Indonesia's argument that it is necessary to consider whether a single economic entity exists under Article 2.4, Indonesia has failed to demonstrate that the European Union violated such an (non-existing) obligation. The facts on the record did not lead the European Commission to the conclusion that PT Musim Mas and ICOF–S constituted a single economic entity. Indonesia fails to demonstrate that the facts were not properly established or were examined in a biased and non-objective manner. It simply disagrees with the European Commission's findings of fact and inappropriately invites the Panel to review the facts as if it was the trier of fact and not the Commission. The EU General Court already found against PT Musim Mas on this very factual question.[23] The Panel may not reject a determination simply because it would have arrived at a different outcome assessing the same facts.[24]

[22] Panel Report, *Korea – Certain Paper*, para. 7.132.
[23] See in particular paras. 123–138 of the EU General Court's judgment, Exhibit EU–4.
[24] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

28. In any case, Indonesia argues that the EU's determination lacked a sufficient basis in the record evidence and that it improperly focused on the *functions* of ICOF−S as opposed to its *corporate and structural links* to PT Musim Mas. These arguments are unfounded and should be rejected because the European Union's determination to make an adjustment was proper, unbiased and objective.

29. First, there is no basis in the text of the relevant provisions to consider that only corporate and structural links are relevant for determining the existence of a single economic entity. Functions of a related company would appear to be much more relevant given the focus on the actual services rendered. So, this approach is entirely reasonable. Indonesia points merely to WTO jurisprudence developed in relation to Article 6.10 of the *Anti-Dumping Agreement* which is wholly unrelated to the present dispute, as noted earlier. In any case, the focus on corporate and structural links makes sense in that context of Article 6.10 for determining whether to calculate individual dumping margins for related entities given the risk of circumvention and avoidance of duties. There is no reason, however, to apply only that same test under Article 2.4.

30. Second, the EU's determination to make an adjustment was based on record evidence presented by PT Musim Mas[25], namely: (i) that a very significant portion of ICOF−S' overall sales related to products of producers other than PT Musim Mas; (ii) that the commercial relationship between PT Musim Mas and ICOF−S were governed by a Sale and Purchase Agreement containing several provisions which clearly negate that ICOF−S was merely an internal sales department of PT Musim Mas[26]; and (iii) that all domestic sales and a significant portion of export sales were invoiced directly by PT Musim Mas.

31. These factual circumstances, which Indonesia fails to disprove, led the European Union to reasonably reject the contention that ICOF−S was the internal sales department of PT Musim Mas with which it allegedly formed a single economic entity. The determination that ICOF−S acted like an agent was reasonable as it was based on the totality of the facts on the record which were evaluated in an unbiased and objective manner. This determination was therefore one that a reasonable investigating authority could have made, and should therefore be upheld by the Panel. Moreover, the European Commission revisited these facts and revised the adjustment determination for Ecogreen, but not for PT Musim Mas, following a development in the case law of the EU Courts. The conclusion that the new case law of the EU Courts did not require repealing the adjustment for PT Musim Mas' was, subsequently, upheld by the Court in PT Musim Mas' domestic challenge.[27]

32. Finally, in relation to the alleged discrimination between PT Musim Mas and the other Indonesian producer, Ecogreen, Indonesia has not pointed to any legal obligation in the *Anti-Dumping Agreement* that the European Union allegedly violated by treating these producers differently. At the first hearing of the Panel, Indonesia ultimately confirmed that it did not claim that such differential treatment violated Article 2.4.[28] Even if there was such an obligation (*quod non*), the 2012 Amending Regulation[29] demonstrates that the European Union engaged in an extensive discussion of the main arguments and factual circumstances on the basis of which the decision was taken to adjust PT Musim Mas' export price and for distinguishing its situation from Ecogreen.[30] There were three main differences in factual circumstances that led to this determination: (i) that PT Musim Mas made a significant amount of export sales (about 20% of all export sales) directly while Ecogreen only sporadically engaged in export transactions (not more than 5% of all export sales)[31], using its trading company for almost all sales; (ii) that the relationship between PT Musim Mas and ICOF−S was governed by a comprehensive and formal Sale and Purchase Agreement and that ICOF−S traded many products from unrelated parties while Ecogreen had no contract with its trader, who almost exclusively sold Ecogreen's products; and (iii) that the contract between PT Musim Mas and ICOF−S stipulated that the trader was to receive a mark-up on all export sales in which it intervened and this was circumstantial evidence that the

[25] See, e.g. European Union's first written submission, para. 95.
[26] See Exhibit IDN−25.
[27] See Exhibit EU−4.
[28] See European Union's response to Panel Question 18.
[29] Amending Regulation, Exhibit IDN−5.
[30] See, e.g. European Union's first written submission, paras. 97−99.
[31] Amending Regulation, Exhibit IDN−5, para. 5 and EU General Court's judgment, Exhibit EU−4, para 134.

trader acted on a commission basis. On the other hand, there was no such contractual provision for a commission to be paid by Ecogreen to its trader.

33. For these reasons, the European Union considered that the situation of PT Musim Mas could be distinguished from that of Ecogreen. This determination was reasonable as it was based on the totality of the facts on the record which were evaluated in an unbiased and objective manner. Leaving aside the lack of legal relevance of the fact that no adjustment was made to Ecogreen, the European Union's determination was one that a reasonable investigating authority could have made. It should therefore be upheld by the Panel.

34. Finally, for the claim of violation of Article X:3(a) of the GATT 1994, which Indonesia orally added during the hearing even though it was not included in its first written submission and not even in the written version of the oral statement that was circulated at the time of the first hearing of the Panel, Indonesia has failed to make a *prima facie* case that the conditions for its application are fulfilled. Clearly, merely treating differently-situated producers differently in a specific anti-dumping investigation is not a violation of Article X:3(a) concerning the uniform and reasonable administration of laws and regulations.

35. In sum, all of Indonesia's claims under Article 2.4 and its consequential claim under Article 2.3 are to be rejected as well as the claim under Article X:3(a) of the GATT 1994.

### 3. Indonesia's erroneous approach to the legal standard in Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*

36. Indonesia's second claim argues that the European Union violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* because it allegedly failed to conduct a proper non-attribution analysis. In particular, the European Union allegedly failed properly to examine two "known factors" other than dumped imports, namely (1) the impact of the economic and financial crisis of 2008/2009, and (2) the impact of the difficulties faced by the EU domestic industry to source raw materials and the fluctuations in prices of these raw materials. Indonesia's claim, however, is based on an erroneous approach to the legal standard of these provisions. It is also based on an inaccurate presentation of the facts on the record and of the European Union's analysis.

37. First, with respect to the economic and financial crisis, Indonesia errs when it argues that the European Union simply rejected its relevance and that the assessment of the role of the crisis was not supported by the facts on the record. In fact, the European Union acknowledged that the crisis was a factor. This factor was examined in light of the evidence on the record and involved an examination of the coincidence in developments in the injury factors, the financial crisis, and other demand-related developments. The European Union carried out a proper correlation analysis which is central to the causation analysis as indicated by the Appellate Body.[32] Based on this analysis, the European Union reached the reasonable and reasoned conclusion that although the economic crisis may have contributed to the injury caused by the dumped imports, it was not of such impact that it broke the causal link.

38. Indonesia makes a big issue of the fact that the European Commission seemed to consider that the financial crisis only started in 2008 and asserts that this vitiates the whole reasoning of the Commission.[33] However, the Commission acknowledged that the economic downturn started in 2008, whilst it cannot be disputed that the effects for the real economy only became manifest in 2009. In any case, irrespective of when exactly the crisis started, when demand increased again reflecting a general economic recovery, the Union industry did not recover due to the massive presence of dumped imports.[34] The Panel should therefore reject Indonesia's attempt at seeking a *de novo* review of the facts as established and properly examined during the original investigation.

39. Moreover, Indonesia acknowledges that the *Anti-Dumping Agreement* provides "considerable latitude" to investigating authorities to carry out the non-attribution analysis.[35] Yet, Indonesia attempts to impose a heightened standard on the European Union by pointing to one panel report that noted a preference for use of economic models. However, this attempt to impose an obligation to conduct a quantitative as opposed to a qualitative non-attribution analysis should be

[32] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.
[33] Indonesia's first written submission, paras. 5.34–5.43.
[34] European Union's first written submission, paras. 133, 146–147.
[35] Indonesia's first written submission, para. 5.94.

rejected. The proper standard remains whether the European Union properly established the facts with respect to the other "known factors" and evaluated the evidence in an objective and unbiased manner.

40. Second, with respect to the claim that access to raw materials was a separate cause of injury to the domestic industry and that this was not properly examined, Indonesia also errs both on the law and on the facts. Indonesia fails to substantiate the importance of this issue to elevate it to a "known factor".[36] It is not an obligation of investigating authorities to examine every factor alleged to have caused injury to the domestic industry, but only those "known factors … which at the same time are injuring the industry". Article 3.5 requires an interested party to provide sufficient argument and evidence of the injurious effect of this factor and not merely to mention a factor in passing among many others as the Indonesian producers did at the start of the investigation only. In any case, Indonesia itself appears to admit that the price volatility of raw materials was closely connected to the economic crisis which was properly examined by the European Union. Indeed, Indonesia's argument is artificial because it separates the economic crisis from its concrete effects. It seeks to elevate to the position of "other factors causing injury" a possible aspect of the crisis. Furthermore, the argument that the domestic industry in the European Union has greater difficulties to source raw materials is simply not a factor causing injury but merely a structural aspect of the conditions of competition. There was no evidence to suggest that this was a separate cause of injury to the domestic industry; rather it appears to be part of the conditions of competition which existed also before the dumping.[37] The European Union's conclusion was reasonable and supported by the facts on the record.[38]

41. For these reasons, Indonesia's claim under Articles 3.1 and 3.5 should be rejected by the Panel.

## 4. Indonesia's claim that the European Union failed to disclose verification results is in error

42. Finally, Indonesia's third claim that the European Union violated Article 6.7 of the *Anti-Dumping Agreement* by failing to provide any meaningful information about the results of the verification visits to Indonesia is in error. As the record evidence demonstrates, the European Union provided full disclosure of the essential facts relating to its final determination to the relevant Indonesian firms, including the results of the verification visits. Moreover, Article 6.7 does not impose an obligation on investigating authorities to prepare a detailed report of a verification visit or of the reasons why certain information was requested during verification. It only requires that the "results" of the verification be communicated. This was clearly done by the European Union after the verification in the specific disclosures, in the General Disclosure Document and the Provisional and Definitive Regulations.

43. The *Anti-Dumping Agreement* provides no definition or guidance regarding the exact content of the disclosure obligation relating to the "results" of the verification, however the ordinary meaning of the term "results" is "an effect, issue, or outcome from some action, process or design".[39] The evaluation of the evidence by the investigating authority is not part of the "results" of the verification visit. Instead, it refers to the essential factual outcome of the verification. This could include the list of exhibits that were provided during verification. It could also include, where relevant, other relevant outcomes such as refusals to provide certain information. The purpose is to inform parties of verification-related developments that could potentially have consequences for the final determination. Article 6.7 does not impose a "reporting" obligation, as Indonesia seems to suggest, but a mere obligation to "make available" or "disclose" the results to the relevant interested parties.[40]

44. Moreover, the Commission underlined that during the verification visit mistakes and errors were corrected in agreement with the company. A list of exhibits that were provided by the Indonesian producers at the time of the verification was also made available. Indonesia does not deny that such discussions took place and that such an agreement was reached. Nor does Indonesia argue that PT Musim Mas made comments concerning the disclosures as explicitly

[36] See European Union's response to Panel Questions 21 and 23.
[37] See European Union's response to Panel Question 22.
[38] See European Union's response to Panel Question 21.
[39] Appellate Body Report, *US – Steel Safeguards*, para. 315.
[40] See European Union's response to Panel Question 26.

invited by the Commission[41], in order to point out omissions or other errors, but that those comments went unheard. It is also striking that Indonesia cannot point to any information, data or behaviour whose absence from the disclosure documents might have affected the position of PT Musim Mas. Basically, it is clear from its first written submission that rather than the "results" of the verification, Indonesia would like this Panel to blame the Commission not to have disclosed the "minutes" of the verification.[42] However, that is not what the language of Article 6.7 requires.[43] Indonesia's claim of a violation of Article 6.7 is therefore without merit.

[41] See Exhibit EU−1.
[42] Indonesia's first written submission, paras. 6.55 and 6.64.
[43] See European Union's response to Panel Question 26.

## ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

### 1. Legal Analysis

1. Indonesia raised three sets of claims against the European Union's AD measure on fatty alcohols. As demonstrated in the European Union's first written submission, all three sets of claims are based on an erroneous interpretation of the relevant provisions of the *Anti-Dumping Agreement* and in fact request the Panel to make a de novo assessment of the facts on the record. Indonesia fails to rebut the arguments presented by the European Union in its first written submission.

#### 1.1. *Claim 1: Indonesia's claim that the European Union's adjustment for commissions paid to ICOF-S violated Articles 2.3 and 2.4 of the Anti-Dumping Agreement is without merit*

2. Indonesia argues that the European Commission made an allegedly inappropriate adjustment for the sales commissions paid to a trading company based in Singapore, ICOF-S, when calculating the export price of PTMM, the producer of the product under consideration. Indonesia fails to respond to the arguments developed by the European Union under Article 2.4 of the *Anti-Dumping Agreement*.

3. Indonesia fails to rebut the argument of the European Union that the notion of a Single Economic Entity ("SEE") is foreign to Article 2.4 of the *Anti-Dumping Agreement* and that the existence of a relationship between certain entities does not preclude making adjustments for differences affecting price comparability. The determinative question is not whether two entities are related but whether there exists evidence of a difference affecting price comparability which requires that an adjustment be made. Without addressing the European Union's legal arguments under Article 2.4 of the *Anti-Dumping Agreement*, Indonesia simply asserts that its position is "obvious as a matter of common sense." It argues that "splitting up a previously integrated company … cannot be an automatic reason for treating them as independent so as to justify imputing a "commission" adjustment under Article 2.4." This argument is purely theoretical and does not reflect the facts of the case. ICOF-S is simply not a spinoff of the internal sales department of PTMM. In addition, it is based on a flawed legal interpretation of Article 2.4 of the *Anti-Dumping Agreement*.

4. In fact, in its answers to the Panel questions, Indonesia contradicts its own claim. It provides an example that contradicts the main argument on which its case rests. Its example suggests that it does not contest the fact that an adjustment was made for the intervention of the related trader in Singapore, but that it takes issue solely with the amount of the adjustment. However, its legal claim is not about the amount of the adjustment but about the fact that an adjustment was made to a transaction between related parties. Indonesia has consistently argued that the key issue is that no adjustments can be made for transactions between affiliated parties because these do not affect the price of the transaction. According to Indonesia, no adjustment can be made at all if the two entities involved are related parties. Thus Indonesia's legal claim in the present case is contradicted by the very example Indonesia provides.

5. In any case, the European Union considers that Indonesia's approach is entirely misguided and not supported by the text of Article 2.4 or its context. Indonesia's legal argument is not based on the text of Article 2.4 of the *Anti-Dumping Agreement* and the "follow the money" principle that it seeks to read into this provision is simply an invention of Indonesia that is contradicted by the context of this provision. First, Article 2.4 is silent on the relevance of any relationship between the parties. This contrasts with other provisions of the *Anti-Dumping Agreement* that expressly concern the treatment of "related parties" (such as Articles 4.1 and footnote 11 of the AD Agreement on the definition of the domestic industry or Article 9.5 on the determination of an individual margin of dumping for new shippers). Second, neither in Article 2.4 nor in any other provision of the *Anti-Dumping Agreement* is the concept of a SEE used, let alone defined in any way. Third, the notion of an SEE was used only in two instances in WTO disputes, in an entirely

different context relating to the possibility to apply the same dumping margin to closely related entities. Fourth, in neither of these disputes was the investigating authority required to examine whether companies formed an SEE, as the question was merely whether an authority was permitted to consider this relationship in light of the requirement of Article 6.10 of the *Anti-Dumping Agreement* to determine an individual margin of dumping for each producer or exported under examination. Fifth, in the WTO dispute in which this notion of an SEE was first addressed in the context of Article 6.10 of the *Anti-Dumping Agreement*, *Korea – Certain Paper*, this very same concept was completely ignored in the context of the Article 2.4 discussion of the panel in that dispute. There is therefore no basis for Indonesia's focus on the existence of an SEE under Article 2.4 and none has been offered by Indonesia in this dispute. In fact, as noted before, even Indonesia agrees that it is possible to make an adjustment for payments made between related parties, and that the only question concerns the amount of the adjustment which may be affected by the relationship.

6. Indonesia's failure to respond to the argument of the European Union based on the Panel's findings in *Korea – Certain Paper*, the one relevant WTO precedent in which Indonesia was directly involved as a complaining party, is also telling. Indonesia tries to avoid the obvious conclusion that the panel in that dispute did not consider the existence of a "single economic entity" to be a relevant factor for purposes of determining whether an adjustment was warranted. And neither did Indonesia in that case. In fact, it appears that Indonesia was arguing in favour of making an adjustment for the services rendered by the related trading company with respect to domestic sales in an effort to lower the normal value, thus arguing that an adjustment was required to reflect the involvement of the "closely related" trading company.

7. In any event, Indonesia's legal argument lacks any textual basis and is fundamentally flawed.

8. Article 2.4 does not set forth a "follow the money"- principle. Indonesia confuses the *suggestion* in Article 2.4 to make the comparison "at the same level of trade, normally at the ex-factory level" with a *requirement* to determine how much of the money paid by the buyer of the goods stays with the producer. Furthermore, the "ex factory" recommendation is not a suggestion that an investigating authority is to pierce the corporate veil to look into the pockets of the producer to see how much money he was really making on the sale. The recommendation to compare transactions "ex factory" is simply a way of ensuring a comparison that is not affected by differences in transportation costs, insurance costs, distribution costs, etc. and reflects the fact that prices of sales to a distributor can be expected to be different from prices of sales to a wholesaler and different from prices of sales to a consumer. It is merely a recommendation but there is no obligation (as Indonesia suggests) to compare prices at the "ex factory" level. Nothing stops an authority from adding the cost of distribution in order to fairly compare a sale to a distributor with a domestic sale that is made directly to the end consumer for example. The comparison must not necessarily be made at the "ex factory" level in order to be fair.

9. Indonesia tries to read legal distinctions into the text of Article 2.4 that are simply not there. Indonesia is making a semantic argument based on terms like "commissions" "direct selling expenses" and "notional" versus "objective" expenses that are not even used in Article 2.4 of the *Anti-Dumping Agreement*.

10. Article 2.4 requires that due allowance shall be made for any difference affecting price comparability. The payment of commissions to a trader in relation to export sales and not domestic sales (or *vice versa*) is a relevant feature of the transactions that are compared and account should be taken of this feature. It may be qualified as a "commission" or "direct selling expense" for which it is well accepted that an adjustment can be made. The artificial separation that Indonesia seeks to draw between "direct selling expenses" and "commissions" is irrelevant and baseless. Similarly baseless is Indonesia's distinction between "objective" costs and other expenses of the related trader and why an adjustment for such "objective costs" would be warranted between related parties but no other adjustments for what can be assumed to be "un-objective" costs? There is nothing in Article 2.4 of the *Anti-Dumping Agreement* that Indonesia can point to in support of its constructed legal argument that is completely divorced from the text of Article 2.4 of the *Anti-Dumping Agreement*. There is simply no basis in Article 2.4 or any other provision of the Anti-Dumping Agreement for Indonesia's legal conclusion that "in the case of payments made between closely-related entities, the requirement of "price comparability" under Article 2.4 requires an investigating authority to examine whether a particular flow of funds

reflects either an "objective" expense (that does "affect price comparability" and should be adjusted for); or instead a mere shifting of funds (allocation of profits) between related parties (that does not affect price comparability and must not be adjusted for)". This lifting of the corporate veil that Indonesia claims is "required" under Article 2.4 does not make legal or economic sense and raises more questions than it answers, given the absence of any textual guidance in the Anti-Dumping Agreement. In contrast, the legal position of the European Union is text-based and straightforward: is there a difference between the export transactions and the domestic transactions and, if so, is this a difference that affects price comparability.

11. In any case, Indonesia's legal argument is also based on a misunderstanding of the facts and findings in this case.

12. Indonesia makes a number of assertions about the European Union's findings in this case which are factually incorrect and misrepresent the conclusions of the investigating authority. The European Union never stated that ICOF-S was an "independent trader" and this dispute does not concern the imposition of a "notional" commission where there was "no actual expense". The evidence on the record confirms that an expense was made in the form of a commission/mark-up accorded to ICOF-S for its involvement in PTMM's export sales. The adjustment that was made to reflect the fact that this commission/mark-up related to export sales only, did not mean that the investigating authority deducted PTMM's profits and SG&A from the export price. The record clearly shows that the European Commission acknowledged that ICOF-S was a related trader. The Commission did not "change reality" in any way. Nor was the price adjustment made for an "imputed, not actual, commission" given that the Sale and Purchase Agreement between ICOF-S and PTMM clearly showed that a commission/mark-up was paid by PTMM to ICOF-S and that the actual "payment" of that mark-up to ICOF-S was never put into question. Based on the dictionary definition of the relevant terms, a "notional" adjustment is an adjustment "based on a suggestion, estimate, or theory; not existing in reality". But, in this case, the Sale and Purchase Agreement makes this adjustment anything but "notional". It is an adjustment based on a valid contract that both companies relied on. This contract was provided to the investigating authorities and the companies were expecting the tax and customs authorities to rely on this contract as well. It is thus simply not correct to refer to a "notional" adjustment in the current situation. The fact that the investigating authority did not accept the amount of the commission at face value but decided to construct the amount of the commission, does not turn the adjustment into an adjustment that is not based on reality. It is simply a matter of ensuring that the amount of the adjustment is not affected by the relationship between the parties.

13. Furthermore, Indonesia is not correct to assert that the Commission "rejected the transaction price" between PTMM and ICOF-S and "calculated the export price on the basis of the sale to an "independent" customer in the EU". Indonesia is confusing the two sales channels and thus the two ways in which the export price was determined. All export sales to the EU were made via ICOF-S, the related trader in Singapore. Some of the sales went from ICOF-S to the related importer in the EU, ICOF-E, and some other sales went directly from ICOF-S to unrelated buyers in the EU. For sales made by ICOF-S to the related importer in the EU (ICOF-E), the export price was constructed on the basis of the first sale by ICOF-E to an independent customer in the EU in accordance with Article 2.3 of the *Anti-Dumping Agreement*. For sales that were made via ICOF-S to independent buyers in the EU, the export price was not constructed. This means that for sales made to unrelated importers in the EU, the price at which the product was introduced into the commerce of the European Union, i.e. the price paid by the unrelated importer in the European Union was used as the export price. In order to ensure a fair comparison with the normal value, adjustments were subsequently made pursuant to Article 2.4 of the *Anti-Dumping Agreement*/Article 2(10) of the EU Basic AD Regulation for differences affecting price comparability, including for the commissions paid to ICOF-S.

14. Indonesia keeps suggesting in its replies that the European Commission acknowledged that PTMM and ICOF-S were "related" parties and that it thus treated both as a "single entity" for purposes of making the dumping determination. Indonesia argues that "[i]n this case, it is clear that the EU defined the producer/exporter for which it was calculating dumping margins as PT Musim Mas/ICOFS as a whole". According to Indonesia, this confirms the correctness of Indonesia's approach to both companies as being an SEE and it implies that no adjustment should have been made for payments made inside this "single seller". Indonesia is wrong. Indonesia is clearly reading too much into the European Commission's acknowledgement of the relationship between PTMM and ICOF-S. A "relationship" exists in the European Union's practice in many

different situations and even when there is only a 5% direct or indirect shareholding. So, even for entities that are not more closely related than that, the reliability of the pricing may be questioned and another basis may be used for determining the price. It is therefore simply not so that the European Commission first considered PTMM and ICOF-S to be a "single seller" and then treated them as "unrelated" parties when making an adjustment. The margin of dumping was determined for PTMM and not, as Indonesia wrongly asserts, for PTMM and ICOF-S "as a whole", whatever that may mean.

15. It is correct that the investigating authority decided not accept at face value the *amount* of the mark-up as shown in the Sale and Purchase Agreement. But Indonesia makes an unjustified leap of logic by asserting that the European Union's examination of the amount of the commission meant that a commission was simply assumed or "imputed" when none actually existed. That is not correct. A commission was "paid" in the form of mark-up. The Sale and Purchase Agreement is direct evidence of this agreed payment. An allowance is therefore due given that, according to the Sale and Purchase Agreement that was submitted by PTMM during the investigation, this payment was made only for export sales, and no evidence exists of similar payments being made for the alleged involvement of ICOF-S in domestic sales. However, the amount of the mark-up "payment", and thus the level of the allowance, may be subject to review and verification given the relationship between the two entities.

16. In addition, it is not so that the European Union adjusted the export price of PTMM by removing the SG&A and profit of PTMM with respect to its export sales but not with respect to its domestic sales as Indonesia asserts. The Commission did not deduct any amount of profits for PTMM. In fact, this is confirmed by Indonesia in para. 1.69 of its replies in which it states that the amount of the export price "includes PT Musim Mas's profits". Rather, the investigating authority made an adjustment to the export price of PTMM for the direct selling expense of PTMM given that PTMM was obliged by contract to pay a commission/mark-up to ICOF-S, just like it used to pay a commission to the independent trader it used before.

17. Indonesia is wrong to equate the SG&A of ICOF-S with those of PTMM. PTMM has its own SG&A and no adjustment was made for the SG&A expenses of PTMM. The Sale and Purchase Agreement makes clear that ICOF-S existed already before PTMM decided to use it as a trading company. PTMM agreed on a commission/mark-up to be paid for the involvement of ICOF-S. There was no distinction between the part of the mark-up that would cover costs and the part that would cover the profit margin of ICOF-S, just like you would expect in a normal trading relationship. There is no indication that ICOF-S was required to subsequently transfer the profits back to PTMM or that PTMM was covering the costs of ICOF-S. There is no basis for the suggestion that simply because of their shareholding relationship, commissions paid to ICOF-S become part of the SG&A of PTMM. And even then, the commission was paid only for export sales. This suggests that there was a difference in costs affecting price comparability given that such cost was not borne for domestic sales activities.

18. Indonesia also seeks to draw the Panel into a big discussion about "transfer pricing agreements". But this dispute does not require the Panel to opine on what constitutes a transfer pricing agreement and what does not. The WTO Agreements do not refer to transfer pricing agreements and there is no agreed definition of a "transfer pricing agreement". Most relevantly, however, the Commission did not simply ignore the argument that the Sale and Purchase Agreement was a transfer pricing agreement. Rather, it addressed the argument and rejected the alleged legal consequences that the Indonesian producer tried to draw. The investigating authority referred among others to the name and "modalities" of the Agreement and explained that even if this agreement can also be used for purposes of calculating arm's length prices in accordance with applicable tax guidelines, this does not contradict the finding that pursuant to this same agreement the trader received a commission. Even if the agreement were a transfer pricing agreement or had the regulation of transfer pricing as its main objective, it would not mean that it is a useless or fraudulent document that investigating authorities could not rely on as part of the totality of the evidence. Transfer pricing agreements are put in place precisely to ensure that, despite the relationship between the parties, their transactions are carried out at arm's length just as if they were unrelated parties. Tax authorities are expect to rely on those agreements for tax purposes as those agreements should genuinely reflect the financial relations taking place between related parties. The same holds for Anti-Dumping investigation authorities, unless it is proven that the transfer pricing agreement in question is a sham document, which Indonesia has never claimed in the present case.

19. Therefore, it is not unreasonable or biased of an investigating authority in an Anti-Dumping investigation to also attach importance to this agreement and to consider its provisions to be trustworthy.

20. Finally, Indonesia appeared to make a separate claim of violation of Article 2.4 of the *Anti-Dumping Agreement* as a result of the alleged discrimination in treatment between PTMM and Ecogreen. The European Union rebutted that claim by pointing to the lack of legal basis of Indonesia's claim. As explained at length in the EU's answers to the questions of the Panel, there were a number of differences that led to the conclusion that the factual circumstances of Ecogreen were similar to those present in the *Interpipe* case that led the European General Court to find that no adjustment was justified. Indonesia is unable to rebut these conclusions and simply tries to re-litigate the argument it already lost before the European General Court where this argument about discriminatory treatment and the application of the European jurisprudence more properly belongs.

21. First, Indonesia does not deny that, as correctly found by the investigating authority, PTMM invoices directly more than 20% of its export sales while Ecogreen only invoices a very small number of export sales directly, as was the case for *Interpipe*. For a number of export sales, PTMM "must contract directly" and therefore no mark-up is being paid to ICOF-S. Such direct contracts were concluded in a relatively significant number of cases, different from the situation that prevailed for Ecogreen. Nothing in Indonesia's reply suggests otherwise.

22. Second, Indonesia merely repeats its view that no weight should be ascribed to any of the provisions of this contract because it is merely a transfer pricing agreement, but it does not deny the fact that a contract exists between PTMM and ICOF-S when no such contract exists governing the relationship between Ecogreen and its related trader, EOS. That is a matter of fact that further distinguishes the factual situation of both companies.

23. Third, with respect to the significance of the trader's activities and the fact that the trader's supplies originate to a significant extent from unrelated companies (similar to the activities of an agent working on a commission basis) Indonesia again "fails to see the relevance of the trader's activities with respect to products outside of the scope of the investigation", but does not deny that those factual findings are correct. The relevance of course is that these were important factual considerations that led the European Court in *Interpipe* to reach a certain conclusion. Indonesia simply tries to minimize the importance of this factual aspect by consistently trying to portray ICOF-S as an internal sales department of PTMM which was simply spun off to Singapore for tax reasons, while in fact ICOF-S **[***]**; ICOF-S was not created as the internal sales department of PTMM at all; and has significant trading activities that are unrelated to the product concerned and to PTMM's activities. If that is put in the context of all of the other evidence and is contrasted with the situation for EOS, the trading company of Ecogreen, it is clear why this factual aspect differentiates the situation of PTMM and ICOF-S from that of Ecogreen and EOS.

24. In sum, although Indonesia disagrees with the weight given by the investigating authority to some of the above stated facts and considerations, it fails to demonstrate that those facts are incorrect and as a consequence that the investigating could not reasonably have concluded that Ecogreen and PTMM were in a factually different situation, taking into account the relevant factors highlighted in the *Interpipe* judgment.

25. In addition, Indonesia has completely failed to indicate which legal provision of the *Anti-Dumping Agreement* would be violated as a result of this alleged error to treat Ecogreen and PTMM in the same manner. There is none.

26. In sum, Indonesia failed to rebut the legal arguments made by the European Union and has not been able to establish a *prima facie* case that the European Union's reasonable and reasoned decision to make due allowances for commissions paid to ICOF-S for export sales only violated Article 2.4 of the *Anti-Dumping Agreement*. Indonesia's consequential claim under Article 2.3 must also fail. In its answers to questions of the Panel, Indonesia confirmed that it only added this claim because it "considered it prudent" to include a reference to Article 2.3 given that certain export transactions for which an adjustment was made for the involvement of ICOF-S also involved the construction of an export price due to the involvement of the related importer ICOF-E in the European Union. Its Article 2.3 claim is thus entirely consequential and fails, just like its principal claim under Article 2.4. Finally, Indonesia did not even begin to develop a *prima facie* case under

its allegedly consequential claim under Article X.3 of the GATT 1994 and any continued allegation of violation of this provision must therefore be rejected.

1.2. *Claim 2: Indonesia's claim that the Commission failed to Separate and distinguish known factors other than the dumped imports causing injury in violation of articles 3.1 and 3.5 of the Anti-Dumping Agreement is in error*

27. Indonesia argues that the Commission's determination that dumped imports caused injury to the domestic industry is inconsistent with Articles 3.5 and 3.1 of the *Anti-Dumping Agreement* because the Commission allegedly failed to conduct a proper non-attribution analysis. In particular, Indonesia claims that the Commission failed to adequately separate and distinguish the effects of the economic/financial crisis of 2008/2009 and that it did not properly examine the effects of the alleged difficulties faced by the domestic industry concerning access to raw materials and the fluctuations in the prices of these raw materials. In its first submission, the European Union demonstrated that Indonesia's arguments with respect to both factors are flawed.

28. Indonesia does not present any new arguments in its answers to the questions of the Panel, or in its rebuttal submission. It merely repeats its erroneous assertions about the alleged lack of a proper causation and non-attribution analysis by the European Union. Indonesia's unsubstantiated and formalistic arguments are without merit and do not establish a prima facie case of violation of Articles 3.1 and 3.5 of the AD Agreement.

29. First, on the evaluation of the effect of the economic crisis, it is clear that the Commission was well aware of the commonly known fact that the global economic crisis started around the second half of 2008. The global economic/financial crisis is a complex phenomenon which develops its effects over time and it is simplistic to turn the debate about its effects on injury factors that are examined by the investigating authority on a year by year basis into a debate about the exact starting point of this crisis. The European Union also disagrees with Indonesia that the injury analysis is an "unrelated section" for purposes of examining the effects of other factors on injury. Article 3.5 of the *Anti-Dumping Agreement* that sets forth the non-attribution requirement is one paragraph of Article 3, entitled "Injury". The text of Article 3.5 refers directly to "the effects of dumping as analysed under paragraphs 2 and 4" of Article 3, which form the heart of any investigating authority's injury analysis. The causation and non-attribution analysis of Article 3.5 is part and parcel of the injury analysis to be undertaken under Article 3 of the Anti-Dumping Agreement. Indonesia's contrary suggestion that it is not appropriate to refer to analysis and conclusions in an investigating authority's injury determination, simply because not all of this analysis is provided under the heading "non-attribution" is not supported by the text of the Anti-Dumping Agreement, WTO jurisprudence or, put simply, common sense. The European Union referred to the findings and reasoning of the investigating authority as included in the relevant determinations dealing with the economic crisis, both in the specific section dealing with causation and non-attribution and in the overlapping section dealing with the evaluation of the injury factors.

30. Second, with respect to the alleged effect of the domestic producers' access to raw materials and price fluctuation in raw materials, Indonesia confirms that it "accepts that an interested party that raises a particular non-attribution factor must provide some evidence that this factor contributed to the injury, thereby triggering the requirement to perform a non-attribution analysis". As demonstrated in the European Union's first written submission and in the answers to the questions of the Panel, that is precisely what the Indonesian interested parties failed to do. Indonesia is unable to present any new arguments or evidence to rebut the European Union's position.

31. It is telling that both in the submissions and in its answers to questions, Indonesia decided to quote the entire paragraph of the October 2010 comments on the application of PTMM in which it raised this factor, trying to increase its importance. In fact, if the Panel goes to the exhibit of Indonesia from which this quote is taken, IDN-35, it will see that these two paragraphs are buried amidst many other equally unsubstantiated assertions and claims. It is for the interested parties to adduce sufficient evidence of the effects of another factor such that this factor becomes a factor that is known to cause injury, requiring the authority to separate and distinguish its effects. It does not suffice to simply make a blunt statement at the start of the investigation without adducing any evidence and then to expect the authority to actively seek to obtain the evidence to substantiate these assertions.

32. In its replies to the Panel's questions, Indonesia argues that PTMM produced evidence showing that the fluctuations in the price of raw material was a factor causing injury distinct from the economic crisis. Indonesia is wrong. In particular, Indonesia refers in alleged support of its argument to page 30 of the Complaint, which it files as Exhibit IDN-58. However, page 30 of the complaint (Exhibit IDN-58) discusses a phenomenon that is precisely the opposite of what Indonesia considers to have been proven by PTMM, i.e. it discusses the increase of raw material prices. It explains that the increase of raw material prices cannot be a separate injury factor since all raw materials for fatty alcohols are traded at world market prices and therefore price fluctuations affect all producers. It explains that integrated producers can shift profits between the internal profit centres, but cannot avoid the effect of a raw material price increase. Then it adds that because the prices of synthetic raw materials and natural raw materials for fatty alcohols have not evolved in parallel (which is exactly the opposite of what PTMM argued in subsection 4.9 of its comments to the complaint), price development in natural raw materials cannot explain the injury suffered by all EU producers that use different manufacturing process. Thus the complaint cannot constitute even an indicator (let alone full evidence) of the claim according to which access to raw materials constituted a separate cause of injury. Indonesia was not able to point to any other valid evidence that could have supported that claim and had been submitted during the investigation by the interested parties. In light of these circumstances, it is clear that it was reasonable of the investigating authority to conclude that PTMM did not produce any evidence to substantiate its assertion, made only at the very beginning of the investigation, that raw material price fluctuation constituted a separate cause of injury to the EU industry so as to deserve further investigation. Indonesia's argument that, as an active "investigating" authority, the Commission should have actively sought for the additional evidence of such a causal impact is without merit. It is telling that Indonesia refers to the panel report in *Mexico – Rice* on the need for an active investigating authority. However, the finding that Indonesia refers to is in fact one of the few findings of that panel that the Appellate Body reversed. The Appellate Body rejected this specific conclusion that Indonesia is relying on and found that the Panel's "extensive interpretation" requiring an "active investigating authority" imposed too high a burden on the authority.

33. In the context of its discussion of the European Union's rebuttal on the factor "raw material prices", Indonesia repeatedly asserts that the European Union is making "a series of ex post arguments, none of which is reflected anywhere in the Commission's determinations". The European Union objects to the repeated allegation that any assistance offered by the European Union to the Panel in the context of these proceedings to allow it to better understand the information provided and to address novel arguments made by Indonesia for the first time in this WTO proceeding would constitute undue "ex post" reasoning. The European Union participated in these proceedings in good faith and provided answers to the questions of the Panel that related to certain evidence on the record that was not further developed by the interested parties and which therefore did not need to be further analysed by the investigating authority. The European Union offered its views to the Panel to explain why from an economic and legal point of view the statements about the existing conditions of competition between Indonesian producers and European producers of fatty alcohols were not relevant and were inaccurate.

34. The Indonesian producers never developed any of the arguments now made by Indonesia in this proceeding and it is thus not surprising that the investigating authority did not provide all of the reasonable explanation that the European Union has offered to the Panel in search of a better understanding of the facts. It is not correct that, as the defendant in this proceeding, the European Union cannot provide any explanation that is not expressly provided by the investigating authority when rebutting arguments that the determination made by the authority was biased and not reasonable. If that were the case, there would be no point in having a contradictory debate in these panel proceedings.

35. In sum, Indonesia has failed to rebut the European Union's argument that effects of the economic crisis were properly separated and distinguished and that access to raw materials or the impact of raw material prices was not a known factor causing injury that the investigating authority was required to examine further as the interested parties failed to present arguments and evidence to this effect, as required. Indonesia's claims under Articles 3.1 and 3.5 are thus to be rejected.

1.3. *Claim 3: Indonesia's claim that the Commission allegedly failed to disclose the results of the verification to the verified producers in violation of article 6.7 of the Anti-Dumping Agreement is in error*

36. Indonesia claims that the European Union violated the obligation under Article 6.7 of the *Anti-Dumping Agreement* to make available the results of the verification visit it made to the Indonesian interested parties. In the first written submission, the European Union demonstrated that Indonesia's claim is based on a misrepresentation of the facts and a misreading of the legal obligation imposed by Article 6.7 of the *Anti-Dumping Agreement*. Indonesia fails to respond to both the factual and legal rebuttal arguments of the European Union. Instead, it simply repeats its broad reading of what it would have ideally liked the obligation under Article 6.7 of the *Anti-Dumping Agreement* to be, ignoring that the requirements it reads into Article 6.7 are nowhere to be found in the text of that provision.

37. First, on the facts, it is important to re-state what the European Union explained in the first written submission. Contrary to Indonesia's assertions, it is clearly from the provisional and final disclosure documents that the European Union provided "discussion of information that was verified, not verified or corrected with respect to essential facts referenced in Article 6.9" as Indonesia seems to suggest is required under Article 6.7 of the *Anti-Dumping Agreement*. In addition, at the end of each verification visit, the Commission and the verified producer agreed on a list of exhibits collected during the verification.

38. Indonesia tries to support its argument by referring to two documents provided during verification. But it suffices to look at the agreed list of exhibits taken at the time of the verification, submitted by the European Union as Exhibit EU-14, to see that both documents are clearly referenced in this list. Furthermore, this alleged lack of information on these two exhibits shared during verification never stopped PTMM from raising the arguments that these exhibits were supposed to support. There is no basis in the record to claim that the interested parties' due process rights were in any way affected by the fact that they allegedly did not receive a detailed report explaining that these documents were provided during verification. In fact PTMM made express reference to these documents in the context of the proceedings before the investigating authorities. It was thus able to defend its interests and develop comments based on the information submitted during verification. Other "examples" of Indonesia relate to statements that were made by PTMM or ICOF-S personnel or representative during the verification and that according to Indonesia were not contested on the spot. However, a statement or an oral explanation provided during a verification visit and which is not confirmed by any concrete evidence does not become a result of the verification or an essential fact just because the verification team did not consider it necessary to rebut it on the spot or to put it in the context of other evidence on the record.

39. Furthermore, in terms of the legal standard, Indonesia is responding to an argument the European Union never made. It is not the position of the European Union that complying with Article 6.9 automatically means that Article 6.7 has been complied with. The ordinary meaning of the term "results" is "the effect, consequence, issue, or outcome of some action, process or design." This suggests that what needs to be made available is not the process as such but rather the "outcome" of that process. Again, Indonesia seems to acquiesce in the correctness of the ordinary meaning of the term as offered by the European Union. It refers to the Appellate Body reading of this term in *US – Steel Safeguards* as "an effect, issue, or outcome from some action, process, or design" and concludes that the results referred to in Article 6.7 are the "effect" or "outcome" of the verification visit. The European Union agrees. However, the European Union does not understand on what basis Indonesia jumps from this definition to its assertions that "in this context [of a verification] the "results" would mean both a simple recital of the evidence obtained during the visit *and the evaluation of the evidence*". The European Union clearly complied with the first suggested requirement by exchanging the lists of exhibits and by correcting the data provided by the interested parties in agreement with them (which is uncontested) but sees no basis for the second requirement, at least not as part of the verification results. Clearly, to evaluate the evidence is not the task of the investigators conducting the verification and it cannot be what is to be provided in terms of the report of the verification. But, to the extent that the verified results relate to the essential facts, the European Union would agree that, pursuant to the obligation to disclose the essential facts, such an evaluation will be provided by the investigating authority with respect to these facts at that time. It will be for the interested parties to make comments, with possible reference to the questionnaire information or to information provided during verification.

Indonesia only confirms everything the European Union has said about the close relationship between Article 6.7 and 6.9 of the *Anti-Dumping Agreement*.

40. Furthermore, Indonesia keeps citing to one obiter dictum in *Korea − Certain Paper*, in which the panel said that "[i]t is therefore important that such disclosure [under Article 6.7] contain adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully". This statement, which was not essential to the panel's finding and was not appealed, must be read in its context. First, in that investigation, the Indonesian exporters had expressly requested to see the results of the verification but their request had been denied. Second, the real reason why the panel found a violation was because the authority "did not inform the two Sinar Mas Group companies of the verification results in a manner that would allow them to properly prepare their case for the rest of the investigation". There is no basis for a similar conclusion in this case, as demonstrated above. The European Union sent a list of information to be verified before the visit and agreed on a list of exhibits taken at the time of concluding the verification. The interested parties never complained about a lack of information on the results of the verification, despite frequent references to the verification visits in the provisional and final determinations

41. In addition, as confirmed by the lack of claims by Indonesia under Articles 6.2, 6.4 or 6.9 of the *Anti-Dumping Agreement*, Indonesia does not consider that its due process rights were violated or that the disclosure of essential facts was deficient. Again this contrasts with the claims and arguments made in *Korea − Certain Paper*.

42. Indonesia continues to seek to raise the profile of the last sentence of Article 6.7 as if this "verification results"-disclosure obligation is the alpha and omega of due process. It asserts that "exporters must know what information was not verified — so that they can make further efforts to put the investigating authority in a position to ultimately verify that information — as well as what information was verified. This information is important for the exporter given that verified information must in principle be used by the investigating authority, and the exporter thus need not any longer devote its scarce resources to convincing the authority about the reliability of that information". Indonesia's approach to on-site verification and the alleged consequences of verification is entirely misguided and it grossly over-states the importance of the last sentence of Article 6.7.

43. First of all, exporters of course do know what information is verified as they are present throughout the on-site verification process, as is clear from the legal counsel's notes on which Indonesia relies. So, the premise of Indonesia's argument is once again flawed. Second, there is no obligation on Members to conduct an on-site verification. That is clear from the text of Article 6.7 (using the term "may") and has been confirmed in WTO jurisprudence. Third, in most cases verification is a documentary process that the investigating authority undertakes on the basis of the information provided and based on any additional information it requests the interested parties to provide. Therefore, interested parties do not really know how the investigating authority will appreciate those documents until they see the disclosure of the essential facts. Yet, this does not pose a problem from a due process perspective. Fourth, it is simply not the case that because information has been verified it is necessarily relevant and probative such that it must be used by the investigating authority, contrary to what Indonesia seems to suggest. It simply means that the authority checked whether that piece of information is correct. But this piece of information still needs to be placed in the context of all of the other information. Its relevance and weight is still to be reasonably determined by the authority, irrespective of whether it was verified or not. Fifth, Indonesia errs in its reliance on Article 6.8 and Annex II. These provisions concern a different situation: if the necessary information has not been provided within a reasonable period of time or if the producer has impeded the investigation, Annex II provides that information that is "verifiable" should still be used by the investigating authority as part of its reliance on the best information available. Annex II does not require an on-site verification and does not state that information provided during verification − and only such verified information − can and must be used. In any event, this issue does not arise in the present case as the interested parties cooperated with the investigating authority to the extent that during the verification visits they agreed on the corrections to be made to the data previously submitted to the investigating authority.

44. Indonesia completely over-states the importance both of the on-site verification process and of the fact that information was verified. Its suggestion that exporters will continue to use their

"scarce resources" to get the authority to further analyse certain information as long as they do not know whether such information was verified, is not what happens in practice and is not required by the text of the Anti-Dumping Agreement. Indonesia is simply inventing these systemic concerns

45. Indonesia has failed to rebut the European Union's factual and legal arguments.

46. Indonesia's claim is not supported by the facts on the record and is based on an erroneous reading of the obligation contained in Article 6.7 of the *Anti-Dumping Agreement*. The European Union respectfully requests the Panel to reject Indonesia's claim under Article 6.7 of the *Anti-Dumping Agreement* relating to the results of the verification visits.

## 2. Conclusions

47. For the reasons stated in this submission, the European Union respectfully requests the Panel to reject all of Indonesia's claims.

# ANNEX C

## ARGUMENTS OF INDONESIA


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# ANNEX C-1

## FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

## 1. INTRODUCTION AND OVERVIEW

1.1. In this dispute, Indonesia challenges certain anti-dumping measures imposed by the European Union on so-called fatty alcohols imported into the European Union from Indonesia.

1.2. At the heart of this dispute lies an improper deduction that the EU made when calculating the ex-factory export price for the Indonesian exporter PT Musim Mas. That deduction accounted for practically the entire dumping margin. In addition, the Commission failed to conduct a proper non-attribution analysis, thereby improperly attributing the injury to the Union's industry to the allegedly dumped imports. The Commission also failed to disclose to the exporters the results of the verification conducted at their premises.

1.3. The Commission's determinations and the EU's arguments before the Panel are incorrect as a matter of substance, on both the relevant legal and on factual issues. In addition, the EU relies on extensive ex post rationalisations, that is, reasoning that was not contained in the Commission's determinations and that the EU has developed for purposes of these WTO proceedings. Needless to say, the applicable standard of review requires the Panel to determine the EU's compliance with its obligations under the Anti-Dumping Agreement exclusively in the light of the published determination and the reasoning contained therein.

## 2. INDONESIA'S CLAIM UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

### 2.1 Introduction

2.1. When calculating the export price for the Indonesian exporter PT Musim Mas, the Commission made an adjustment under a provision of European Union (EU) law that, broadly speaking, corresponds to Article 2.4 of the Anti-dumping Agreement. Under Article 2.4, an investigating authority is required to ensure a "fair comparison" between the export price and normal value. The investigating authority is entitled - and required - to adjust for any difference that "affect[s] price comparability". Conversely, the investigating authority may not adjust for any difference that does not "affect price comparability".

2.2. The EU erroneously adjusted for what it termed "Commission ICOFS markup". This deduction allegedly reflected the activities of PT Musim Mas' sales entity, which is located in Singapore. The key issue before the Panel is whether, in doing so, the EU correctly adjusted for a factor that "affect[ed] price comparability" within the meaning of Article 2.4 and conducted a "fair comparison" at the same level of trade.

2.3. In Indonesia's view, the answer to this question is manifestly "no". This is because the Commission ignored that any transfer of funds between PT Musim Mas and the sales entity ICOFS are simply transfers within a single economic entity (SEE)/between two closely-related companies; because the Commission ignored or distorted relevant record evidence; and because it relied on internally-inconsistent reasoning. Moreover, the Commission treated PT Musim Mas differently from the second Indonesian exporter Ecogreen, even though Ecogreen was in an identical situation as PT Musim Mas, and differentiated between the two companies on the basis of irrelevant or inconsistent criteria. This differential treatment of the two exporters further highlights the improper nature of the Commission's deduction when calculating PT Musim Mas' export price, highlighting the violation of Article 2.4.

### 2.2 The Commission ignored the nature of transactions within a single economic entity

2.4. The Commission made an adjustment on the basis of transactions between PT Musim Mas and ICOFS. However, the Commission failed properly to consider whether these transactions and the conditions in which they occurred "affect[ed] price comparability". The Commission therefore failed to consider whether the adjustment was consistent with the requirement to conduct a "fair comparison", within the meaning of Article 2.4. The existence of a close relationship – or a "single

economic entity" formed by two or more formally separate entities − falls within the scope of the terms "affect price comparability" and "fair comparison", under Article 2.4.

2.5. The evidence before the Commission clearly indicated, both generally as well as with respect to the sales in question, that the producer/exporter and its Singapore sales affiliate were closely related or intertwined − put another way, that they were part of an SEE. Therefore, it was improper to make an adjustment to the export price on the basis of transactions between the two arms of the same entity that amounted, in fact, to nothing more than moving money from one pocket of the same body to another.

2.6. The question of the relationship between producer/exporter and an affiliated trading company has not yet arisen in WTO panel proceedings in the context of an adjustment under Article 2.4. However, it has arisen in the context of Article 6.10, where panels have − like the European courts and the Commission itself in the present and other anti-dumping investigations − found it convenient to use the phrase "single economic entity" to describe a closely-intertwined relationship.

2.7. Moreover, whether one uses the term "single economic entity" or any other label, the obligation remains for the investigating authority to examine and to ensure that adjustments − including those in the context of related companies − be only made for factors that "affect price comparability". The Commission's own reasoning in its determinations reveals that the Commission accepts that the degree and nature of the relationship between two companies can be crucial for determining whether a particular item or expense "affect[s] price comparability" and therefore is highly relevant for a "fair comparison", within the meaning of Article 2.4.

2.8. The Commission's reasoning confirms that the Commission accepts − as Indonesia argues in this dispute − that payments made between related parties, at least in some circumstances, do not justify an adjustment. To recall, the Commission recognized that Ecogreen paid "commissions" to its Singapore trading department EOS. Initially, the Commission determined that these commissions "affect[ed] price comparability" and that an adjustment was warranted in order to ensure a "fair comparison". However, subsequently, the Commission reconsidered certain criteria concerning the relationship between Ecogreen and EOS and determined that the required "fair comparison" required not making the adjustment, because the "commissions" paid by Ecogreen did not "affect price comparability".

### 2.3 The Commission's adjustment for the activities of PT Musim Mas' selling department was improper and resulted in a non-"fair comparison"

2.9. The Commission failed to acknowledge, let alone to properly factor into its reasoning, the fact that ICOFS is PT Musim Mas' selling department, and that the two companies are integral parts of a single economic entity, characterized by common ownership and a common managerial and operational control structure. The entire SEE is a **[***]**

2.10. PT Musim Mas repeatedly reminded the Commission, and supported through record evidence, that it does not have a sales department, and that all of its sales − whether export or domestic sales − are negotiated, organized and arranged by ICOFS.

2.11. Given this closely intertwined structure, transfers of financial resources between the companies − for instance the "mark-up" or "margin" retained by ICOFS on some export sales − are not expenses to be adjusted for, but rather the shifting of money from one pocket into another pocket of a single economic entity. The "mark-up" or "margin" is simply a way, within an SEE, to allocate profit generated by that entity and to ensure adequate financing of the selling department located in a different jurisdiction.

2.12. The need to finance the selling department arises also because, as PT Musim Mas repeatedly pointed out to the Commission during the investigation, ICOFS does not receive any funds from PT Musim Mas for its involvement in domestic sales as well as for its involvement in the so-called "direct" export sales. Moreover, the fact that ICOFS does not receive any remuneration for its involvement in those sales further underscores the closely-integrated nature of the two companies' relationship. Of course, an independent trader would never accept to perform sales and trading services for free.

**2.4 The Commission's argument that, prior to the creation of ICOFS, PT Musim Mas used independent traders for its sales precisely serves to highlight the issue at hand and demonstrates the exact opposite of the Commission's conclusion**

2.13. During the Panel's first meeting with the parties, the EU referred to the fact that the preamble to the transfer pricing agreement between PT Musim Mas and ICOFS states that PT Musim Mas previously used an independent trader to make its sales. For the EU, this is a confirmation of its position. However, quite to the contrary, this fact clearly illustrates the issue before the Panel and demonstrates why Indonesia's position is correct.

2.14. If PT Musim Mas made its European sales of the investigated product through an independent trader in Singapore, it would pay that independent trader a commission. This was indeed PT Musim Mas' situation several years ago, before the Musim Mas Group chose to create ICOFS as its sales and trading office. In an anti-dumping investigation, it would be appropriate to deduct that commission from the invoice price in order to arrive at the net ex factory price to be used in the fair comparison under the first, second, and third sentences of Article 2.4. This is because the commission represents an expense for which an adjustment may – indeed must – be made under Article 2.4. Of course, an exporter such as PT Musim Mas may decide to stop using an independent trader for these sales, and instead decide to establish its own affiliated sales company in Singapore to perform the same functions. PT Musim Mas would do so in order to save money and to increase its profits on the sales. Doing so will change the way in which PT Musim Mas does business; it will change the expenses that the company incurs; and this change in expenses must be reflected in the anti-dumping calculations. The Commission's position amounts to a denial of this very basic principle.

2.15. For example, assume that an exporter sells to an independent European customer at € 100 per unit and pays a commission of € 10 per unit on each sale to an independent trader in Singapore. The ex factory price – or, put another way, the net return to the exporter – is € 90 per unit.

2.16. The exporter may decide that the independent trader is charging too much as a commission. Therefore, the exporter may set up its own trading company in Singapore. Assume that the costs of maintaining the trading company in Singapore are € 4 per unit. In this case, the exporter can maintain its price to the independent customer in Europe, reduce its expenses, and increase its profits. The ex factory price or net return to the exporter now is €100 - € 4 = € 96 per unit. Profit has increased by € 6 per unit.

2.17. For the purposes of a dumping analysis, two things have changed. First, the nature of the expense has changed: it is now a selling expense, not a commission. Second, the amount of the expense has changed: it is now € 4 per unit, not € 10. These changes can be illustrated in the following table:

| | Sales Through Independent Trader | Sales Through Affiliated Trading Company |
|---|---|---|
| Invoice Price | € 100 | € 100 |
| Commission | € 10 | € 0 |
| Selling Expenses | € 0 | € 4 |
| Ex Factory Price | € 90 | € 96 |

2.18. The EU's position before the Panel is that these changes do not affect the dumping analysis. In other words, for the EU, the ex factory price in the second scenario is not € 96, but € 90, just like in the first scenario. Even though the exporter has changed how it does business – resulting in a change in both the type and amount of expenses it incurs, as well as in the net revenue it receives – the EU contends that it is entitled to disregard these changes and to conduct the same dumping analysis as if the exporter was still selling through an independent trader.

2.19. Indonesia disagrees. Indonesia does not consider that the EU can correctly calculate the ex factory price and make a fair comparison between export price and normal value within the meaning of Article 2.4 where it ignores the actual facts. The EU cannot ignore how the exporter structures its business, the expenses it actually incurs in making the investigated sales, and the net revenue it receives. It cannot instead replace those amounts with imputed expenses that may have been incurred based on a notionally-different means whereby the exporter could have structured, or used to structure, its sales.

### 2.5 The Commission's adjustment for "profit" and for indirect selling expenses was improper and resulted in a non-"fair comparison"

2.20. Above and beyond the fundamentally improper nature of the Commission's deduction, the very items (and the labels applied to these items) deducted by the Commission demonstrate that this adjustment violates Article 2.4.

2.21. To recall, the Commission's deduction consists of two elements: "profit" and "indirect selling expenses". Both items are improper elements to be deducted in determining the ex factory price (whether on the export or normal value side).

2.22. First, profit is not an item to be adjusted for. It is not customary for investigating authorities to deduct "profit" when determining the ex factory price, whether on the normal value or on the export side. This is because dumping is international price discrimination, and "price" includes profit. Indeed, the conventional theory is that dumping is "unfair", because the exporter is using "high profits" from the domestic market to finance "low profits" (or losses) in the export market. Profit is also not deducted because, after deducting profits, only costs would remain. However, costs should be the same no matter where the product is subsequently sold.

2.23. Hence, the items to be adjusted for under Article 2.4 are expenses. However, "profit" is not an expense; "profit" is a residual amount, after all costs and expenses have been deducted from the price.

2.24. Further proof that profits are not to be deducted is the fact that a constructed normal value includes an amount for profit, as per Articles 2.2 and 2.2.2 of the Anti-dumping Agreement. (The only exception to the rule that profits are not to be deducted is in the context of a constructed export price, which was a controversial topic in the Uruguay Round and is not at issue in this dispute).

2.25. Second, the Commission deducted ICOFS' indirect selling expenses. Indirect selling expenses (items such as sales department staff salaries, advertising, office expenses of sales departments, etc.), as opposed to *direct* selling expenses (such as freight, insurance, etc.), are normally not deducted when determining the ex factory price. This is also supported by the fact that, in the construction of normal value, indirect selling expenses are included. In the case at hand, however, the Commission − without any explanation − deducted ICOFS' indirect selling expenses when calculating the ex factory export price. However, the Commission proceeded entirely differently when calculating normal value. It did not deduct any indirect selling expenses when determining the ex factory normal value; and, correspondingly, it included indirect selling expenses when constructing normal value for certain product models. Hence, the Commission deducted items on the export price side that it did not deduct on the normal value side. This asymmetry further vitiates the Commission's comparison, renders it unfair, and contributes to the violation of Article 2.4.

### 2.6 The criteria relied on by the Commission for justifying the adjustment are irrelevant, factually incorrect or involve ignoring or distorting record evidence

2.26. In the Amending Regulation, in which it justified its differential treatment of PT Musim Mas from that of Ecogreen, the Commission highlighted certain criteria as supporting its determination. In Indonesia's view, none of these criteria has any relevance in determining whether the involvement of ICOFS "affect[s] price comparability". Moreover, in its treatment of these criteria, the Commission repeatedly ignored or distorted record evidence.

### 2.6.2 The Commission improperly relied on "direct" export sales

2.27. The Commission relied on the fact that PT Musim Mas, rather than ICOFS, featured as the official selling party on a certain proportion of export sales (the so-called "direct" export sales). This, in the Commission's view, meant that certain export sales were "performed" by PT Musim Mas "from Indonesia"[1] and that PT Musim Mas was not "using" its sales department in Singapore for these export sales.[2]

2.28. This characterization is demonstrably incorrect and highly misleading. PT Musim Mas explained repeatedly during the investigation, and supported by evidence, that, with respect to these "direct" export sales, ICOFS handles all contact with the client, as well as negotiates and arranges the sale, just as it does for all other export sales. However, in certain instances, the client (typically Asia-based clients) prefer for PT Musim Mas to feature on the contract as the formal selling party, in order for the client to obtain an Indonesian certificate of origin. In order to accommodate this client preference, as the final step in the standard formal sales process, ICOFS sends PT Musim Mas a **[***]**. (No client ever contacts PT Musim Mas directly). Subsequently, PT Musim Mas ships the products, as it does for all other export sales.

2.29. Hence, **all** (export) sales are negotiated and arranged by ICOFS; and **all** (export) sales are physically "performed" (shipped) out of Indonesia. It therefore amounts to a distortion of the record evidence when the Commission found that the "direct" export sales are somehow different due to being "performed" out of Indonesia. Moreover, Indonesia fails to understand why the mere formality of PT Musim Mas appearing on the contract, rather than ICOFS (a difference driven entirely by client preferences), should be one of the decisive criteria for considering that PT Musim Mas and ICOFS operate at arm's length and are fundamentally different from Ecogreen (which also has "direct" export sales, for the same reason as PT Musim Mas). If anything, the flexibility of adapting one formal aspect of the sale depending on what the client communicates to ICOFS is further evidence of the tightly knit relationship and cooperation between the two companies.

2.30. In any event, and leaving aside all of the above, the Commission failed to explain the significance of the "direct" export sales for the key issue at hand; namely, why, with respect to the sales under investigation, the involving of ICOFS and any transfer of funds from PT Musim Mas to ICOFS should be regarded as a sales expense that affects price comparability.

### 2.6.3 The Commission improperly relied on ICOFS' other trading activities

2.31. As another criterion for distinguishing PT Musim Mas from Ecogreen, the Commission stated in the December 2012 Amending Regulation that, because "the trader's overall activities [are] based to a significant extent on supplies originating from unrelated companies", the "trader's functions are therefore similar to those of an agent working on a commission basis."[3]

2.32. Indonesia fails to see the relevance of the activities of the trader's office that involve products outside of the scope of investigation. The Commission's task was to decide whether, with respect to the sales under investigation, the allocation of funds between PT Musim Mas and ICOFS is an expense that affects price comparability. For Indonesia, it is clear that transactions between ICOFS and unrelated third parties, of products outside the scope of investigation, have nothing to do with the transactions between PT Musim Mas and ICOFS.

2.33. To the extent that these third party sales can shed any useful light on the question before the Commission, they would have to relate to the overall relationship between ICOFS and PT Musim Mas, for instance, regarding corporate control, management and operational decision-making such as pricing decisions. However, the Commission made no attempt to examine such circumstances and merely looked at the quantities of these sales (which, in any event, it did not disclose or otherwise discuss).

2.34. By way of example, had the Commission examined these "third party" purchases and sales in more detail, it could have found that these sales are oftentimes an integral part of how PT

[1] Amending Regulation, para. 27. Exhibit IDN-5.
[2] EU's First Written Submission, para. 98.
[3] Amending Regulation, para. 29. Exhibit IDN-5.

Musim Mas interacts with ICOFS and how ICOFS closely coordinates such purchases and sales with PT Musim Mas. Specifically, for a number of products (although not including the product under investigation), ICOFS may sometimes purchase from third parties in order to sell to clients that normally purchased PT Musim Mas-produced products. This will occur when, on any given occasions, **[***]** Had the Commission properly investigated the issue, it would have been informed about these matters.

### 2.6.4 The Commission improperly considered that the existence of a sales and purchasing agreement as well as certain clauses of that agreement support the contested deduction

2.35. As the third criterion, the Commission relied on the fact that a sales and purchase agreement ("S&P Agreement" or "transfer pricing agreement") existed between PT Musim Mas and ICOFS. It also relied on unspecified elements of the content of this agreement, in rejecting PT Musim Mas' explanation that this contract was a "master agreement to regulate transfer prices between [the] related parties".[4]

2.36. The contract governs sales from PT Musim Mas and ICOFS. It was concluded in order to demonstrate to both Singaporean and Indonesian tax authorities arm's length pricing practices applied by the companies. Such transfer pricing agreements (or intercompany agreements) are a daily occurrence in business practices. In its Answers to the Panel's first set of questions, Indonesia presented several exhibits to support this point, including general advice to private companies from a reputed law firm about intercompany/transfer pricing agreements and how to conclude them; as well as two templates for intercompany/transfer pricing agreements that contain clauses identical or very similar to those of the S&P Agreement between PT Musim Mas and ICOFS.

2.37. It is nonsensical to argue that two related companies become arm's length companies because they conclude an intercompany agreement that looks like, or seeks to imitate, an agreement between unrelated companies. As demonstrated by Indonesia's evidence above, it is the very purpose of intercompany agreements to structure commercial interaction in a manner that reflects practices between unrelated companies.

2.38. The Commission also relied in its determinations on certain aspects of the S&P Agreement. For instance, it relied on the fact that the trading office "was involved in a range of different palm oil-based products".[5] Indonesia does not understand what relevance this criterion has for the issue at hand and why the Commission thinks this point proves anything. The Commission also claimed that ICOFS bought products from PT Musim Mas under "one single contract without distinguishing among products".[6] This statement is factually incorrect, because the transfer pricing agreement does differentiate between products. Moreover, even if true, lack of, or limited, differentiation would suggest − if anything − that the two companies do not deal at arm's length.

2.39. The Commission left unanswered − as does the EU in these proceedings − the simple fact that this type of transfer pricing agreement/intercompany agreement reflects international practice and is recommended by international transfer pricing guidelines, including those issued by the OECD and the United Nations. Such recommendations also exist in transfer pricing guidelines at the national level in numerous jurisdictions, including in the EU's own legal order.

2.40. During the panel proceedings, the EU has also provided certain ex post rationalisations concerning other specific clauses of that agreement, not mentioned in the Commission's determinations. Besides being procedurally inadmissible, the EU's reliance on these elements is also misplaced as a matter of substance. For instance, the allocation of risk between PT Musim Mas and ICOFS is customary for this kind of agreement. PT Musim Mas even highlighted this risk allocation, on its own initiative, to the Commission during the investigation, to argue that − contrary to the Commission's view − this risk allocation demonstrated that ICOFS did not act as an "agent working on a commission basis", as stated by the Commission. During the investigation, the Commission ignored these arguments. Now, in the WTO proceedings, the Commission impermissibly relies on them *to argue the opposite*. Besides being incorrect on substance, this is procedurally unfair and arbitrary.

[4] Amending Regulation, para. 30. Exhibit IDN-5.
[5] Amending Regulation, para. 28. Exhibit IDN-5.
[6] Amending Regulation, para. 29. Exhibit IDN-5.

2.41. As another example, the Commission's reliance on the clauses concerning the manner of communication between the contracting parties and the clause concerning dispute resolution makes no sense. These clauses are entirely consistent with how related parties structure intercompany/transfer pricing agreements. Indonesia has submitted evidence to this effect.[7]

### 2.7 The Commission ignored or distorted further evidence that suggests that PT Musim Mas and ICOFS are closely intertwined and closely cooperate, including on the sales at issue

2.42. Although it purported to analyse the relationship and the mutual "functions" of PT Musim Mas and ICOFS, the Commission ignored relevant evidence of how closely the two companies are related and operate. For instance, as part of its Questionnaire Response, PT Musim Mas submitted highly confidential cost data pertaining to ICOFS. Needless to say, a producer would never have access to such confidential data of an independent trader. The tight relationship between PT Musim Mas and ICOFS is even implied in how the Commission initially treated the two companies. Indeed, in a pre-verification visit letter addressed to PT Musim Mas' lawyers, the Commission referred to ICOFS as "the company's premises in Singapore ([ICOF-S])".[8]

2.43. Furthermore, ICOFS staff assisted PT Musim Mas throughout the anti-dumping investigation. During verification, ICOFS staff was present at the PT Musim Mas' verification and answered questions on PT Musim Mas domestic sales and on technical issues concerning PT Musim Mas' plant in Indonesia.

2.44. Finally, ICOFS is involved in PT Musim Mas' domestic sales in the same manner as it is involved in export sales (the only exception being that it is formally PT Musim Mas that signs all domestic sales agreements). However, ICOFS does not **[***]** for its involvement on domestic sales. The Commission did not contest this evidence during the investigation. The involvement of ICOFS **[***]** in the domestic sales process (as well as its involvement **[***]** in certain export sales) demonstrates that the two companies do not deal with each other at arm's length.

### 2.8 The Commission's proffered logic for the adjustment is internally inconsistent

2.45. The lack of principled reasoning underpinning the contested adjustment is also discernible from how the EU explained its logic during the first panel hearing: According to the Commission, PT Musim Mas pays a "commission" to ICOFS on export sales, but not on domestic sales. Consequently, the EU explained, the Commission made the adjustment for ICOFS' "commission" on export sales, but not on domestic sales. However, because the two companies are related, the Commission did not use the amount/percentages actually paid by PT Musim Mas to ICOFS, but rather changed the amounts to be deducted. The EU cannot contest that ICOFS negotiated and arranged PT Musim Mas' domestic sales in the same manner as it negotiated and arranged PT Musim Mas' export sales. However, the EU argues, ICOFS did not **[***]** on the domestic sales, no money changed hands and therefore no adjustment was warranted.

2.46. However, inconsistently with the above explanation, the EU made the adjustment on **all** export sales, including the "direct export sales", even though **[***]** Thus, the Commission violated its own approach and its own logic. To be consistent with its own logic, the Commission should have made the adjustment only for those export sales in which ICOFS featured as the formal contracting party and on which ICOFS retained a mark-up, and it should not have made the adjustment for the "direct" export sales.

2.47. In addition to highlighting the internally inconsistent approach of the EU, the fact that ICOFS did not **[***]** on the "direct" export sales further demonstrates the non-arm's length nature of the dealings between the companies. It bears repeating that ICOFS negotiates and arranges all export and all domestic sales. However, ICOFS receives **[***]** Clearly, an independent trader would never do so.

[7] See Indonesia's exhibits IDN-52, IDN-53, and IDN-54.
[8] Letter from the European Commission to PT Musim Mas, 5 November 2010, p. 1. Exhibit IDN-41.

### 2.9 The EU's incorrectly argues that the Panel should reject Indonesia's arguments in case it disagrees with the label "single economic entity"

2.48. As part of its legal argument, the EU has stated that, if the Panel does not consider the "single economic entity" or "closely related parties" terminology or criteria for addressing this issue to be the optimum, the Panel should reject Indonesia's claim. According to the EU, if Indonesia has not guessed precisely how the Panel would interpret and articulate the meaning of the Article 2.4, including the phrase "to affect price comparability", in the context of transactions between related parties, Indonesia's claim should be rejected.

2.49. This, of course, is incorrect. Indonesia's claim is that the EU has violated Article 2.4 because it has made an adjustment for something that does not "affect price comparability" within the meaning of Article 2.4, thereby failing to conduct a "fair comparison" under that provision. Indonesia's argument as to why the transactions, or the transfers between PT Musim Mas and ICOFS, do not affect price comparability is expressed through the term "single economic entity" or "closely related parties" test. However, even if the Panel does not wish to rely on the "single economic entity" or "closely related parties" language or test proposed by Indonesia, the Panel has to provide what it considers to be the correct interpretation of, or the correct legal standard under, the phrase "to affect price comparability" in the context of transactions between closely related parties under Article 2.4. The Panel must then apply that legal standard to the facts before it. Indonesia's claim would not fail simply because the Panel might articulate the relevant legal standard in different words or using different concepts than the complainant.

2.50. This is because no party bears the burden of providing the correct legal interpretation to a WTO dispute settlement body. This principle − also known as "iura novit curia" − has been affirmed by the Appellate Body in several decisions, including in *EC − Tariff Preferences,*[9] *EC - Hormones*[10] *and EC − Export Subsidies on Sugar.*[11]

2.51. Therefore, in summary, it is for the Panel in this dispute to decide what the phrase "to affect price comparability" means in the context of transfers of funds between closely related parties and non-arm's length transactions. Should the Panel consider pertinent Indonesia's proposed legal standard of "single economic entity" or "close relationship", the Panel can rely on this standard. Should the Panel disagree with this articulation of the legal standard, the Panel is bound by Article 11 of the DSU to enunciate its own version and to apply it to the facts before it.

### 2.10 The Commission's differential treatment of PT Musim Mas and Ecogreen further highlights the unjustified character of the Commission's adjustment

2.52. Another arbitrary aspect of the Commission's adjustment for PT Musim Mas is the different treatment of that company from the treatment of the second Indonesian exporter, Ecogreen. Specifically, the Commission relied on the existence of direct export sales; the existence of the written S&P Agreement; as well as the type and extent of other activities of the sales department to justify the differential treatment between PT Musim Mas and Ecogreen. This reasoning is flawed and further demonstrates the arbitrary nature of the Commission's determination.

2.53. Indonesia submits that the Panel should bear in mind that the Commission initially determined that the companies should be treated the same, because they were in an identical position. Subsequently, the Commission turned around and determined the exact opposite, arguing that the two companies were situated so fundamentally differently as to warrant an entirely different treatment. Indonesia acknowledges that an investigating authority enjoys a degree of discretion in its assessment of the facts. However, the required "reasoned and adequate explanation" is seriously undermined where the investigating authority, within a span of a few months, goes from emphasizing the commonality between two companies for purposes of an adjustment to arguing that these companies are so fundamentally differently situated that they should be treated in diametrically opposite fashion. Where the investigating authority has itself, merely a few months earlier, espoused an entirely different explanation and interpretation of the same record evidence, it is particularly important to explain, in compelling terms, the plausibility of its now diametrically opposed conclusions.

[9] Appellate Body Report, *EC − Tariff Preferences*, footnote 220 to para. 105.
[10] Appellate Body Report, *EC − Tariff Preferences*, footnote 220 to para. 105.
[11] Panel Report, *EC − Export Subsidies on Sugar*, para .7.121.

2.54. In any event, the Commission's reasoning in the Amending Regulation is flawed. With respect to "direct" export sales, the Commission initially relied on the fact that both companies had "direct" export sales; and that for both companies these "direct" export sales" were "structural" and "permanent".[12] The Commission subsequently treats the initial criterion as irrelevant and decides that what matters is the quantity of these sales. This shift in reasoning is not explained.

2.55. In any event, the Commission has failed to provide any further context or description of the circumstances of these sales and what light these sales, or their respective quantities, might shed on question why amounts of money shifted between Ecogreen and EOS *should not* be considered an expense; and the amounts shifted between PT Musim Mas and ICOFS *should* be considered an expense.

2.56. With respect to the written S&P Agreement, the Commission fails to explain why the existence of such a written master transfer pricing agreement between PT Musim Mas and ICOFS should place PT Musim Mas in such a different position from Ecogreen. It stands to reason that, even in the absence of a written master agreement, some form of agreement and agreed-upon terms of sale − perhaps transaction-specific contracts or discernible from invoices − must have existed between Ecogreen and its trading department EOS. After all, the Commission found that Ecogreen also paid "commissions" to EOS. However, the Commission has made no reference to, nor has it analysed, any evidence submitted by Ecogreen on this point. Such evidence must, nevertheless, be part of the record, given that it would have been part of Ecogreen's response to its Questionnaire.

2.57. Moreover, Indonesia has presented evidence that demonstrates that some related companies choose to conclude intercompany/transfer-pricing agreements in order to facilitate their interaction with tax authorities, whereas other related companies choose not to do so. This type of choice, however, cannot influence the analysis of an anti-dumping investigating authority as to whether an adjustment between two related companies is warranted. In addition, unrelated companies may choose to use or not to use written agreements similar to the S&P Agreement. Contrary to the EU's assumption, how parties choose to memorialize their relationship is not as important as the substance or nature of that relationship.

2.58. Furthermore, the Commission's reliance on individual clauses of the written agreement is also misplaced. For instance, the Commission's reliance on the risk allocation between PT Musim Mas and ICOFS suggests that Ecogreen and ICOFS did not allocate risk between themselves or allocated that risk differently. However, the Commission has not pointed to any evidence whatsoever to substantiate this implied assertion. However, relevant information must be contained in the investigation record, in particular, in Ecogreen's Questionnaire Response.

2.59. With respect to other activities of the selling office, the Commission confirmed in the Definitive Regulation that EOS traded products from companies other than Ecogreen. Hence, the only difference appears to be the extent of such third-party sales. As noted above, the Commission has not explained why the extent of such sales should have any bearing on the determination whether, with respect to the investigated sales, PT Musim Mas and ICOFS should be considered as an SEE or closely related.

### 2.11 The Commission also acted inconsistently with Article 2.3

2.60. The EU also violated Article 2.3 of the Anti-Dumping Agreement, because the dumping margins for several sales were calculated using the constructed export price methodology of Article 2.3 and the third and fourth sentences of Article 2.4. Given this tight nexus between the two provisions, and the overarching role of Article 2.3 for the construction of the export price, an adjustment with respect to a constructed export price that violates Article 2.4 may also be said to mean that the constructed export price under Article 2.3 was also calculated improperly.

## 3. INDONESIA'S CLAIMS UNDER ARTICLES 3.5 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

3.1. The EU's determination is inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement, because the EU Commission failed to conduct a proper non-attribution analysis for two

[12] Definitive Determination, para. 33. Exhibit IDN-4.

"known factors". These two factors are (i) the "economic/financial crisis of 2008/2009", and (ii) "the effects of the difficulties faced by the EU domestic industry with access to raw materials and of the fluctuations in the prices of these raw materials".

### 3.2 The Commission failed to conduct a proper non-attribution analysis of the factor "financial crisis"

3.2. It is undisputed − and the EU accepts in these proceedings − that the financial crisis was a "known factor" other than dumped imports, in that it caused injury to the EU industry at the same time as the dumped imports. Nevertheless, the Commission's analysis of this factor is entirely inadequate and flawed for the following reasons.

3.3. First, the Commission's finding of causation is premised on the unexplained assumption that 2009 was the year in which the financial crisis started or the year in which its effects could first be felt. This is explicit in the Commission's reference to the year 2008 as "the year before the financial crisis" in paragraph 96 of its Definitive Regulation. The Commission thus relied on 2008 as a baseline period (counterfactual) during which the EU industry was unaffected by the financial crisis and during which injury reflected the effects of dumped imports only.

3.4. However, the assumption that the Union industry in 2008 was unaffected by the financial crisis, and that the financial crisis started only the following year, is contradicted by evidence in the record as well as by commonly known facts of which judicial notice can be taken. At the very least, the Commission should have provided a reasoned and adequate explanation for its view that the year 2008 could serve as evidence of a year in which dumped imports were the only injurious factor. However, it failed to do so.

3.5. The EU relies on various unrelated statements in the Commission's Provisional Regulation. It argues that the Commission did not find that the financial crisis began in 2009, but rather acknowledged that the crisis began showing some effects already in 2008. This argument, however, contradicts the explicit words of the Commission in paragraph 96 of the Definitive Regulation − the same factor cannot begin both in 2008 and also in 2009. Moreover, the passages from the Provisional Regulation to which the European Union refers paint a confusing picture. Some suggest that the crisis started in 2008; others imply that the crisis started in 2009; in its first written submission, the European Union seems to adopt an intermediary position, suggesting that the crisis existed in some fashion, but was not "clearly felt in 2008". All of these explanations are ex post rationalisations that may not be taken into account by the Panel. Moreover, the EU draws on the statements that, by their very nature, do not address the issue of causation/non-attribution, but instead deal with a description of injury indicators. An investigating authority does not satisfy the requirements of Articles 3.1 and 3.5 when its explanation is poorly structured, incoherent, illogical, and requires interested parties to piece together various disjointed statements scattered across the record.

3.6. Second, the Commission failed to "separate" and "distinguish" the injurious effects of the factor financial crisis from those of dumped imports. It may be recalled that the non-attribution analysis requires the investigating authority to examine the nature and the extent of the injurious effects of other factors.[13] The Commission accepted that the crisis affected the Union industry *through the same channels* as did the (allegedly) dumped imports, namely by reducing the demand for the Union industry's product and lowering sales prices. In other words, the Commission found that the *nature* of the effects of the financial crisis was the same as that of dumped imports. Thus, without knowing the *extent* to which the financial crisis affected the Union industry, the Commission was unable to distinguish between the injurious effects of dumped imports and the financial crisis, respectively, and therefore could not make its causation and non-attribution finding in a manner consistent with Article 3.5.

3.7. Third, the Commission failed to address the parties' arguments and record evidence that contradicted its conclusion. For example, the Commission failed to address Musim Mas' explanation that, in late 2009 and early 2010, imports from the countries concerned increased, but, at the same time, the profit of some EU companies as a whole and for the care chemicals segment in particular improved considerably. This casts in serious doubt the Commission's narrative that dumped imports, and their increased amounts, were responsible for the domestic industry's injury.

[13] Panel Report, *EC − Countervailing Measures on DRAM Chips*, para. 7.405.

In light of this argument, an entirely plausible (if not compelling) interpretation of the record evidence is that the injury to the domestic industry in 2008 was caused by the financial crisis, rather than dumped imports. The applicable standard of review requires an investigating authority to address alternative explanations of record evidence. Nevertheless, the Commission left this argument unaddressed.

3.8. Fourth, in its first written submission, the EU invoked the "correlation/coincidence" approach approved by the Appellate Body in *Argentina – Footwear (EC)*. However, both the panel and the Appellate Body in that dispute – just as the case law ever since then – treated "correlation/ coincidence" and "non-attribution" as separate elements of the causation analysis. In any event, the European Union's argument constitutes ex post rationalization, which should be rejected.

3.9. Finally, the Commission's conclusion with respect to the financial crisis, in paragraph 109 of the Provisional Regulation, is that the economic crisis "does not break the causal link established in relation to the low-priced dumped imports from the countries concerned". Indonesia submits that this "breaking the causal link" analytical framework and language is inappropriate to satisfy the non-attribution requirement. It is not methodologically possible to first establish a causal link for dumped imports and only then enquire about the injurious effects of other factors, by determining whether these factors "break" an already established causal link. This amounts to putting the cart before the horse. An investigating authority cannot determine a causal link between injury and dumped imports without looking at the effects of other injurious factors. Rather, an initial determination of the effects of other injurious factors is the logical basis for a determination whether the link between dumped imports and injury satisfies the standard for "causal link" of Article 3.5; it is also the logical prerequisite for ensuring that the effect of other factors is not improperly attributed to the dumped imports.

### 3.3 The Commission failed to conduct a proper non-attribution analysis of the factor "raw materials"

3.10. The Commission failed to conduct any analysis for the factor "raw materials". At the very outset of the investigation, interested parties provided argument and evidence that the domestic industry experienced injury due to insufficient access to raw materials and fluctuations in raw material prices. PT Musim Mas provided extensive explanations that the EU industry faces a structural disadvantage vis-à-vis Indonesian exporters, because Indonesian exporters have their own sources of raw materials. The EU domestic industry is, therefore, exposed to greater potential price fluctuations for these raw materials. This risk of price fluctuations materialized in particular during the financial crisis, starting in mid-2008; during this period, the price of the raw material decreased by over 60 per cent just between July and December 2008. The significantly longer lead-times for the EU industry, and the resulting greater exposure to price fluctuations, can leave the EU industry severely limited in its ability to compete with foreign producers.

3.11. In support, PT Musim Mas relied on raw material pricing data, as well as on other documents and record evidence submitted to the Commission. The accuracy of the price data was not disputed, nor was the fact that the raw materials account for "a substantial part of the overall production costs" in the fatty alcohols production process. It was similarly demonstrated, undisputed and verified that some EU companies depend on the supplies of raw materials by their Indonesian competitors, and that the long duration of raw material shipments from Indonesia/Malaysia to the EU exposes the industry to price fluctuations.

3.12. The Commission rejected PT Musim Mas' extensive explanation and evidence on the grounds that it was allegedly unsubstantiated. This was the entirety of the Commission's explanation for its decision in paragraph 98 of the Definitive Regulation. This one-sentence finding is entirely inadequate and is inconsistent with the requirements of Articles 3.5 and 3.1. The extent of PT Musim Mas' arguments and evidence required the Commission to investigate whether the alleged factor was indeed an injurious factor for which a non-attribution analysis should have been performed.

3.13. To the extent that, notwithstanding the amount of argument and evidence placed before it, the Commission considered that it required further evidence, it was incumbent on it to gather such evidence. As an investigating authority, in these circumstances, the Commission was not permitted to remain passive, but rather had an active duty to investigate.

3.14. Indonesia also emphasizes that the violation of Article 3.5 does not reside in the Commission's failure to find that this factor was causing injury at the same time as dumped imports. Rather, the violation of Article 3.5 arises from the Commission's refusal to engage in any analysis at all.

3.15. The EU's defense in these proceedings is that the factor "raw materials" is part of the "conditions of competition", and was subsumed in the factor "economic crisis". This is in manifest contradiction to the Commission's determination. Both interested parties and the Commission treated the factor "economic crisis" as a separate factor, acknowledged its injurious effects and analysed (albeit inadequately) it. In contrast, the factor "raw materials" is treated in subsequent paragraphs of the determination; and the Commission stated explicitly that, with respect to this particular factor, the interested parties had failed to "substantiate" their assertions. Hence, the EU's defense is not only an ex post rationalisation, but is in direct contradiction to the content and structure of the Commission's determinations.

## 4. THE EU VIOLATED ARTICLE 6.7 BECAUSE IT FAILED TO REVEAL TO THE INTERESTED PARTIES THE RESULTS OF THE VERIFICATION VISIT

4.1. Indonesia's final claim is that the EU violated Article 6.7, because it failed to disclose the results of the verification visit, as required by this provision.

4.2. Article 6.7 requires the investigating authority to disclose the results of the verification either in a separate report or as part of its disclosure of the essential facts under Article 6.9 of the Anti-Dumping Agreement. In this case, however, contrary to Article 6.7, the EU did not disclose any meaningful information about the results of the verification visits to the premises of the Indonesian exporters and their affiliates.

4.3. It is undisputed that the Commissio0n did not issue a separate disclosure document. Instead, in the Provisional and Definitive Disclosures issued pursuant to Article 6.9, the Commission in essence only stated that verification had taken place and that unspecified information had been verified, unspecified errors had been corrected and additional unspecified information had been collected.

4.4. This is insufficient to comply with the requirements of Article 6.7. Article 6.7 requires the investigating authority to disclose the "results" of the verification visits, by means of one or other of two different avenues: the investigating authority may either (i) "make available" a separate report containing the results of the verification visits, or (ii) "provide disclosure" of the results as part of the disclosure of the essential facts under Article 6.9. Regardless of which avenue is chosen, the investigating authority must disclose the same thing − the "results" of the verification visit.

4.5. The "result" referred to in Article 6.7 is the "effect" or "outcome" of the verification visit. As with the "result" of any activity, the "result" of a verification visit is closely linked to the *conduct, content and purpose* of that verification visit. Indeed, the Appellate Body in *US − Steel Safeguards* stated that the term "result" is to be read as "an effect, issue, or outcome *from* some action, process or design".[14] Annex I(7) of the Anti-Dumping Agreement defines the purpose of a verification visit as to "verify the information provided or to obtain further details". The purpose, conduct, and content of a verification visit is thus to verify the information provided by the investigated firms in their questionnaire responses and to enable the investigating authority to obtain, and the investigated exporter to provide, additional information or explanations regarding the exporter's submitted questionnaire responses.

4.6. In the normal course of events, during a verification visit, an investigating authority will request the investigated company to provide access to its accounting system and other records, including all of the worksheets and source documents used to prepare the questionnaire responses. During the verification visits, the investigating authority normally reviews these documents and cross-checks them against the data provided in the questionnaire responses. The investigating authority also uses the opportunity to clarify any areas of doubt regarding the contents of the questionnaire responses. As part of this process, the investigating authority may,

[14] Appellate Body Report, *US − Steel Safeguards*, para. 315. (original emphasis).

for instance, request access to an entire category of documents or data or focus on certain specific documents.

4.7. Normally, therefore, a verification visit involves a quasi-audit of all information relevant to the company's operations with respect to the investigated product as explained in its questionnaire responses. There may be several "results" of the verification, for instance, the investigating authority will have collected additional documents, worksheets, copies of invoices, financial statements, etc. A proper listing/description of these documents and their contents, therefore, forms part of the "results" of the verification. The investigating authority may also have satisfied itself as to the accuracy of certain facts and figures contained in the exporter's questionnaire responses. The questions posed and answers received by which the investigating authority satisfied itself of this accuracy forms part, therefore, of the results of the verification. The investigating authority may have received corrections or additional explanations regarding matters in the exporter's questionnaire responses. These corrections or explanations are part of the "results" of the investigation. Next, the investigating authority may discover errors in the questionnaire responses. The ability or inability to correct these errors is also part of the "results" of the investigation. The "results" also include any reasons why a particular piece of information was not verified, including, for instance, because the exporter refused to provide the required information and did not provide access to the relevant documents.

4.8. This is precisely the conclusion reached by the panel in *Korea – Certain Paper*, which stated that "results" of verifications include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".[15]

4.9. It is also important to keep in mind the due process-purpose of the disclosure requirement under Article 6.7. As noted by the panel in *Korea – Certain Paper*:

> The purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results.[16]

4.10. In other words, the purpose of Article 6.7 is, inter alia, to enable exporters to safeguard their rights in an anti-dumping investigation and "structure their cases for the rest of the investigation in light of those results".[17] For this purpose, exporters must know what information *was not* verified – so that they can make further efforts to put the investigating authority in a position to ultimately verify that information – as well as what information *was* verified, since verified information must in principle be used by the investigating authority and the exporter thus need not any longer devote its scarce resources to convincing the authority about the reliability of that information.

4.11. Throughout these proceedings, the EU has sought to blur or even eliminate the difference between the disclosure of the *results of the verification*, pursuant to Article 6.7, and the disclosure of *essential facts*, pursuant to Article 6.9 of the Anti-Dumping Agreement. In its First Written Submission, the EU argues that the term "results" refers to the "essential factual outcome of the verification" or the "essential facts under consideration as established through the on-the-spot investigation".[18]

4.12. This is of course incorrect. Even if the investigating authority has the option of disclosing the "results" of the verification at the same time as disclosing the essential facts, the subject of these two sets of disclosures is different: "Results" of the verification visit, on the one hand, and "essential facts", on the other hand. The difference between these two terms is obvious not only as a matter of treaty interpretation – since the drafters used two different terms, they must have meant two different things. It is also obvious from the structure and the unfolding of an

[15] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added).
[16] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added).
[17] Panel Report, *Korea – Certain Paper*, para. 7.192.
[18] EU's First Written Submission, paras. 185.

anti-dumping investigation. More specifically, whereas the results of the verification become part of the investigation record, the essential facts are merely a subset of the facts on the record.

4.13. The verification team normally cannot or does not take any final decisions on how the verification will affect the investigating authority's determinations of dumping and injury in the investigation until they have returned home and had the opportunity to consult with their superiors and other colleagues on any issues arising during the verification. The verification is, therefore, in essence a fact-gathering and a fact-checking exercise. The results of this exercise, therefore, relate to what facts have been gathered and checked and, by implication, what facts have *not* been gathered or checked. However, the results of the verification do not include any *subsequent determinations* by the investigating authority as to how to use the results of the verification, and other items in the record, to calculate dumping margins for the exporter in accordance with the Anti-Dumping Agreement. The subsequent decision how to determine the dumping margins is the result of the *investigation* – and disclosed inter alia in the disclosure under Article 6.9 – and not the result of the *verification* that must be disclosed under Article 6.7.

4.14. The respective objects of the disclosure under Article 6.7 and 6.9 must also be clearly distinguished because disclosure pursuant to Article 6.7 may occur at a point in time well before the disclosure under Article 6.9. The investigating authorities of numerous WTO Members provide a separate "verification report"; in the chronology of anti-dumping investigations, this report is typically issued well before these authorities have decided on what constitutes essential facts. Indonesia of course accepts that an investigating authority may choose to disclose the results of the verification visit simultaneously with the essential facts, as reflected in the text of Article 6.7. However, that choice of the investigating authority may under no circumstances modify the type of information to be disclosed or otherwise result in an impairment of the procedural rights and position of the investigated parties. Otherwise, the term "results" would refer to different matters depending on when the authority decided to satisfy its obligation under Article 6.7. This interpretative outcome would be alien to basic principles of treaty interpretation and would subject the due process rights of investigated companies to discretionary choices by the investigating authority.[19]

4.15. Thus, the *results* of a verification visit are reflected in the investigating authority's choices as to (i) which information to look at; (ii) why it looks at that information and (iii) whether it is satisfied during the verification that a given specific piece of information or document was successfully verified. However, the results of the verification may also include information that was provided and substantiated by the exporter but that the investigating authority did not immediately consider relevant to its final determination.

4.16. Yet another consideration is that Article 6.7 is also intended to provide domestic courts (using their own standard of review) and WTO panels (using the standard of review pursuant to Article 17.6(i)) with the ability to review the determinations of investigating authorities. This ability depends on the existence of a proper disclosure of the "results" of the verification visit under Article 6.7 of the Anti-Dumping Agreement.

4.17. WTO case law – such as *Korea – Certain Paper* and *US – Steel Plate* – demonstrates that information contained in the disclosure of the verification results (whether through a verification report or with the disclosure of essential facts) – concerning the type of information verified; the authority's decision whether the information was verifiable, verified or not; as well as any attendant circumstances, such as behaviour of the investigated firm – plays an important role for a panel's ability to examine whether the investigating authority complied with Article 17.6(i) of the Anti-Dumping Agreement. A failure to disclose the results of the verification, or an incomplete disclosure, will thus significantly undermine a panel's ability to examine, in a "critical and searching" fashion, the establishment and evaluation of the facts by the investigating authority.[20] Similarly, only a proper reporting of the results of the verification visit will enable the appropriate judicial review within a WTO Member's domestic legal system, as required by Article 13.

4.18. Moreover, a failure by the investigating authority to describe accurately and in detail events during the verification visit is a failure to permit interested parties to see information that is relevant to the presentation of their cases. This is contrary to Article 6.2 - which requires that all

[19] Indonesia's Opening Statement at the First Panel Hearing, para. 98.
[20] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

interested parties have a "full opportunity for the defence of their interests"— as well as Article 6.4, which requires authorities, whenever practicable, to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases … that is used by the authorities … and to prepare presentations on the basis of this information".

4.19. In this case, the EU argues that the Commission provided the results of the verification visits as part of the disclosure of the findings of the investigation. However, these efforts were, at best, cursory and cannot be considered to have met the standard required under Article 6.7. For instance, the Commission failed to set out

- which specific types of information, documents, or issues were addressed in the verifications.
- which particular documents (e.g. sales invoices, rebate notes, etc.) were examined; and
- what questions were asked by the Commission officials or what answers were provided by the exporters.

4.20. The extent of the Commission's failure to disclose the results of the verification is clearly visible from a reading of the contemporaneous notes taken by PT Musim Mas' counsel during the verifications at that exporter's premises in Singapore, Medan, and Hamburg. These notes contain the kinds of basic information that are entirely absent from the Commission's purported disclosure of the verification results, namely, who attended the verifications, what documents were reviewed, what questions were asked, and what answers were given. There are several issues of critical importance to the Commission's subsequent adjustment of PT Musim Mas' export price and to Indonesia's related claim under Article 2.4 of the Anti-Dumping Agreement. As the counsel notes demonstrate, the issues at hand were discussed during verification, but were not subsequently disclosed by the Commission. These issues include the close corporate, management, organizational and operational links between PT Musim Mas and ICOFS; transfer pricing policy; the so-called "direct" export sales by PT Musim Mas; the manner in which ICOFS and PT Musim Mas co-operate on such export sales as well as for domestic sales; and the fact that ICOFS was involved in negotiating, preparing and executing each and every sale of PT Musim Mas' products, including domestic sales. The Commission's conclusion that ICOFS is not the sales department of PT Musim Mas, but rather stands in a commission-agent relationship with PT Musim Mas is in direct contradiction with this information.

## 5. CONCLUSION AND REQUEST FOR FINDINGS

5.1. For the above reasons, Indonesia respectfully requests that the Panel find that the European Union.

- Acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement, by making an improper deduction for the activities of PT Musim Mas' trading arm ICOFS and disregarded the fact that the two entities are part of an SEE;
- Acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, by failing to conduct a proper non-attribution analysis with respect to the factors "financial/economic crisis" and "issues related to the European Union's domestic industry's access to raw materials"; and
- Acted inconsistently with Article 6.7 of the Anti-Dumping Agreement, by failing to disclose to either of the investigated Indonesian exporters the results of the verification visit.

5.2. Indonesia thanks the Panel and the Secretariat team for its work so far. Indonesia looks forward to assisting the Panel in the subsequent stages of this dispute.

## ANNEX C-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

# 1 INTRODUCTION AND OVERVIEW

1.1. The key issue regarding Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement is that adjustments may be made only for actual/genuine expenses incurred by the seller that affect the price and therefore affect price comparability, within the meaning of Article 2.4. In this case, the EU's adjustment for internal transfers between the two arms of the seller, PT Musim Mas and ICOFS did not reflect an actual expense that was incurred by the seller. Therefore, the internal transfer did not reduce the net price received by the seller for the goods. The EU has failed to address this issue or to explain how this was any other than a purely notional adjustment, based on what might have happened had the producer/exporter structured its business differently.

1.2. Regarding Indonesia's claim under Article 3.5 of the Anti-Dumping Agreement, the EU has failed to show where the Commission provided a reasoned and adequate explanation of the factors raised by Indonesia. Instead, the EU relies on *ex post* explanations, which in any event, frequently contradict record evidence or are internally inconsistent. Finally, the EU's arguments under Article 6.7 of the Anti-Dumping Agreement cannot surmount the fact that the Commission simply failed to provide the investigated companies with any meaningful "results" of the verification visit.

# 2 INDONESIA'S CLAIM UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

## 2.1 Indonesia's claim does not hinge on the label "single economic entity"

2.1. The EU continues to argue that Indonesia's claim stands and falls on whether the Panel's decision adopts the terminology of a "single economic entity". Indonesia has explained at length that its legal claim is that the EU has acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by making an adjustment for an item that does not affect the price received by the seller and therefore does not affect price comparability, resulting in an "unfair comparison", within the meaning of Article 2.4.

2.2. In Indonesia's view – and in keeping with prior WTO case law and the EU's own domestic legal terminology – a suitable terminology for the process of considering whether transactions between related parties affect price comparability is to ask whether the two entities form a "single economic entity". However, the term "single economic entity" is nothing but a phrase intended to operationalize, in the context of related parties, the concept of "affect[ing] price comparability", within the meaning of Article 2.4. Needless to say, other labels are perfectly possible, e.g. whether two companies are sufficiently closely related or, to paraphrase the EU Commission, whether an adjustment is "appropriate". This is the term the Commission used when examining transactions between Ecogreen and EOS. The choice of the most appropriate label, as decided by the Panel, does not affect either the substance of the analysis or Indonesia's claim that the "mark-up" at issue is not an item that affects price comparability. If the companies at issue are sufficiently closely related or intertwined as to operate as a single entity, transfers between them do not affect the price they receive for the goods.

## 2.2 The EU's adjustment under Article 2.4 does not reflect an actual or genuine expense incurred by the seller

2.3. The central question under Article 2.4 is whether the adjustment is required to ensure price comparability. An adjustment is required for any item that affects price comparability; and, conversely, an adjustment is prohibited for any item that does not affect price comparability. Hence, the key issue is whether transactions between ICOFS and PT Musim Mas and the "mark-up" discussed in these proceedings affects the price received by the seller and hence price comparability. However, both the Commission and now the EU have failed to explain how the "mark-up" can be regarded as an actual or genuine expense incurred by the seller of the investigated goods.

2.4. Indonesia has explained in detail how a company's cost structure will be impacted by the different ways in which it may organize its business activities. For instance, if a producer uses an in-house sales department to conduct sales activities or an in-house transportation department to provide transportation services to its customers (or if a single economic entity uses separate legal entities within its structure for that purpose), the producer's expenses will be the financial outlay required to operate these departments or legal entities. In contrast, if the producer uses independent third party entities (traders or a transportation company) to provide these services for its customers, the producer's expenses will be the actual fees paid to these independent third party service providers. The difference between in-house expenses and actual fees paid to independent third parties cannot be blurred by pretending, for instance, that a producer that in reality is using an in-house sales department is actually relying on an independent trader. The difference between these two scenarios has significant implications for the nature of the expense (cost vs. a commission) and the amount (one may be higher than the other, which is the very reason why companies choose one option over the other).

2.5. Indonesia has provided multiple examples − along with numerical values in table format − to illustrate this point. The EU has not addressed any of these arguments or examples directly. The EU cannot make notional or fictitious adjustments as if PT Musim Mas were using (or were continuing to use) an independent trader, if the company in reality is relying on a sales department with which it is tightly integrated and with which it jointly sells the investigated product.

2.6. Moreover, there is not a shred of evidence in the record of the investigation to suggest that the "mark-up" represents the amount of an actual commission paid by the seller on these sales. Even the Commission did not consider that the "mark-up" was an actual commission. Instead, it decided that the actual "mark-up" was not reliable "in order to avoid any distorting effects that may arise from the transfer prices".[1] Consequently, instead of relying on the transfer prices, the Commission used "a reasonable profit margin" based on "a reasonable profit for the activities carried out by trading companies in the chemical sector". Thus, even in the Commission's view, the amount of the "mark-up" appears to be irrelevant: the Commission would, it seems, use a reasonable profit margin of other companies regardless of whether the "mark-up" was zero, the percentage amount set out in the S&P Agreement or some other (higher) amount. This makes clear that the Commission did not consider that the "mark-up" was an actual commission or expense, but merely the justification for making a *notional* adjustment.

2.7. It is clear also that even the Commission does not consider that either the actual "mark-up" between PT Musim Mas and ICOFS or the "reasonable profit" it used instead represents the actual selling, general and administrative expenses (SG&A) incurred by either ICOFS or PT Musim Mas for these sales. As Indonesia has explained, the Commission *also* deducted ICOFS' SG&A, suggesting that this adjustment was intended to represent profit (which is, indeed, the term used by the Commission − "a reasonable profit margin", "actual profit margins" etc). The EU now argues that this case concerns a direct selling expense in the form of a commission that is related to export sales only. There is, however, no suggestion in the Commission's determinations that the "mark-up" was an actual selling expense actually incurred by the seller − ICOFS and PT Musim Mas − in this case. Instead, it is clear that the Commission decided that the "mark-up" was *not* reliable but that it was nevertheless entitled to make a "notional" adjustment *as if* ICOFS and PT Musim Mas had used a different structure and process.

2.8. Moreover, the audited financial statements of PT Musim Mas and ICOFS provide *no evidence whatsoever* that the "mark-up" was an actual expense incurred by the seller − ICOFS and PT Musim Mas − in making the investigated sales. If PT Musim Mas had used an independent trader − or an agent working on a commission basis − a corresponding entry would exist in its financial records. However, there is no such entry. Instead, the "mark-up" is simply an allocation of revenue between the two arms of the producer/exporter, and the actual selling expenses are clearly recorded as SG&A expenses in the financial statements of the two companies.

2.9. Throughout this dispute, the EU has failed to establish that a commission was actually paid in this case. While the EU chooses to use the terms "commission" and "mark-up" interchangeably, and the EU's regulation defines "commission" to include a "mark-up", the EU has failed to show how a commission was actually paid in this case. Moreover, the EU has failed to explain the legal

[1] Definitive Regulation, para. 36. Exhibit IDN-4.

or economic justification for treating a "mark-up" as the same as an actual commission and imputing a notional expense to the seller in these circumstances. It has not explained how a transfer between two entities that form part of the investigated producer/exporter affects the price received by the producer/exporter for the investigated goods. It has not explained on what grounds it is permissible to ignore the actual sales structure and process, as well as the audited financial statements, of the producer/exporter in order to impute a notional expense in this case. The EU has not explained how the "mark-up" can be a cost to the "seller", when it is the party that actually sells the goods − ICOFS − that receives the "mark-up".

2.10. The EU has argued that Indonesia's argument is, in effect, that once two parties are related, there can be no adjustments for transactions between them. This is incorrect. Indonesia has made clear that there may be situations in which parties are related in the sense that there is some common stockholding but, overall, the relationship does not satisfy the *Korea − Certain Paper* criteria. In that case, it may be appropriate to treat the two parties as independent. In that case, however, several factors would be different than the present case: (i) it is unlikely that the investigating authority would reject the price charged by the producer to its not-closely-related affiliate as unreliable; (ii) if the not-closely-related affiliate was acting as an agent on commission basis, it would not take title to the goods and be treated as the "seller"; and (iii) any commission paid in those circumstances would likely be recorded as such in the audited financial statements of the seller.

2.11. Again, there is no evidence that this is an actual commission paid or actual expense incurred by the producer/exporter, even if the Commission considers that it has the right to proceed as if it is. The standard of review under Article 17.6(i) of the Anti-Dumping Agreement requires a panel to determine whether an investigating authority's "establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". In this investigation, the Commission ignored the actual facts regarding the expenses actually incurred by the producer/exporter and instead adjusted for a hypothetical, imputed commission that is based solely on the Commission's view of what expenses *would have been incurred if the producer/exporter used a different sales process* and determined that it is entitled to make an adjustment on that basis. In the absence of any evidence in the financial statements of either PT Musim Mas or ICOFS that the intra-company transfer of funds represented an actual expense to the producer/exporter as a whole, there is no basis for the Panel to find that the Commission's "establishment of the facts was proper".

2.12. Even assuming that the mark-up could be considered as a cost to PT Musim Mas, it is *revenue* to ICOFS. As explained in greater length in the next section, it is fundamental to note that the Commission treated both PT Musim Mas and ICOFS − taken together − as the seller. The export price on the basis of which an ex works price was calculated was the price charged by ICOFS to European customers, not the price at which PT Musim Mas sold to ICOFS. This means that both PT Musim Mas and ICOFS together were the seller. To the producer/exporter as a whole, therefore, the "mark-up" does not represent a cost: the cost to one entity and the revenue to the other cancel each other out. The EU has never addressed this point, nor provided any legal basis for a deduction for an amount which, under its own logic, is revenue to the very seller (ICOFS) on whose price it is basing its determination of export price.

### 2.3 The EU's determinations concerning the relationship between PT Musim Mas and ICOFS are contradictory

2.13. The starting point for the EU's determination of the export price was the price charged by ICOFS to the first unrelated customer in the EU. This means, in effect, that the Commission treated ICOFS as the seller of the investigated goods and PT Musim Mas/ICOFS together as the producer/exporter for whom a single dumping margin must be and was calculated in accordance with Article 6.10 of the Anti-Dumping Agreement.

2.14. The EU contends that there is no contradiction between the treatment of PT Musim Mas and ICOFS as a single entity for the purpose of identifying the starting price and as, in effect, separate entities for the purpose of adjustments. The EU argues that the use of ICOFS' price to the first unrelated customer in the EU merely flows from the reference in Article 2.1 to the price at which the investigated goods are "introduced into the commerce" of the investigating Member.

2.15. The EU omits, however, that the Commission's reliance on ICOFS' price to the first unrelated customer pre-supposes a finding by the Commission regarding the relationship between PT Musim Mas and ICOFS and the reliability of the transfer price between the two. Put another way, at the outset of the investigation, the Commission made a crucial choice to treat PT Musim Mas and ICOFS as a single entity. This choice entails logical consequences that the EU now seeks to avoid.

> In a number of cases the foreign producer will not sell directly to the Community. A trading house, for instance, may act as an intermediary between the foreign producer and the Community importer. … If the intermediate company is *independent* from the producer, provided that the producer knows when selling to the intermediate company, that the final destination of the goods is the EC, *the export price is normally the price charged by the foreign producer to the intermediate company for further resale* to the Community … In principle*, related sales subsidiaries* located in the country of the producer *will be treated as an export sales department* of the producer and *the export price will be determined on the basis of the prices charged by the related company to the first independent customer* in the Community … *The same approach may also be taken with respect to related sales subsidiaries located in a country other than the producer.* In *Welded Tubes*, the Commission acknowledged that the prices charged by a company located in a country other than that of the producer and performing the tasks of an export department (e.g., conclusion of export contracts, invoicing and collection of payments) had to be taken into account for the dumping calculation.[2]

2.16. The EU's decision to use the price charged by ICOFS to the first unrelated customer in the EU is, therefore, not simply a matter of applying the definitional provisions of Article 2.1 of the Anti-Dumping Agreement. It also involves a decision by the investigating authority regarding the relationship between PT Musim Mas and ICOFS that has important consequences for the rest of the Commission's analysis. If ICOFS were an independent "trading house", the Commission would have used the price charged by PT Musim Mas to ICOFS "for further resale to the [Union]" as the basis for the export price. Instead, the Commission drew the normal distinction "between intermediate companies that are independent from the producer and those that are related to the producer". The Commission treated the "related sales subsidiary" ICOFS as "an export sales department of the producer" that was "performing the tasks of an export department" and used ICOFS' price to the first unrelated customer as the starting point to determine the export price. Again, put another way, the Commission treated PT Musim Mas and ICOFS as a single entity.

2.17. In the words of the description quoted above, ICOFS was treated as the *export sales department* of the producer and *the export price was determined on the basis of the prices charged by the related company to the first independent customer* in the EU. As a result, PT Musim Mas and ICOFS were treated as a single "producer/exporter" or "seller" for the purposes of determining dumping margins. Again, contrary to the EU's arguments, this necessarily involved a determination by the Commission regarding the relationship between them.

2.18. To illustrate how all this works in practice, an investigating authority may be faced with three distinct sales structure and processes that are relevant to this determination. In a **Scenario 1,** the exporter sells to an independent trader, who then re-sells to the investigating Member. In this case, the investigating authority will ask the producer to report all sales to the independent trader for which the producer knows in advance that the destination is the investigating Member. Clearly, the Commission found that this is not the structure or process used by PT Musim Mas and ICOFS.

2.19. In a **Scenario 2,** the producer sells directly to customers in the importing Member, but pays a commission to an independent trader for arranging the sales. Here, the producer (but not the independent trader) would be the seller of the goods and would report its sales directly to the customers in the importing Member. The starting price for determining the net export price would be the price charged by the producer. The commission paid to the independent trader would be a direct selling expense. Again, the Commission clearly found that this is not the structure or process used by PT Musim Mas and ICOFS, as the starting price used was the price charged by ICOFS.

[2] Anti-Dumping and Other Trade Protection Laws of the EC, Van Bael & Bellis, pp. 87-89 (italics added). Exhibit IDN-69.

2.20. Finally, in a **Scenario 3,** the producer sells to a related trader who then sells to the importing Member. In this case, the investigating authority must determine whether the relationship between the producer and the related trader is such that the prices between them are unreliable. Once it makes this determination, it will ask them to report the sales by the related trader to the customer in the importing Member rather than the sales from the producer to the related trader as the starting point for the determination of the export price. Clearly, the Commission found that this is the sales structure and process that exists with respect to PT Musim Mas and ICOFS in this case. In effect, the related trader acts "as the export sales department of the producer", and the two entities are, for all relevant purposes, a single economic entity.

2.21. Contrary to the EU's assertion, therefore, there is a clear contradiction between the Commission's determination to treat PT Musim Mas and ICOFS as a single entity for the purpose of identifying the starting price for the calculation of dumping margins and for the purpose of determining a single margin of dumping within the meaning of Article 6.10, on the one hand, and deciding to treat them as if they operated independently for the purpose of determining adjustments to the export price, on the other. The Commission cannot, on the one hand, determine that PT Musim Mas and ICOFS are, together, the producer/exporter or seller of the goods and then, on the other hand, determine that their relationship is one of seller and independent trading company. At a minimum, the Commission has failed to provide a reasoned and adequate explanation of how this contradiction can be reconciled.

2.22. The EU has failed to address the implications of its finding − for this purpose at least − that PT Musim Mas and ICOFS are a single entity. The EU has not explained how money transfers between two pockets of a single producer/exporter − which PT Musim Mas and ICOFS undoubtedly are for the purposes of this case − affect the ex works price received by the producer/exporter for its export sales of the investigated producer.

2.23. Put another way, the "mark-up" represents part of the price that the seller, ICOFS and PT Musim Mas, receives for the sale. Their decision, as closely intertwined parties, on how to allocate that revenue between them, does not in any way affect the price received for the sale. The price received by the seller − ICOFS and PT Musim Mas taken together − would not change whether the amount of the "mark-up" were in a different amount or zero. To put this in practical terms, assume the price charged by PT Musim Mas/ICOFS to the first unrelated customer was increased by 20%. PT Musim Mas /ICOFS could decide − for tax or other internal reasons − that the additional 20% revenue would be split 50-50 between them. They could decide that all of the additional revenue could go to ICOFS. Or they could decide that it would all go PT Musim Mas. In all of these three scenarios, the actual price received by the seller remains the same, and the expenses actually incurred by the seller remain the same. Similarly, the amount of the expenses actually incurred by ICOFS and PT Musim Mas does not change regardless of whether the "mark-up" is a different amount or zero. Thus, the "mark-up" does not affect the price and, hence, price comparability.

2.24. However, under the Commission's approach, however, the choice between the 50-50 and the other options would have a decisive impact on the ex works price and on the dumping margins. This lacks logic under any scenario.

### 2.4 The EU has made deductions for items that are normally not deducted from the ex works price and that the EU did not deduct for the ex works price on the normal value side

2.25. First, the EU has not addressed that the ex works price normally *includes* SG&A expenses incurred by the seller in each of the domestic and export markets. The sole exception in this case is the deduction the Commission made for the SG&A incurred by ICOFS and deducted from the export price as part of the contested adjustment. Where the Commission seeks to establish the net price at an ex works level that normally includes the indirect selling expenses/SG&A incurred by the seller, and it includes indirect selling expenses/SG&A in the normal value, there is no legal basis to deduct any indirect selling expenses/SG&A of the seller from the export price. The same applies to any revenue that could be considered as part of the profit of the seller.

2.26. Secondly, the EU has not provided any justification for the deduction of any amount that is the "profit" of the seller (or that serves as a proxy for that "profit"). The determination of price discrimination involves a comparison of two prices (normal value and export price) in order to identify whether the seller is obtaining a lower return on sales in the export market than on sales in the domestic market. Deducting profit from the export price necessarily reduces the return achieved by the seller on the export sales and distorts the comparison unfairly. To the extent that the Commission purports to have deducted *profits made by the seller, ICOFS,* the EU has provided no justification for this deduction. Moreover, unless the Commission can establish that *the entire amount it deducted* represented an *actual expense* of the seller, Indonesia sees no legal basis for the adjustment.

### 2.5 The differential treatment of PT Musim Mas and Ecogreen

2.27. The EU continues to mischaracterize Indonesia's arguments concerning the differential treatment of PT Musim Mas and Ecogreen. Indonesia does not argue that the differential treatment *per se* amounts to discrimination. Rather, Indonesia argues that the Commission's reasoning explaining its differential treatment of the two companies is part and parcel of the Commission's explanation for why it made the adjustment for PT Musim Mas and must be measured against the benchmark of a "reasoned and adequate explanation".

2.28. Indonesia has previously explained that the three key criteria relied on by the Commission to differentiate between the PT Musim Mas/ICOFS and Ecogreen/EOS, respectively, are not meaningful and provide no insight into whether the allocation of income between the producer and the trading arm affected price comparability. The EU has failed to respond or explain why the three sets of criteria − "direct" export sales; the existence of a written as opposed to a verbal agreement; and third party sales − are relevant for determining whether a monetary transfer between two related parties affects price comparability. In Indonesia's view, none of these criteria has any relationship with the question at hand.

2.29. The Commission's determination is also undermined by the fact that it examined the existence of corporate and management links in the case of Ecogreen/EOS, but not in the case of PT Musim Mas/ICOFS. The silence of the Commission on this point for PT Musim Mas cannot be read − as the EU argues − that the Commission acknowledged that both companies were closely related to their sales entity, but that this criterion was not of any further relevance. A panel cannot take the defending Member at its word, but rather must find direct evidence in the record and in the investigating authority's reasoning that a particular analysis was undertaken. Any ambiguity in this regard must be interpreted to the detriment of the investigating authority, which is required to provide a reasoned and adequate explanation.

2.30. The absence of any reference or explanation in this case is compounded by the fact that the Amending Regulation does not make clear what weight the Commission attached to the "common ownership/control" criterion, relative to the other criteria, in its analysis of Ecogreen/EOS. Thus, even if the remaining criteria were meaningful and relevant, the Commission's reasoning would still be deficient, because it remains entirely unclear how the Commission weighted, in relative terms, the differences between the two producer/exporters versus the common, shared feature of "common ownership/control".

2.31. The EU erroneously claims that it did not change its criteria in response to the Interpipe judgment and that "[t]he only change that occurred was to examine the factual situation of the interested parties in the light of the factual situation" in the Interpipe case.[3]

2.32. This appears to be nothing but semantics and merely another way of saying that indeed the criteria did change. The criteria changed from those used in the Definitive Regulation to those reflected in the *Interpipe* judgment and applied in the Amending Regulation. The *Interpipe* judgment contained not merely a set of facts, but the Court's view as to how EU law should be applied to those facts. In the Amending Regulation, the Commission purported to apply the interpretation by the *Interpipe* court to the facts of the fatty alcohols investigation (and made other changes below).

[3] EU's response to Panel question No. 43, para. 17.

2.33. In any event, it is simple logic that the criteria changed. In the Definitive Regulation, Ecogreen and PT Musim Mas were treated identically. In the Amending Regulation, they were treated differently. The facts had not changed. The EU's criteria must, therefore, have changed. It is not clear why the EU feels compelled to suggest otherwise.

2.34. Although an investigating authority enjoys a certain degree of discretion, which may also entail a change in the analytical framework applied during the investigation, it must comply with certain key principles.

2.35. First, the authority must provide a reasoned and adequate explanation for its determination. Second, where the authority previously reached a certain conclusion on the basis of a given set of facts; and then subsequently reaches the exactly opposite conclusion, without any change in the underlying facts; the investigating authority must address this point in its explanation. In other words, whether the second (amended) explanation is sufficient is determined, in no small measure, on whether the authority has adequately explained why the authority chose to alter its assessment criteria after the initial determination; how the new assessment criteria differ from the old assessment criteria; why the new assessment criteria are preferable to the old assessment criteria; and how the amended conclusion is justified in the light of the new assessment criteria.

2.36. The Commission also failed to explain in the Amended Regulation how it viewed and weighed its previous determination that the two producers/exporters were identically situated. The investigating authority must also explain how it weighed the previously found similarities between the producers/exporters, and its conclusion that the two producers/exporters were identically situated and warranted identical treatment, against the new assessment criteria that point towards differences between the producers/exporters.

2.37. The EU appears to consider that the Commission was entitled to radically change the assessment criteria, and reach a diametrically opposite conclusion, simply because the European Court decided that the new criteria were appropriate. However, the EU is not entitled to deference simply because the Commission acted in the light of a decision of an EU court.

## 3 INDONESIA'S CLAIMS UNDER ARTICLES 3.5 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

3.1. The EU has failed to rebut Indonesia's claims that the Commission's non-attribution analysis of the factors "financial crisis" and "raw materials" is inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement.

3.2. As a general defence, the EU alleges that Indonesia seeks to heighten the standard under Article 3.5, by imposing an obligation on investigating authorities to conduct a quantitative rather than a qualitative analysis of the effects of other factors. However, Indonesia's arguments merely reflect the well-established legal principle that investigating authorities must provide a reasoned, adequate, and meaningful explanation for their injury and causation determination. Moreover, with respect to the "raw materials" factor, it is useful to recall that the Commission did not provide *any analysis at all*. It simply brushed aside PT Musim Mas' extensive arguments and evidentiary references as "unsubstantiated", without any explanation whatsoever.

3.3. Indonesia is not arguing that the Commission erred because it did not agree with PT Musim Mas that poor raw material access for the EU domestic industry was a main cause (or simply a cause) of the injury experienced by the domestic industry. Whatever the ultimate result the Commission may have reached, at the very least, PT Musim Mas' arguments and evidence required *some* degree of analysis.

3.4. The EU's arguments draw on random, unconnected statements and figures in sections of the determinations that the Commission never intended to be part of its non-attribution analysis. Indonesia is not arguing that the Panel cannot, as a matter of principle, look beyond the "non-attribution" heading in analysing the Commission's findings. In Indonesia's view, however, the fact that a particular statement is under a different heading is a good indication that the investigating authority did not intend this statement to be part of its causation analysis.

3.5. Measured against the well-established standard of review applicable in disputes involving anti-dumping matters, all of the EU's *ex post* arguments must be rejected.

### 3.1 The Commission failed to conduct a proper non-attribution analysis of the factor "financial crisis"

3.6. With respect to the "financial crisis" factor, the EU failed to explain why the Commission refused to address the exporter's argument concerning the EU industry's profits in late 2009 and early 2010. During that time period, imports from the countries concerned increased, but at the same time the profit of some EU companies as a whole and for the care chemicals segment improved considerably.

3.7. Furthermore, the Commission refused to address the issue of captive demand, raised by PT Musim Mas in Exhibit IDN-35 in support of its argument that the injury to the EU industry was caused by the factor "financial crisis", rather than by dumped imports. In a nutshell, the logic of this argument was that the financial crisis led to reduced captive demand for fatty alcohols (FOH)-downstream products, such as ethoxylate or surfactants. This, in turn, resulted in lower demand for FOH itself, especially for premium branded products produced by EU companies. Before the EU FOH-producers adjusted to this situation, their continued production at previous levels created an oversupply of FOH, which led to a decrease in the price of FOH in the EU market. Subsequently, there was lower capacity utilization by the EU companies. Both of these phenomena − price decreases and/or lower capacity utilisation − were relied upon by the Commission in its finding of injury, but improperly attributed to imports.

3.8. In Indonesia's view, at the very least, the EU Commission had a duty to investigate and analyse the EU industry's profits in late 2009 and early 2010, and the issue of captive demand. By ignoring entirely PT Musim Mas's arguments and evidence with respect to these issues, the EU Commission acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

### 3.2 The Commission failed to conduct a proper non-attribution analysis of the factor "raw materials"

3.9. With respect to the factor "raw materials", the EU alleges that Indonesia's entire case rests on a few paragraphs in PT Musim Mas's comments on the Complaint, and that, in all of the subsequent comments and communications, PT Musim Mas failed to repeat its arguments with respect to this factor.

3.10. However, PT Musim Mas' arguments and evidence constitute an extensive narrative contained in PT Musim Mas' Comments on the Complaint, which Indonesia quoted and described in its first written submission and its responses to Panel questions 20 and 24. Furthermore, as the EU acknowledges, after setting out its detailed arguments in its initial submission, PT Musim Mas referred consistently to the "raw materials" factor as an independent "known factor" throughout the remainder of the investigation, in particular in its Comments on the provisional determination.

3.11. The EU is also incorrect to suggest that, faced with the Commission's silence in the provisional determination, PT Musim Mas was somehow obliged subsequently to repeat *in extenso* these arguments and evidence in its comments on the provisional determination, and that the company's failure to do so somehow limits the Panel's analysis in this case. This argument is untenable. On the contrary, it is established case law that the right of an exporting WTO Member in a WTO dispute — Indonesia in this case — to raise particular arguments concerning a trade remedy determination does not depend on whether an investigated company raised that argument during the investigation. This applies, *a fortiori*, in a case where the argument *was* made by the investigated company and merely was not *repeated* in subsequent stages of the investigation. Finally, the EU's argument has far-reaching systemic implications. It means essentially that, in order to maintain their rights in a subsequent challenge to a dumping determination, investigated companies would have to repeat all of their arguments throughout all of their submissions during the entire investigation — simply because the investigating authority chooses not to address them in a provisional determination. This makes no sense, and, moreover, would impose a high burden on commercial operators, affecting in particular exporters from developing countries.

3.12. The EU's primary defence is that the factor "raw materials" is nothing but a part of the factor "financial crisis", or that access to "raw materials" is relevant to the conditions of competition between Indonesian and EU producers and, therefore, was analysed under a different rubric. This is incorrect. PT Musim Mas listed the factor "raw materials" among "various other factors" that injured the EU industry, separately from the factor "financial crisis", and *the Commission itself* treated it as an independent non-attribution factor in its final determination. The fact that "raw materials" may indeed be an element within the competitive relationship between the domestic and foreign producers does not preclude this factor from being a non-attribution factor in its own right within the meaning of Article 3.5. Indeed, several factors listed in Article 3.5 can be characterized as aspects of the conditions of competition.

3.13. The EU made a number of additional *ex post* arguments, all of which lack merit. For instance, in its response to Panel question 22, the EU alleged that EU FOH producers could easily switch from one raw-material source to another, depending on their market price, as prices for different raw materials do not develop in parallel. In its response to Panel question 45, the EU tried to develop this argument by relying on a very general statement in the EU domestic industry's Complaint that the EU producers have plants that use as inputs both synthetic and natural raw materials. Importantly, however, this statement lacks any evidentiary support, and does not explain whether a particular plant may use one or more types of raw materials. Indeed, it is clear from a letter from one of the complainants (submitted as an exhibit in this dispute) that some EU companies produce FOH based on natural oils, whereas others produce FOH products based on synthetic inputs. These raw materials are not substitutable and producers relying on one of these inputs cannot easily shift to the other raw material.

## 4 THE EU HAS FAILED TO REBUT INDONESIA'S CLAIMS UNDER ARTICLE 6.7

4.1. Indonesia claims that the EU acted inconsistently with Article 6.7 of the Anti-Dumping Agreement, because it failed to make the results of the verification visit available or to disclose them pursuant to Article 6.9, as required by Article 6.7.

4.2. Article 6.7 requires the investigating authority to disclose the results of the verification either in a separate report or as part of its disclosure of the essential facts under Article 6.9 of the Anti-Dumping Agreement. In this case, the EU did not provide any meaningful disclosure of the results of the verification visits to the Indonesian exporters and their affiliates, either in the form of a stand-alone disclosure document containing the results of the verification or as part of the disclosure of the essential facts. Instead, in the Provisional and Definitive Disclosures issued pursuant to Article 6.9, the Commission stated only that verification had taken place and that unspecified information had been verified, unspecified errors had been corrected and additional unspecified information had been collected.

4.3. The EU's position in this dispute is, in essence, that these general boilerplate references — that could apply to any anti-dumping verification — satisfy the requirements of Article 6.7. Before the Panel, the EU has also relied on a list of exhibits that it provided to the Panel as Exhibit EU-14 as part of the verification results. Beyond these two elements, the EU in essence denies that the "results" of the verification are an independent concept, because it argues that the essential facts under consideration under Article 6.9 are co-extensive with the "results" of the verification and that, by disclosing essential facts under Article 6.9, the authority also complies with Article 6.7. Finally, as evidenced in particular in its later submission in this dispute, the EU has relied on what, in its view, the investigated company "knew", "should have known" or "must have known", that the verification did not happen "behind closed doors" and that the company never complained about insufficient information. As explained below, all these arguments are mistaken.

### 4.1 The "results" of the verification

4.4. In this dispute, Indonesia's primary legal argument is that the EU failed to make available the "results" of the verification. Indonesia does not dispute that, as provided in Article 6.7, the "results" may be provided in a separate document or in the disclosure of the essential facts.

4.5. It is clear from the text of Article 6.7 and of Article 6.9 that the "results" of the verification visits referred to in Article 6.7 are not the same as the "essential facts" referred to in Article 6.9.

In its legal analysis, therefore, bearing in mind the ordinary meaning, purpose, and context of the terms, the Panel should take care to define the "results" separately from the "essential facts".

4.6. The EU, however, appears to conflate these terms. Under the EU's practice and arguments before this Panel, the terms are interpreted so as to provide no separate meaning to "results" as compared to "essential facts". If endorsed by the Panel, this would render the obligation with respect to the "results" essentially meaningless. In accordance with the doctrine of *effet utile*, the Panel must ensure that its interpretation of these terms gives effect to the differences between these terms and gives substance to the requirement in Article 6.7 to make the "results" of the verification available.

4.7. Moreover, if the Panel agrees with Indonesia's legal interpretation that the term "results" in Article 6.7 means something different than the "essential facts" referred to in Article 6.9, the Panel should rule in Indonesia's favour. In its submissions to the Panel, the EU takes the position that by disclosing the essential facts it has *necessarily* disclosed the results of the verification. Hence, if the Panel disagrees with this legal position adopted by the EU, it can immediately find that the EU has acted inconsistently with Article 6.7.

4.8. Indonesia broadly agrees with the general definitions of the term "results" provided by the EU in its answers to the Panel's questions following the first meeting of the Panel with the parties. For example, the EU quotes the Appellate Body in *US – Steel Safeguards* to the effect that the ordinary meaning of "result" is "an effect, issue, or outcome from some action, process or design".

4.9. Indeed, the "results" referred to in Article 6.7 are the "effect" or "outcome" of the verification visit. As with the "result" of any activity, the "result" of a verification visit is closely linked to the *conduct, content and purpose* of that verification visit. In *Korea – Certain Paper*, the panel explained that "results" of verifications include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".

4.10. Although it provides a correct initial definition of the term "results", however, the EU errs when it subsequently defines the "results" *of a verification visit*. The EU's position appears to be that there is no practical difference between the results of the verification visit and the essential facts under Article 6.9, such that there is no necessity for separate disclosure and that a disclosure of essential facts automatically constitutes disclosure of the results of a verification visit. This erroneous view appears to be premised on the notion that "the evaluation of the evidence by the investigating authority is not part of the 'results' of the verification visit".[4] This is incorrect.

4.11. Under the EU's view, the "results" of the verification consist of nothing more than any facts that end up in the essential facts and a listing of the evidence collected during the verification. This is inconsistent with the definition of the word "results" to include the "effect" or "outcome", as noted above. It is also inconsistent with the *purpose* of the verification visits, as set out in Article 6.7, which is "to verify information or to obtain further information". It is axiomatic that information is not verified simply because the investigating authority collects additional exhibits during a verification visit. The dictionary definitions of "to verify" include "show to be true or correct by demonstration or evidence; confirm the truth or authenticity of; substantiate" and "ascertain or test the accuracy or correctness of, esp. by examination or by comparison of data etc". A mere list of exhibits collected does not indicate whether those documents served to establish that an issue was "shown to be correct by demonstration or by a comparison of data" or even what the issue was.

4.12. The results of the verification visit are different than the essential facts because they are known before the essential facts are decided upon.[5] At the end of the verification visit, the results of the verification visit are known, even if the essential facts are not. This means that the results of the verification visit are different than the essential facts — even the investigating authority may later decide that some of the results of the verifications are also "essential facts", while other results of the verification may not, in the investigating authority's view, amount to "essential facts".

[4] EU's response to Panel question 26, p. 28.
[5] See Indonesia's Opening Statement at the first meeting of the Panel with the parties, para. 98.

4.13. Indonesia has previously provided the Panel with practical examples of results of the verification visits and of how these results may differ from the essential facts.[6] The EU has failed to address these examples or explained how the logic of Indonesia's analysis is inconsistent with the text of Article 6.7.

4.14. To give a further example, a situation that occurs with some frequency in practice during verifications is whether an exporter has cooperated within the meaning of Article 6.8 of the Anti-Dumping Agreement. As the Panel is aware, a determination by the investigating authority that an exporter has not cooperated within the meaning of Article 6.8 can lead to the exporter's information being rejected and determinations being made on the basis of the facts available, with adverse consequences for the exporter.

4.15. The question of whether an exporter actually cooperated to the best of its ability is frequently hotly contested. When controversies arise with respect to what occurred in the course of a verification visit, it can become a drawn-out "he said/she said" dispute between the investigating authority and the exporter as to what really happened at the verification visits: What did the investigating authority ask for? Did the exporter make its best efforts to provide documents and answers? Were there any problems with the documents — were they sourced from the company's ledgers or financial statements or could they otherwise be authenticated? Did the investigating authority fairly acknowledge the exporter's efforts to provide documents or, if requested documents were not realistically available, to provide reasonable alternative documents? These and other questions about the verification are relevant both to the investigating authority's decision as to whether the exporter was cooperative within the meaning of Article 6.8 as well as the exporter's ability to challenge that decision. Thus, while the <u>essential fact</u> may be that the investigating authority has determined that the exporter was not cooperative, the <u>results of the verification</u> would include the circumstances that gave rise to the investigating authority making that determination. In order to challenge that determination in either domestic courts or in WTO dispute settlement, the exporter or its government must have access to a record of what happened at the verification and the reasons relied on by the investigating authorities to deem that the exporter had been uncooperative.

4.16. Other potential "results" of the verification would include an explanation of issues that arose during the verification which the investigating authority might need to resolve on the verification team's return to capital. For example, an issue could arise during verification as to whether the exporter had properly allocated its freight expenses between investigated and non-investigated products. Based on the information reviewed during the verification, the verification team may have questions as to whether this allocation of expenses between investigated and non-investigated products should be accepted or revised.

4.17. In that scenario, the <u>results of the verification</u> would necessarily include the facts relating to how the freight expenses were incurred and the evidence both for and against the exporter's allocation of the expenses, as reviewed by the investigating authority and the exporter during the verification visit. In contrast, the <u>essential facts</u> would consist of the investigating authority's decision as to what freight expenses it intended to use in its calculation.

4.18. As the above examples demonstrate, it is necessary to distinguish between the results of the verification, on the one hand, and the essential facts, on the other hand. These examples also demonstrate that the EU's approach of collapsing the difference between these two concepts is incorrect.

4.19. It is also important to keep in mind the due-process purpose of the disclosure requirement under Article 6.7. This purpose further underlines the need to keep separate the two concepts "results of the verification" and "essential facts". As noted by the panel in *Korea – Certain Paper*:

> The purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, <u>are informed of the</u>

[6] Indonesia's Opening Statement, paras. 106-108. Indonesia's response to Panel question 26, paras. 1.106–1.115.

> verification results and can therefore structure their cases for the rest of the investigation in light of those results.[7] (emphasis added)

4.20. In other words, the purpose of Article 6.7 is, *inter alia*, to enable exporters to safeguard their rights in an anti-dumping investigation and "structure their cases for the rest of the investigation in light of those results".[8] For this purpose, exporters must know what information *was not* verified — so that they can make further efforts to put the investigating authority in a position to ultimately verify that information — as well as what information *was* verified. This information is important for the exporter given that verified information must in principle be used by the investigating authority, and the exporter thus need not any longer devote its scarce resources to convincing the authority about the reliability of that information.

4.21. There is yet another factor that supports the need for giving separate meaning to the terms "results of the verification" and "essential facts". This factor has to do with what kinds of decisions are or are not taken during a verification visit. Specifically, the verification team normally cannot or does not take any final decisions on how the verification will affect the investigating authority's determinations of dumping and injury in the investigation until they have returned home and had the opportunity to consult with their superiors and other colleagues on any issues arising during the verification. The verification is, therefore, in essence a fact-gathering and a fact-checking exercise. The results of this exercise, therefore, relate to what facts have been gathered and checked and, by implication, what facts have *not* been gathered or checked. However, the results of the verification do not include any *subsequent determinations* by the investigating authority as to how to use the results of the verification, and other items in the record, to calculate dumping margins for the exporter in accordance with the Anti-Dumping Agreement. The subsequent decision how to determine the dumping margins is the result of the *investigation* — and disclosed, inter alia, in the disclosure under Article 6.9. It is not the result of the *verification* that must be disclosed under Article 6.7.

4.22. WTO case law - such as *Korea – Certain Paper* and *Mexico – Steel Pipes and Tubes* - demonstrates that information contained in the disclosure of the verification results (whether through a verification report or with the disclosure of essential facts) plays an important role for a panel's ability to examine whether the investigating authority complied with Article 17.6(i) of the Anti-Dumping Agreement. This may include information concerning the type of information verified; the authority's decision whether the information was verifiable and whether it was actually verified, as well as any attendant circumstances, such as behaviour of the investigated firm. The case law reveals that a failure to disclose the results of the verification, or an incomplete disclosure, will significantly undermine a panel's ability to examine, in a "critical and searching" fashion, the establishment and evaluation of the facts by the investigating authority. In addition, only a proper reporting of the results of the verification visit will enable the appropriate judicial review within a WTO Member's domestic legal system, as required by Article 13.

4.23. Moreover, the EU's interpretation of Article 6.7 in this case, if accepted, would automatically give rise to violations of Articles 6.2 and 6.4, at least in the circumstances in which the investigating authority chooses to disclose the verification results simultaneously with the essential facts. Specifically, conflating the verification "results" with the "essential facts" in the manner advocated by the EU would mean that the investigating authority would not disclose all those verification "results" that did not find their way into the "essential facts". This would be contrary to Article 6.2, which requires that all interested parties have a "full opportunity for the defence of their interests", as well as Article 6.4, which requires authorities, whenever practicable, to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases … that is used by the authorities … and to prepare presentations on the basis of this information". This inevitable conflict with the requirements of Articles 6.2 and 6.4 is yet another reason why the EU's proposed interpretative approach, and the Commission's actions in this investigation, under Article 6.7 cannot be correct.[9]

4.24. In this case, the EU argues that the Commission provided the results of the verification visits as part of the disclosure of the findings of the investigation. However, these efforts were, at

[7] Panel Report, *Korea – Certain Paper*, para. 7.192.
[8] Panel Report, *Korea – Certain Paper*, para. 7.192.
[9] See Indonesia's Opening Statement at the first meeting of the Panel with the parties, para. 108. Indonesia's first written submission, paras. 6.46–6.48.

best, cursory and cannot be considered to have met the standard required under Article 6.7. For instance, assuming that the General Disclosure document was indeed intended to be the vehicle to disclose the "results" of the investigation, the Commission failed to set out:

- which specific types of information, documents, or issues were addressed in the verifications;
- which particular documents (e.g. sales invoices, rebate notes, etc.) were examined; and
- what questions were asked by the Commission officials or what answers were provided by the exporters.

4.25. The extent of the Commission's failure to disclose the results of the verification is clearly visible from a reading of the contemporaneous notes taken by PT Musim Mas' counsel during the verifications at that exporter's premises in Singapore, Medan, and Hamburg. These notes contain the kinds of basic information that are entirely absent from the Commission's purported disclosure of the verification results, such as who attended the verifications, what documents were reviewed, what questions were asked, and what answers were given. There are several issues of critical importance to the Commission's subsequent adjustment of PT Musim Mas' export price and to Indonesia's related claim under Article 2.4 of the Anti-Dumping Agreement. As the counsel notes demonstrate, the issues at hand were discussed during verification, but were not subsequently disclosed by the Commission.

4.26. These issues include: the close corporate, management, organizational and operational links between PT Musim Mas and ICOFS; transfer pricing policy; the so-called "direct" export sales by PT Musim Mas; the manner in which ICOFS and PT Musim Mas co-operate on such export sales as well as for domestic sales; and the involvement of ICOFS in PT Musim Mas' sales, including Exhibit PTM-18.

4.27. The Commission's conclusion that ICOFS is not the sales department of PT Musim Mas, but rather stands in a commission-agent relationship with PT Musim Mas is in direct contradiction with this information.

4.28. The EU states that "the Commission underlined that during the verification visit mistakes and errors were corrected in agreement with the company".[10] This is, of course, a wholly generic assertion that could be made with respect to any verification in any investigation. It hardly constitutes the "results" of the specific verifications in this investigation, which involved specific companies, with their own features, data, and specific matters that were addressed during the respective verification visits. Presumably, the Commission officials, when they report back to their superiors after the verification, provide more detail than simply stating that "mistakes and errors were corrected". To the extent that the officials' reports to their colleagues and superiors address whether the verification team was able to *verify* information — to "ascertain or test the accuracy or correctness of, esp. by examination or by comparison of data etc." — those reports could be said to contain "results" of the verification.

4.29. In arguing that the Commission disclosed the results of the verification visit, the EU also repeatedly refers to actions that occurred prior to the visits. However, events occurring prior to a verification visit cannot be relevant for assessing whether the Commission subsequently communicated the "results" of the verification exercise. Neither the exporter, nor a reviewing domestic court or WTO panel, can glean from a list of information that the investigating authority announces it will/may verify − but may end up not verifying − whether that information was successfully verified or not; whether additional information was requested; and what discussion around that information took place between the company and the investigating authority. Claiming that results of a verification visit can be disclosed by something that occurred prior to the visit is comparable to arguing that the investigating authority can satisfy its disclosure obligation under Article 6.9 by pointing to information requests contained in a blank questionnaire response.

[10] EU's Opening Statement, para. 52.

### 4.2 Alleged knowledge or awareness by the companies is not a workable standard for assessing an investigating authority's compliance with Article 6.7

4.30. The EU relies, as a crucial part of its argument, on alleged awareness on the part of the exporters of what information the Commission wanted to inspect; what information it did inspect; and what it concluded with respect to that information; and that the investigating parties never protested or complained about lack of information. This argument is flawed at a number of levels.

4.31. It is virtually impossible to verify or to ascertain what the companies were or were not aware of at the time of verification or subsequently. The EU would have the Panel guess, infer and rely entirely on the Commission's view as to what the Commission thinks the investigated parties knew or should have known. This is not a proper workable standard on which to conduct a coherent enquiry at the multilateral level. If adopted, it would leave less experienced or less sophisticated exporters at the mercy of what investigating authorities think they knew or should have known. This is precisely one of the reasons why the Anti-Dumping Agreement requires a proper disclosure of the results of the verification that can be examined by a WTO panel. In any event, even if the companies were aware of what the EU claims they were aware of, the EU has a duty also to the reviewing courts and WTO panels, as well as WTO Member governments, including Indonesia. Compliance with its WTO obligations vis-à-vis these other Members cannot depend on whether different entities − private investigated companies − were or were not aware of some fact that cannot be subsequently verified in domestic court or WTO proceedings.

### 4.3 The results of the verification must be "made available" or disclosed

4.32. In response to the Panel's question to the parties as to meaning of "make available", the EU quotes the Appellate Body in *EC and certain member States − Large Civil Aircraft* to the effect that to "make available" is part of the ordinary meaning of the verb "to provide" and, therefore, in the EU's words, the results of the verification may be made available to the relevant firms either "directly by sending them a report or by making the results available as part of the file or as an additional alternative through the disclosure of the outcome of the verification visit as part of the general obligation to disclose 'essential facts'". Indonesia agrees.[11] This, of course, does not address the key issue at hand — the failure of the Commission to actually convey the required information about the results of the verification visit, whatever the chosen procedural conduit.

### 4.4 The list of exhibits is not sufficient to satisfy Article 6.7

4.33. As a final issue concerning Indonesia's claim under Article 6.7, Indonesia addresses the list of exhibits. In its questions following the first meeting, the Panel asked the EU to provide the list of exhibits referred to in the first substantive meeting and asked Indonesia whether PT Musim Mas received this document. In its answers to questions, the EU provided certain lists of the exhibits collected by the Commission at the verifications as Exhibit EU-14.

4.34. Indonesia notes that the EU's exhibit is an undated and unsigned document that contains only a title of each exhibit without any indication of the content or purpose of each exhibit. Indonesia understands that PT Musim Mas was not provided with or asked to agree as to the content of these lists, although, however, PT Musim Mas agrees that these lists reflect the documents collected by the verification teams. Indonesia disagrees, however, that these lists of exhibits, either separately or read in conjunction with the disclosure documents, satisfy the requirements of Article 6.7.

4.35. First, the list of documents does not explain what topics were discussed at the verification visit or how the listed documents served to verify those topics. For example, as noted above, the EU asserts that the results of the verification were contained in the statement that "mistakes and errors were corrected in agreement with the company". However, the lists of exhibits, by themselves, shed no light whatsoever on what mistakes and errors were corrected or why. There is no indication that the unspecified "mistakes and errors" had anything to do with the content of the documents collected.

[11] See Indonesia's response to Panel question 27, paras. 1.116-1.122.

4.36. Second, the EU asserts that "the relevant results of the discussion reflected [in the counsel's notes submitted by Indonesia] are all included in the list of exhibits". The EU then argues that the relevant "result" of the verification is simply that the agreements were provided and that this is reflected fully in the list of exhibits. However, if the agreements were provided and reviewed at the verification "to provide further information on the relationship between PT Musim Mas and ICOF-S", the result of the verification must include some discussion of what the agreements actually said about the relationship between the two companies, whether the Commission team had any further questions about the companies' explanation of the relationship, and whether the Commission team was satisfied with the explanations provided by the company. A mere reference to the documents provided contains no information as to whether the Commission had to "ascertain[ed] or test[ed] the accuracy or correctness of [the information and explanations provided by the company], by examination or by comparison of data etc" on this point.

4.37. In addition, the list of documents does not indicate whether there were *other* topics addressed during the visit for which no additional documents were collected.

4.38. Moreover, the "results" of the verification must include also the *purpose* for which a particular document was provided or particular information requested.[12] The EU's list of documents does not specify this purpose. It is not obvious, from the face of the EU's list, what the purpose of providing each document was. For instance, a reader of the list would have had to be physically present at the verification to know the purpose for which the S&P Agreement was submitted. Moreover, the S&P Agreement was subsequently relied upon by the Commission for multiple purposes. Hence, a mere listing of the evidence as in the EU's list is entirely insufficient adequately to disclose the "results" of the verification visit.

4.39. Similarly, the EU notes that the counsel's notes refer to the Commission team examining the role of ICOFS in domestic sales in Indonesia and that PT Musim Mas provided "an email as alleged evidence that ICOFS is also involved in providing services for domestic sales of PTMM". The EU states that "the provision of this email was a result of the verification". Indonesia disagrees. Again, the mere provision of this email is only at most only a small part of the result of the verification. To the extent that the Commission was verifying the role of ICOFS in domestic sales, the result of the verification is whether the Commission was satisfied that the corroborating evidence provided by the company was consistent with the company's explanations. To the extent that it was not, the Commission should have requested additional information or explained how the explanations provided by the company were not satisfactory.

4.40. Finally, Indonesia rejects the EU's argument that PT Musim Mas should have urged the Commission to provide it with more detailed information about the results of the verification. Indonesia notes that nothing in Article 6.7 imposes on the investigated producers/exporters an obligation to request further information on the results of the verification from the investigating authority. Article 6.7 imposes a mandatory obligation on the investigating authority to make the results of the verification available. It cannot be a defence to a violation of this requirement that the producer/exporter did not push the investigating authority to comply.

4.41. To conclude, the EU has failed to show how the Commission disclosed the actual results of the verification in this case. The stand-alone obligation of Article 6.7 cannot be satisfied by a grab bag of generic and separate references sprinkled throughout the essential facts disclosures or by reference to lists of exhibits that contain nothing more than imprecise references to the documents examined during the verifications.

### 4.5 Conclusion

4.42. For these reasons, Indonesia respectfully requests that the Panel find that the EU has acted inconsistently with Article 6.7 by failing to make the results of the verifications available or otherwise provide disclosure thereof as required under Article 6.7.

[12] See Indonesia's first written submission, para. 6.42.

## 5 CONCLUSION AND REQUEST FOR FINDINGS

5.1. For all of the above reasons, Indonesia reiterates its request to the Panel that the Panel find that the European Union:

- Acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement, by making an improper deduction for a factor that did not affect price comparability;

- Acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, by failing to conduct a proper non-attribution analysis with respect to the factors "financial/economic crisis" and "issues related to the European Union's domestic industry's access to raw materials"; and

- Acted inconsistently with Article 6.7 of the Anti-Dumping Agreement, by failing to disclose to either of the investigated Indonesian exporters the results of the verification visit.

5.2. Indonesia once again thanks the Panel and the Secretariat team for their hard work and dedication to this dispute.

# ANNEX D

## ARGUMENTS OF THIRD PARTIES


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## ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

## I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") welcomes this opportunity to be heard and to present its views as a third party in this case. Turkey's objective to make this third party submission is to contribute to the correct and consistent interpretation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "ADA" or "Anti-Dumping Agreement").

2. Turkey will not elaborate on the particular facts presented by the Parties, rather, underlining her systematic interest, Turkey would like to limit her third party submission to the discussion on the rights and obligation of an investigating authority within the legal context of Article 2.3 and 2.4 of the ADA.

## II. LEGAL INTERPRETATION OF ARTICLE 2.3 AND 2.4 OF THE ANTI-DUMPING AGREEMENT

3. At the outset Turkey would like to underline that the structure of the "fair comparison" between normal value and export price of the product under consideration is as significant as the methodology used by the investigating authority to calculate the normal value or export price itself. In this vein, the components of the fair comparison do have a potential to alter the outcome of the dumping margin calculation profoundly. Therefore, accurate interpretation of the Article 2.3 and 2.4 of the ADA is highly important in this regard.

4. Article 2.3 and 2.4 of the ADA reads as follows:

> *2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.*
>
> *2.4 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. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.*

5. Turkey understands that the existence of two conditions is imperative to resort to constructed export price within Article 2.3 of the ADA. First, the presence of an association or compensatory arrangement between exporter and importer or a third party and second, the outcome of unreliable export prices due to this association or compensatory arrangement. Under this reading, the mere existence of an association or compensatory arrangement is not enough to conclude that the export prices between the exporter and importer or any other third party is unreliable. Equally, the fact that the provisions of the arrangement do not point out any kind of distortions of export price should not overshadow the possibility that the export prices can be

unreliable due to *de-facto* reasons. In light of these explanations, the investigating authority may undertake both a *de-jure* and *de-facto* examination to determine whether this arrangement warrants the use of constructed export prices.

6. The word "appear", however, indicates that the investigating authority is not under a strict obligation to reach an undisputable conclusion that the distortion of export prices is a direct outcome of the arrangement between the exporter and importer or a third party. Turkey understands that the drafters tended to keep the wording flexible considering the often loose nature of the arrangements between exporter and importer or trader. Nevertheless, Turkey understands that the investigating authority is still burdened to present an explanation on why the arrangement appeared to render the export prices unreliable.

7. The reference made in the second sentence of Article 2.4 requires the investigating authority to consider allowances for costs including but not limited to duties, taxes (incurred between importation and resale) and profits accrued by the trader and importer of the product under consideration. Similar to the comparison between the normal value and the ordinary export price, the investigating authority is obliged to make due allowances or to equal the level of trade if the price comparability is affected.

8. As rightly underlined by the EU[1], the investigating authority is obliged to evaluate and, if applicable, alter the elements of the normal value and (constructed) export price if the differences in components in these two data sets adversely affect the comparability of the normal value and export price.

9. In that context, as stressed in the panel report of US-Sheet/Plate form Korea "…[t]he requirement to make due allowances for differences that affect price comparability is intended to neutralize differences in a transaction that an exporter could be expected to have reflected in his pricing".[2]Thus, the analysis required in Article 2.4 of the ADA displays a fact based and case-by-case nature taking into consideration that the elements of due allowance may differ based on the merits of each case.[3]

10. As matter of legal interpretation, the interested party claiming that the legal discipline in Article 2.4 was violated by the investigating authority has to pass through three steps to bring a viable assertion. It has to show that (1) there was a difference between the elements of normal value and export price which (2) affected the price comparability between these data (3) that was not accepted by the investigating authority as an element of due allowance.[4] Turkey understands that the word "demonstrate" at the end of the first sentence of Article 2.4 of the ADA introduces a positive obligation *vis-à-vis* the interested parties requesting modification. The interested parties must bring their requests of fair comparison to the attention of the investigating authority by indicating the elements to be considered and to what extent these elements influence the comparability of the normal value and export price.

11. Turkey considers the elements listed in Article 2.4 to illustrate, *inter alia*, the possible examples of due allowance (conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics) are equally subject to the above-mentioned obligation incumbent on the interested parties requesting due allowance.

12. Turkey is in the same line with the case law that the investigating authority has discretion to reject the request of due allowance if it concludes that the difference is not affecting price comparability or such an adjustment lacks merits.[5] Furthermore, she equally agrees with the case law that the investigating authority cannot be legally compelled to conduct an *ex-officio* inquiry to identify non-requested elements of due allowance[6].

[1] EU's first written submission, para. 59 and 60.
[2] Panel Report, US-Sheet/Plate from Korea, para. 6.77.
[3] Panel Report, Egypt-Rebar, para. 7.352; Panel Report, EC-Pipe Fittings, para. 7.138.
[4] Panel Report, Korea-Certain Sheet, para. 7.138.
[5] Panel Report, EC-Fasteners, para. 7.298; Appellate Body Report, EC-Fastener, para. 488 and 528; Panel Report, EC-Tube or Pipe Fittings, para. 7.158.
[6] Panel Report, EC-Fastener, para. 7.298; Appellate Body Report, EC-Fastener, para. 517; Panel Report, China-HP-SSST, para. 7.77.

13. Finally as underlined in the Panel Report of Egypt-Rebar the dialogue between the interested parties and the investigating authority concerning the context of Article 2.4 is central to ensure that the dumping margin is calculated with necessary components compared in a fair manner.[7]

## III. CONCLUSION

14. With these comments, Turkey expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the interpretation of the ADA Agreement.

[7] Panel report, Egypt-Rebar, para. 7.352.

## ANNEX D-2

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

### I. U.S. VIEWS ON THE EUROPEAN UNION'S PRELIMINARY RULING REQUEST

1. While sympathetic to certain practical concerns expressed by the European Union, the United States respectfully disagrees with the understanding of Article 12.12 that underlies the European Union's PRR. The United States submits that the European Union wrongly interprets the relevant terms of Article 12.12, including its interpretation of "panel," and what it means in the context of this provision for a panel to "suspend" its "work."

2. Pursuant to DSU Article 11, the Panel's "function" is to assist the DSB by making an objective assessment of the matter before it, including the applicability of and conformity with the relevant covered agreements. DSU Article 3.2 establishes that such an assessment of the existing provisions of those covered agreements shall be made in accordance with customary rules of interpretation of public international law.

3. The ordinary meaning of "panel" (or "the panel") is not in dispute by either party. The United States agrees with the European Union that there is no express limitation imposed in the text of the DSU on the meaning of the term "panel," and that in some instances, "panel" may refer to a panel that has been composed and in others, it may refer to a panel that has been established but not composed. The United States also agrees with Indonesia, however, that it is precisely because "panel" refers to both circumstances in various places in the DSU that interpretation of "panel" as used in Article 12.12 does not end with a facial inquiry into the ordinary meaning of the term.

4. The last sentence of Article 12.12 describes a circumstance in which the work of the panel "has been suspended for more than 12 months." The first sentence sets out how such a suspension may arise: "at the request of the complaining party for a period not to exceed 12 months." The request is made to, and would be acted upon in its discretion, by the panel ("[t]he panel may suspend its work"). The second sentence confirms the "suspension" is one the panel decides upon at the complaining party's request ("[i]n the event of *such* a suspension"). Thus, the circumstance in Article 12.12 arises only when there is a panel to which the complaining party may direct its "request," and only if the panel has decided to exercise its discretion to accede to that request. Neither can occur before a panel has been composed.

5. The context of Article 12 as a whole also is instructive. The articles of the DSU proceed sequentially from the initial phases of the dispute settlement process to the final stages of that process. Depending on the stage of the process and the content of the relevant rules, the term "panel" in the various provisions may be interpreted differently.

6. Article 6, for example, governs the "establishment of panels," including the timing of their establishment and the method by which their establishment must be requested. As a matter of both timing and logic, these actions necessarily would precede the composition of a panel and therefore would refer to an uncomposed panel. Article 7, on the other hand, may refer to both composed and uncomposed panels when it describes the "terms of reference of panels." For example, Article 7.1 states that "[p]anels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel." Therefore, whether or not a panel has been composed, within 20 days of establishment the terms of reference are determined and govern thereafter the scope of the dispute for purposes of any panel that has been "established," including one that has subsequently been composed. Article 7.2, however, provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." By requiring panels to "address" certain provisions of the covered agreements, the use of the term "panel" in Article 7.2 necessarily refers to a panel that has been composed, for the obvious reason that a panel that has been established only cannot "address" anything.

7. With respect to the interpretation of "panel" in Article 12 as well, both the stage of the process and the specific rules it provides assist in interpreting the terms contained in Article 12.12.

Article 8, for example, which deals with panel composition, precedes Article 12, which deals with panel procedures. Therefore, given where it is situated in the DSU, Article 12 contemplates that, in the normal course, a panel already would have been composed when the "panel procedures" would apply. For example, Article 12.1 establishes that a panel shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties; a panel could neither "follow" those Procedures nor decide otherwise nor consult if it has not been composed. Article 12.3 even more explicitly refers to "panelists" when it describes a process and schedule for fixing the timetable during the panel process. Logically, there would be no "panelists" fixing the timetable if the panel had not yet been composed.

8. Based on the above, the "work" of the panel in the context of Article 12.12 refers to the examination by the panel, once composed, of the matter referred to it by the DSB under the procedures established in Article 12. Therefore, Indonesia's request *to the Secretariat* to suspend a meeting *to compose* the panel would not constitute a request *to the panel* that it "suspend its *work*" pursuant to Article 12.12. Nothing in the text of the DSU, or in the email correspondence from Indonesia to the Secretariat, supports the European Union's position to the contrary.

9. The European Union also raises a contextual argument regarding the interpretation of the term "panel" in Article 12.12 based on its relationship with Article 12.9. To bolster its argument that reference to the "panel" in Article 12.12 means only a panel that has been established, not necessarily composed, the European Union notes that Article 12.9 (governing timeframes to submit the panel report) and 12.12 both refer to the "establishment," not composition, of a panel. Because "composition" is used elsewhere in the DSU, the European Union argues, the use of "establishment" alone is significant.

10. The United States agrees that use of the term "establishment" in Article 12.12 is meaningful. Because a panel is established by the DSB (Article 6.1) to assist the DSB in discharging its responsibilities to make recommendations (Articles 7.1, 11, 19.1) through issuance of findings in a written report (Article 15), to terminate a panel's authority to undertake that work, the DSU removes the legal basis for the panel's establishment. That this legal authority relates to whether a panel is established does not imply that a panel that has not been composed may undertake any "work," much less "suspend" that work.

11. Second, with respect to the contention that the time limit in Article 12.9 would be rendered meaningless were the twelve month limitation in 12.12 read to apply only to composed panels, the United States observes that the language regarding the time limit imposed in Article 12.9 is precatory, not binding, providing that in no case "should" the proceedings exceed nine months. Therefore, the premise for the European Union's arguments in this respect − that in no case may the proceedings, including any 12 month suspension, exceed 21 months − fails. It is simply not the case that such a mandatory time limit is imposed by the DSU on panel proceedings.

12. For these reasons, the situation described in the last sentence in DSU Article 12.12 arises only once a panel has been composed, the complaining party makes a request to the panel to suspend its work, and the panel decides to exercise its discretion to accept that request and suspends its work accordingly.

13. The European Union raises several policy concerns which it considers support its interpretation of Article 12.12, including considerations relating to the reputational consequences of unresolved proceedings for a responding Member and the limited resources both Members and the Secretariat have to dedicate to a given dispute. While such policy considerations cannot lead to a different interpretation and application of DSU Article 12.12, the United States nonetheless considers that the proper interpretation and application of Article 12.12 lead to a desirable policy outcome.

14. There does not seem to be any serious cause for concern about a "reputational stain" somehow adhering to a responding Member as a result of a dispute brought before the WTO. If Members have not, through consultations or other means, managed to resolve a trade issue between them, parties regularly request the establishment of panels in an effort to achieve formal resolution of the dispute. Not all of these disputes proceed to the circulation of a final panel report. Often, disputes are successfully resolved only after the establishment of a panel. Therefore, the European Union's suggestion that in all cases it would be in a responding party's interest to

expedite the panel process so that accusations against it can be resolved does not reflect the nature of dispute settlement under the DSU.

15. Regarding resource constraints and the burden imposed on Members and the Secretariat to devote resources indefinitely to a dispute, the United States understands the dilemma to which the European Union refers. However, we do not consider that dissolving the panel process would address these concerns. To the contrary, the likelihood that the same issue might be raised multiple times as formally "new" disputes would seem to risk exacerbating the strains on limited WTO resources rather than easing them. And should the European Union believe it is prejudiced by the length of time taken to compose a panel, the United States respectfully suggests that an adequate remedy may be found under the DSU. Pursuant to Article 12.4, the European Union could explain those circumstances to the Panel and, in light of those circumstances, the Panel must provide the parties with sufficient time to prepare their written submissions to the panel.

16. Finally, the United States considers that reading into Article 12.12 a limitation on the ability of a complaining party to pause in its use of dispute settlement procedures would undermine the aim of the dispute settlement system to secure a positive solution to the dispute (Article 3.7). Where a party may be actively engaged in trying to resolve a dispute through alternative means, even after panel establishment, such action would be consistent with the preference expressed under the DSU. Indeed, under DSU Article 11, a panel is charged with giving the parties an adequate opportunity to develop a mutually satisfactory solution. The understanding of Article 12.12 proposed in the PRR would rather appear to limit such opportunities.

## II. INDONESIA'S CLAIMS REGARDING ARTICLE 2 OF THE AD AGREEMENT

17. Indonesia claims that the European Union acted inconsistently with Article 2.4 of the AD Agreement by failing to make allowances for differences affecting price comparability − namely, by subtracting sales commissions from the constructed export price for one of the participating producers.

18. Article 2.4 of the AD Agreement requires investigating authorities to conduct a comparison between the export price and normal value. As Indonesia correctly observes, such comparison "is typically made at the ex-factory level…a practice envisaged explicitly by Article 2.4." It appears that both the European Union and Indonesia share the U.S. view that the essential requirement for any adjustment under Article 2.4 is that a factor must affect price comparability. Thus, under Article 2.4, making a "fair comparison" requires a consideration of how differences in conditions and terms of sale, taxation, levels of trade, quantities, and physical characteristics impact price comparability.

19. In this respect, the Appellate Body has stated that under Article 2.4, the obligation to ensure fair comparison lies on the investigating authorities, and not the exporters. Although the investigating authority has the burden to ensure a fair comparison, the interested parties also have the burden to substantiate any requested adjustments for differences that affect price comparability. As the Appellate Body has found, an investigating authority does not have to accept a request for an adjustment that is unsubstantiated.

20. Indonesia and the European Union appear to agree that a sales commission can affect price comparability within the meaning of Article 2.4 because it may reflect a difference in conditions and terms of sale. However, the parties disagree on whether it is necessary to determine that a single economic entity ("SEE") does not exist in order to make a downward adjustment to export price for sales commissions.

21. While the United States agrees with the European Union that an analysis of whether an SEE exists is not required under Article 2.4, it may sometimes be relevant to consider the relationship between two entities as part of an evaluation of price comparability. In this respect, it would not be inappropriate to consider the various factors discussed by the panel in *Korea − Certain Paper* and referenced by the Appellate Body in *EC-Fasteners (China)*. While we recognize that, as stated by the European Union, the analyses in those cases arose in a different context − *i.e.*, for purposes of determining whether related companies should be assigned a single dumping margin − these factors may nonetheless be relevant to determining what, if any, adjustment should be made under Article 2.4.

22. In reviewing the investigating authority's determination, the Panel may wish to consider whether the evidence and explanation provided − regardless of the specific methodology applied − supports a finding that the sales entity did not form part of a single entity with PTMM and that, therefore, an adjustment was necessary to ensure a fair comparison under Article 2.4. If the Panel concludes that the facts support a finding that the producer and the trading company are not affiliated, there is no dispute that an adjustment for a commission paid to the trader was appropriate.

23. Finally, the United States considers that it is permissible for an investigating authority to make a price adjustment to address circumstances of sale, if the facts on the record support it. An investigating authority must ensure price comparability regardless of whether affiliated or non-affiliated parties are involved. As explained earlier, a comparison between normal value and export price is usually made at the ex factory level. If, for example, the producer sells in the home market directly to its customers, but sells through a trading company (affiliated or not) to its export market, the differences in the circumstances of sale may warrant an adjustment to ensure that comparison is made at the ex-factory level in both markets.

24. The views expressed by the United States in relation to Indonesia's claims under Article 2.4 are relevant to the substance of Indonesia's Article 2.3 claim. The United States agrees with the European Union that Indonesia's Article 2.3 claim is purely a consequential claim.

## III. INDONESIA'S CLAIMS REGARDING ARTICLE 3 OF THE AD AGREEMENT

25. The third sentence of Article 3.5 provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. As the Appellate Body has found, if a known factor other than dumped imports is a cause of injury, the third sentence requires the authority to engage in a non-attribution analysis to ensure that the effects of that other factor are not attributed to the dumped imports.

26. The Appellate Body has further stated that the AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis. In this regard, the United States disagrees with Indonesia that only a particular kind of analysis − e.g., quantitative analysis − meets the requirements of Article 3.5. The question of whether an investigating authority's analysis is consistent with Article 3 should turn on whether the authority has in fact evaluated these factors and whether its evaluation is supported by positive evidence and reflects an objective examination, as required by Article 3.1.

27. Article 3.5 further requires that "[t]he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." Hence, the authorities are obliged to consider all relevant evidence in the record. While the United States does not take a view on the weight the European Union gave to certain evidence, the European Union must demonstrate that it examined these factors in its analysis. Whether or not, as Indonesia claims, the European Union was required specifically to consider these factors under the third sentence of Article 3.5 would depend on whether these factors were known to the investigating authority and whether they were in fact contributing at the same time as the imports to any difficulties experienced by the domestic industry.

28. Thus, the panel must determine if the investigating authority demonstrated that it examined other "known factors" within the meaning of Article 3.5 of the AD Agreement, and based its causation analysis on an examination of all relevant evidence.

## IV. INDONESIA'S CLAIM UNDER ARTICLE 6 OF THE AD AGREEMENT

29. Article 6.7 of the AD agreement requires investigating authorities conducting verification to "make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9 to the firms which they pertain and may make such results available to the applicants." Article 6.9 in turn provides that an investigating authority "shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." The United States agrees with both Indonesia and the European Union that under its ordinary meaning, the term

"results" in Article 6.7 refers to "outcomes" of the verification process. The United States agrees with the European Union that Articles 6.7, 6.8, and 6.9 form a continuum of obligations under Article 6, and that each obligation is grounded in the context of the specific provision.

30. While the United States does not believe that trivial or immaterial aspects of what occurred at the verification must be included in the report, at a minimum the report should include discussion of information that was verified, not verified, or corrected with respect to essential facts referenced in Article 6.9. The United States agrees with the European Union that the text of Article 6.7 contains no requirements on form or format. Articles 6.7 and 6.9 do require disclosure of verification "results" and the "essential facts under consideration." To the extent the European Union characterizes the lack of disclosure of results and essential facts as a question of form, not substance, the United States disagrees with that characterization. For example (without opining on the factual issues presented in this dispute), the United States believes that the term "essential facts," as defined in Article 6.9, relates necessarily to the determination of normal value and export prices, *as well as* to the data underlying those determinations. Accordingly, the United States believes that information verified or corrected at verification relating to these "essential facts" should be disclosed pursuant to Article 6.7 and Article 6.9.

31. These provisions of the AD Agreement promote transparency and procedural fairness by ensuring that "disclosure…take[s] place in sufficient time for the parties to defend their interests." Failure to provide such disclosure could prevent an interested party from effectively defending its interests in the proceeding, and potentially, before national courts. In this respect, the United States agrees with the panel in *Korea – Certain Paper*, which noted that disclosing both verified and unverified information could "be relevant to the presentation of the interested parties' cases."

32. Similarly, a basic tenet of the AD Agreement, as reflected in Article 6, is that the investigating authority "must provide timely opportunities for all interested parties to see all information … relevant to the presentation of their cases that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation," and "shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests…[and these opportunities] must take account of the need for confidentiality." Articles 6.4 and 6.2 have specific obligations which may apply to the disclosure of verification results. Therefore, bearing in mind the obligations of Article 6.5, the United States agrees with Indonesia that failing to disclose information under Article 6.7, particularly as it relates to the "essential facts" of an investigation under Article 6.9, would deprive parties of the full opportunity to defend their interests.

WORLD TRADE ORGANIZATION

WT/DS442/R/Add.1

16 December 2016

(16-6862)

Page: 1/71

Original: English

# EUROPEAN UNION – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN FATTY ALCOHOLS FROM INDONESIA

REPORT OF THE PANEL

*Addendum*

*BCI deleted, as indicated **[***]***

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS442/R.

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## ANNEX A-1

WORKING PROCEDURES OF THE PANEL

*Adopted on 13 July 2015*

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

### General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

### Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Indonesia requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, Indonesia shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this

procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Indonesia could be numbered IDN-1, IDN-2, etc. If the last exhibit in connection with the first submission was numbered IDN-5, the first exhibit of the next submission thus would be numbered IDN-6.

10. Each party and third party should make its submissions in accordance with the WTO Editorial Guide for Panel Submissions, attached as Annex 1.

**Questions**

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

**Substantive meetings**

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Indonesia to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Indonesia presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by Indonesia. If the European Union chooses not to avail itself of that right, the Panel shall invite Indonesia to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any,

preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

**Third parties**

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

**Descriptive part**

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

**Interim review**

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

**Service of documents**

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 2 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxx@wto.org, xxxxx@wto.org and xxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance

of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

## ANNEX A-2

### ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

*Adopted on 13 July 2015*

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS442.

1. For the purposes of these Panel proceedings, BCI is any information that has been designated as such by the party submitting the information and that was previously treated as confidential within the meaning of Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 by the Commission of the European Union in the anti-dumping investigation at issue in this dispute. However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. As required by Article 18.2 of the DSU, a party or third party having access to BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these working procedures to protect BCI. An outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party under the terms specified in these procedures, or an outside advisor to a party or third party for the purposes of this dispute.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 4.

7. If a party or third party considers that information submitted by the other party or a third party contains information which should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection as appropriate. Similarly, if a party or third party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate.

8. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

10. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

# ANNEX B

## ARGUMENTS OF THE EUROPEAN UNION


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## ANNEX B-1

### FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

## 1. Introduction

1. Indonesia has presented three sets of legal claims in respect of the EU's anti-dumping duty on fatty alcohols from Indonesia, which was imposed in 2011. Indonesia considers that the European Union acted inconsistently with several obligations under the *Anti-Dumping Agreement* when adopting the measure relating to (1) the requirement to make adjustments for differences affecting price comparability in order to make a fair comparison between the normal value and the export price; (2) the establishment of causal link between the dumped imports and the injury to the domestic industry; and (3) the procedural requirement to inform interested parties of the results of a verification.[1]

2. The European Union considers that Indonesia's claims are without merit and constitute an unwarranted attempt at obtaining from the Panel a *de novo* review of the facts. They are not supported by the text of the *Anti-Dumping Agreement* and relevant jurisprudence and they are based on an inaccurate reflection of the facts on the record. Therefore, all of the claims must be rejected.

3. Indonesia is effectively asking the Panel to re-do the investigation based on legal concepts that are nowhere to be found in the *Anti-Dumping Agreement.* However, the standard of review of panels in relation to anti-dumping measures is limited to examining whether the EU's interpretation of the relevant provisions is permissible, whether the investigating authority's establishment of the facts was proper and whether the evaluation of those facts was unbiased and objective. It is equally well-established in WTO jurisprudence that a panel's analysis of the legal obligations imposed on Members of the WTO is to be based on the text of the Agreement, and that panels may not read into the WTO Agreements words or concepts that are not there.[2]

## 2. Indonesia's erroneous interpretation and application of Article 2.4 of the *Anti-Dumping Agreement*

4. Indonesia argues that the European Union violated Article 2.4 of the *Anti-Dumping Agreement* when adjusting PT Musim Mas' export price for the sales commissions received by the related trading company in Singapore, ICOF-S, through which its export sales to the EU were made, on the basis (i) that no adjustment was warranted because ICOF-S and PT Musim Mas formed a single economic entity, and (ii) that the European Union's adjustment was inconsistent with Article 2.4 because it treated two Indonesian exporters in identical situations differently and that this distinction was legally unfounded and unsupported by the facts.

### A. The relevant consideration of Article 2.4 is whether there is a difference affecting price comparability

5. Article 2.4 of the *Anti-Dumping Agreement* requires adjustments to be made for differences affecting price comparability in order to make a fair comparison between normal value and export price. The purpose of this provision is to ensure that the ultimate determination identifies whether or not there is international price discrimination. If the starting domestic and export prices are different for some other objective reason, then it is that other reason or countervailing explanation

[1] It is important to remember that PT Musim Mas has brought proceedings on most of the issues raised in the present dispute also in the courts of the European Union and lost. The General Court of the EU in its judgment of June 2015 made a number of relevant findings that Indonesia seeks to have re-litigated, notably in relation to the existence of a single economic entity and the alleged discrimination between two Indonesian producers. Although the EU Court made its findings based on EU law, many of its factual findings rejecting provide important context for a number of the claims and assertions made in the present dispute (See in particular paras. 40−84, 92-97, 115-118 and 123−138 of the EU General Court's judgment, Exhibit EU−4).

[2] Appellate Body Report, *Japan − Alcoholic Beverages II*, pp. 11−12; see also Appellate Body Report, *India − Patents (US)*, para. 45.

that explains what is happening − not the existence of international price discrimination by the producer. Indonesia shares this understanding of Article 2.4.[3]

6. The main obligation in Article 2.4 is therefore for investigating authorities to adjust for any difference which affects the price comparability of the export price and normal value. Failing to make such adjustments could result either in a false positive (a finding of dumping when none exists) or a false negative (a finding of no dumping when it is in fact occurring). Indonesia correctly acknowledges that "the ultimate litmus test"[4] of Article 2.4 is whether a factor affects price comparability and that, if there is such a factor, Article 2.4 requires that the investigating authority makes an adjustment to ensure a fair comparison. Following the same line of reasoning, Indonesia admits that if a sales commission is paid by an exporting producer to a trading company through which it sells the goods, an adjustment is due.[5]

7. However, for commissions paid to trading companies, Indonesia argues that Article 2.4 contains an implicit obligation to consider whether or not a single economic entity exists between the producer and a related trading company, or whether the producer/exporter and the trader can be regarded as two economically independent entities operating at arm's length. Where a single economic entity exists, Article 2.4 would not allow the authority to make any adjustments for a commission paid even when, for example, there is evidence that such commissions were paid only in relation to export sales and not for domestic sales transactions.[6] Indonesia also proposes to read into Article 2.4 the principle it calls "follow the money", i.e. what ultimately goes into the pocket of the exporting producer when it sells to the importing country compared to what it gets into the pocket when selling the same product domestically. There is of course no textual basis for Indonesia's propositions and none has been referred to by Indonesia.

8. First, Article 2.4 does not mention "related parties" or a "single economic entity". The concept of a single economic entity is nowhere to be found in the *Anti-Dumping Agreement*. In any case, even Indonesia agrees that within a single economic entity adjustments must be made for costs which objectively are generated by specific transactions.[7] A commission, which by contractual arrangement is paid in relation only to export sales and not in relation to domestic sales, is such a cost that must be adjusted for irrespective of the relationship. Second, the AD Agreement concerns the "product", not the producer. Article 2.1 provides that there is dumping if the product "is introduced" into the commerce of another country at a price that is less than its normal value and states that this is the case "if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". The concept of dumping is not about "following the money" and is not about establishing who ultimately benefits from certain sales transactions or the profitability of those transactions; it is about ensuring a fair and correct comparison between two types of transactions that are comparable or that are made comparable such that it can be determined whether the product was introduced into the commerce of another country at less than its normal value.[8] The EU also considers that the fourth sentence of Article 2.4 is evidence of the fact that Article 2.4 does not embody the "follow the money principle".[9]

9. Indonesia also argues that the European Union violated Article 2.4 for treating two Indonesian producers in similar situations in different ways. However, also this argument is divorced from the text of Article 2.4 which contains the general obligation to make a fair comparison and to adjust for factors affecting price comparability. In any case, the differences in the situation of the two Indonesian exporters justified a different treatment.

10. The essential question under Article 2.4 is whether there is an objective difference affecting price comparability between the export price and the normal value. It is immaterial whether the difference affecting price comparability is, for example, a cost of additional material sourced from a related or integrated company or from a third party supplier.[10] Thus, the question is not whether the commission is paid to a related party or not. The focus of Article 2.4 is on the price

[3] Indonesia's first written submission, paras. 4.51−4.52.
[4] Indonesia's first written submission, para. 4.57.
[5] Indonesia's first written submission, para. 4.67.
[6] Indonesia's first written submission, paras. 4.67−4.71.
[7] Indonesia's first written submission, paras. 4.119 and 4.278.
[8] See European Union's response to Panel Question 7.
[9] See European Union's response to Panel Question 13.
[10] See European Union's response to Panel Question 10.

discrimination and the need to ensure a proper apples-to-apples comparison between the export price and the normal value, adjusted for differences that affected the prices paid by the consumer in one context that were not affecting the price in another context.

11. The European Union, like many other Members, considers that sales commissions can constitute an objective difference affecting price comparability and has included "commissions" in the list of factors that may require an adjustment.[11] In that sense, the EU Basic Anti-Dumping Regulation goes beyond Article 2.4 that does not expressly refer to commissions. The interference of a sales agent in the export sale of a product may introduce an element that can affect price comparability. This is particularly the situation where there is no sales commission paid for the like product on the domestic market, but a commission is paid in relation to export sales, or *vice versa* of course. Just like differences between domestic sales and export sales in terms of insurance or credit costs need to be adjusted, a difference in commissions paid to trading companies that are involved in the sale of the product require an adjustment if the commission is lower or non-existent on either the normal value or the export price side, regardless of the degree of closeness between the trading company and the producer.

12. In the present dispute, the European Union examined all the relevant facts in relation to PT Musim Mas' export of the product concerned and domestic sales of the like product and concluded that the commission paid to ICOF−S for export sales affected price comparability as no similar expense was incurred by PT Musim Mas for the domestic sales. The record evidence clearly shows that PT Musim Mas and ICOF−S signed a Sale and Purchase Agreement, a contract that undisputedly only concerns export sales and which stipulated that ICOF−S receives a commission (in the form of a mark-up) for every export sale it intervenes in.[12] Neither the contract nor any other piece of evidence presented to the European Union showed that a similar direct selling expense was incurred for the domestic sales made by PT Musim Mas.[13] All other things being equal, if there were no export sales, ICOF−S would receive neither a commission nor other forms of remuneration from PT Musim Mas that could be equated to that commission.

13. However, Indonesia argues that the Sale and Purchase Agreement, despite its name and terms, was drafted for complying with tax laws in Singapore and Indonesia and in order to show that transfer prices between the two entities reflect the arm's length principle.[14] Indonesia invites the Panel to ignore what the contract says in clear terms, and suggests that the Panel should conduct a *de novo* review. Indonesia logically fails to show that by accepting the terms of the Sale and Purchase Agreement, the European Commission acted in an unreasonable and biased manner.

14. In summary, Indonesia has failed to establish a *prima facie* case that the adjustment is inconsistent with Article 2.4. In fact, the European Union was not only entitled to reach this reasonable and reasoned conclusion that the ICOF−S' sales commission affected price comparability, it was "required" by Article 2.4 to adjust for this difference.

## B. The existence of a single economic entity is not a relevant consideration under Article 2.4

15. Indonesia acknowledges that a commission paid to a trader may warrant an adjustment because it may affect price comparability.[15] It disputes instead the adjustment because of the European Union's failure to recognize the single economic entity allegedly formed by PT Musim Mas and ICOF−S. The European Union has already demonstrated that whether or not a single economic entity exists is not the relevant question for the application of Article 2.4. In fact, the claim that no adjustment is warranted where a single economic entity exists between the producer and its trader lacks a legal basis in Article 2.4.

16. The lack of a legal basis in the *Anti-Dumping Agreement* is evident from Indonesia's first written submission where, in over 50 pages, it is unable to substantiate a relevant legal obligation that the European Union would have violated when making the adjustment. Indeed, the "single economic entity" concept does not even exist in the *Anti-Dumping Agreement* and it certainly is not part of Article 2.4. Indonesia duly acknowledges that "there is no provision of the

[11] This is reflected in Article 2(10)(i) of the EU Basic Anti-Dumping Regulation, Exhibit EU−3.
[12] Exhibit IDN−25; see also Indonesia's first written submission, para. 4.201.
[13] See Exhibit IDN-21, pp. 2 and 3.
[14] Indonesia's first written submission, para. 4.227.
[15] Indonesia's first written submission, para. 4.67.

*Anti-Dumping Agreement* that explicitly references or defines a [single economic entity]".[16] Indonesia merely cites to WTO jurisprudence in relation to Article 6.10 of the *Anti-Dumping Agreement* to argue that the concept of a single economic entity is "well-engrained in WTO case law".[17] It also loosely argues that "several provisions in the Anti-Dumping Agreement − in particular Articles 2.4 and 6.10 − implicitly require consideration whether two or more formally separate entities form an [single economic entity]".[18]

17. Indonesia is wrong for many reasons. First of all, the fact that Indonesia has to rely from the beginning on an "implicit" requirement is telling. It is undisputed in the WTO that a panel's analysis of the legal obligations imposed on Members of the WTO is to be based on the text of the Agreement. We recall the Appellate Body's statement in *India − Patents* that "principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[19]

18. Second, Indonesia's reference to the WTO jurisprudence on Article 6.10 of the *Anti-Dumping Agreement* does not suggest that authorities are "implicitly required" to examine whether companies form a single economic entity. The question addressed in the two cases referred to by Indonesia, *Korea − Certain Paper* and *EC − Fasteners (China)*, considered whether the authorities could deviate from the general rule in Article 6.10 of calculating separate dumping margins when several companies can be considered as a single "exporter" because of the corporate and functional links between them. At no point in these two cases did the panels or the Appellate Body impose a "requirement" to examine this relationship. They merely considered whether the language of Article 6.10 allowed investigating authorities to impose a single dumping margin on closely related entities.

19. Third, in neither *Korea − Certain Paper* nor *EC − Fasteners (China)* did the panels or the Appellate Body consider the existence of a single economic entity in relation to the application of Article 2.4. It was only considered in relation to Article 6.10 and for obvious reasons given that the calculation of individual dumping margins for entities that are actually part of the same economic entity could lead to circumvention and avoidance of the payment of duties thus undermining the protection to be afforded to the domestic industry. The willingness to entertain this concept in both cases made perfect sense in the logic of Article 6.10; it does not make sense in the price comparability logic of Article 2.4.

20. The European Union notes with particular interest Indonesia's frequent references to the *Korea − Certain Paper* dispute in support of its single economic entity argument. What is interesting about the panel's findings in that dispute is that, in so far as the panel dealt with claims under Article 2.4 of the *Anti-Dumping Agreement*, its findings actually go against Indonesia's arguments in this dispute.

21. First, the panel acknowledged in the context of its Article 6.10 analysis that the trading company and the relevant Indonesian producers formed a single economic entity, the "Sinar Mas Group".[20] However, this fact played no role in the panel's analysis under Article 2.4 as to whether any adjustments were required to ensure price comparability. Instead, the panel rightly focused solely on whether evidence had been presented of a difference between normal value sales and export sales that required an adjustment. So, the very same panel that for the first time discussed the concept of a single economic entity in the context of Article 6.10 and made findings that such a single economic entity existed between the trader and the producing companies in Indonesia did not even refer to this relationship when examining whether adjustments under Article 2.4 were warranted. Under Article 2.4, the existence or not of a single economic entity was a completely irrelevant consideration for the panel. It should be the same in the current dispute.

22. Second, the panel in *Korea − Certain Paper* rejected Indonesia's claim that an adjustment was required because Indonesia had failed to present evidence of such a difference affecting price comparability.[21] The panel expressly rejected the notion that the intervention of a trading company

[16] Indonesia's first written submission, para. 4.120.
[17] Indonesia's first written submission, para. 4.120.
[18] Indonesia's first written submission, para. 4.120.
[19] Appellate Body Report, *Japan − Alcoholic Beverages II*, pp. 11 − 12; see also Appellate Body Report, *India − Patents (US)*, para. 45.
[20] Panel Report, *Korea − Certain Paper*, paras. 7.165−7.168.
[21] Panel Report, *Korea − Certain Paper*, para. 7.147.

was relevant as such but rather focused on whether there was evidence of any difference affecting price comparability. It was not convinced that there were sales-related services rendered by the trading company in the Indonesian market which were not rendered in the context of export sales to Korea and thus considered that Indonesia had failed to make a *prima facie* case that adjustments were necessary. In the Fatty Alcohol investigation, the European Union did have such evidence before it, notably in the form of the Sale and Purchase Agreement that refers to the payment of commissions only for export sales. No evidence was presented by Indonesia or the Indonesian producers that similar commissions were also paid for domestic sales related support by the trading company.

23. Third, the dispute in *Korea – Certain Paper* is also interesting because Indonesia was one of the disputing parties and it is striking to note that its position in that dispute is the exact opposite of what it argues in the present dispute. In *Korea – Certain Paper*, Indonesia argued that an adjustment was required for the interference of the trader that formed a single economic entity with the producing company because the trader was only involved in the domestic sales and not in the export sales. Thus, Indonesia considered that an adjustment should have been made for the costs of the additional sales-related services of the trader in the domestic market. However, because the Korean authority failed to adjust for lack of evidence of such a difference, Indonesia alleged a violation of Article 2.4 of the *Anti-Dumping Agreement*.[22]

24. Indonesia's argument in the present dispute is the exact opposite where it considers that no adjustment shall be made because of the existence of a single economy entity between PT Musim Mas and ICOF–S. Although these positions on the same issue are diametrically opposed to each other, the European Union understands the reason for this opportunistic shift in position:

In *Korea – Certain Paper*, Indonesia wanted to reduce the normal value to avoid a dumping determination and thus argued for a downward adjustment of the normal value because of the involvement of the related trader in the domestic sales; and

In the present dispute, Indonesia wants to maintain the export price as high as possible to avoid a dumping determination by arguing that no adjustment is required for the involvement of the related trader in the export sales.

25. The opportunistic shift in positions is strategically understandable but does at the same time reveal the weakness of Indonesia's present claim under Article 2.4.

26. In sum, the European Union considers that Indonesia has not demonstrated any legal basis for its claim that the European Union violated Article 2.4 by failing to account for the alleged single economic entity between PT Musim Mas and ICOF–S. Indonesia opportunistically attempts to create an obligation in Article 2.4 that simply does not exist in the text of the *Anti-Dumping Agreement* and that is not supported by the WTO jurisprudence it refers to. For this reason as well, Indonesia's claim under Article 2.4 as well as its purely consequential claim of violation of Article 2.3 should be rejected.

## C. Even accepting *arguendo* the relevance of a single economic entity in Article 2.4, Indonesia has failed to demonstrate that the European Union failed to take this into consideration

27. Even accepting *arguendo* Indonesia's argument that it is necessary to consider whether a single economic entity exists under Article 2.4, Indonesia has failed to demonstrate that the European Union violated such an (non-existing) obligation. The facts on the record did not lead the European Commission to the conclusion that PT Musim Mas and ICOF–S constituted a single economic entity. Indonesia fails to demonstrate that the facts were not properly established or were examined in a biased and non-objective manner. It simply disagrees with the European Commission's findings of fact and inappropriately invites the Panel to review the facts as if it was the trier of fact and not the Commission. The EU General Court already found against PT Musim Mas on this very factual question.[23] The Panel may not reject a determination simply because it would have arrived at a different outcome assessing the same facts.[24]

[22] Panel Report, *Korea – Certain Paper*, para. 7.132.
[23] See in particular paras. 123–138 of the EU General Court's judgment, Exhibit EU–4.
[24] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

28. In any case, Indonesia argues that the EU's determination lacked a sufficient basis in the record evidence and that it improperly focused on the *functions* of ICOF−S as opposed to its *corporate and structural links* to PT Musim Mas. These arguments are unfounded and should be rejected because the European Union's determination to make an adjustment was proper, unbiased and objective.

29. First, there is no basis in the text of the relevant provisions to consider that only corporate and structural links are relevant for determining the existence of a single economic entity. Functions of a related company would appear to be much more relevant given the focus on the actual services rendered. So, this approach is entirely reasonable. Indonesia points merely to WTO jurisprudence developed in relation to Article 6.10 of the *Anti-Dumping Agreement* which is wholly unrelated to the present dispute, as noted earlier. In any case, the focus on corporate and structural links makes sense in that context of Article 6.10 for determining whether to calculate individual dumping margins for related entities given the risk of circumvention and avoidance of duties. There is no reason, however, to apply only that same test under Article 2.4.

30. Second, the EU's determination to make an adjustment was based on record evidence presented by PT Musim Mas[25], namely: (i) that a very significant portion of ICOF−S' overall sales related to products of producers other than PT Musim Mas; (ii) that the commercial relationship between PT Musim Mas and ICOF−S were governed by a Sale and Purchase Agreement containing several provisions which clearly negate that ICOF−S was merely an internal sales department of PT Musim Mas[26]; and (iii) that all domestic sales and a significant portion of export sales were invoiced directly by PT Musim Mas.

31. These factual circumstances, which Indonesia fails to disprove, led the European Union to reasonably reject the contention that ICOF−S was the internal sales department of PT Musim Mas with which it allegedly formed a single economic entity. The determination that ICOF−S acted like an agent was reasonable as it was based on the totality of the facts on the record which were evaluated in an unbiased and objective manner. This determination was therefore one that a reasonable investigating authority could have made, and should therefore be upheld by the Panel. Moreover, the European Commission revisited these facts and revised the adjustment determination for Ecogreen, but not for PT Musim Mas, following a development in the case law of the EU Courts. The conclusion that the new case law of the EU Courts did not require repealing the adjustment for PT Musim Mas' was, subsequently, upheld by the Court in PT Musim Mas' domestic challenge.[27]

32. Finally, in relation to the alleged discrimination between PT Musim Mas and the other Indonesian producer, Ecogreen, Indonesia has not pointed to any legal obligation in the *Anti-Dumping Agreement* that the European Union allegedly violated by treating these producers differently. At the first hearing of the Panel, Indonesia ultimately confirmed that it did not claim that such differential treatment violated Article 2.4.[28] Even if there was such an obligation (*quod non*), the 2012 Amending Regulation[29] demonstrates that the European Union engaged in an extensive discussion of the main arguments and factual circumstances on the basis of which the decision was taken to adjust PT Musim Mas' export price and for distinguishing its situation from Ecogreen.[30] There were three main differences in factual circumstances that led to this determination: (i) that PT Musim Mas made a significant amount of export sales (about 20% of all export sales) directly while Ecogreen only sporadically engaged in export transactions (not more than 5% of all export sales)[31], using its trading company for almost all sales; (ii) that the relationship between PT Musim Mas and ICOF−S was governed by a comprehensive and formal Sale and Purchase Agreement and that ICOF−S traded many products from unrelated parties while Ecogreen had no contract with its trader, who almost exclusively sold Ecogreen's products; and (iii) that the contract between PT Musim Mas and ICOF−S stipulated that the trader was to receive a mark-up on all export sales in which it intervened and this was circumstantial evidence that the

[25] See, e.g. European Union's first written submission, para. 95.
[26] See Exhibit IDN−25.
[27] See Exhibit EU−4.
[28] See European Union's response to Panel Question 18.
[29] Amending Regulation, Exhibit IDN−5.
[30] See, e.g. European Union's first written submission, paras. 97−99.
[31] Amending Regulation, Exhibit IDN−5, para. 5 and EU General Court's judgment, Exhibit EU−4, para 134.

trader acted on a commission basis. On the other hand, there was no such contractual provision for a commission to be paid by Ecogreen to its trader.

33. For these reasons, the European Union considered that the situation of PT Musim Mas could be distinguished from that of Ecogreen. This determination was reasonable as it was based on the totality of the facts on the record which were evaluated in an unbiased and objective manner. Leaving aside the lack of legal relevance of the fact that no adjustment was made to Ecogreen, the European Union's determination was one that a reasonable investigating authority could have made. It should therefore be upheld by the Panel.

34. Finally, for the claim of violation of Article X:3(a) of the GATT 1994, which Indonesia orally added during the hearing even though it was not included in its first written submission and not even in the written version of the oral statement that was circulated at the time of the first hearing of the Panel, Indonesia has failed to make a *prima facie* case that the conditions for its application are fulfilled. Clearly, merely treating differently-situated producers differently in a specific anti-dumping investigation is not a violation of Article X:3(a) concerning the uniform and reasonable administration of laws and regulations.

35. In sum, all of Indonesia's claims under Article 2.4 and its consequential claim under Article 2.3 are to be rejected as well as the claim under Article X:3(a) of the GATT 1994.

### 3. Indonesia's erroneous approach to the legal standard in Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*

36. Indonesia's second claim argues that the European Union violated Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* because it allegedly failed to conduct a proper non-attribution analysis. In particular, the European Union allegedly failed properly to examine two "known factors" other than dumped imports, namely (1) the impact of the economic and financial crisis of 2008/2009, and (2) the impact of the difficulties faced by the EU domestic industry to source raw materials and the fluctuations in prices of these raw materials. Indonesia's claim, however, is based on an erroneous approach to the legal standard of these provisions. It is also based on an inaccurate presentation of the facts on the record and of the European Union's analysis.

37. First, with respect to the economic and financial crisis, Indonesia errs when it argues that the European Union simply rejected its relevance and that the assessment of the role of the crisis was not supported by the facts on the record. In fact, the European Union acknowledged that the crisis was a factor. This factor was examined in light of the evidence on the record and involved an examination of the coincidence in developments in the injury factors, the financial crisis, and other demand-related developments. The European Union carried out a proper correlation analysis which is central to the causation analysis as indicated by the Appellate Body.[32] Based on this analysis, the European Union reached the reasonable and reasoned conclusion that although the economic crisis may have contributed to the injury caused by the dumped imports, it was not of such impact that it broke the causal link.

38. Indonesia makes a big issue of the fact that the European Commission seemed to consider that the financial crisis only started in 2008 and asserts that this vitiates the whole reasoning of the Commission.[33] However, the Commission acknowledged that the economic downturn started in 2008, whilst it cannot be disputed that the effects for the real economy only became manifest in 2009. In any case, irrespective of when exactly the crisis started, when demand increased again reflecting a general economic recovery, the Union industry did not recover due to the massive presence of dumped imports.[34] The Panel should therefore reject Indonesia's attempt at seeking a *de novo* review of the facts as established and properly examined during the original investigation.

39. Moreover, Indonesia acknowledges that the *Anti-Dumping Agreement* provides "considerable latitude" to investigating authorities to carry out the non-attribution analysis.[35] Yet, Indonesia attempts to impose a heightened standard on the European Union by pointing to one panel report that noted a preference for use of economic models. However, this attempt to impose an obligation to conduct a quantitative as opposed to a qualitative non-attribution analysis should be

[32] Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.
[33] Indonesia's first written submission, paras. 5.34–5.43.
[34] European Union's first written submission, paras. 133, 146–147.
[35] Indonesia's first written submission, para. 5.94.

rejected. The proper standard remains whether the European Union properly established the facts with respect to the other "known factors" and evaluated the evidence in an objective and unbiased manner.

40. Second, with respect to the claim that access to raw materials was a separate cause of injury to the domestic industry and that this was not properly examined, Indonesia also errs both on the law and on the facts. Indonesia fails to substantiate the importance of this issue to elevate it to a "known factor".[36] It is not an obligation of investigating authorities to examine every factor alleged to have caused injury to the domestic industry, but only those "known factors … which at the same time are injuring the industry". Article 3.5 requires an interested party to provide sufficient argument and evidence of the injurious effect of this factor and not merely to mention a factor in passing among many others as the Indonesian producers did at the start of the investigation only. In any case, Indonesia itself appears to admit that the price volatility of raw materials was closely connected to the economic crisis which was properly examined by the European Union. Indeed, Indonesia's argument is artificial because it separates the economic crisis from its concrete effects. It seeks to elevate to the position of "other factors causing injury" a possible aspect of the crisis. Furthermore, the argument that the domestic industry in the European Union has greater difficulties to source raw materials is simply not a factor causing injury but merely a structural aspect of the conditions of competition. There was no evidence to suggest that this was a separate cause of injury to the domestic industry; rather it appears to be part of the conditions of competition which existed also before the dumping.[37] The European Union's conclusion was reasonable and supported by the facts on the record.[38]

41. For these reasons, Indonesia's claim under Articles 3.1 and 3.5 should be rejected by the Panel.

## 4. Indonesia's claim that the European Union failed to disclose verification results is in error

42. Finally, Indonesia's third claim that the European Union violated Article 6.7 of the *Anti-Dumping Agreement* by failing to provide any meaningful information about the results of the verification visits to Indonesia is in error. As the record evidence demonstrates, the European Union provided full disclosure of the essential facts relating to its final determination to the relevant Indonesian firms, including the results of the verification visits. Moreover, Article 6.7 does not impose an obligation on investigating authorities to prepare a detailed report of a verification visit or of the reasons why certain information was requested during verification. It only requires that the "results" of the verification be communicated. This was clearly done by the European Union after the verification in the specific disclosures, in the General Disclosure Document and the Provisional and Definitive Regulations.

43. The *Anti-Dumping Agreement* provides no definition or guidance regarding the exact content of the disclosure obligation relating to the "results" of the verification, however the ordinary meaning of the term "results" is "an effect, issue, or outcome from some action, process or design".[39] The evaluation of the evidence by the investigating authority is not part of the "results" of the verification visit. Instead, it refers to the essential factual outcome of the verification. This could include the list of exhibits that were provided during verification. It could also include, where relevant, other relevant outcomes such as refusals to provide certain information. The purpose is to inform parties of verification-related developments that could potentially have consequences for the final determination. Article 6.7 does not impose a "reporting" obligation, as Indonesia seems to suggest, but a mere obligation to "make available" or "disclose" the results to the relevant interested parties.[40]

44. Moreover, the Commission underlined that during the verification visit mistakes and errors were corrected in agreement with the company. A list of exhibits that were provided by the Indonesian producers at the time of the verification was also made available. Indonesia does not deny that such discussions took place and that such an agreement was reached. Nor does Indonesia argue that PT Musim Mas made comments concerning the disclosures as explicitly

[36] See European Union's response to Panel Questions 21 and 23.
[37] See European Union's response to Panel Question 22.
[38] See European Union's response to Panel Question 21.
[39] Appellate Body Report, *US – Steel Safeguards*, para. 315.
[40] See European Union's response to Panel Question 26.

invited by the Commission[41], in order to point out omissions or other errors, but that those comments went unheard. It is also striking that Indonesia cannot point to any information, data or behaviour whose absence from the disclosure documents might have affected the position of PT Musim Mas. Basically, it is clear from its first written submission that rather than the "results" of the verification, Indonesia would like this Panel to blame the Commission not to have disclosed the "minutes" of the verification.[42] However, that is not what the language of Article 6.7 requires.[43] Indonesia's claim of a violation of Article 6.7 is therefore without merit.

[41] See Exhibit EU−1.
[42] Indonesia's first written submission, paras. 6.55 and 6.64.
[43] See European Union's response to Panel Question 26.

## ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

### 1. Legal Analysis

1. Indonesia raised three sets of claims against the European Union's AD measure on fatty alcohols. As demonstrated in the European Union's first written submission, all three sets of claims are based on an erroneous interpretation of the relevant provisions of the *Anti-Dumping Agreement* and in fact request the Panel to make a de novo assessment of the facts on the record. Indonesia fails to rebut the arguments presented by the European Union in its first written submission.

#### 1.1. *Claim 1: Indonesia's claim that the European Union's adjustment for commissions paid to ICOF-S violated Articles 2.3 and 2.4 of the Anti-Dumping Agreement is without merit*

2. Indonesia argues that the European Commission made an allegedly inappropriate adjustment for the sales commissions paid to a trading company based in Singapore, ICOF-S, when calculating the export price of PTMM, the producer of the product under consideration. Indonesia fails to respond to the arguments developed by the European Union under Article 2.4 of the *Anti-Dumping Agreement*.

3. Indonesia fails to rebut the argument of the European Union that the notion of a Single Economic Entity ("SEE") is foreign to Article 2.4 of the *Anti-Dumping Agreement* and that the existence of a relationship between certain entities does not preclude making adjustments for differences affecting price comparability. The determinative question is not whether two entities are related but whether there exists evidence of a difference affecting price comparability which requires that an adjustment be made. Without addressing the European Union's legal arguments under Article 2.4 of the *Anti-Dumping Agreement*, Indonesia simply asserts that its position is "obvious as a matter of common sense." It argues that "splitting up a previously integrated company … cannot be an automatic reason for treating them as independent so as to justify imputing a "commission" adjustment under Article 2.4." This argument is purely theoretical and does not reflect the facts of the case. ICOF-S is simply not a spinoff of the internal sales department of PTMM. In addition, it is based on a flawed legal interpretation of Article 2.4 of the *Anti-Dumping Agreement*.

4. In fact, in its answers to the Panel questions, Indonesia contradicts its own claim. It provides an example that contradicts the main argument on which its case rests. Its example suggests that it does not contest the fact that an adjustment was made for the intervention of the related trader in Singapore, but that it takes issue solely with the amount of the adjustment. However, its legal claim is not about the amount of the adjustment but about the fact that an adjustment was made to a transaction between related parties. Indonesia has consistently argued that the key issue is that no adjustments can be made for transactions between affiliated parties because these do not affect the price of the transaction. According to Indonesia, no adjustment can be made at all if the two entities involved are related parties. Thus Indonesia's legal claim in the present case is contradicted by the very example Indonesia provides.

5. In any case, the European Union considers that Indonesia's approach is entirely misguided and not supported by the text of Article 2.4 or its context. Indonesia's legal argument is not based on the text of Article 2.4 of the *Anti-Dumping Agreement* and the "follow the money" principle that it seeks to read into this provision is simply an invention of Indonesia that is contradicted by the context of this provision. First, Article 2.4 is silent on the relevance of any relationship between the parties. This contrasts with other provisions of the *Anti-Dumping Agreement* that expressly concern the treatment of "related parties" (such as Articles 4.1 and footnote 11 of the AD Agreement on the definition of the domestic industry or Article 9.5 on the determination of an individual margin of dumping for new shippers). Second, neither in Article 2.4 nor in any other provision of the *Anti-Dumping Agreement* is the concept of a SEE used, let alone defined in any way. Third, the notion of an SEE was used only in two instances in WTO disputes, in an entirely

different context relating to the possibility to apply the same dumping margin to closely related entities. Fourth, in neither of these disputes was the investigating authority required to examine whether companies formed an SEE, as the question was merely whether an authority was permitted to consider this relationship in light of the requirement of Article 6.10 of the *Anti-Dumping Agreement* to determine an individual margin of dumping for each producer or exported under examination. Fifth, in the WTO dispute in which this notion of an SEE was first addressed in the context of Article 6.10 of the *Anti-Dumping Agreement*, *Korea – Certain Paper*, this very same concept was completely ignored in the context of the Article 2.4 discussion of the panel in that dispute. There is therefore no basis for Indonesia's focus on the existence of an SEE under Article 2.4 and none has been offered by Indonesia in this dispute. In fact, as noted before, even Indonesia agrees that it is possible to make an adjustment for payments made between related parties, and that the only question concerns the amount of the adjustment which may be affected by the relationship.

6. Indonesia's failure to respond to the argument of the European Union based on the Panel's findings in *Korea – Certain Paper*, the one relevant WTO precedent in which Indonesia was directly involved as a complaining party, is also telling. Indonesia tries to avoid the obvious conclusion that the panel in that dispute did not consider the existence of a "single economic entity" to be a relevant factor for purposes of determining whether an adjustment was warranted. And neither did Indonesia in that case. In fact, it appears that Indonesia was arguing in favour of making an adjustment for the services rendered by the related trading company with respect to domestic sales in an effort to lower the normal value, thus arguing that an adjustment was required to reflect the involvement of the "closely related" trading company.

7. In any event, Indonesia's legal argument lacks any textual basis and is fundamentally flawed.

8. Article 2.4 does not set forth a "follow the money"- principle. Indonesia confuses the *suggestion* in Article 2.4 to make the comparison "at the same level of trade, normally at the ex-factory level" with a *requirement* to determine how much of the money paid by the buyer of the goods stays with the producer. Furthermore, the "ex factory" recommendation is not a suggestion that an investigating authority is to pierce the corporate veil to look into the pockets of the producer to see how much money he was really making on the sale. The recommendation to compare transactions "ex factory" is simply a way of ensuring a comparison that is not affected by differences in transportation costs, insurance costs, distribution costs, etc. and reflects the fact that prices of sales to a distributor can be expected to be different from prices of sales to a wholesaler and different from prices of sales to a consumer. It is merely a recommendation but there is no obligation (as Indonesia suggests) to compare prices at the "ex factory" level. Nothing stops an authority from adding the cost of distribution in order to fairly compare a sale to a distributor with a domestic sale that is made directly to the end consumer for example. The comparison must not necessarily be made at the "ex factory" level in order to be fair.

9. Indonesia tries to read legal distinctions into the text of Article 2.4 that are simply not there. Indonesia is making a semantic argument based on terms like "commissions" "direct selling expenses" and "notional" versus "objective" expenses that are not even used in Article 2.4 of the *Anti-Dumping Agreement*.

10. Article 2.4 requires that due allowance shall be made for any difference affecting price comparability. The payment of commissions to a trader in relation to export sales and not domestic sales (or *vice versa*) is a relevant feature of the transactions that are compared and account should be taken of this feature. It may be qualified as a "commission" or "direct selling expense" for which it is well accepted that an adjustment can be made. The artificial separation that Indonesia seeks to draw between "direct selling expenses" and "commissions" is irrelevant and baseless. Similarly baseless is Indonesia's distinction between "objective" costs and other expenses of the related trader and why an adjustment for such "objective costs" would be warranted between related parties but no other adjustments for what can be assumed to be "un-objective" costs? There is nothing in Article 2.4 of the *Anti-Dumping Agreement* that Indonesia can point to in support of its constructed legal argument that is completely divorced from the text of Article 2.4 of the *Anti-Dumping Agreement*. There is simply no basis in Article 2.4 or any other provision of the Anti-Dumping Agreement for Indonesia's legal conclusion that "in the case of payments made between closely-related entities, the requirement of "price comparability" under Article 2.4 requires an investigating authority to examine whether a particular flow of funds

reflects either an "objective" expense (that does "affect price comparability" and should be adjusted for); or instead a mere shifting of funds (allocation of profits) between related parties (that does not affect price comparability and must not be adjusted for)". This lifting of the corporate veil that Indonesia claims is "required" under Article 2.4 does not make legal or economic sense and raises more questions than it answers, given the absence of any textual guidance in the Anti-Dumping Agreement. In contrast, the legal position of the European Union is text-based and straightforward: is there a difference between the export transactions and the domestic transactions and, if so, is this a difference that affects price comparability.

11. In any case, Indonesia's legal argument is also based on a misunderstanding of the facts and findings in this case.

12. Indonesia makes a number of assertions about the European Union's findings in this case which are factually incorrect and misrepresent the conclusions of the investigating authority. The European Union never stated that ICOF-S was an "independent trader" and this dispute does not concern the imposition of a "notional" commission where there was "no actual expense". The evidence on the record confirms that an expense was made in the form of a commission/mark-up accorded to ICOF-S for its involvement in PTMM's export sales. The adjustment that was made to reflect the fact that this commission/mark-up related to export sales only, did not mean that the investigating authority deducted PTMM's profits and SG&A from the export price. The record clearly shows that the European Commission acknowledged that ICOF-S was a related trader. The Commission did not "change reality" in any way. Nor was the price adjustment made for an "imputed, not actual, commission" given that the Sale and Purchase Agreement between ICOF-S and PTMM clearly showed that a commission/mark-up was paid by PTMM to ICOF-S and that the actual "payment" of that mark-up to ICOF-S was never put into question. Based on the dictionary definition of the relevant terms, a "notional" adjustment is an adjustment "based on a suggestion, estimate, or theory; not existing in reality". But, in this case, the Sale and Purchase Agreement makes this adjustment anything but "notional". It is an adjustment based on a valid contract that both companies relied on. This contract was provided to the investigating authorities and the companies were expecting the tax and customs authorities to rely on this contract as well. It is thus simply not correct to refer to a "notional" adjustment in the current situation. The fact that the investigating authority did not accept the amount of the commission at face value but decided to construct the amount of the commission, does not turn the adjustment into an adjustment that is not based on reality. It is simply a matter of ensuring that the amount of the adjustment is not affected by the relationship between the parties.

13. Furthermore, Indonesia is not correct to assert that the Commission "rejected the transaction price" between PTMM and ICOF-S and "calculated the export price on the basis of the sale to an "independent" customer in the EU". Indonesia is confusing the two sales channels and thus the two ways in which the export price was determined. All export sales to the EU were made via ICOF-S, the related trader in Singapore. Some of the sales went from ICOF-S to the related importer in the EU, ICOF-E, and some other sales went directly from ICOF-S to unrelated buyers in the EU. For sales made by ICOF-S to the related importer in the EU (ICOF-E), the export price was constructed on the basis of the first sale by ICOF-E to an independent customer in the EU in accordance with Article 2.3 of the *Anti-Dumping Agreement*. For sales that were made via ICOF-S to independent buyers in the EU, the export price was not constructed. This means that for sales made to unrelated importers in the EU, the price at which the product was introduced into the commerce of the European Union, i.e. the price paid by the unrelated importer in the European Union was used as the export price. In order to ensure a fair comparison with the normal value, adjustments were subsequently made pursuant to Article 2.4 of the *Anti-Dumping Agreement*/Article 2(10) of the EU Basic AD Regulation for differences affecting price comparability, including for the commissions paid to ICOF-S.

14. Indonesia keeps suggesting in its replies that the European Commission acknowledged that PTMM and ICOF-S were "related" parties and that it thus treated both as a "single entity" for purposes of making the dumping determination. Indonesia argues that "[i]n this case, it is clear that the EU defined the producer/exporter for which it was calculating dumping margins as PT Musim Mas/ICOFS as a whole". According to Indonesia, this confirms the correctness of Indonesia's approach to both companies as being an SEE and it implies that no adjustment should have been made for payments made inside this "single seller". Indonesia is wrong. Indonesia is clearly reading too much into the European Commission's acknowledgement of the relationship between PTMM and ICOF-S. A "relationship" exists in the European Union's practice in many

different situations and even when there is only a 5% direct or indirect shareholding. So, even for entities that are not more closely related than that, the reliability of the pricing may be questioned and another basis may be used for determining the price. It is therefore simply not so that the European Commission first considered PTMM and ICOF-S to be a "single seller" and then treated them as "unrelated" parties when making an adjustment. The margin of dumping was determined for PTMM and not, as Indonesia wrongly asserts, for PTMM and ICOF-S "as a whole", whatever that may mean.

15. It is correct that the investigating authority decided not accept at face value the *amount* of the mark-up as shown in the Sale and Purchase Agreement. But Indonesia makes an unjustified leap of logic by asserting that the European Union's examination of the amount of the commission meant that a commission was simply assumed or "imputed" when none actually existed. That is not correct. A commission was "paid" in the form of mark-up. The Sale and Purchase Agreement is direct evidence of this agreed payment. An allowance is therefore due given that, according to the Sale and Purchase Agreement that was submitted by PTMM during the investigation, this payment was made only for export sales, and no evidence exists of similar payments being made for the alleged involvement of ICOF-S in domestic sales. However, the amount of the mark-up "payment", and thus the level of the allowance, may be subject to review and verification given the relationship between the two entities.

16. In addition, it is not so that the European Union adjusted the export price of PTMM by removing the SG&A and profit of PTMM with respect to its export sales but not with respect to its domestic sales as Indonesia asserts. The Commission did not deduct any amount of profits for PTMM. In fact, this is confirmed by Indonesia in para. 1.69 of its replies in which it states that the amount of the export price "includes PT Musim Mas's profits". Rather, the investigating authority made an adjustment to the export price of PTMM for the direct selling expense of PTMM given that PTMM was obliged by contract to pay a commission/mark-up to ICOF-S, just like it used to pay a commission to the independent trader it used before.

17. Indonesia is wrong to equate the SG&A of ICOF-S with those of PTMM. PTMM has its own SG&A and no adjustment was made for the SG&A expenses of PTMM. The Sale and Purchase Agreement makes clear that ICOF-S existed already before PTMM decided to use it as a trading company. PTMM agreed on a commission/mark-up to be paid for the involvement of ICOF-S. There was no distinction between the part of the mark-up that would cover costs and the part that would cover the profit margin of ICOF-S, just like you would expect in a normal trading relationship. There is no indication that ICOF-S was required to subsequently transfer the profits back to PTMM or that PTMM was covering the costs of ICOF-S. There is no basis for the suggestion that simply because of their shareholding relationship, commissions paid to ICOF-S become part of the SG&A of PTMM. And even then, the commission was paid only for export sales. This suggests that there was a difference in costs affecting price comparability given that such cost was not borne for domestic sales activities.

18. Indonesia also seeks to draw the Panel into a big discussion about "transfer pricing agreements". But this dispute does not require the Panel to opine on what constitutes a transfer pricing agreement and what does not. The WTO Agreements do not refer to transfer pricing agreements and there is no agreed definition of a "transfer pricing agreement". Most relevantly, however, the Commission did not simply ignore the argument that the Sale and Purchase Agreement was a transfer pricing agreement. Rather, it addressed the argument and rejected the alleged legal consequences that the Indonesian producer tried to draw. The investigating authority referred among others to the name and "modalities" of the Agreement and explained that even if this agreement can also be used for purposes of calculating arm's length prices in accordance with applicable tax guidelines, this does not contradict the finding that pursuant to this same agreement the trader received a commission. Even if the agreement were a transfer pricing agreement or had the regulation of transfer pricing as its main objective, it would not mean that it is a useless or fraudulent document that investigating authorities could not rely on as part of the totality of the evidence. Transfer pricing agreements are put in place precisely to ensure that, despite the relationship between the parties, their transactions are carried out at arm's length just as if they were unrelated parties. Tax authorities are expect to rely on those agreements for tax purposes as those agreements should genuinely reflect the financial relations taking place between related parties. The same holds for Anti-Dumping investigation authorities, unless it is proven that the transfer pricing agreement in question is a sham document, which Indonesia has never claimed in the present case.

19. Therefore, it is not unreasonable or biased of an investigating authority in an Anti-Dumping investigation to also attach importance to this agreement and to consider its provisions to be trustworthy.

20. Finally, Indonesia appeared to make a separate claim of violation of Article 2.4 of the *Anti-Dumping Agreement* as a result of the alleged discrimination in treatment between PTMM and Ecogreen. The European Union rebutted that claim by pointing to the lack of legal basis of Indonesia's claim. As explained at length in the EU's answers to the questions of the Panel, there were a number of differences that led to the conclusion that the factual circumstances of Ecogreen were similar to those present in the *Interpipe* case that led the European General Court to find that no adjustment was justified. Indonesia is unable to rebut these conclusions and simply tries to re-litigate the argument it already lost before the European General Court where this argument about discriminatory treatment and the application of the European jurisprudence more properly belongs.

21. First, Indonesia does not deny that, as correctly found by the investigating authority, PTMM invoices directly more than 20% of its export sales while Ecogreen only invoices a very small number of export sales directly, as was the case for *Interpipe*. For a number of export sales, PTMM "must contract directly" and therefore no mark-up is being paid to ICOF-S. Such direct contracts were concluded in a relatively significant number of cases, different from the situation that prevailed for Ecogreen. Nothing in Indonesia's reply suggests otherwise.

22. Second, Indonesia merely repeats its view that no weight should be ascribed to any of the provisions of this contract because it is merely a transfer pricing agreement, but it does not deny the fact that a contract exists between PTMM and ICOF-S when no such contract exists governing the relationship between Ecogreen and its related trader, EOS. That is a matter of fact that further distinguishes the factual situation of both companies.

23. Third, with respect to the significance of the trader's activities and the fact that the trader's supplies originate to a significant extent from unrelated companies (similar to the activities of an agent working on a commission basis) Indonesia again "fails to see the relevance of the trader's activities with respect to products outside of the scope of the investigation", but does not deny that those factual findings are correct. The relevance of course is that these were important factual considerations that led the European Court in *Interpipe* to reach a certain conclusion. Indonesia simply tries to minimize the importance of this factual aspect by consistently trying to portray ICOF-S as an internal sales department of PTMM which was simply spun off to Singapore for tax reasons, while in fact ICOF-S **[***]**; ICOF-S was not created as the internal sales department of PTMM at all; and has significant trading activities that are unrelated to the product concerned and to PTMM's activities. If that is put in the context of all of the other evidence and is contrasted with the situation for EOS, the trading company of Ecogreen, it is clear why this factual aspect differentiates the situation of PTMM and ICOF-S from that of Ecogreen and EOS.

24. In sum, although Indonesia disagrees with the weight given by the investigating authority to some of the above stated facts and considerations, it fails to demonstrate that those facts are incorrect and as a consequence that the investigating could not reasonably have concluded that Ecogreen and PTMM were in a factually different situation, taking into account the relevant factors highlighted in the *Interpipe* judgment.

25. In addition, Indonesia has completely failed to indicate which legal provision of the *Anti-Dumping Agreement* would be violated as a result of this alleged error to treat Ecogreen and PTMM in the same manner. There is none.

26. In sum, Indonesia failed to rebut the legal arguments made by the European Union and has not been able to establish a *prima facie* case that the European Union's reasonable and reasoned decision to make due allowances for commissions paid to ICOF-S for export sales only violated Article 2.4 of the *Anti-Dumping Agreement*. Indonesia's consequential claim under Article 2.3 must also fail. In its answers to questions of the Panel, Indonesia confirmed that it only added this claim because it "considered it prudent" to include a reference to Article 2.3 given that certain export transactions for which an adjustment was made for the involvement of ICOF-S also involved the construction of an export price due to the involvement of the related importer ICOF-E in the European Union. Its Article 2.3 claim is thus entirely consequential and fails, just like its principal claim under Article 2.4. Finally, Indonesia did not even begin to develop a *prima facie* case under

its allegedly consequential claim under Article X.3 of the GATT 1994 and any continued allegation of violation of this provision must therefore be rejected.

1.2. *Claim 2: Indonesia's claim that the Commission failed to Separate and distinguish known factors other than the dumped imports causing injury in violation of articles 3.1 and 3.5 of the Anti-Dumping Agreement is in error*

27. Indonesia argues that the Commission's determination that dumped imports caused injury to the domestic industry is inconsistent with Articles 3.5 and 3.1 of the *Anti-Dumping Agreement* because the Commission allegedly failed to conduct a proper non-attribution analysis. In particular, Indonesia claims that the Commission failed to adequately separate and distinguish the effects of the economic/financial crisis of 2008/2009 and that it did not properly examine the effects of the alleged difficulties faced by the domestic industry concerning access to raw materials and the fluctuations in the prices of these raw materials. In its first submission, the European Union demonstrated that Indonesia's arguments with respect to both factors are flawed.

28. Indonesia does not present any new arguments in its answers to the questions of the Panel, or in its rebuttal submission. It merely repeats its erroneous assertions about the alleged lack of a proper causation and non-attribution analysis by the European Union. Indonesia's unsubstantiated and formalistic arguments are without merit and do not establish a prima facie case of violation of Articles 3.1 and 3.5 of the AD Agreement.

29. First, on the evaluation of the effect of the economic crisis, it is clear that the Commission was well aware of the commonly known fact that the global economic crisis started around the second half of 2008. The global economic/financial crisis is a complex phenomenon which develops its effects over time and it is simplistic to turn the debate about its effects on injury factors that are examined by the investigating authority on a year by year basis into a debate about the exact starting point of this crisis. The European Union also disagrees with Indonesia that the injury analysis is an "unrelated section" for purposes of examining the effects of other factors on injury. Article 3.5 of the *Anti-Dumping Agreement* that sets forth the non-attribution requirement is one paragraph of Article 3, entitled "Injury". The text of Article 3.5 refers directly to "the effects of dumping as analysed under paragraphs 2 and 4" of Article 3, which form the heart of any investigating authority's injury analysis. The causation and non-attribution analysis of Article 3.5 is part and parcel of the injury analysis to be undertaken under Article 3 of the Anti-Dumping Agreement. Indonesia's contrary suggestion that it is not appropriate to refer to analysis and conclusions in an investigating authority's injury determination, simply because not all of this analysis is provided under the heading "non-attribution" is not supported by the text of the Anti-Dumping Agreement, WTO jurisprudence or, put simply, common sense. The European Union referred to the findings and reasoning of the investigating authority as included in the relevant determinations dealing with the economic crisis, both in the specific section dealing with causation and non-attribution and in the overlapping section dealing with the evaluation of the injury factors.

30. Second, with respect to the alleged effect of the domestic producers' access to raw materials and price fluctuation in raw materials, Indonesia confirms that it "accepts that an interested party that raises a particular non-attribution factor must provide some evidence that this factor contributed to the injury, thereby triggering the requirement to perform a non-attribution analysis". As demonstrated in the European Union's first written submission and in the answers to the questions of the Panel, that is precisely what the Indonesian interested parties failed to do. Indonesia is unable to present any new arguments or evidence to rebut the European Union's position.

31. It is telling that both in the submissions and in its answers to questions, Indonesia decided to quote the entire paragraph of the October 2010 comments on the application of PTMM in which it raised this factor, trying to increase its importance. In fact, if the Panel goes to the exhibit of Indonesia from which this quote is taken, IDN-35, it will see that these two paragraphs are buried amidst many other equally unsubstantiated assertions and claims. It is for the interested parties to adduce sufficient evidence of the effects of another factor such that this factor becomes a factor that is known to cause injury, requiring the authority to separate and distinguish its effects. It does not suffice to simply make a blunt statement at the start of the investigation without adducing any evidence and then to expect the authority to actively seek to obtain the evidence to substantiate these assertions.

32. In its replies to the Panel's questions, Indonesia argues that PTMM produced evidence showing that the fluctuations in the price of raw material was a factor causing injury distinct from the economic crisis. Indonesia is wrong. In particular, Indonesia refers in alleged support of its argument to page 30 of the Complaint, which it files as Exhibit IDN-58. However, page 30 of the complaint (Exhibit IDN-58) discusses a phenomenon that is precisely the opposite of what Indonesia considers to have been proven by PTMM, i.e. it discusses the increase of raw material prices. It explains that the increase of raw material prices cannot be a separate injury factor since all raw materials for fatty alcohols are traded at world market prices and therefore price fluctuations affect all producers. It explains that integrated producers can shift profits between the internal profit centres, but cannot avoid the effect of a raw material price increase. Then it adds that because the prices of synthetic raw materials and natural raw materials for fatty alcohols have not evolved in parallel (which is exactly the opposite of what PTMM argued in subsection 4.9 of its comments to the complaint), price development in natural raw materials cannot explain the injury suffered by all EU producers that use different manufacturing process. Thus the complaint cannot constitute even an indicator (let alone full evidence) of the claim according to which access to raw materials constituted a separate cause of injury. Indonesia was not able to point to any other valid evidence that could have supported that claim and had been submitted during the investigation by the interested parties. In light of these circumstances, it is clear that it was reasonable of the investigating authority to conclude that PTMM did not produce any evidence to substantiate its assertion, made only at the very beginning of the investigation, that raw material price fluctuation constituted a separate cause of injury to the EU industry so as to deserve further investigation. Indonesia's argument that, as an active "investigating" authority, the Commission should have actively sought for the additional evidence of such a causal impact is without merit. It is telling that Indonesia refers to the panel report in *Mexico – Rice* on the need for an active investigating authority. However, the finding that Indonesia refers to is in fact one of the few findings of that panel that the Appellate Body reversed. The Appellate Body rejected this specific conclusion that Indonesia is relying on and found that the Panel's "extensive interpretation" requiring an "active investigating authority" imposed too high a burden on the authority.

33. In the context of its discussion of the European Union's rebuttal on the factor "raw material prices", Indonesia repeatedly asserts that the European Union is making "a series of ex post arguments, none of which is reflected anywhere in the Commission's determinations". The European Union objects to the repeated allegation that any assistance offered by the European Union to the Panel in the context of these proceedings to allow it to better understand the information provided and to address novel arguments made by Indonesia for the first time in this WTO proceeding would constitute undue "ex post" reasoning. The European Union participated in these proceedings in good faith and provided answers to the questions of the Panel that related to certain evidence on the record that was not further developed by the interested parties and which therefore did not need to be further analysed by the investigating authority. The European Union offered its views to the Panel to explain why from an economic and legal point of view the statements about the existing conditions of competition between Indonesian producers and European producers of fatty alcohols were not relevant and were inaccurate.

34. The Indonesian producers never developed any of the arguments now made by Indonesia in this proceeding and it is thus not surprising that the investigating authority did not provide all of the reasonable explanation that the European Union has offered to the Panel in search of a better understanding of the facts. It is not correct that, as the defendant in this proceeding, the European Union cannot provide any explanation that is not expressly provided by the investigating authority when rebutting arguments that the determination made by the authority was biased and not reasonable. If that were the case, there would be no point in having a contradictory debate in these panel proceedings.

35. In sum, Indonesia has failed to rebut the European Union's argument that effects of the economic crisis were properly separated and distinguished and that access to raw materials or the impact of raw material prices was not a known factor causing injury that the investigating authority was required to examine further as the interested parties failed to present arguments and evidence to this effect, as required. Indonesia's claims under Articles 3.1 and 3.5 are thus to be rejected.

1.3. *Claim 3: Indonesia's claim that the Commission allegedly failed to disclose the results of the verification to the verified producers in violation of article 6.7 of the Anti-Dumping Agreement is in error*

36. Indonesia claims that the European Union violated the obligation under Article 6.7 of the *Anti-Dumping Agreement* to make available the results of the verification visit it made to the Indonesian interested parties. In the first written submission, the European Union demonstrated that Indonesia's claim is based on a misrepresentation of the facts and a misreading of the legal obligation imposed by Article 6.7 of the *Anti-Dumping Agreement*. Indonesia fails to respond to both the factual and legal rebuttal arguments of the European Union. Instead, it simply repeats its broad reading of what it would have ideally liked the obligation under Article 6.7 of the *Anti-Dumping Agreement* to be, ignoring that the requirements it reads into Article 6.7 are nowhere to be found in the text of that provision.

37. First, on the facts, it is important to re-state what the European Union explained in the first written submission. Contrary to Indonesia's assertions, it is clearly from the provisional and final disclosure documents that the European Union provided "discussion of information that was verified, not verified or corrected with respect to essential facts referenced in Article 6.9" as Indonesia seems to suggest is required under Article 6.7 of the *Anti-Dumping Agreement*. In addition, at the end of each verification visit, the Commission and the verified producer agreed on a list of exhibits collected during the verification.

38. Indonesia tries to support its argument by referring to two documents provided during verification. But it suffices to look at the agreed list of exhibits taken at the time of the verification, submitted by the European Union as Exhibit EU-14, to see that both documents are clearly referenced in this list. Furthermore, this alleged lack of information on these two exhibits shared during verification never stopped PTMM from raising the arguments that these exhibits were supposed to support. There is no basis in the record to claim that the interested parties' due process rights were in any way affected by the fact that they allegedly did not receive a detailed report explaining that these documents were provided during verification. In fact PTMM made express reference to these documents in the context of the proceedings before the investigating authorities. It was thus able to defend its interests and develop comments based on the information submitted during verification. Other "examples" of Indonesia relate to statements that were made by PTMM or ICOF-S personnel or representative during the verification and that according to Indonesia were not contested on the spot. However, a statement or an oral explanation provided during a verification visit and which is not confirmed by any concrete evidence does not become a result of the verification or an essential fact just because the verification team did not consider it necessary to rebut it on the spot or to put it in the context of other evidence on the record.

39. Furthermore, in terms of the legal standard, Indonesia is responding to an argument the European Union never made. It is not the position of the European Union that complying with Article 6.9 automatically means that Article 6.7 has been complied with. The ordinary meaning of the term "results" is "the effect, consequence, issue, or outcome of some action, process or design." This suggests that what needs to be made available is not the process as such but rather the "outcome" of that process. Again, Indonesia seems to acquiesce in the correctness of the ordinary meaning of the term as offered by the European Union. It refers to the Appellate Body reading of this term in *US – Steel Safeguards* as "an effect, issue, or outcome from some action, process, or design" and concludes that the results referred to in Article 6.7 are the "effect" or "outcome" of the verification visit. The European Union agrees. However, the European Union does not understand on what basis Indonesia jumps from this definition to its assertions that "in this context [of a verification] the "results" would mean both a simple recital of the evidence obtained during the visit *and the evaluation of the evidence*". The European Union clearly complied with the first suggested requirement by exchanging the lists of exhibits and by correcting the data provided by the interested parties in agreement with them (which is uncontested) but sees no basis for the second requirement, at least not as part of the verification results. Clearly, to evaluate the evidence is not the task of the investigators conducting the verification and it cannot be what is to be provided in terms of the report of the verification. But, to the extent that the verified results relate to the essential facts, the European Union would agree that, pursuant to the obligation to disclose the essential facts, such an evaluation will be provided by the investigating authority with respect to these facts at that time. It will be for the interested parties to make comments, with possible reference to the questionnaire information or to information provided during verification.

Indonesia only confirms everything the European Union has said about the close relationship between Article 6.7 and 6.9 of the *Anti-Dumping Agreement*.

40. Furthermore, Indonesia keeps citing to one obiter dictum in *Korea − Certain Paper*, in which the panel said that "[i]t is therefore important that such disclosure [under Article 6.7] contain adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully". This statement, which was not essential to the panel's finding and was not appealed, must be read in its context. First, in that investigation, the Indonesian exporters had expressly requested to see the results of the verification but their request had been denied. Second, the real reason why the panel found a violation was because the authority "did not inform the two Sinar Mas Group companies of the verification results in a manner that would allow them to properly prepare their case for the rest of the investigation". There is no basis for a similar conclusion in this case, as demonstrated above. The European Union sent a list of information to be verified before the visit and agreed on a list of exhibits taken at the time of concluding the verification. The interested parties never complained about a lack of information on the results of the verification, despite frequent references to the verification visits in the provisional and final determinations

41. In addition, as confirmed by the lack of claims by Indonesia under Articles 6.2, 6.4 or 6.9 of the *Anti-Dumping Agreement*, Indonesia does not consider that its due process rights were violated or that the disclosure of essential facts was deficient. Again this contrasts with the claims and arguments made in *Korea − Certain Paper*.

42. Indonesia continues to seek to raise the profile of the last sentence of Article 6.7 as if this "verification results"-disclosure obligation is the alpha and omega of due process. It asserts that "exporters must know what information was not verified — so that they can make further efforts to put the investigating authority in a position to ultimately verify that information — as well as what information was verified. This information is important for the exporter given that verified information must in principle be used by the investigating authority, and the exporter thus need not any longer devote its scarce resources to convincing the authority about the reliability of that information". Indonesia's approach to on-site verification and the alleged consequences of verification is entirely misguided and it grossly over-states the importance of the last sentence of Article 6.7.

43. First of all, exporters of course do know what information is verified as they are present throughout the on-site verification process, as is clear from the legal counsel's notes on which Indonesia relies. So, the premise of Indonesia's argument is once again flawed. Second, there is no obligation on Members to conduct an on-site verification. That is clear from the text of Article 6.7 (using the term "may") and has been confirmed in WTO jurisprudence. Third, in most cases verification is a documentary process that the investigating authority undertakes on the basis of the information provided and based on any additional information it requests the interested parties to provide. Therefore, interested parties do not really know how the investigating authority will appreciate those documents until they see the disclosure of the essential facts. Yet, this does not pose a problem from a due process perspective. Fourth, it is simply not the case that because information has been verified it is necessarily relevant and probative such that it must be used by the investigating authority, contrary to what Indonesia seems to suggest. It simply means that the authority checked whether that piece of information is correct. But this piece of information still needs to be placed in the context of all of the other information. Its relevance and weight is still to be reasonably determined by the authority, irrespective of whether it was verified or not. Fifth, Indonesia errs in its reliance on Article 6.8 and Annex II. These provisions concern a different situation: if the necessary information has not been provided within a reasonable period of time or if the producer has impeded the investigation, Annex II provides that information that is "verifiable" should still be used by the investigating authority as part of its reliance on the best information available. Annex II does not require an on-site verification and does not state that information provided during verification − and only such verified information − can and must be used. In any event, this issue does not arise in the present case as the interested parties cooperated with the investigating authority to the extent that during the verification visits they agreed on the corrections to be made to the data previously submitted to the investigating authority.

44. Indonesia completely over-states the importance both of the on-site verification process and of the fact that information was verified. Its suggestion that exporters will continue to use their

"scarce resources" to get the authority to further analyse certain information as long as they do not know whether such information was verified, is not what happens in practice and is not required by the text of the Anti-Dumping Agreement. Indonesia is simply inventing these systemic concerns

45. Indonesia has failed to rebut the European Union's factual and legal arguments.

46. Indonesia's claim is not supported by the facts on the record and is based on an erroneous reading of the obligation contained in Article 6.7 of the *Anti-Dumping Agreement*. The European Union respectfully requests the Panel to reject Indonesia's claim under Article 6.7 of the *Anti-Dumping Agreement* relating to the results of the verification visits.

## 2. Conclusions

47. For the reasons stated in this submission, the European Union respectfully requests the Panel to reject all of Indonesia's claims.

# ANNEX C

## ARGUMENTS OF INDONESIA


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# ANNEX C-1

## FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

## 1. INTRODUCTION AND OVERVIEW

1.1. In this dispute, Indonesia challenges certain anti-dumping measures imposed by the European Union on so-called fatty alcohols imported into the European Union from Indonesia.

1.2. At the heart of this dispute lies an improper deduction that the EU made when calculating the ex-factory export price for the Indonesian exporter PT Musim Mas. That deduction accounted for practically the entire dumping margin. In addition, the Commission failed to conduct a proper non-attribution analysis, thereby improperly attributing the injury to the Union's industry to the allegedly dumped imports. The Commission also failed to disclose to the exporters the results of the verification conducted at their premises.

1.3. The Commission's determinations and the EU's arguments before the Panel are incorrect as a matter of substance, on both the relevant legal and on factual issues. In addition, the EU relies on extensive ex post rationalisations, that is, reasoning that was not contained in the Commission's determinations and that the EU has developed for purposes of these WTO proceedings. Needless to say, the applicable standard of review requires the Panel to determine the EU's compliance with its obligations under the Anti-Dumping Agreement exclusively in the light of the published determination and the reasoning contained therein.

## 2. INDONESIA'S CLAIM UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

### 2.1 Introduction

2.1. When calculating the export price for the Indonesian exporter PT Musim Mas, the Commission made an adjustment under a provision of European Union (EU) law that, broadly speaking, corresponds to Article 2.4 of the Anti-dumping Agreement. Under Article 2.4, an investigating authority is required to ensure a "fair comparison" between the export price and normal value. The investigating authority is entitled - and required - to adjust for any difference that "affect[s] price comparability". Conversely, the investigating authority may not adjust for any difference that does not "affect price comparability".

2.2. The EU erroneously adjusted for what it termed "Commission ICOFS markup". This deduction allegedly reflected the activities of PT Musim Mas' sales entity, which is located in Singapore. The key issue before the Panel is whether, in doing so, the EU correctly adjusted for a factor that "affect[ed] price comparability" within the meaning of Article 2.4 and conducted a "fair comparison" at the same level of trade.

2.3. In Indonesia's view, the answer to this question is manifestly "no". This is because the Commission ignored that any transfer of funds between PT Musim Mas and the sales entity ICOFS are simply transfers within a single economic entity (SEE)/between two closely-related companies; because the Commission ignored or distorted relevant record evidence; and because it relied on internally-inconsistent reasoning. Moreover, the Commission treated PT Musim Mas differently from the second Indonesian exporter Ecogreen, even though Ecogreen was in an identical situation as PT Musim Mas, and differentiated between the two companies on the basis of irrelevant or inconsistent criteria. This differential treatment of the two exporters further highlights the improper nature of the Commission's deduction when calculating PT Musim Mas' export price, highlighting the violation of Article 2.4.

### 2.2 The Commission ignored the nature of transactions within a single economic entity

2.4. The Commission made an adjustment on the basis of transactions between PT Musim Mas and ICOFS. However, the Commission failed properly to consider whether these transactions and the conditions in which they occurred "affect[ed] price comparability". The Commission therefore failed to consider whether the adjustment was consistent with the requirement to conduct a "fair comparison", within the meaning of Article 2.4. The existence of a close relationship – or a "single

economic entity" formed by two or more formally separate entities − falls within the scope of the terms "affect price comparability" and "fair comparison", under Article 2.4.

2.5. The evidence before the Commission clearly indicated, both generally as well as with respect to the sales in question, that the producer/exporter and its Singapore sales affiliate were closely related or intertwined − put another way, that they were part of an SEE. Therefore, it was improper to make an adjustment to the export price on the basis of transactions between the two arms of the same entity that amounted, in fact, to nothing more than moving money from one pocket of the same body to another.

2.6. The question of the relationship between producer/exporter and an affiliated trading company has not yet arisen in WTO panel proceedings in the context of an adjustment under Article 2.4. However, it has arisen in the context of Article 6.10, where panels have − like the European courts and the Commission itself in the present and other anti-dumping investigations − found it convenient to use the phrase "single economic entity" to describe a closely-intertwined relationship.

2.7. Moreover, whether one uses the term "single economic entity" or any other label, the obligation remains for the investigating authority to examine and to ensure that adjustments − including those in the context of related companies − be only made for factors that "affect price comparability". The Commission's own reasoning in its determinations reveals that the Commission accepts that the degree and nature of the relationship between two companies can be crucial for determining whether a particular item or expense "affect[s] price comparability" and therefore is highly relevant for a "fair comparison", within the meaning of Article 2.4.

2.8. The Commission's reasoning confirms that the Commission accepts − as Indonesia argues in this dispute − that payments made between related parties, at least in some circumstances, do not justify an adjustment. To recall, the Commission recognized that Ecogreen paid "commissions" to its Singapore trading department EOS. Initially, the Commission determined that these commissions "affect[ed] price comparability" and that an adjustment was warranted in order to ensure a "fair comparison". However, subsequently, the Commission reconsidered certain criteria concerning the relationship between Ecogreen and EOS and determined that the required "fair comparison" required not making the adjustment, because the "commissions" paid by Ecogreen did not "affect price comparability".

### 2.3 The Commission's adjustment for the activities of PT Musim Mas' selling department was improper and resulted in a non-"fair comparison"

2.9. The Commission failed to acknowledge, let alone to properly factor into its reasoning, the fact that ICOFS is PT Musim Mas' selling department, and that the two companies are integral parts of a single economic entity, characterized by common ownership and a common managerial and operational control structure. The entire SEE is a **[***]**

2.10. PT Musim Mas repeatedly reminded the Commission, and supported through record evidence, that it does not have a sales department, and that all of its sales − whether export or domestic sales − are negotiated, organized and arranged by ICOFS.

2.11. Given this closely intertwined structure, transfers of financial resources between the companies − for instance the "mark-up" or "margin" retained by ICOFS on some export sales − are not expenses to be adjusted for, but rather the shifting of money from one pocket into another pocket of a single economic entity. The "mark-up" or "margin" is simply a way, within an SEE, to allocate profit generated by that entity and to ensure adequate financing of the selling department located in a different jurisdiction.

2.12. The need to finance the selling department arises also because, as PT Musim Mas repeatedly pointed out to the Commission during the investigation, ICOFS does not receive any funds from PT Musim Mas for its involvement in domestic sales as well as for its involvement in the so-called "direct" export sales. Moreover, the fact that ICOFS does not receive any remuneration for its involvement in those sales further underscores the closely-integrated nature of the two companies' relationship. Of course, an independent trader would never accept to perform sales and trading services for free.

**2.4 The Commission's argument that, prior to the creation of ICOFS, PT Musim Mas used independent traders for its sales precisely serves to highlight the issue at hand and demonstrates the exact opposite of the Commission's conclusion**

2.13. During the Panel's first meeting with the parties, the EU referred to the fact that the preamble to the transfer pricing agreement between PT Musim Mas and ICOFS states that PT Musim Mas previously used an independent trader to make its sales. For the EU, this is a confirmation of its position. However, quite to the contrary, this fact clearly illustrates the issue before the Panel and demonstrates why Indonesia's position is correct.

2.14. If PT Musim Mas made its European sales of the investigated product through an independent trader in Singapore, it would pay that independent trader a commission. This was indeed PT Musim Mas' situation several years ago, before the Musim Mas Group chose to create ICOFS as its sales and trading office. In an anti-dumping investigation, it would be appropriate to deduct that commission from the invoice price in order to arrive at the net ex factory price to be used in the fair comparison under the first, second, and third sentences of Article 2.4. This is because the commission represents an expense for which an adjustment may – indeed must – be made under Article 2.4. Of course, an exporter such as PT Musim Mas may decide to stop using an independent trader for these sales, and instead decide to establish its own affiliated sales company in Singapore to perform the same functions. PT Musim Mas would do so in order to save money and to increase its profits on the sales. Doing so will change the way in which PT Musim Mas does business; it will change the expenses that the company incurs; and this change in expenses must be reflected in the anti-dumping calculations. The Commission's position amounts to a denial of this very basic principle.

2.15. For example, assume that an exporter sells to an independent European customer at € 100 per unit and pays a commission of € 10 per unit on each sale to an independent trader in Singapore. The ex factory price – or, put another way, the net return to the exporter – is € 90 per unit.

2.16. The exporter may decide that the independent trader is charging too much as a commission. Therefore, the exporter may set up its own trading company in Singapore. Assume that the costs of maintaining the trading company in Singapore are € 4 per unit. In this case, the exporter can maintain its price to the independent customer in Europe, reduce its expenses, and increase its profits. The ex factory price or net return to the exporter now is €100 - € 4 = € 96 per unit. Profit has increased by € 6 per unit.

2.17. For the purposes of a dumping analysis, two things have changed. First, the nature of the expense has changed: it is now a selling expense, not a commission. Second, the amount of the expense has changed: it is now € 4 per unit, not € 10. These changes can be illustrated in the following table:

| | Sales Through Independent Trader | Sales Through Affiliated Trading Company |
|---|---|---|
| Invoice Price | € 100 | € 100 |
| Commission | € 10 | € 0 |
| Selling Expenses | € 0 | € 4 |
| Ex Factory Price | € 90 | € 96 |

2.18. The EU's position before the Panel is that these changes do not affect the dumping analysis. In other words, for the EU, the ex factory price in the second scenario is not € 96, but € 90, just like in the first scenario. Even though the exporter has changed how it does business – resulting in a change in both the type and amount of expenses it incurs, as well as in the net revenue it receives – the EU contends that it is entitled to disregard these changes and to conduct the same dumping analysis as if the exporter was still selling through an independent trader.

2.19. Indonesia disagrees. Indonesia does not consider that the EU can correctly calculate the ex factory price and make a fair comparison between export price and normal value within the meaning of Article 2.4 where it ignores the actual facts. The EU cannot ignore how the exporter structures its business, the expenses it actually incurs in making the investigated sales, and the net revenue it receives. It cannot instead replace those amounts with imputed expenses that may have been incurred based on a notionally-different means whereby the exporter could have structured, or used to structure, its sales.

### 2.5 The Commission's adjustment for "profit" and for indirect selling expenses was improper and resulted in a non-"fair comparison"

2.20. Above and beyond the fundamentally improper nature of the Commission's deduction, the very items (and the labels applied to these items) deducted by the Commission demonstrate that this adjustment violates Article 2.4.

2.21. To recall, the Commission's deduction consists of two elements: "profit" and "indirect selling expenses". Both items are improper elements to be deducted in determining the ex factory price (whether on the export or normal value side).

2.22. First, profit is not an item to be adjusted for. It is not customary for investigating authorities to deduct "profit" when determining the ex factory price, whether on the normal value or on the export side. This is because dumping is international price discrimination, and "price" includes profit. Indeed, the conventional theory is that dumping is "unfair", because the exporter is using "high profits" from the domestic market to finance "low profits" (or losses) in the export market. Profit is also not deducted because, after deducting profits, only costs would remain. However, costs should be the same no matter where the product is subsequently sold.

2.23. Hence, the items to be adjusted for under Article 2.4 are expenses. However, "profit" is not an expense; "profit" is a residual amount, after all costs and expenses have been deducted from the price.

2.24. Further proof that profits are not to be deducted is the fact that a constructed normal value includes an amount for profit, as per Articles 2.2 and 2.2.2 of the Anti-dumping Agreement. (The only exception to the rule that profits are not to be deducted is in the context of a constructed export price, which was a controversial topic in the Uruguay Round and is not at issue in this dispute).

2.25. Second, the Commission deducted ICOFS' indirect selling expenses. Indirect selling expenses (items such as sales department staff salaries, advertising, office expenses of sales departments, etc.), as opposed to *direct* selling expenses (such as freight, insurance, etc.), are normally not deducted when determining the ex factory price. This is also supported by the fact that, in the construction of normal value, indirect selling expenses are included. In the case at hand, however, the Commission − without any explanation − deducted ICOFS' indirect selling expenses when calculating the ex factory export price. However, the Commission proceeded entirely differently when calculating normal value. It did not deduct any indirect selling expenses when determining the ex factory normal value; and, correspondingly, it included indirect selling expenses when constructing normal value for certain product models. Hence, the Commission deducted items on the export price side that it did not deduct on the normal value side. This asymmetry further vitiates the Commission's comparison, renders it unfair, and contributes to the violation of Article 2.4.

### 2.6 The criteria relied on by the Commission for justifying the adjustment are irrelevant, factually incorrect or involve ignoring or distorting record evidence

2.26. In the Amending Regulation, in which it justified its differential treatment of PT Musim Mas from that of Ecogreen, the Commission highlighted certain criteria as supporting its determination. In Indonesia's view, none of these criteria has any relevance in determining whether the involvement of ICOFS "affect[s] price comparability". Moreover, in its treatment of these criteria, the Commission repeatedly ignored or distorted record evidence.

### 2.6.2 The Commission improperly relied on "direct" export sales

2.27. The Commission relied on the fact that PT Musim Mas, rather than ICOFS, featured as the official selling party on a certain proportion of export sales (the so-called "direct" export sales). This, in the Commission's view, meant that certain export sales were "performed" by PT Musim Mas "from Indonesia"[1] and that PT Musim Mas was not "using" its sales department in Singapore for these export sales.[2]

2.28. This characterization is demonstrably incorrect and highly misleading. PT Musim Mas explained repeatedly during the investigation, and supported by evidence, that, with respect to these "direct" export sales, ICOFS handles all contact with the client, as well as negotiates and arranges the sale, just as it does for all other export sales. However, in certain instances, the client (typically Asia-based clients) prefer for PT Musim Mas to feature on the contract as the formal selling party, in order for the client to obtain an Indonesian certificate of origin. In order to accommodate this client preference, as the final step in the standard formal sales process, ICOFS sends PT Musim Mas a **[***]**. (No client ever contacts PT Musim Mas directly). Subsequently, PT Musim Mas ships the products, as it does for all other export sales.

2.29. Hence, **all** (export) sales are negotiated and arranged by ICOFS; and **all** (export) sales are physically "performed" (shipped) out of Indonesia. It therefore amounts to a distortion of the record evidence when the Commission found that the "direct" export sales are somehow different due to being "performed" out of Indonesia. Moreover, Indonesia fails to understand why the mere formality of PT Musim Mas appearing on the contract, rather than ICOFS (a difference driven entirely by client preferences), should be one of the decisive criteria for considering that PT Musim Mas and ICOFS operate at arm's length and are fundamentally different from Ecogreen (which also has "direct" export sales, for the same reason as PT Musim Mas). If anything, the flexibility of adapting one formal aspect of the sale depending on what the client communicates to ICOFS is further evidence of the tightly knit relationship and cooperation between the two companies.

2.30. In any event, and leaving aside all of the above, the Commission failed to explain the significance of the "direct" export sales for the key issue at hand; namely, why, with respect to the sales under investigation, the involving of ICOFS and any transfer of funds from PT Musim Mas to ICOFS should be regarded as a sales expense that affects price comparability.

### 2.6.3 The Commission improperly relied on ICOFS' other trading activities

2.31. As another criterion for distinguishing PT Musim Mas from Ecogreen, the Commission stated in the December 2012 Amending Regulation that, because "the trader's overall activities [are] based to a significant extent on supplies originating from unrelated companies", the "trader's functions are therefore similar to those of an agent working on a commission basis."[3]

2.32. Indonesia fails to see the relevance of the activities of the trader's office that involve products outside of the scope of investigation. The Commission's task was to decide whether, with respect to the sales under investigation, the allocation of funds between PT Musim Mas and ICOFS is an expense that affects price comparability. For Indonesia, it is clear that transactions between ICOFS and unrelated third parties, of products outside the scope of investigation, have nothing to do with the transactions between PT Musim Mas and ICOFS.

2.33. To the extent that these third party sales can shed any useful light on the question before the Commission, they would have to relate to the overall relationship between ICOFS and PT Musim Mas, for instance, regarding corporate control, management and operational decision-making such as pricing decisions. However, the Commission made no attempt to examine such circumstances and merely looked at the quantities of these sales (which, in any event, it did not disclose or otherwise discuss).

2.34. By way of example, had the Commission examined these "third party" purchases and sales in more detail, it could have found that these sales are oftentimes an integral part of how PT

[1] Amending Regulation, para. 27. Exhibit IDN-5.
[2] EU's First Written Submission, para. 98.
[3] Amending Regulation, para. 29. Exhibit IDN-5.

Musim Mas interacts with ICOFS and how ICOFS closely coordinates such purchases and sales with PT Musim Mas. Specifically, for a number of products (although not including the product under investigation), ICOFS may sometimes purchase from third parties in order to sell to clients that normally purchased PT Musim Mas-produced products. This will occur when, on any given occasions, **[***]** Had the Commission properly investigated the issue, it would have been informed about these matters.

### 2.6.4 The Commission improperly considered that the existence of a sales and purchasing agreement as well as certain clauses of that agreement support the contested deduction

2.35. As the third criterion, the Commission relied on the fact that a sales and purchase agreement ("S&P Agreement" or "transfer pricing agreement") existed between PT Musim Mas and ICOFS. It also relied on unspecified elements of the content of this agreement, in rejecting PT Musim Mas' explanation that this contract was a "master agreement to regulate transfer prices between [the] related parties".[4]

2.36. The contract governs sales from PT Musim Mas and ICOFS. It was concluded in order to demonstrate to both Singaporean and Indonesian tax authorities arm's length pricing practices applied by the companies. Such transfer pricing agreements (or intercompany agreements) are a daily occurrence in business practices. In its Answers to the Panel's first set of questions, Indonesia presented several exhibits to support this point, including general advice to private companies from a reputed law firm about intercompany/transfer pricing agreements and how to conclude them; as well as two templates for intercompany/transfer pricing agreements that contain clauses identical or very similar to those of the S&P Agreement between PT Musim Mas and ICOFS.

2.37. It is nonsensical to argue that two related companies become arm's length companies because they conclude an intercompany agreement that looks like, or seeks to imitate, an agreement between unrelated companies. As demonstrated by Indonesia's evidence above, it is the very purpose of intercompany agreements to structure commercial interaction in a manner that reflects practices between unrelated companies.

2.38. The Commission also relied in its determinations on certain aspects of the S&P Agreement. For instance, it relied on the fact that the trading office "was involved in a range of different palm oil-based products".[5] Indonesia does not understand what relevance this criterion has for the issue at hand and why the Commission thinks this point proves anything. The Commission also claimed that ICOFS bought products from PT Musim Mas under "one single contract without distinguishing among products".[6] This statement is factually incorrect, because the transfer pricing agreement does differentiate between products. Moreover, even if true, lack of, or limited, differentiation would suggest − if anything − that the two companies do not deal at arm's length.

2.39. The Commission left unanswered − as does the EU in these proceedings − the simple fact that this type of transfer pricing agreement/intercompany agreement reflects international practice and is recommended by international transfer pricing guidelines, including those issued by the OECD and the United Nations. Such recommendations also exist in transfer pricing guidelines at the national level in numerous jurisdictions, including in the EU's own legal order.

2.40. During the panel proceedings, the EU has also provided certain ex post rationalisations concerning other specific clauses of that agreement, not mentioned in the Commission's determinations. Besides being procedurally inadmissible, the EU's reliance on these elements is also misplaced as a matter of substance. For instance, the allocation of risk between PT Musim Mas and ICOFS is customary for this kind of agreement. PT Musim Mas even highlighted this risk allocation, on its own initiative, to the Commission during the investigation, to argue that − contrary to the Commission's view − this risk allocation demonstrated that ICOFS did not act as an "agent working on a commission basis", as stated by the Commission. During the investigation, the Commission ignored these arguments. Now, in the WTO proceedings, the Commission impermissibly relies on them *to argue the opposite*. Besides being incorrect on substance, this is procedurally unfair and arbitrary.

[4] Amending Regulation, para. 30. Exhibit IDN-5.
[5] Amending Regulation, para. 28. Exhibit IDN-5.
[6] Amending Regulation, para. 29. Exhibit IDN-5.

2.41. As another example, the Commission's reliance on the clauses concerning the manner of communication between the contracting parties and the clause concerning dispute resolution makes no sense. These clauses are entirely consistent with how related parties structure intercompany/transfer pricing agreements. Indonesia has submitted evidence to this effect.[7]

### 2.7 The Commission ignored or distorted further evidence that suggests that PT Musim Mas and ICOFS are closely intertwined and closely cooperate, including on the sales at issue

2.42. Although it purported to analyse the relationship and the mutual "functions" of PT Musim Mas and ICOFS, the Commission ignored relevant evidence of how closely the two companies are related and operate. For instance, as part of its Questionnaire Response, PT Musim Mas submitted highly confidential cost data pertaining to ICOFS. Needless to say, a producer would never have access to such confidential data of an independent trader. The tight relationship between PT Musim Mas and ICOFS is even implied in how the Commission initially treated the two companies. Indeed, in a pre-verification visit letter addressed to PT Musim Mas' lawyers, the Commission referred to ICOFS as "the company's premises in Singapore ([ICOF-S])".[8]

2.43. Furthermore, ICOFS staff assisted PT Musim Mas throughout the anti-dumping investigation. During verification, ICOFS staff was present at the PT Musim Mas' verification and answered questions on PT Musim Mas domestic sales and on technical issues concerning PT Musim Mas' plant in Indonesia.

2.44. Finally, ICOFS is involved in PT Musim Mas' domestic sales in the same manner as it is involved in export sales (the only exception being that it is formally PT Musim Mas that signs all domestic sales agreements). However, ICOFS does not **[***]** for its involvement on domestic sales. The Commission did not contest this evidence during the investigation. The involvement of ICOFS **[***]** in the domestic sales process (as well as its involvement **[***]** in certain export sales) demonstrates that the two companies do not deal with each other at arm's length.

### 2.8 The Commission's proffered logic for the adjustment is internally inconsistent

2.45. The lack of principled reasoning underpinning the contested adjustment is also discernible from how the EU explained its logic during the first panel hearing: According to the Commission, PT Musim Mas pays a "commission" to ICOFS on export sales, but not on domestic sales. Consequently, the EU explained, the Commission made the adjustment for ICOFS' "commission" on export sales, but not on domestic sales. However, because the two companies are related, the Commission did not use the amount/percentages actually paid by PT Musim Mas to ICOFS, but rather changed the amounts to be deducted. The EU cannot contest that ICOFS negotiated and arranged PT Musim Mas' domestic sales in the same manner as it negotiated and arranged PT Musim Mas' export sales. However, the EU argues, ICOFS did not **[***]** on the domestic sales, no money changed hands and therefore no adjustment was warranted.

2.46. However, inconsistently with the above explanation, the EU made the adjustment on **all** export sales, including the "direct export sales", even though **[***]** Thus, the Commission violated its own approach and its own logic. To be consistent with its own logic, the Commission should have made the adjustment only for those export sales in which ICOFS featured as the formal contracting party and on which ICOFS retained a mark-up, and it should not have made the adjustment for the "direct" export sales.

2.47. In addition to highlighting the internally inconsistent approach of the EU, the fact that ICOFS did not **[***]** on the "direct" export sales further demonstrates the non-arm's length nature of the dealings between the companies. It bears repeating that ICOFS negotiates and arranges all export and all domestic sales. However, ICOFS receives **[***]** Clearly, an independent trader would never do so.

[7] See Indonesia's exhibits IDN-52, IDN-53, and IDN-54.
[8] Letter from the European Commission to PT Musim Mas, 5 November 2010, p. 1. Exhibit IDN-41.

### 2.9 The EU's incorrectly argues that the Panel should reject Indonesia's arguments in case it disagrees with the label "single economic entity"

2.48. As part of its legal argument, the EU has stated that, if the Panel does not consider the "single economic entity" or "closely related parties" terminology or criteria for addressing this issue to be the optimum, the Panel should reject Indonesia's claim. According to the EU, if Indonesia has not guessed precisely how the Panel would interpret and articulate the meaning of the Article 2.4, including the phrase "to affect price comparability", in the context of transactions between related parties, Indonesia's claim should be rejected.

2.49. This, of course, is incorrect. Indonesia's claim is that the EU has violated Article 2.4 because it has made an adjustment for something that does not "affect price comparability" within the meaning of Article 2.4, thereby failing to conduct a "fair comparison" under that provision. Indonesia's argument as to why the transactions, or the transfers between PT Musim Mas and ICOFS, do not affect price comparability is expressed through the term "single economic entity" or "closely related parties" test. However, even if the Panel does not wish to rely on the "single economic entity" or "closely related parties" language or test proposed by Indonesia, the Panel has to provide what it considers to be the correct interpretation of, or the correct legal standard under, the phrase "to affect price comparability" in the context of transactions between closely related parties under Article 2.4. The Panel must then apply that legal standard to the facts before it. Indonesia's claim would not fail simply because the Panel might articulate the relevant legal standard in different words or using different concepts than the complainant.

2.50. This is because no party bears the burden of providing the correct legal interpretation to a WTO dispute settlement body. This principle − also known as "iura novit curia" − has been affirmed by the Appellate Body in several decisions, including in *EC − Tariff Preferences,*[9] *EC - Hormones*[10] *and EC − Export Subsidies on Sugar.*[11]

2.51. Therefore, in summary, it is for the Panel in this dispute to decide what the phrase "to affect price comparability" means in the context of transfers of funds between closely related parties and non-arm's length transactions. Should the Panel consider pertinent Indonesia's proposed legal standard of "single economic entity" or "close relationship", the Panel can rely on this standard. Should the Panel disagree with this articulation of the legal standard, the Panel is bound by Article 11 of the DSU to enunciate its own version and to apply it to the facts before it.

### 2.10 The Commission's differential treatment of PT Musim Mas and Ecogreen further highlights the unjustified character of the Commission's adjustment

2.52. Another arbitrary aspect of the Commission's adjustment for PT Musim Mas is the different treatment of that company from the treatment of the second Indonesian exporter, Ecogreen. Specifically, the Commission relied on the existence of direct export sales; the existence of the written S&P Agreement; as well as the type and extent of other activities of the sales department to justify the differential treatment between PT Musim Mas and Ecogreen. This reasoning is flawed and further demonstrates the arbitrary nature of the Commission's determination.

2.53. Indonesia submits that the Panel should bear in mind that the Commission initially determined that the companies should be treated the same, because they were in an identical position. Subsequently, the Commission turned around and determined the exact opposite, arguing that the two companies were situated so fundamentally differently as to warrant an entirely different treatment. Indonesia acknowledges that an investigating authority enjoys a degree of discretion in its assessment of the facts. However, the required "reasoned and adequate explanation" is seriously undermined where the investigating authority, within a span of a few months, goes from emphasizing the commonality between two companies for purposes of an adjustment to arguing that these companies are so fundamentally differently situated that they should be treated in diametrically opposite fashion. Where the investigating authority has itself, merely a few months earlier, espoused an entirely different explanation and interpretation of the same record evidence, it is particularly important to explain, in compelling terms, the plausibility of its now diametrically opposed conclusions.

[9] Appellate Body Report, *EC − Tariff Preferences*, footnote 220 to para. 105.
[10] Appellate Body Report, *EC − Tariff Preferences*, footnote 220 to para. 105.
[11] Panel Report, *EC − Export Subsidies on Sugar*, para .7.121.

2.54. In any event, the Commission's reasoning in the Amending Regulation is flawed. With respect to "direct" export sales, the Commission initially relied on the fact that both companies had "direct" export sales; and that for both companies these "direct" export sales" were "structural" and "permanent".[12] The Commission subsequently treats the initial criterion as irrelevant and decides that what matters is the quantity of these sales. This shift in reasoning is not explained.

2.55. In any event, the Commission has failed to provide any further context or description of the circumstances of these sales and what light these sales, or their respective quantities, might shed on question why amounts of money shifted between Ecogreen and EOS *should not* be considered an expense; and the amounts shifted between PT Musim Mas and ICOFS *should* be considered an expense.

2.56. With respect to the written S&P Agreement, the Commission fails to explain why the existence of such a written master transfer pricing agreement between PT Musim Mas and ICOFS should place PT Musim Mas in such a different position from Ecogreen. It stands to reason that, even in the absence of a written master agreement, some form of agreement and agreed-upon terms of sale − perhaps transaction-specific contracts or discernible from invoices − must have existed between Ecogreen and its trading department EOS. After all, the Commission found that Ecogreen also paid "commissions" to EOS. However, the Commission has made no reference to, nor has it analysed, any evidence submitted by Ecogreen on this point. Such evidence must, nevertheless, be part of the record, given that it would have been part of Ecogreen's response to its Questionnaire.

2.57. Moreover, Indonesia has presented evidence that demonstrates that some related companies choose to conclude intercompany/transfer-pricing agreements in order to facilitate their interaction with tax authorities, whereas other related companies choose not to do so. This type of choice, however, cannot influence the analysis of an anti-dumping investigating authority as to whether an adjustment between two related companies is warranted. In addition, unrelated companies may choose to use or not to use written agreements similar to the S&P Agreement. Contrary to the EU's assumption, how parties choose to memorialize their relationship is not as important as the substance or nature of that relationship.

2.58. Furthermore, the Commission's reliance on individual clauses of the written agreement is also misplaced. For instance, the Commission's reliance on the risk allocation between PT Musim Mas and ICOFS suggests that Ecogreen and ICOFS did not allocate risk between themselves or allocated that risk differently. However, the Commission has not pointed to any evidence whatsoever to substantiate this implied assertion. However, relevant information must be contained in the investigation record, in particular, in Ecogreen's Questionnaire Response.

2.59. With respect to other activities of the selling office, the Commission confirmed in the Definitive Regulation that EOS traded products from companies other than Ecogreen. Hence, the only difference appears to be the extent of such third-party sales. As noted above, the Commission has not explained why the extent of such sales should have any bearing on the determination whether, with respect to the investigated sales, PT Musim Mas and ICOFS should be considered as an SEE or closely related.

### 2.11 The Commission also acted inconsistently with Article 2.3

2.60. The EU also violated Article 2.3 of the Anti-Dumping Agreement, because the dumping margins for several sales were calculated using the constructed export price methodology of Article 2.3 and the third and fourth sentences of Article 2.4. Given this tight nexus between the two provisions, and the overarching role of Article 2.3 for the construction of the export price, an adjustment with respect to a constructed export price that violates Article 2.4 may also be said to mean that the constructed export price under Article 2.3 was also calculated improperly.

## 3. INDONESIA'S CLAIMS UNDER ARTICLES 3.5 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

3.1. The EU's determination is inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement, because the EU Commission failed to conduct a proper non-attribution analysis for two

[12] Definitive Determination, para. 33. Exhibit IDN-4.

"known factors". These two factors are (i) the "economic/financial crisis of 2008/2009", and (ii) "the effects of the difficulties faced by the EU domestic industry with access to raw materials and of the fluctuations in the prices of these raw materials".

### 3.2 The Commission failed to conduct a proper non-attribution analysis of the factor "financial crisis"

3.2. It is undisputed − and the EU accepts in these proceedings − that the financial crisis was a "known factor" other than dumped imports, in that it caused injury to the EU industry at the same time as the dumped imports. Nevertheless, the Commission's analysis of this factor is entirely inadequate and flawed for the following reasons.

3.3. First, the Commission's finding of causation is premised on the unexplained assumption that 2009 was the year in which the financial crisis started or the year in which its effects could first be felt. This is explicit in the Commission's reference to the year 2008 as "the year before the financial crisis" in paragraph 96 of its Definitive Regulation. The Commission thus relied on 2008 as a baseline period (counterfactual) during which the EU industry was unaffected by the financial crisis and during which injury reflected the effects of dumped imports only.

3.4. However, the assumption that the Union industry in 2008 was unaffected by the financial crisis, and that the financial crisis started only the following year, is contradicted by evidence in the record as well as by commonly known facts of which judicial notice can be taken. At the very least, the Commission should have provided a reasoned and adequate explanation for its view that the year 2008 could serve as evidence of a year in which dumped imports were the only injurious factor. However, it failed to do so.

3.5. The EU relies on various unrelated statements in the Commission's Provisional Regulation. It argues that the Commission did not find that the financial crisis began in 2009, but rather acknowledged that the crisis began showing some effects already in 2008. This argument, however, contradicts the explicit words of the Commission in paragraph 96 of the Definitive Regulation − the same factor cannot begin both in 2008 and also in 2009. Moreover, the passages from the Provisional Regulation to which the European Union refers paint a confusing picture. Some suggest that the crisis started in 2008; others imply that the crisis started in 2009; in its first written submission, the European Union seems to adopt an intermediary position, suggesting that the crisis existed in some fashion, but was not "clearly felt in 2008". All of these explanations are ex post rationalisations that may not be taken into account by the Panel. Moreover, the EU draws on the statements that, by their very nature, do not address the issue of causation/non-attribution, but instead deal with a description of injury indicators. An investigating authority does not satisfy the requirements of Articles 3.1 and 3.5 when its explanation is poorly structured, incoherent, illogical, and requires interested parties to piece together various disjointed statements scattered across the record.

3.6. Second, the Commission failed to "separate" and "distinguish" the injurious effects of the factor financial crisis from those of dumped imports. It may be recalled that the non-attribution analysis requires the investigating authority to examine the nature and the extent of the injurious effects of other factors.[13] The Commission accepted that the crisis affected the Union industry *through the same channels* as did the (allegedly) dumped imports, namely by reducing the demand for the Union industry's product and lowering sales prices. In other words, the Commission found that the *nature* of the effects of the financial crisis was the same as that of dumped imports. Thus, without knowing the *extent* to which the financial crisis affected the Union industry, the Commission was unable to distinguish between the injurious effects of dumped imports and the financial crisis, respectively, and therefore could not make its causation and non-attribution finding in a manner consistent with Article 3.5.

3.7. Third, the Commission failed to address the parties' arguments and record evidence that contradicted its conclusion. For example, the Commission failed to address Musim Mas' explanation that, in late 2009 and early 2010, imports from the countries concerned increased, but, at the same time, the profit of some EU companies as a whole and for the care chemicals segment in particular improved considerably. This casts in serious doubt the Commission's narrative that dumped imports, and their increased amounts, were responsible for the domestic industry's injury.

[13] Panel Report, *EC − Countervailing Measures on DRAM Chips*, para. 7.405.

In light of this argument, an entirely plausible (if not compelling) interpretation of the record evidence is that the injury to the domestic industry in 2008 was caused by the financial crisis, rather than dumped imports. The applicable standard of review requires an investigating authority to address alternative explanations of record evidence. Nevertheless, the Commission left this argument unaddressed.

3.8. Fourth, in its first written submission, the EU invoked the "correlation/coincidence" approach approved by the Appellate Body in *Argentina – Footwear (EC)*. However, both the panel and the Appellate Body in that dispute – just as the case law ever since then – treated "correlation/ coincidence" and "non-attribution" as separate elements of the causation analysis. In any event, the European Union's argument constitutes ex post rationalization, which should be rejected.

3.9. Finally, the Commission's conclusion with respect to the financial crisis, in paragraph 109 of the Provisional Regulation, is that the economic crisis "does not break the causal link established in relation to the low-priced dumped imports from the countries concerned". Indonesia submits that this "breaking the causal link" analytical framework and language is inappropriate to satisfy the non-attribution requirement. It is not methodologically possible to first establish a causal link for dumped imports and only then enquire about the injurious effects of other factors, by determining whether these factors "break" an already established causal link. This amounts to putting the cart before the horse. An investigating authority cannot determine a causal link between injury and dumped imports without looking at the effects of other injurious factors. Rather, an initial determination of the effects of other injurious factors is the logical basis for a determination whether the link between dumped imports and injury satisfies the standard for "causal link" of Article 3.5; it is also the logical prerequisite for ensuring that the effect of other factors is not improperly attributed to the dumped imports.

### 3.3 The Commission failed to conduct a proper non-attribution analysis of the factor "raw materials"

3.10. The Commission failed to conduct any analysis for the factor "raw materials". At the very outset of the investigation, interested parties provided argument and evidence that the domestic industry experienced injury due to insufficient access to raw materials and fluctuations in raw material prices. PT Musim Mas provided extensive explanations that the EU industry faces a structural disadvantage vis-à-vis Indonesian exporters, because Indonesian exporters have their own sources of raw materials. The EU domestic industry is, therefore, exposed to greater potential price fluctuations for these raw materials. This risk of price fluctuations materialized in particular during the financial crisis, starting in mid-2008; during this period, the price of the raw material decreased by over 60 per cent just between July and December 2008. The significantly longer lead-times for the EU industry, and the resulting greater exposure to price fluctuations, can leave the EU industry severely limited in its ability to compete with foreign producers.

3.11. In support, PT Musim Mas relied on raw material pricing data, as well as on other documents and record evidence submitted to the Commission. The accuracy of the price data was not disputed, nor was the fact that the raw materials account for "a substantial part of the overall production costs" in the fatty alcohols production process. It was similarly demonstrated, undisputed and verified that some EU companies depend on the supplies of raw materials by their Indonesian competitors, and that the long duration of raw material shipments from Indonesia/Malaysia to the EU exposes the industry to price fluctuations.

3.12. The Commission rejected PT Musim Mas' extensive explanation and evidence on the grounds that it was allegedly unsubstantiated. This was the entirety of the Commission's explanation for its decision in paragraph 98 of the Definitive Regulation. This one-sentence finding is entirely inadequate and is inconsistent with the requirements of Articles 3.5 and 3.1. The extent of PT Musim Mas' arguments and evidence required the Commission to investigate whether the alleged factor was indeed an injurious factor for which a non-attribution analysis should have been performed.

3.13. To the extent that, notwithstanding the amount of argument and evidence placed before it, the Commission considered that it required further evidence, it was incumbent on it to gather such evidence. As an investigating authority, in these circumstances, the Commission was not permitted to remain passive, but rather had an active duty to investigate.

3.14. Indonesia also emphasizes that the violation of Article 3.5 does not reside in the Commission's failure to find that this factor was causing injury at the same time as dumped imports. Rather, the violation of Article 3.5 arises from the Commission's refusal to engage in any analysis at all.

3.15. The EU's defense in these proceedings is that the factor "raw materials" is part of the "conditions of competition", and was subsumed in the factor "economic crisis". This is in manifest contradiction to the Commission's determination. Both interested parties and the Commission treated the factor "economic crisis" as a separate factor, acknowledged its injurious effects and analysed (albeit inadequately) it. In contrast, the factor "raw materials" is treated in subsequent paragraphs of the determination; and the Commission stated explicitly that, with respect to this particular factor, the interested parties had failed to "substantiate" their assertions. Hence, the EU's defense is not only an ex post rationalisation, but is in direct contradiction to the content and structure of the Commission's determinations.

## 4. THE EU VIOLATED ARTICLE 6.7 BECAUSE IT FAILED TO REVEAL TO THE INTERESTED PARTIES THE RESULTS OF THE VERIFICATION VISIT

4.1. Indonesia's final claim is that the EU violated Article 6.7, because it failed to disclose the results of the verification visit, as required by this provision.

4.2. Article 6.7 requires the investigating authority to disclose the results of the verification either in a separate report or as part of its disclosure of the essential facts under Article 6.9 of the Anti-Dumping Agreement. In this case, however, contrary to Article 6.7, the EU did not disclose any meaningful information about the results of the verification visits to the premises of the Indonesian exporters and their affiliates.

4.3. It is undisputed that the Commissio0n did not issue a separate disclosure document. Instead, in the Provisional and Definitive Disclosures issued pursuant to Article 6.9, the Commission in essence only stated that verification had taken place and that unspecified information had been verified, unspecified errors had been corrected and additional unspecified information had been collected.

4.4. This is insufficient to comply with the requirements of Article 6.7. Article 6.7 requires the investigating authority to disclose the "results" of the verification visits, by means of one or other of two different avenues: the investigating authority may either (i) "make available" a separate report containing the results of the verification visits, or (ii) "provide disclosure" of the results as part of the disclosure of the essential facts under Article 6.9. Regardless of which avenue is chosen, the investigating authority must disclose the same thing − the "results" of the verification visit.

4.5. The "result" referred to in Article 6.7 is the "effect" or "outcome" of the verification visit. As with the "result" of any activity, the "result" of a verification visit is closely linked to the *conduct, content and purpose* of that verification visit. Indeed, the Appellate Body in *US − Steel Safeguards* stated that the term "result" is to be read as "an effect, issue, or outcome *from* some action, process or design".[14] Annex I(7) of the Anti-Dumping Agreement defines the purpose of a verification visit as to "verify the information provided or to obtain further details". The purpose, conduct, and content of a verification visit is thus to verify the information provided by the investigated firms in their questionnaire responses and to enable the investigating authority to obtain, and the investigated exporter to provide, additional information or explanations regarding the exporter's submitted questionnaire responses.

4.6. In the normal course of events, during a verification visit, an investigating authority will request the investigated company to provide access to its accounting system and other records, including all of the worksheets and source documents used to prepare the questionnaire responses. During the verification visits, the investigating authority normally reviews these documents and cross-checks them against the data provided in the questionnaire responses. The investigating authority also uses the opportunity to clarify any areas of doubt regarding the contents of the questionnaire responses. As part of this process, the investigating authority may,

[14] Appellate Body Report, *US − Steel Safeguards*, para. 315. (original emphasis).

for instance, request access to an entire category of documents or data or focus on certain specific documents.

4.7. Normally, therefore, a verification visit involves a quasi-audit of all information relevant to the company's operations with respect to the investigated product as explained in its questionnaire responses. There may be several "results" of the verification, for instance, the investigating authority will have collected additional documents, worksheets, copies of invoices, financial statements, etc. A proper listing/description of these documents and their contents, therefore, forms part of the "results" of the verification. The investigating authority may also have satisfied itself as to the accuracy of certain facts and figures contained in the exporter's questionnaire responses. The questions posed and answers received by which the investigating authority satisfied itself of this accuracy forms part, therefore, of the results of the verification. The investigating authority may have received corrections or additional explanations regarding matters in the exporter's questionnaire responses. These corrections or explanations are part of the "results" of the investigation. Next, the investigating authority may discover errors in the questionnaire responses. The ability or inability to correct these errors is also part of the "results" of the investigation. The "results" also include any reasons why a particular piece of information was not verified, including, for instance, because the exporter refused to provide the required information and did not provide access to the relevant documents.

4.8. This is precisely the conclusion reached by the panel in *Korea – Certain Paper*, which stated that "results" of verifications include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".[15]

4.9. It is also important to keep in mind the due process-purpose of the disclosure requirement under Article 6.7. As noted by the panel in *Korea – Certain Paper*:

> The purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results.[16]

4.10. In other words, the purpose of Article 6.7 is, inter alia, to enable exporters to safeguard their rights in an anti-dumping investigation and "structure their cases for the rest of the investigation in light of those results".[17] For this purpose, exporters must know what information *was not* verified – so that they can make further efforts to put the investigating authority in a position to ultimately verify that information – as well as what information *was* verified, since verified information must in principle be used by the investigating authority and the exporter thus need not any longer devote its scarce resources to convincing the authority about the reliability of that information.

4.11. Throughout these proceedings, the EU has sought to blur or even eliminate the difference between the disclosure of the *results of the verification*, pursuant to Article 6.7, and the disclosure of *essential facts*, pursuant to Article 6.9 of the Anti-Dumping Agreement. In its First Written Submission, the EU argues that the term "results" refers to the "essential factual outcome of the verification" or the "essential facts under consideration as established through the on-the-spot investigation".[18]

4.12. This is of course incorrect. Even if the investigating authority has the option of disclosing the "results" of the verification at the same time as disclosing the essential facts, the subject of these two sets of disclosures is different: "Results" of the verification visit, on the one hand, and "essential facts", on the other hand. The difference between these two terms is obvious not only as a matter of treaty interpretation – since the drafters used two different terms, they must have meant two different things. It is also obvious from the structure and the unfolding of an

[15] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added).
[16] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added).
[17] Panel Report, *Korea – Certain Paper*, para. 7.192.
[18] EU's First Written Submission, paras. 185.

anti-dumping investigation. More specifically, whereas the results of the verification become part of the investigation record, the essential facts are merely a subset of the facts on the record.

4.13. The verification team normally cannot or does not take any final decisions on how the verification will affect the investigating authority's determinations of dumping and injury in the investigation until they have returned home and had the opportunity to consult with their superiors and other colleagues on any issues arising during the verification. The verification is, therefore, in essence a fact-gathering and a fact-checking exercise. The results of this exercise, therefore, relate to what facts have been gathered and checked and, by implication, what facts have *not* been gathered or checked. However, the results of the verification do not include any *subsequent determinations* by the investigating authority as to how to use the results of the verification, and other items in the record, to calculate dumping margins for the exporter in accordance with the Anti-Dumping Agreement. The subsequent decision how to determine the dumping margins is the result of the *investigation* – and disclosed inter alia in the disclosure under Article 6.9 – and not the result of the *verification* that must be disclosed under Article 6.7.

4.14. The respective objects of the disclosure under Article 6.7 and 6.9 must also be clearly distinguished because disclosure pursuant to Article 6.7 may occur at a point in time well before the disclosure under Article 6.9. The investigating authorities of numerous WTO Members provide a separate "verification report"; in the chronology of anti-dumping investigations, this report is typically issued well before these authorities have decided on what constitutes essential facts. Indonesia of course accepts that an investigating authority may choose to disclose the results of the verification visit simultaneously with the essential facts, as reflected in the text of Article 6.7. However, that choice of the investigating authority may under no circumstances modify the type of information to be disclosed or otherwise result in an impairment of the procedural rights and position of the investigated parties. Otherwise, the term "results" would refer to different matters depending on when the authority decided to satisfy its obligation under Article 6.7. This interpretative outcome would be alien to basic principles of treaty interpretation and would subject the due process rights of investigated companies to discretionary choices by the investigating authority.[19]

4.15. Thus, the *results* of a verification visit are reflected in the investigating authority's choices as to (i) which information to look at; (ii) why it looks at that information and (iii) whether it is satisfied during the verification that a given specific piece of information or document was successfully verified. However, the results of the verification may also include information that was provided and substantiated by the exporter but that the investigating authority did not immediately consider relevant to its final determination.

4.16. Yet another consideration is that Article 6.7 is also intended to provide domestic courts (using their own standard of review) and WTO panels (using the standard of review pursuant to Article 17.6(i)) with the ability to review the determinations of investigating authorities. This ability depends on the existence of a proper disclosure of the "results" of the verification visit under Article 6.7 of the Anti-Dumping Agreement.

4.17. WTO case law – such as *Korea – Certain Paper* and *US – Steel Plate* – demonstrates that information contained in the disclosure of the verification results (whether through a verification report or with the disclosure of essential facts) – concerning the type of information verified; the authority's decision whether the information was verifiable, verified or not; as well as any attendant circumstances, such as behaviour of the investigated firm – plays an important role for a panel's ability to examine whether the investigating authority complied with Article 17.6(i) of the Anti-Dumping Agreement. A failure to disclose the results of the verification, or an incomplete disclosure, will thus significantly undermine a panel's ability to examine, in a "critical and searching" fashion, the establishment and evaluation of the facts by the investigating authority.[20] Similarly, only a proper reporting of the results of the verification visit will enable the appropriate judicial review within a WTO Member's domestic legal system, as required by Article 13.

4.18. Moreover, a failure by the investigating authority to describe accurately and in detail events during the verification visit is a failure to permit interested parties to see information that is relevant to the presentation of their cases. This is contrary to Article 6.2 - which requires that all

[19] Indonesia's Opening Statement at the First Panel Hearing, para. 98.
[20] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

interested parties have a "full opportunity for the defence of their interests"— as well as Article 6.4, which requires authorities, whenever practicable, to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases … that is used by the authorities … and to prepare presentations on the basis of this information".

4.19. In this case, the EU argues that the Commission provided the results of the verification visits as part of the disclosure of the findings of the investigation. However, these efforts were, at best, cursory and cannot be considered to have met the standard required under Article 6.7. For instance, the Commission failed to set out

- which specific types of information, documents, or issues were addressed in the verifications.
- which particular documents (e.g. sales invoices, rebate notes, etc.) were examined; and
- what questions were asked by the Commission officials or what answers were provided by the exporters.

4.20. The extent of the Commission's failure to disclose the results of the verification is clearly visible from a reading of the contemporaneous notes taken by PT Musim Mas' counsel during the verifications at that exporter's premises in Singapore, Medan, and Hamburg. These notes contain the kinds of basic information that are entirely absent from the Commission's purported disclosure of the verification results, namely, who attended the verifications, what documents were reviewed, what questions were asked, and what answers were given. There are several issues of critical importance to the Commission's subsequent adjustment of PT Musim Mas' export price and to Indonesia's related claim under Article 2.4 of the Anti-Dumping Agreement. As the counsel notes demonstrate, the issues at hand were discussed during verification, but were not subsequently disclosed by the Commission. These issues include the close corporate, management, organizational and operational links between PT Musim Mas and ICOFS; transfer pricing policy; the so-called "direct" export sales by PT Musim Mas; the manner in which ICOFS and PT Musim Mas co-operate on such export sales as well as for domestic sales; and the fact that ICOFS was involved in negotiating, preparing and executing each and every sale of PT Musim Mas' products, including domestic sales. The Commission's conclusion that ICOFS is not the sales department of PT Musim Mas, but rather stands in a commission-agent relationship with PT Musim Mas is in direct contradiction with this information.

## 5. CONCLUSION AND REQUEST FOR FINDINGS

5.1. For the above reasons, Indonesia respectfully requests that the Panel find that the European Union.

- Acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement, by making an improper deduction for the activities of PT Musim Mas' trading arm ICOFS and disregarded the fact that the two entities are part of an SEE;
- Acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, by failing to conduct a proper non-attribution analysis with respect to the factors "financial/economic crisis" and "issues related to the European Union's domestic industry's access to raw materials"; and
- Acted inconsistently with Article 6.7 of the Anti-Dumping Agreement, by failing to disclose to either of the investigated Indonesian exporters the results of the verification visit.

5.2. Indonesia thanks the Panel and the Secretariat team for its work so far. Indonesia looks forward to assisting the Panel in the subsequent stages of this dispute.

## ANNEX C-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

# 1 INTRODUCTION AND OVERVIEW

1.1. The key issue regarding Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement is that adjustments may be made only for actual/genuine expenses incurred by the seller that affect the price and therefore affect price comparability, within the meaning of Article 2.4. In this case, the EU's adjustment for internal transfers between the two arms of the seller, PT Musim Mas and ICOFS did not reflect an actual expense that was incurred by the seller. Therefore, the internal transfer did not reduce the net price received by the seller for the goods. The EU has failed to address this issue or to explain how this was any other than a purely notional adjustment, based on what might have happened had the producer/exporter structured its business differently.

1.2. Regarding Indonesia's claim under Article 3.5 of the Anti-Dumping Agreement, the EU has failed to show where the Commission provided a reasoned and adequate explanation of the factors raised by Indonesia. Instead, the EU relies on *ex post* explanations, which in any event, frequently contradict record evidence or are internally inconsistent. Finally, the EU's arguments under Article 6.7 of the Anti-Dumping Agreement cannot surmount the fact that the Commission simply failed to provide the investigated companies with any meaningful "results" of the verification visit.

# 2 INDONESIA'S CLAIM UNDER ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

## 2.1 Indonesia's claim does not hinge on the label "single economic entity"

2.1. The EU continues to argue that Indonesia's claim stands and falls on whether the Panel's decision adopts the terminology of a "single economic entity". Indonesia has explained at length that its legal claim is that the EU has acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by making an adjustment for an item that does not affect the price received by the seller and therefore does not affect price comparability, resulting in an "unfair comparison", within the meaning of Article 2.4.

2.2. In Indonesia's view – and in keeping with prior WTO case law and the EU's own domestic legal terminology – a suitable terminology for the process of considering whether transactions between related parties affect price comparability is to ask whether the two entities form a "single economic entity". However, the term "single economic entity" is nothing but a phrase intended to operationalize, in the context of related parties, the concept of "affect[ing] price comparability", within the meaning of Article 2.4. Needless to say, other labels are perfectly possible, e.g. whether two companies are sufficiently closely related or, to paraphrase the EU Commission, whether an adjustment is "appropriate". This is the term the Commission used when examining transactions between Ecogreen and EOS. The choice of the most appropriate label, as decided by the Panel, does not affect either the substance of the analysis or Indonesia's claim that the "mark-up" at issue is not an item that affects price comparability. If the companies at issue are sufficiently closely related or intertwined as to operate as a single entity, transfers between them do not affect the price they receive for the goods.

## 2.2 The EU's adjustment under Article 2.4 does not reflect an actual or genuine expense incurred by the seller

2.3. The central question under Article 2.4 is whether the adjustment is required to ensure price comparability. An adjustment is required for any item that affects price comparability; and, conversely, an adjustment is prohibited for any item that does not affect price comparability. Hence, the key issue is whether transactions between ICOFS and PT Musim Mas and the "mark-up" discussed in these proceedings affects the price received by the seller and hence price comparability. However, both the Commission and now the EU have failed to explain how the "mark-up" can be regarded as an actual or genuine expense incurred by the seller of the investigated goods.

2.4. Indonesia has explained in detail how a company's cost structure will be impacted by the different ways in which it may organize its business activities. For instance, if a producer uses an in-house sales department to conduct sales activities or an in-house transportation department to provide transportation services to its customers (or if a single economic entity uses separate legal entities within its structure for that purpose), the producer's expenses will be the financial outlay required to operate these departments or legal entities. In contrast, if the producer uses independent third party entities (traders or a transportation company) to provide these services for its customers, the producer's expenses will be the actual fees paid to these independent third party service providers. The difference between in-house expenses and actual fees paid to independent third parties cannot be blurred by pretending, for instance, that a producer that in reality is using an in-house sales department is actually relying on an independent trader. The difference between these two scenarios has significant implications for the nature of the expense (cost vs. a commission) and the amount (one may be higher than the other, which is the very reason why companies choose one option over the other).

2.5. Indonesia has provided multiple examples − along with numerical values in table format − to illustrate this point. The EU has not addressed any of these arguments or examples directly. The EU cannot make notional or fictitious adjustments as if PT Musim Mas were using (or were continuing to use) an independent trader, if the company in reality is relying on a sales department with which it is tightly integrated and with which it jointly sells the investigated product.

2.6. Moreover, there is not a shred of evidence in the record of the investigation to suggest that the "mark-up" represents the amount of an actual commission paid by the seller on these sales. Even the Commission did not consider that the "mark-up" was an actual commission. Instead, it decided that the actual "mark-up" was not reliable "in order to avoid any distorting effects that may arise from the transfer prices".[1] Consequently, instead of relying on the transfer prices, the Commission used "a reasonable profit margin" based on "a reasonable profit for the activities carried out by trading companies in the chemical sector". Thus, even in the Commission's view, the amount of the "mark-up" appears to be irrelevant: the Commission would, it seems, use a reasonable profit margin of other companies regardless of whether the "mark-up" was zero, the percentage amount set out in the S&P Agreement or some other (higher) amount. This makes clear that the Commission did not consider that the "mark-up" was an actual commission or expense, but merely the justification for making a *notional* adjustment.

2.7. It is clear also that even the Commission does not consider that either the actual "mark-up" between PT Musim Mas and ICOFS or the "reasonable profit" it used instead represents the actual selling, general and administrative expenses (SG&A) incurred by either ICOFS or PT Musim Mas for these sales. As Indonesia has explained, the Commission *also* deducted ICOFS' SG&A, suggesting that this adjustment was intended to represent profit (which is, indeed, the term used by the Commission − "a reasonable profit margin", "actual profit margins" etc). The EU now argues that this case concerns a direct selling expense in the form of a commission that is related to export sales only. There is, however, no suggestion in the Commission's determinations that the "mark-up" was an actual selling expense actually incurred by the seller − ICOFS and PT Musim Mas − in this case. Instead, it is clear that the Commission decided that the "mark-up" was *not* reliable but that it was nevertheless entitled to make a "notional" adjustment *as if* ICOFS and PT Musim Mas had used a different structure and process.

2.8. Moreover, the audited financial statements of PT Musim Mas and ICOFS provide *no evidence whatsoever* that the "mark-up" was an actual expense incurred by the seller − ICOFS and PT Musim Mas − in making the investigated sales. If PT Musim Mas had used an independent trader − or an agent working on a commission basis − a corresponding entry would exist in its financial records. However, there is no such entry. Instead, the "mark-up" is simply an allocation of revenue between the two arms of the producer/exporter, and the actual selling expenses are clearly recorded as SG&A expenses in the financial statements of the two companies.

2.9. Throughout this dispute, the EU has failed to establish that a commission was actually paid in this case. While the EU chooses to use the terms "commission" and "mark-up" interchangeably, and the EU's regulation defines "commission" to include a "mark-up", the EU has failed to show how a commission was actually paid in this case. Moreover, the EU has failed to explain the legal

[1] Definitive Regulation, para. 36. Exhibit IDN-4.

or economic justification for treating a "mark-up" as the same as an actual commission and imputing a notional expense to the seller in these circumstances. It has not explained how a transfer between two entities that form part of the investigated producer/exporter affects the price received by the producer/exporter for the investigated goods. It has not explained on what grounds it is permissible to ignore the actual sales structure and process, as well as the audited financial statements, of the producer/exporter in order to impute a notional expense in this case. The EU has not explained how the "mark-up" can be a cost to the "seller", when it is the party that actually sells the goods − ICOFS − that receives the "mark-up".

2.10. The EU has argued that Indonesia's argument is, in effect, that once two parties are related, there can be no adjustments for transactions between them. This is incorrect. Indonesia has made clear that there may be situations in which parties are related in the sense that there is some common stockholding but, overall, the relationship does not satisfy the *Korea − Certain Paper* criteria. In that case, it may be appropriate to treat the two parties as independent. In that case, however, several factors would be different than the present case: (i) it is unlikely that the investigating authority would reject the price charged by the producer to its not-closely-related affiliate as unreliable; (ii) if the not-closely-related affiliate was acting as an agent on commission basis, it would not take title to the goods and be treated as the "seller"; and (iii) any commission paid in those circumstances would likely be recorded as such in the audited financial statements of the seller.

2.11. Again, there is no evidence that this is an actual commission paid or actual expense incurred by the producer/exporter, even if the Commission considers that it has the right to proceed as if it is. The standard of review under Article 17.6(i) of the Anti-Dumping Agreement requires a panel to determine whether an investigating authority's "establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". In this investigation, the Commission ignored the actual facts regarding the expenses actually incurred by the producer/exporter and instead adjusted for a hypothetical, imputed commission that is based solely on the Commission's view of what expenses *would have been incurred if the producer/exporter used a different sales process* and determined that it is entitled to make an adjustment on that basis. In the absence of any evidence in the financial statements of either PT Musim Mas or ICOFS that the intra-company transfer of funds represented an actual expense to the producer/exporter as a whole, there is no basis for the Panel to find that the Commission's "establishment of the facts was proper".

2.12. Even assuming that the mark-up could be considered as a cost to PT Musim Mas, it is *revenue* to ICOFS. As explained in greater length in the next section, it is fundamental to note that the Commission treated both PT Musim Mas and ICOFS − taken together − as the seller. The export price on the basis of which an ex works price was calculated was the price charged by ICOFS to European customers, not the price at which PT Musim Mas sold to ICOFS. This means that both PT Musim Mas and ICOFS together were the seller. To the producer/exporter as a whole, therefore, the "mark-up" does not represent a cost: the cost to one entity and the revenue to the other cancel each other out. The EU has never addressed this point, nor provided any legal basis for a deduction for an amount which, under its own logic, is revenue to the very seller (ICOFS) on whose price it is basing its determination of export price.

### 2.3 The EU's determinations concerning the relationship between PT Musim Mas and ICOFS are contradictory

2.13. The starting point for the EU's determination of the export price was the price charged by ICOFS to the first unrelated customer in the EU. This means, in effect, that the Commission treated ICOFS as the seller of the investigated goods and PT Musim Mas/ICOFS together as the producer/exporter for whom a single dumping margin must be and was calculated in accordance with Article 6.10 of the Anti-Dumping Agreement.

2.14. The EU contends that there is no contradiction between the treatment of PT Musim Mas and ICOFS as a single entity for the purpose of identifying the starting price and as, in effect, separate entities for the purpose of adjustments. The EU argues that the use of ICOFS' price to the first unrelated customer in the EU merely flows from the reference in Article 2.1 to the price at which the investigated goods are "introduced into the commerce" of the investigating Member.

2.15. The EU omits, however, that the Commission's reliance on ICOFS' price to the first unrelated customer pre-supposes a finding by the Commission regarding the relationship between PT Musim Mas and ICOFS and the reliability of the transfer price between the two. Put another way, at the outset of the investigation, the Commission made a crucial choice to treat PT Musim Mas and ICOFS as a single entity. This choice entails logical consequences that the EU now seeks to avoid.

> In a number of cases the foreign producer will not sell directly to the Community. A trading house, for instance, may act as an intermediary between the foreign producer and the Community importer. … If the intermediate company is *independent* from the producer, provided that the producer knows when selling to the intermediate company, that the final destination of the goods is the EC, *the export price is normally the price charged by the foreign producer to the intermediate company for further resale* to the Community … In principle*, related sales subsidiaries* located in the country of the producer *will be treated as an export sales department* of the producer and *the export price will be determined on the basis of the prices charged by the related company to the first independent customer* in the Community … *The same approach may also be taken with respect to related sales subsidiaries located in a country other than the producer.* In *Welded Tubes*, the Commission acknowledged that the prices charged by a company located in a country other than that of the producer and performing the tasks of an export department (e.g., conclusion of export contracts, invoicing and collection of payments) had to be taken into account for the dumping calculation.[2]

2.16. The EU's decision to use the price charged by ICOFS to the first unrelated customer in the EU is, therefore, not simply a matter of applying the definitional provisions of Article 2.1 of the Anti-Dumping Agreement. It also involves a decision by the investigating authority regarding the relationship between PT Musim Mas and ICOFS that has important consequences for the rest of the Commission's analysis. If ICOFS were an independent "trading house", the Commission would have used the price charged by PT Musim Mas to ICOFS "for further resale to the [Union]" as the basis for the export price. Instead, the Commission drew the normal distinction "between intermediate companies that are independent from the producer and those that are related to the producer". The Commission treated the "related sales subsidiary" ICOFS as "an export sales department of the producer" that was "performing the tasks of an export department" and used ICOFS' price to the first unrelated customer as the starting point to determine the export price. Again, put another way, the Commission treated PT Musim Mas and ICOFS as a single entity.

2.17. In the words of the description quoted above, ICOFS was treated as the *export sales department* of the producer and *the export price was determined on the basis of the prices charged by the related company to the first independent customer* in the EU. As a result, PT Musim Mas and ICOFS were treated as a single "producer/exporter" or "seller" for the purposes of determining dumping margins. Again, contrary to the EU's arguments, this necessarily involved a determination by the Commission regarding the relationship between them.

2.18. To illustrate how all this works in practice, an investigating authority may be faced with three distinct sales structure and processes that are relevant to this determination. In a **Scenario 1,** the exporter sells to an independent trader, who then re-sells to the investigating Member. In this case, the investigating authority will ask the producer to report all sales to the independent trader for which the producer knows in advance that the destination is the investigating Member. Clearly, the Commission found that this is not the structure or process used by PT Musim Mas and ICOFS.

2.19. In a **Scenario 2,** the producer sells directly to customers in the importing Member, but pays a commission to an independent trader for arranging the sales. Here, the producer (but not the independent trader) would be the seller of the goods and would report its sales directly to the customers in the importing Member. The starting price for determining the net export price would be the price charged by the producer. The commission paid to the independent trader would be a direct selling expense. Again, the Commission clearly found that this is not the structure or process used by PT Musim Mas and ICOFS, as the starting price used was the price charged by ICOFS.

[2] Anti-Dumping and Other Trade Protection Laws of the EC, Van Bael & Bellis, pp. 87-89 (italics added). Exhibit IDN-69.

2.20. Finally, in a **Scenario 3,** the producer sells to a related trader who then sells to the importing Member. In this case, the investigating authority must determine whether the relationship between the producer and the related trader is such that the prices between them are unreliable. Once it makes this determination, it will ask them to report the sales by the related trader to the customer in the importing Member rather than the sales from the producer to the related trader as the starting point for the determination of the export price. Clearly, the Commission found that this is the sales structure and process that exists with respect to PT Musim Mas and ICOFS in this case. In effect, the related trader acts "as the export sales department of the producer", and the two entities are, for all relevant purposes, a single economic entity.

2.21. Contrary to the EU's assertion, therefore, there is a clear contradiction between the Commission's determination to treat PT Musim Mas and ICOFS as a single entity for the purpose of identifying the starting price for the calculation of dumping margins and for the purpose of determining a single margin of dumping within the meaning of Article 6.10, on the one hand, and deciding to treat them as if they operated independently for the purpose of determining adjustments to the export price, on the other. The Commission cannot, on the one hand, determine that PT Musim Mas and ICOFS are, together, the producer/exporter or seller of the goods and then, on the other hand, determine that their relationship is one of seller and independent trading company. At a minimum, the Commission has failed to provide a reasoned and adequate explanation of how this contradiction can be reconciled.

2.22. The EU has failed to address the implications of its finding − for this purpose at least − that PT Musim Mas and ICOFS are a single entity. The EU has not explained how money transfers between two pockets of a single producer/exporter − which PT Musim Mas and ICOFS undoubtedly are for the purposes of this case − affect the ex works price received by the producer/exporter for its export sales of the investigated producer.

2.23. Put another way, the "mark-up" represents part of the price that the seller, ICOFS and PT Musim Mas, receives for the sale. Their decision, as closely intertwined parties, on how to allocate that revenue between them, does not in any way affect the price received for the sale. The price received by the seller − ICOFS and PT Musim Mas taken together − would not change whether the amount of the "mark-up" were in a different amount or zero. To put this in practical terms, assume the price charged by PT Musim Mas/ICOFS to the first unrelated customer was increased by 20%. PT Musim Mas /ICOFS could decide − for tax or other internal reasons − that the additional 20% revenue would be split 50-50 between them. They could decide that all of the additional revenue could go to ICOFS. Or they could decide that it would all go PT Musim Mas. In all of these three scenarios, the actual price received by the seller remains the same, and the expenses actually incurred by the seller remain the same. Similarly, the amount of the expenses actually incurred by ICOFS and PT Musim Mas does not change regardless of whether the "mark-up" is a different amount or zero. Thus, the "mark-up" does not affect the price and, hence, price comparability.

2.24. However, under the Commission's approach, however, the choice between the 50-50 and the other options would have a decisive impact on the ex works price and on the dumping margins. This lacks logic under any scenario.

### 2.4 The EU has made deductions for items that are normally not deducted from the ex works price and that the EU did not deduct for the ex works price on the normal value side

2.25. First, the EU has not addressed that the ex works price normally *includes* SG&A expenses incurred by the seller in each of the domestic and export markets. The sole exception in this case is the deduction the Commission made for the SG&A incurred by ICOFS and deducted from the export price as part of the contested adjustment. Where the Commission seeks to establish the net price at an ex works level that normally includes the indirect selling expenses/SG&A incurred by the seller, and it includes indirect selling expenses/SG&A in the normal value, there is no legal basis to deduct any indirect selling expenses/SG&A of the seller from the export price. The same applies to any revenue that could be considered as part of the profit of the seller.

2.26. Secondly, the EU has not provided any justification for the deduction of any amount that is the "profit" of the seller (or that serves as a proxy for that "profit"). The determination of price discrimination involves a comparison of two prices (normal value and export price) in order to identify whether the seller is obtaining a lower return on sales in the export market than on sales in the domestic market. Deducting profit from the export price necessarily reduces the return achieved by the seller on the export sales and distorts the comparison unfairly. To the extent that the Commission purports to have deducted *profits made by the seller, ICOFS,* the EU has provided no justification for this deduction. Moreover, unless the Commission can establish that *the entire amount it deducted* represented an *actual expense* of the seller, Indonesia sees no legal basis for the adjustment.

### 2.5 The differential treatment of PT Musim Mas and Ecogreen

2.27. The EU continues to mischaracterize Indonesia's arguments concerning the differential treatment of PT Musim Mas and Ecogreen. Indonesia does not argue that the differential treatment *per se* amounts to discrimination. Rather, Indonesia argues that the Commission's reasoning explaining its differential treatment of the two companies is part and parcel of the Commission's explanation for why it made the adjustment for PT Musim Mas and must be measured against the benchmark of a "reasoned and adequate explanation".

2.28. Indonesia has previously explained that the three key criteria relied on by the Commission to differentiate between the PT Musim Mas/ICOFS and Ecogreen/EOS, respectively, are not meaningful and provide no insight into whether the allocation of income between the producer and the trading arm affected price comparability. The EU has failed to respond or explain why the three sets of criteria − "direct" export sales; the existence of a written as opposed to a verbal agreement; and third party sales − are relevant for determining whether a monetary transfer between two related parties affects price comparability. In Indonesia's view, none of these criteria has any relationship with the question at hand.

2.29. The Commission's determination is also undermined by the fact that it examined the existence of corporate and management links in the case of Ecogreen/EOS, but not in the case of PT Musim Mas/ICOFS. The silence of the Commission on this point for PT Musim Mas cannot be read − as the EU argues − that the Commission acknowledged that both companies were closely related to their sales entity, but that this criterion was not of any further relevance. A panel cannot take the defending Member at its word, but rather must find direct evidence in the record and in the investigating authority's reasoning that a particular analysis was undertaken. Any ambiguity in this regard must be interpreted to the detriment of the investigating authority, which is required to provide a reasoned and adequate explanation.

2.30. The absence of any reference or explanation in this case is compounded by the fact that the Amending Regulation does not make clear what weight the Commission attached to the "common ownership/control" criterion, relative to the other criteria, in its analysis of Ecogreen/EOS. Thus, even if the remaining criteria were meaningful and relevant, the Commission's reasoning would still be deficient, because it remains entirely unclear how the Commission weighted, in relative terms, the differences between the two producer/exporters versus the common, shared feature of "common ownership/control".

2.31. The EU erroneously claims that it did not change its criteria in response to the Interpipe judgment and that "[t]he only change that occurred was to examine the factual situation of the interested parties in the light of the factual situation" in the Interpipe case.[3]

2.32. This appears to be nothing but semantics and merely another way of saying that indeed the criteria did change. The criteria changed from those used in the Definitive Regulation to those reflected in the *Interpipe* judgment and applied in the Amending Regulation. The *Interpipe* judgment contained not merely a set of facts, but the Court's view as to how EU law should be applied to those facts. In the Amending Regulation, the Commission purported to apply the interpretation by the *Interpipe* court to the facts of the fatty alcohols investigation (and made other changes below).

[3] EU's response to Panel question No. 43, para. 17.

2.33. In any event, it is simple logic that the criteria changed. In the Definitive Regulation, Ecogreen and PT Musim Mas were treated identically. In the Amending Regulation, they were treated differently. The facts had not changed. The EU's criteria must, therefore, have changed. It is not clear why the EU feels compelled to suggest otherwise.

2.34. Although an investigating authority enjoys a certain degree of discretion, which may also entail a change in the analytical framework applied during the investigation, it must comply with certain key principles.

2.35. First, the authority must provide a reasoned and adequate explanation for its determination. Second, where the authority previously reached a certain conclusion on the basis of a given set of facts; and then subsequently reaches the exactly opposite conclusion, without any change in the underlying facts; the investigating authority must address this point in its explanation. In other words, whether the second (amended) explanation is sufficient is determined, in no small measure, on whether the authority has adequately explained why the authority chose to alter its assessment criteria after the initial determination; how the new assessment criteria differ from the old assessment criteria; why the new assessment criteria are preferable to the old assessment criteria; and how the amended conclusion is justified in the light of the new assessment criteria.

2.36. The Commission also failed to explain in the Amended Regulation how it viewed and weighed its previous determination that the two producers/exporters were identically situated. The investigating authority must also explain how it weighed the previously found similarities between the producers/exporters, and its conclusion that the two producers/exporters were identically situated and warranted identical treatment, against the new assessment criteria that point towards differences between the producers/exporters.

2.37. The EU appears to consider that the Commission was entitled to radically change the assessment criteria, and reach a diametrically opposite conclusion, simply because the European Court decided that the new criteria were appropriate. However, the EU is not entitled to deference simply because the Commission acted in the light of a decision of an EU court.

## 3 INDONESIA'S CLAIMS UNDER ARTICLES 3.5 AND 3.1 OF THE ANTI-DUMPING AGREEMENT

3.1. The EU has failed to rebut Indonesia's claims that the Commission's non-attribution analysis of the factors "financial crisis" and "raw materials" is inconsistent with Articles 3.5 and 3.1 of the Anti-Dumping Agreement.

3.2. As a general defence, the EU alleges that Indonesia seeks to heighten the standard under Article 3.5, by imposing an obligation on investigating authorities to conduct a quantitative rather than a qualitative analysis of the effects of other factors. However, Indonesia's arguments merely reflect the well-established legal principle that investigating authorities must provide a reasoned, adequate, and meaningful explanation for their injury and causation determination. Moreover, with respect to the "raw materials" factor, it is useful to recall that the Commission did not provide *any analysis at all*. It simply brushed aside PT Musim Mas' extensive arguments and evidentiary references as "unsubstantiated", without any explanation whatsoever.

3.3. Indonesia is not arguing that the Commission erred because it did not agree with PT Musim Mas that poor raw material access for the EU domestic industry was a main cause (or simply a cause) of the injury experienced by the domestic industry. Whatever the ultimate result the Commission may have reached, at the very least, PT Musim Mas' arguments and evidence required *some* degree of analysis.

3.4. The EU's arguments draw on random, unconnected statements and figures in sections of the determinations that the Commission never intended to be part of its non-attribution analysis. Indonesia is not arguing that the Panel cannot, as a matter of principle, look beyond the "non-attribution" heading in analysing the Commission's findings. In Indonesia's view, however, the fact that a particular statement is under a different heading is a good indication that the investigating authority did not intend this statement to be part of its causation analysis.

3.5. Measured against the well-established standard of review applicable in disputes involving anti-dumping matters, all of the EU's *ex post* arguments must be rejected.

### 3.1 The Commission failed to conduct a proper non-attribution analysis of the factor "financial crisis"

3.6. With respect to the "financial crisis" factor, the EU failed to explain why the Commission refused to address the exporter's argument concerning the EU industry's profits in late 2009 and early 2010. During that time period, imports from the countries concerned increased, but at the same time the profit of some EU companies as a whole and for the care chemicals segment improved considerably.

3.7. Furthermore, the Commission refused to address the issue of captive demand, raised by PT Musim Mas in Exhibit IDN-35 in support of its argument that the injury to the EU industry was caused by the factor "financial crisis", rather than by dumped imports. In a nutshell, the logic of this argument was that the financial crisis led to reduced captive demand for fatty alcohols (FOH)-downstream products, such as ethoxylate or surfactants. This, in turn, resulted in lower demand for FOH itself, especially for premium branded products produced by EU companies. Before the EU FOH-producers adjusted to this situation, their continued production at previous levels created an oversupply of FOH, which led to a decrease in the price of FOH in the EU market. Subsequently, there was lower capacity utilization by the EU companies. Both of these phenomena − price decreases and/or lower capacity utilisation − were relied upon by the Commission in its finding of injury, but improperly attributed to imports.

3.8. In Indonesia's view, at the very least, the EU Commission had a duty to investigate and analyse the EU industry's profits in late 2009 and early 2010, and the issue of captive demand. By ignoring entirely PT Musim Mas's arguments and evidence with respect to these issues, the EU Commission acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

### 3.2 The Commission failed to conduct a proper non-attribution analysis of the factor "raw materials"

3.9. With respect to the factor "raw materials", the EU alleges that Indonesia's entire case rests on a few paragraphs in PT Musim Mas's comments on the Complaint, and that, in all of the subsequent comments and communications, PT Musim Mas failed to repeat its arguments with respect to this factor.

3.10. However, PT Musim Mas' arguments and evidence constitute an extensive narrative contained in PT Musim Mas' Comments on the Complaint, which Indonesia quoted and described in its first written submission and its responses to Panel questions 20 and 24. Furthermore, as the EU acknowledges, after setting out its detailed arguments in its initial submission, PT Musim Mas referred consistently to the "raw materials" factor as an independent "known factor" throughout the remainder of the investigation, in particular in its Comments on the provisional determination.

3.11. The EU is also incorrect to suggest that, faced with the Commission's silence in the provisional determination, PT Musim Mas was somehow obliged subsequently to repeat *in extenso* these arguments and evidence in its comments on the provisional determination, and that the company's failure to do so somehow limits the Panel's analysis in this case. This argument is untenable. On the contrary, it is established case law that the right of an exporting WTO Member in a WTO dispute — Indonesia in this case — to raise particular arguments concerning a trade remedy determination does not depend on whether an investigated company raised that argument during the investigation. This applies, *a fortiori*, in a case where the argument *was* made by the investigated company and merely was not *repeated* in subsequent stages of the investigation. Finally, the EU's argument has far-reaching systemic implications. It means essentially that, in order to maintain their rights in a subsequent challenge to a dumping determination, investigated companies would have to repeat all of their arguments throughout all of their submissions during the entire investigation — simply because the investigating authority chooses not to address them in a provisional determination. This makes no sense, and, moreover, would impose a high burden on commercial operators, affecting in particular exporters from developing countries.

3.12. The EU's primary defence is that the factor "raw materials" is nothing but a part of the factor "financial crisis", or that access to "raw materials" is relevant to the conditions of competition between Indonesian and EU producers and, therefore, was analysed under a different rubric. This is incorrect. PT Musim Mas listed the factor "raw materials" among "various other factors" that injured the EU industry, separately from the factor "financial crisis", and *the Commission itself* treated it as an independent non-attribution factor in its final determination. The fact that "raw materials" may indeed be an element within the competitive relationship between the domestic and foreign producers does not preclude this factor from being a non-attribution factor in its own right within the meaning of Article 3.5. Indeed, several factors listed in Article 3.5 can be characterized as aspects of the conditions of competition.

3.13. The EU made a number of additional *ex post* arguments, all of which lack merit. For instance, in its response to Panel question 22, the EU alleged that EU FOH producers could easily switch from one raw-material source to another, depending on their market price, as prices for different raw materials do not develop in parallel. In its response to Panel question 45, the EU tried to develop this argument by relying on a very general statement in the EU domestic industry's Complaint that the EU producers have plants that use as inputs both synthetic and natural raw materials. Importantly, however, this statement lacks any evidentiary support, and does not explain whether a particular plant may use one or more types of raw materials. Indeed, it is clear from a letter from one of the complainants (submitted as an exhibit in this dispute) that some EU companies produce FOH based on natural oils, whereas others produce FOH products based on synthetic inputs. These raw materials are not substitutable and producers relying on one of these inputs cannot easily shift to the other raw material.

## 4 THE EU HAS FAILED TO REBUT INDONESIA'S CLAIMS UNDER ARTICLE 6.7

4.1. Indonesia claims that the EU acted inconsistently with Article 6.7 of the Anti-Dumping Agreement, because it failed to make the results of the verification visit available or to disclose them pursuant to Article 6.9, as required by Article 6.7.

4.2. Article 6.7 requires the investigating authority to disclose the results of the verification either in a separate report or as part of its disclosure of the essential facts under Article 6.9 of the Anti-Dumping Agreement. In this case, the EU did not provide any meaningful disclosure of the results of the verification visits to the Indonesian exporters and their affiliates, either in the form of a stand-alone disclosure document containing the results of the verification or as part of the disclosure of the essential facts. Instead, in the Provisional and Definitive Disclosures issued pursuant to Article 6.9, the Commission stated only that verification had taken place and that unspecified information had been verified, unspecified errors had been corrected and additional unspecified information had been collected.

4.3. The EU's position in this dispute is, in essence, that these general boilerplate references — that could apply to any anti-dumping verification — satisfy the requirements of Article 6.7. Before the Panel, the EU has also relied on a list of exhibits that it provided to the Panel as Exhibit EU-14 as part of the verification results. Beyond these two elements, the EU in essence denies that the "results" of the verification are an independent concept, because it argues that the essential facts under consideration under Article 6.9 are co-extensive with the "results" of the verification and that, by disclosing essential facts under Article 6.9, the authority also complies with Article 6.7. Finally, as evidenced in particular in its later submission in this dispute, the EU has relied on what, in its view, the investigated company "knew", "should have known" or "must have known", that the verification did not happen "behind closed doors" and that the company never complained about insufficient information. As explained below, all these arguments are mistaken.

### 4.1 The "results" of the verification

4.4. In this dispute, Indonesia's primary legal argument is that the EU failed to make available the "results" of the verification. Indonesia does not dispute that, as provided in Article 6.7, the "results" may be provided in a separate document or in the disclosure of the essential facts.

4.5. It is clear from the text of Article 6.7 and of Article 6.9 that the "results" of the verification visits referred to in Article 6.7 are not the same as the "essential facts" referred to in Article 6.9.

In its legal analysis, therefore, bearing in mind the ordinary meaning, purpose, and context of the terms, the Panel should take care to define the "results" separately from the "essential facts".

4.6. The EU, however, appears to conflate these terms. Under the EU's practice and arguments before this Panel, the terms are interpreted so as to provide no separate meaning to "results" as compared to "essential facts". If endorsed by the Panel, this would render the obligation with respect to the "results" essentially meaningless. In accordance with the doctrine of *effet utile*, the Panel must ensure that its interpretation of these terms gives effect to the differences between these terms and gives substance to the requirement in Article 6.7 to make the "results" of the verification available.

4.7. Moreover, if the Panel agrees with Indonesia's legal interpretation that the term "results" in Article 6.7 means something different than the "essential facts" referred to in Article 6.9, the Panel should rule in Indonesia's favour. In its submissions to the Panel, the EU takes the position that by disclosing the essential facts it has *necessarily* disclosed the results of the verification. Hence, if the Panel disagrees with this legal position adopted by the EU, it can immediately find that the EU has acted inconsistently with Article 6.7.

4.8. Indonesia broadly agrees with the general definitions of the term "results" provided by the EU in its answers to the Panel's questions following the first meeting of the Panel with the parties. For example, the EU quotes the Appellate Body in *US – Steel Safeguards* to the effect that the ordinary meaning of "result" is "an effect, issue, or outcome from some action, process or design".

4.9. Indeed, the "results" referred to in Article 6.7 are the "effect" or "outcome" of the verification visit. As with the "result" of any activity, the "result" of a verification visit is closely linked to the *conduct, content and purpose* of that verification visit. In *Korea – Certain Paper*, the panel explained that "results" of verifications include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".

4.10. Although it provides a correct initial definition of the term "results", however, the EU errs when it subsequently defines the "results" *of a verification visit*. The EU's position appears to be that there is no practical difference between the results of the verification visit and the essential facts under Article 6.9, such that there is no necessity for separate disclosure and that a disclosure of essential facts automatically constitutes disclosure of the results of a verification visit. This erroneous view appears to be premised on the notion that "the evaluation of the evidence by the investigating authority is not part of the 'results' of the verification visit".[4] This is incorrect.

4.11. Under the EU's view, the "results" of the verification consist of nothing more than any facts that end up in the essential facts and a listing of the evidence collected during the verification. This is inconsistent with the definition of the word "results" to include the "effect" or "outcome", as noted above. It is also inconsistent with the *purpose* of the verification visits, as set out in Article 6.7, which is "to verify information or to obtain further information". It is axiomatic that information is not verified simply because the investigating authority collects additional exhibits during a verification visit. The dictionary definitions of "to verify" include "show to be true or correct by demonstration or evidence; confirm the truth or authenticity of; substantiate" and "ascertain or test the accuracy or correctness of, esp. by examination or by comparison of data etc". A mere list of exhibits collected does not indicate whether those documents served to establish that an issue was "shown to be correct by demonstration or by a comparison of data" or even what the issue was.

4.12. The results of the verification visit are different than the essential facts because they are known before the essential facts are decided upon.[5] At the end of the verification visit, the results of the verification visit are known, even if the essential facts are not. This means that the results of the verification visit are different than the essential facts — even the investigating authority may later decide that some of the results of the verifications are also "essential facts", while other results of the verification may not, in the investigating authority's view, amount to "essential facts".

[4] EU's response to Panel question 26, p. 28.
[5] See Indonesia's Opening Statement at the first meeting of the Panel with the parties, para. 98.

4.13. Indonesia has previously provided the Panel with practical examples of results of the verification visits and of how these results may differ from the essential facts.[6] The EU has failed to address these examples or explained how the logic of Indonesia's analysis is inconsistent with the text of Article 6.7.

4.14. To give a further example, a situation that occurs with some frequency in practice during verifications is whether an exporter has cooperated within the meaning of Article 6.8 of the Anti-Dumping Agreement. As the Panel is aware, a determination by the investigating authority that an exporter has not cooperated within the meaning of Article 6.8 can lead to the exporter's information being rejected and determinations being made on the basis of the facts available, with adverse consequences for the exporter.

4.15. The question of whether an exporter actually cooperated to the best of its ability is frequently hotly contested. When controversies arise with respect to what occurred in the course of a verification visit, it can become a drawn-out "he said/she said" dispute between the investigating authority and the exporter as to what really happened at the verification visits: What did the investigating authority ask for? Did the exporter make its best efforts to provide documents and answers? Were there any problems with the documents — were they sourced from the company's ledgers or financial statements or could they otherwise be authenticated? Did the investigating authority fairly acknowledge the exporter's efforts to provide documents or, if requested documents were not realistically available, to provide reasonable alternative documents? These and other questions about the verification are relevant both to the investigating authority's decision as to whether the exporter was cooperative within the meaning of Article 6.8 as well as the exporter's ability to challenge that decision. Thus, while the <u>essential fact</u> may be that the investigating authority has determined that the exporter was not cooperative, the <u>results of the verification</u> would include the circumstances that gave rise to the investigating authority making that determination. In order to challenge that determination in either domestic courts or in WTO dispute settlement, the exporter or its government must have access to a record of what happened at the verification and the reasons relied on by the investigating authorities to deem that the exporter had been uncooperative.

4.16. Other potential "results" of the verification would include an explanation of issues that arose during the verification which the investigating authority might need to resolve on the verification team's return to capital. For example, an issue could arise during verification as to whether the exporter had properly allocated its freight expenses between investigated and non-investigated products. Based on the information reviewed during the verification, the verification team may have questions as to whether this allocation of expenses between investigated and non-investigated products should be accepted or revised.

4.17. In that scenario, the <u>results of the verification</u> would necessarily include the facts relating to how the freight expenses were incurred and the evidence both for and against the exporter's allocation of the expenses, as reviewed by the investigating authority and the exporter during the verification visit. In contrast, the <u>essential facts</u> would consist of the investigating authority's decision as to what freight expenses it intended to use in its calculation.

4.18. As the above examples demonstrate, it is necessary to distinguish between the results of the verification, on the one hand, and the essential facts, on the other hand. These examples also demonstrate that the EU's approach of collapsing the difference between these two concepts is incorrect.

4.19. It is also important to keep in mind the due-process purpose of the disclosure requirement under Article 6.7. This purpose further underlines the need to keep separate the two concepts "results of the verification" and "essential facts". As noted by the panel in *Korea – Certain Paper*:

> The purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, <u>are informed of the</u>

[6] Indonesia's Opening Statement, paras. 106-108. Indonesia's response to Panel question 26, paras. 1.106–1.115.

> verification results and can therefore structure their cases for the rest of the investigation in light of those results.[7] (emphasis added)

4.20. In other words, the purpose of Article 6.7 is, *inter alia*, to enable exporters to safeguard their rights in an anti-dumping investigation and "structure their cases for the rest of the investigation in light of those results".[8] For this purpose, exporters must know what information *was not* verified — so that they can make further efforts to put the investigating authority in a position to ultimately verify that information — as well as what information *was* verified. This information is important for the exporter given that verified information must in principle be used by the investigating authority, and the exporter thus need not any longer devote its scarce resources to convincing the authority about the reliability of that information.

4.21. There is yet another factor that supports the need for giving separate meaning to the terms "results of the verification" and "essential facts". This factor has to do with what kinds of decisions are or are not taken during a verification visit. Specifically, the verification team normally cannot or does not take any final decisions on how the verification will affect the investigating authority's determinations of dumping and injury in the investigation until they have returned home and had the opportunity to consult with their superiors and other colleagues on any issues arising during the verification. The verification is, therefore, in essence a fact-gathering and a fact-checking exercise. The results of this exercise, therefore, relate to what facts have been gathered and checked and, by implication, what facts have *not* been gathered or checked. However, the results of the verification do not include any *subsequent determinations* by the investigating authority as to how to use the results of the verification, and other items in the record, to calculate dumping margins for the exporter in accordance with the Anti-Dumping Agreement. The subsequent decision how to determine the dumping margins is the result of the *investigation* — and disclosed, inter alia, in the disclosure under Article 6.9. It is not the result of the *verification* that must be disclosed under Article 6.7.

4.22. WTO case law - such as *Korea – Certain Paper* and *Mexico – Steel Pipes and Tubes* - demonstrates that information contained in the disclosure of the verification results (whether through a verification report or with the disclosure of essential facts) plays an important role for a panel's ability to examine whether the investigating authority complied with Article 17.6(i) of the Anti-Dumping Agreement. This may include information concerning the type of information verified; the authority's decision whether the information was verifiable and whether it was actually verified, as well as any attendant circumstances, such as behaviour of the investigated firm. The case law reveals that a failure to disclose the results of the verification, or an incomplete disclosure, will significantly undermine a panel's ability to examine, in a "critical and searching" fashion, the establishment and evaluation of the facts by the investigating authority. In addition, only a proper reporting of the results of the verification visit will enable the appropriate judicial review within a WTO Member's domestic legal system, as required by Article 13.

4.23. Moreover, the EU's interpretation of Article 6.7 in this case, if accepted, would automatically give rise to violations of Articles 6.2 and 6.4, at least in the circumstances in which the investigating authority chooses to disclose the verification results simultaneously with the essential facts. Specifically, conflating the verification "results" with the "essential facts" in the manner advocated by the EU would mean that the investigating authority would not disclose all those verification "results" that did not find their way into the "essential facts". This would be contrary to Article 6.2, which requires that all interested parties have a "full opportunity for the defence of their interests", as well as Article 6.4, which requires authorities, whenever practicable, to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases … that is used by the authorities … and to prepare presentations on the basis of this information". This inevitable conflict with the requirements of Articles 6.2 and 6.4 is yet another reason why the EU's proposed interpretative approach, and the Commission's actions in this investigation, under Article 6.7 cannot be correct.[9]

4.24. In this case, the EU argues that the Commission provided the results of the verification visits as part of the disclosure of the findings of the investigation. However, these efforts were, at

[7] Panel Report, *Korea – Certain Paper*, para. 7.192.
[8] Panel Report, *Korea – Certain Paper*, para. 7.192.
[9] See Indonesia's Opening Statement at the first meeting of the Panel with the parties, para. 108. Indonesia's first written submission, paras. 6.46–6.48.

best, cursory and cannot be considered to have met the standard required under Article 6.7. For instance, assuming that the General Disclosure document was indeed intended to be the vehicle to disclose the "results" of the investigation, the Commission failed to set out:

- which specific types of information, documents, or issues were addressed in the verifications;
- which particular documents (e.g. sales invoices, rebate notes, etc.) were examined; and
- what questions were asked by the Commission officials or what answers were provided by the exporters.

4.25. The extent of the Commission's failure to disclose the results of the verification is clearly visible from a reading of the contemporaneous notes taken by PT Musim Mas' counsel during the verifications at that exporter's premises in Singapore, Medan, and Hamburg. These notes contain the kinds of basic information that are entirely absent from the Commission's purported disclosure of the verification results, such as who attended the verifications, what documents were reviewed, what questions were asked, and what answers were given. There are several issues of critical importance to the Commission's subsequent adjustment of PT Musim Mas' export price and to Indonesia's related claim under Article 2.4 of the Anti-Dumping Agreement. As the counsel notes demonstrate, the issues at hand were discussed during verification, but were not subsequently disclosed by the Commission.

4.26. These issues include: the close corporate, management, organizational and operational links between PT Musim Mas and ICOFS; transfer pricing policy; the so-called "direct" export sales by PT Musim Mas; the manner in which ICOFS and PT Musim Mas co-operate on such export sales as well as for domestic sales; and the involvement of ICOFS in PT Musim Mas' sales, including Exhibit PTM-18.

4.27. The Commission's conclusion that ICOFS is not the sales department of PT Musim Mas, but rather stands in a commission-agent relationship with PT Musim Mas is in direct contradiction with this information.

4.28. The EU states that "the Commission underlined that during the verification visit mistakes and errors were corrected in agreement with the company".[10] This is, of course, a wholly generic assertion that could be made with respect to any verification in any investigation. It hardly constitutes the "results" of the specific verifications in this investigation, which involved specific companies, with their own features, data, and specific matters that were addressed during the respective verification visits. Presumably, the Commission officials, when they report back to their superiors after the verification, provide more detail than simply stating that "mistakes and errors were corrected". To the extent that the officials' reports to their colleagues and superiors address whether the verification team was able to *verify* information — to "ascertain or test the accuracy or correctness of, esp. by examination or by comparison of data etc." — those reports could be said to contain "results" of the verification.

4.29. In arguing that the Commission disclosed the results of the verification visit, the EU also repeatedly refers to actions that occurred prior to the visits. However, events occurring prior to a verification visit cannot be relevant for assessing whether the Commission subsequently communicated the "results" of the verification exercise. Neither the exporter, nor a reviewing domestic court or WTO panel, can glean from a list of information that the investigating authority announces it will/may verify − but may end up not verifying − whether that information was successfully verified or not; whether additional information was requested; and what discussion around that information took place between the company and the investigating authority. Claiming that results of a verification visit can be disclosed by something that occurred prior to the visit is comparable to arguing that the investigating authority can satisfy its disclosure obligation under Article 6.9 by pointing to information requests contained in a blank questionnaire response.

[10] EU's Opening Statement, para. 52.

### 4.2 Alleged knowledge or awareness by the companies is not a workable standard for assessing an investigating authority's compliance with Article 6.7

4.30. The EU relies, as a crucial part of its argument, on alleged awareness on the part of the exporters of what information the Commission wanted to inspect; what information it did inspect; and what it concluded with respect to that information; and that the investigating parties never protested or complained about lack of information. This argument is flawed at a number of levels.

4.31. It is virtually impossible to verify or to ascertain what the companies were or were not aware of at the time of verification or subsequently. The EU would have the Panel guess, infer and rely entirely on the Commission's view as to what the Commission thinks the investigated parties knew or should have known. This is not a proper workable standard on which to conduct a coherent enquiry at the multilateral level. If adopted, it would leave less experienced or less sophisticated exporters at the mercy of what investigating authorities think they knew or should have known. This is precisely one of the reasons why the Anti-Dumping Agreement requires a proper disclosure of the results of the verification that can be examined by a WTO panel. In any event, even if the companies were aware of what the EU claims they were aware of, the EU has a duty also to the reviewing courts and WTO panels, as well as WTO Member governments, including Indonesia. Compliance with its WTO obligations vis-à-vis these other Members cannot depend on whether different entities − private investigated companies − were or were not aware of some fact that cannot be subsequently verified in domestic court or WTO proceedings.

### 4.3 The results of the verification must be "made available" or disclosed

4.32. In response to the Panel's question to the parties as to meaning of "make available", the EU quotes the Appellate Body in *EC and certain member States − Large Civil Aircraft* to the effect that to "make available" is part of the ordinary meaning of the verb "to provide" and, therefore, in the EU's words, the results of the verification may be made available to the relevant firms either "directly by sending them a report or by making the results available as part of the file or as an additional alternative through the disclosure of the outcome of the verification visit as part of the general obligation to disclose 'essential facts'". Indonesia agrees.[11] This, of course, does not address the key issue at hand — the failure of the Commission to actually convey the required information about the results of the verification visit, whatever the chosen procedural conduit.

### 4.4 The list of exhibits is not sufficient to satisfy Article 6.7

4.33. As a final issue concerning Indonesia's claim under Article 6.7, Indonesia addresses the list of exhibits. In its questions following the first meeting, the Panel asked the EU to provide the list of exhibits referred to in the first substantive meeting and asked Indonesia whether PT Musim Mas received this document. In its answers to questions, the EU provided certain lists of the exhibits collected by the Commission at the verifications as Exhibit EU-14.

4.34. Indonesia notes that the EU's exhibit is an undated and unsigned document that contains only a title of each exhibit without any indication of the content or purpose of each exhibit. Indonesia understands that PT Musim Mas was not provided with or asked to agree as to the content of these lists, although, however, PT Musim Mas agrees that these lists reflect the documents collected by the verification teams. Indonesia disagrees, however, that these lists of exhibits, either separately or read in conjunction with the disclosure documents, satisfy the requirements of Article 6.7.

4.35. First, the list of documents does not explain what topics were discussed at the verification visit or how the listed documents served to verify those topics. For example, as noted above, the EU asserts that the results of the verification were contained in the statement that "mistakes and errors were corrected in agreement with the company". However, the lists of exhibits, by themselves, shed no light whatsoever on what mistakes and errors were corrected or why. There is no indication that the unspecified "mistakes and errors" had anything to do with the content of the documents collected.

[11] See Indonesia's response to Panel question 27, paras. 1.116-1.122.

4.36. Second, the EU asserts that "the relevant results of the discussion reflected [in the counsel's notes submitted by Indonesia] are all included in the list of exhibits". The EU then argues that the relevant "result" of the verification is simply that the agreements were provided and that this is reflected fully in the list of exhibits. However, if the agreements were provided and reviewed at the verification "to provide further information on the relationship between PT Musim Mas and ICOF-S", the result of the verification must include some discussion of what the agreements actually said about the relationship between the two companies, whether the Commission team had any further questions about the companies' explanation of the relationship, and whether the Commission team was satisfied with the explanations provided by the company. A mere reference to the documents provided contains no information as to whether the Commission had to "ascertain[ed] or test[ed] the accuracy or correctness of [the information and explanations provided by the company], by examination or by comparison of data etc" on this point.

4.37. In addition, the list of documents does not indicate whether there were *other* topics addressed during the visit for which no additional documents were collected.

4.38. Moreover, the "results" of the verification must include also the *purpose* for which a particular document was provided or particular information requested.[12] The EU's list of documents does not specify this purpose. It is not obvious, from the face of the EU's list, what the purpose of providing each document was. For instance, a reader of the list would have had to be physically present at the verification to know the purpose for which the S&P Agreement was submitted. Moreover, the S&P Agreement was subsequently relied upon by the Commission for multiple purposes. Hence, a mere listing of the evidence as in the EU's list is entirely insufficient adequately to disclose the "results" of the verification visit.

4.39. Similarly, the EU notes that the counsel's notes refer to the Commission team examining the role of ICOFS in domestic sales in Indonesia and that PT Musim Mas provided "an email as alleged evidence that ICOFS is also involved in providing services for domestic sales of PTMM". The EU states that "the provision of this email was a result of the verification". Indonesia disagrees. Again, the mere provision of this email is only at most only a small part of the result of the verification. To the extent that the Commission was verifying the role of ICOFS in domestic sales, the result of the verification is whether the Commission was satisfied that the corroborating evidence provided by the company was consistent with the company's explanations. To the extent that it was not, the Commission should have requested additional information or explained how the explanations provided by the company were not satisfactory.

4.40. Finally, Indonesia rejects the EU's argument that PT Musim Mas should have urged the Commission to provide it with more detailed information about the results of the verification. Indonesia notes that nothing in Article 6.7 imposes on the investigated producers/exporters an obligation to request further information on the results of the verification from the investigating authority. Article 6.7 imposes a mandatory obligation on the investigating authority to make the results of the verification available. It cannot be a defence to a violation of this requirement that the producer/exporter did not push the investigating authority to comply.

4.41. To conclude, the EU has failed to show how the Commission disclosed the actual results of the verification in this case. The stand-alone obligation of Article 6.7 cannot be satisfied by a grab bag of generic and separate references sprinkled throughout the essential facts disclosures or by reference to lists of exhibits that contain nothing more than imprecise references to the documents examined during the verifications.

### 4.5 Conclusion

4.42. For these reasons, Indonesia respectfully requests that the Panel find that the EU has acted inconsistently with Article 6.7 by failing to make the results of the verifications available or otherwise provide disclosure thereof as required under Article 6.7.

[12] See Indonesia's first written submission, para. 6.42.

## 5 CONCLUSION AND REQUEST FOR FINDINGS

5.1. For all of the above reasons, Indonesia reiterates its request to the Panel that the Panel find that the European Union:

- Acted inconsistently with Articles 2.3 and 2.4 of the Anti-Dumping Agreement, by making an improper deduction for a factor that did not affect price comparability;

- Acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, by failing to conduct a proper non-attribution analysis with respect to the factors "financial/economic crisis" and "issues related to the European Union's domestic industry's access to raw materials"; and

- Acted inconsistently with Article 6.7 of the Anti-Dumping Agreement, by failing to disclose to either of the investigated Indonesian exporters the results of the verification visit.

5.2. Indonesia once again thanks the Panel and the Secretariat team for their hard work and dedication to this dispute.

# ANNEX D

## ARGUMENTS OF THIRD PARTIES


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## ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

## I. INTRODUCTION

1. The Republic of Turkey (hereinafter referred to as "Turkey") welcomes this opportunity to be heard and to present its views as a third party in this case. Turkey's objective to make this third party submission is to contribute to the correct and consistent interpretation of the Agreement on the Implementation of Article VI of GATT 1994 (hereinafter referred to as "ADA" or "Anti-Dumping Agreement").

2. Turkey will not elaborate on the particular facts presented by the Parties, rather, underlining her systematic interest, Turkey would like to limit her third party submission to the discussion on the rights and obligation of an investigating authority within the legal context of Article 2.3 and 2.4 of the ADA.

## II. LEGAL INTERPRETATION OF ARTICLE 2.3 AND 2.4 OF THE ANTI-DUMPING AGREEMENT

3. At the outset Turkey would like to underline that the structure of the "fair comparison" between normal value and export price of the product under consideration is as significant as the methodology used by the investigating authority to calculate the normal value or export price itself. In this vein, the components of the fair comparison do have a potential to alter the outcome of the dumping margin calculation profoundly. Therefore, accurate interpretation of the Article 2.3 and 2.4 of the ADA is highly important in this regard.

4. Article 2.3 and 2.4 of the ADA reads as follows:

> *2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.*
>
> *2.4 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. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.*

5. Turkey understands that the existence of two conditions is imperative to resort to constructed export price within Article 2.3 of the ADA. First, the presence of an association or compensatory arrangement between exporter and importer or a third party and second, the outcome of unreliable export prices due to this association or compensatory arrangement. Under this reading, the mere existence of an association or compensatory arrangement is not enough to conclude that the export prices between the exporter and importer or any other third party is unreliable. Equally, the fact that the provisions of the arrangement do not point out any kind of distortions of export price should not overshadow the possibility that the export prices can be

unreliable due to *de-facto* reasons. In light of these explanations, the investigating authority may undertake both a *de-jure* and *de-facto* examination to determine whether this arrangement warrants the use of constructed export prices.

6. The word "appear", however, indicates that the investigating authority is not under a strict obligation to reach an undisputable conclusion that the distortion of export prices is a direct outcome of the arrangement between the exporter and importer or a third party. Turkey understands that the drafters tended to keep the wording flexible considering the often loose nature of the arrangements between exporter and importer or trader. Nevertheless, Turkey understands that the investigating authority is still burdened to present an explanation on why the arrangement appeared to render the export prices unreliable.

7. The reference made in the second sentence of Article 2.4 requires the investigating authority to consider allowances for costs including but not limited to duties, taxes (incurred between importation and resale) and profits accrued by the trader and importer of the product under consideration. Similar to the comparison between the normal value and the ordinary export price, the investigating authority is obliged to make due allowances or to equal the level of trade if the price comparability is affected.

8. As rightly underlined by the EU[1], the investigating authority is obliged to evaluate and, if applicable, alter the elements of the normal value and (constructed) export price if the differences in components in these two data sets adversely affect the comparability of the normal value and export price.

9. In that context, as stressed in the panel report of US-Sheet/Plate form Korea "…[t]he requirement to make due allowances for differences that affect price comparability is intended to neutralize differences in a transaction that an exporter could be expected to have reflected in his pricing".[2]Thus, the analysis required in Article 2.4 of the ADA displays a fact based and case-by-case nature taking into consideration that the elements of due allowance may differ based on the merits of each case.[3]

10. As matter of legal interpretation, the interested party claiming that the legal discipline in Article 2.4 was violated by the investigating authority has to pass through three steps to bring a viable assertion. It has to show that (1) there was a difference between the elements of normal value and export price which (2) affected the price comparability between these data (3) that was not accepted by the investigating authority as an element of due allowance.[4] Turkey understands that the word "demonstrate" at the end of the first sentence of Article 2.4 of the ADA introduces a positive obligation *vis-à-vis* the interested parties requesting modification. The interested parties must bring their requests of fair comparison to the attention of the investigating authority by indicating the elements to be considered and to what extent these elements influence the comparability of the normal value and export price.

11. Turkey considers the elements listed in Article 2.4 to illustrate, *inter alia*, the possible examples of due allowance (conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics) are equally subject to the above-mentioned obligation incumbent on the interested parties requesting due allowance.

12. Turkey is in the same line with the case law that the investigating authority has discretion to reject the request of due allowance if it concludes that the difference is not affecting price comparability or such an adjustment lacks merits.[5] Furthermore, she equally agrees with the case law that the investigating authority cannot be legally compelled to conduct an *ex-officio* inquiry to identify non-requested elements of due allowance[6].

[1] EU's first written submission, para. 59 and 60.
[2] Panel Report, US-Sheet/Plate from Korea, para. 6.77.
[3] Panel Report, Egypt-Rebar, para. 7.352; Panel Report, EC-Pipe Fittings, para. 7.138.
[4] Panel Report, Korea-Certain Sheet, para. 7.138.
[5] Panel Report, EC-Fasteners, para. 7.298; Appellate Body Report, EC-Fastener, para. 488 and 528; Panel Report, EC-Tube or Pipe Fittings, para. 7.158.
[6] Panel Report, EC-Fastener, para. 7.298; Appellate Body Report, EC-Fastener, para. 517; Panel Report, China-HP-SSST, para. 7.77.

13. Finally as underlined in the Panel Report of Egypt-Rebar the dialogue between the interested parties and the investigating authority concerning the context of Article 2.4 is central to ensure that the dumping margin is calculated with necessary components compared in a fair manner.[7]

## III. CONCLUSION

14. With these comments, Turkey expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the interpretation of the ADA Agreement.

[7] Panel report, Egypt-Rebar, para. 7.352.

## ANNEX D-2

### INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

### I. U.S. VIEWS ON THE EUROPEAN UNION'S PRELIMINARY RULING REQUEST

1. While sympathetic to certain practical concerns expressed by the European Union, the United States respectfully disagrees with the understanding of Article 12.12 that underlies the European Union's PRR. The United States submits that the European Union wrongly interprets the relevant terms of Article 12.12, including its interpretation of "panel," and what it means in the context of this provision for a panel to "suspend" its "work."

2. Pursuant to DSU Article 11, the Panel's "function" is to assist the DSB by making an objective assessment of the matter before it, including the applicability of and conformity with the relevant covered agreements. DSU Article 3.2 establishes that such an assessment of the existing provisions of those covered agreements shall be made in accordance with customary rules of interpretation of public international law.

3. The ordinary meaning of "panel" (or "the panel") is not in dispute by either party. The United States agrees with the European Union that there is no express limitation imposed in the text of the DSU on the meaning of the term "panel," and that in some instances, "panel" may refer to a panel that has been composed and in others, it may refer to a panel that has been established but not composed. The United States also agrees with Indonesia, however, that it is precisely because "panel" refers to both circumstances in various places in the DSU that interpretation of "panel" as used in Article 12.12 does not end with a facial inquiry into the ordinary meaning of the term.

4. The last sentence of Article 12.12 describes a circumstance in which the work of the panel "has been suspended for more than 12 months." The first sentence sets out how such a suspension may arise: "at the request of the complaining party for a period not to exceed 12 months." The request is made to, and would be acted upon in its discretion, by the panel ("[t]he panel may suspend its work"). The second sentence confirms the "suspension" is one the panel decides upon at the complaining party's request ("[i]n the event of *such* a suspension"). Thus, the circumstance in Article 12.12 arises only when there is a panel to which the complaining party may direct its "request," and only if the panel has decided to exercise its discretion to accede to that request. Neither can occur before a panel has been composed.

5. The context of Article 12 as a whole also is instructive. The articles of the DSU proceed sequentially from the initial phases of the dispute settlement process to the final stages of that process. Depending on the stage of the process and the content of the relevant rules, the term "panel" in the various provisions may be interpreted differently.

6. Article 6, for example, governs the "establishment of panels," including the timing of their establishment and the method by which their establishment must be requested. As a matter of both timing and logic, these actions necessarily would precede the composition of a panel and therefore would refer to an uncomposed panel. Article 7, on the other hand, may refer to both composed and uncomposed panels when it describes the "terms of reference of panels." For example, Article 7.1 states that "[p]anels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel." Therefore, whether or not a panel has been composed, within 20 days of establishment the terms of reference are determined and govern thereafter the scope of the dispute for purposes of any panel that has been "established," including one that has subsequently been composed. Article 7.2, however, provides that "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." By requiring panels to "address" certain provisions of the covered agreements, the use of the term "panel" in Article 7.2 necessarily refers to a panel that has been composed, for the obvious reason that a panel that has been established only cannot "address" anything.

7. With respect to the interpretation of "panel" in Article 12 as well, both the stage of the process and the specific rules it provides assist in interpreting the terms contained in Article 12.12.

Article 8, for example, which deals with panel composition, precedes Article 12, which deals with panel procedures. Therefore, given where it is situated in the DSU, Article 12 contemplates that, in the normal course, a panel already would have been composed when the "panel procedures" would apply. For example, Article 12.1 establishes that a panel shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties; a panel could neither "follow" those Procedures nor decide otherwise nor consult if it has not been composed. Article 12.3 even more explicitly refers to "panelists" when it describes a process and schedule for fixing the timetable during the panel process. Logically, there would be no "panelists" fixing the timetable if the panel had not yet been composed.

8. Based on the above, the "work" of the panel in the context of Article 12.12 refers to the examination by the panel, once composed, of the matter referred to it by the DSB under the procedures established in Article 12. Therefore, Indonesia's request *to the Secretariat* to suspend a meeting *to compose* the panel would not constitute a request *to the panel* that it "suspend its *work*" pursuant to Article 12.12. Nothing in the text of the DSU, or in the email correspondence from Indonesia to the Secretariat, supports the European Union's position to the contrary.

9. The European Union also raises a contextual argument regarding the interpretation of the term "panel" in Article 12.12 based on its relationship with Article 12.9. To bolster its argument that reference to the "panel" in Article 12.12 means only a panel that has been established, not necessarily composed, the European Union notes that Article 12.9 (governing timeframes to submit the panel report) and 12.12 both refer to the "establishment," not composition, of a panel. Because "composition" is used elsewhere in the DSU, the European Union argues, the use of "establishment" alone is significant.

10. The United States agrees that use of the term "establishment" in Article 12.12 is meaningful. Because a panel is established by the DSB (Article 6.1) to assist the DSB in discharging its responsibilities to make recommendations (Articles 7.1, 11, 19.1) through issuance of findings in a written report (Article 15), to terminate a panel's authority to undertake that work, the DSU removes the legal basis for the panel's establishment. That this legal authority relates to whether a panel is established does not imply that a panel that has not been composed may undertake any "work," much less "suspend" that work.

11. Second, with respect to the contention that the time limit in Article 12.9 would be rendered meaningless were the twelve month limitation in 12.12 read to apply only to composed panels, the United States observes that the language regarding the time limit imposed in Article 12.9 is precatory, not binding, providing that in no case "should" the proceedings exceed nine months. Therefore, the premise for the European Union's arguments in this respect − that in no case may the proceedings, including any 12 month suspension, exceed 21 months − fails. It is simply not the case that such a mandatory time limit is imposed by the DSU on panel proceedings.

12. For these reasons, the situation described in the last sentence in DSU Article 12.12 arises only once a panel has been composed, the complaining party makes a request to the panel to suspend its work, and the panel decides to exercise its discretion to accept that request and suspends its work accordingly.

13. The European Union raises several policy concerns which it considers support its interpretation of Article 12.12, including considerations relating to the reputational consequences of unresolved proceedings for a responding Member and the limited resources both Members and the Secretariat have to dedicate to a given dispute. While such policy considerations cannot lead to a different interpretation and application of DSU Article 12.12, the United States nonetheless considers that the proper interpretation and application of Article 12.12 lead to a desirable policy outcome.

14. There does not seem to be any serious cause for concern about a "reputational stain" somehow adhering to a responding Member as a result of a dispute brought before the WTO. If Members have not, through consultations or other means, managed to resolve a trade issue between them, parties regularly request the establishment of panels in an effort to achieve formal resolution of the dispute. Not all of these disputes proceed to the circulation of a final panel report. Often, disputes are successfully resolved only after the establishment of a panel. Therefore, the European Union's suggestion that in all cases it would be in a responding party's interest to

expedite the panel process so that accusations against it can be resolved does not reflect the nature of dispute settlement under the DSU.

15. Regarding resource constraints and the burden imposed on Members and the Secretariat to devote resources indefinitely to a dispute, the United States understands the dilemma to which the European Union refers. However, we do not consider that dissolving the panel process would address these concerns. To the contrary, the likelihood that the same issue might be raised multiple times as formally "new" disputes would seem to risk exacerbating the strains on limited WTO resources rather than easing them. And should the European Union believe it is prejudiced by the length of time taken to compose a panel, the United States respectfully suggests that an adequate remedy may be found under the DSU. Pursuant to Article 12.4, the European Union could explain those circumstances to the Panel and, in light of those circumstances, the Panel must provide the parties with sufficient time to prepare their written submissions to the panel.

16. Finally, the United States considers that reading into Article 12.12 a limitation on the ability of a complaining party to pause in its use of dispute settlement procedures would undermine the aim of the dispute settlement system to secure a positive solution to the dispute (Article 3.7). Where a party may be actively engaged in trying to resolve a dispute through alternative means, even after panel establishment, such action would be consistent with the preference expressed under the DSU. Indeed, under DSU Article 11, a panel is charged with giving the parties an adequate opportunity to develop a mutually satisfactory solution. The understanding of Article 12.12 proposed in the PRR would rather appear to limit such opportunities.

## II. INDONESIA'S CLAIMS REGARDING ARTICLE 2 OF THE AD AGREEMENT

17. Indonesia claims that the European Union acted inconsistently with Article 2.4 of the AD Agreement by failing to make allowances for differences affecting price comparability − namely, by subtracting sales commissions from the constructed export price for one of the participating producers.

18. Article 2.4 of the AD Agreement requires investigating authorities to conduct a comparison between the export price and normal value. As Indonesia correctly observes, such comparison "is typically made at the ex-factory level…a practice envisaged explicitly by Article 2.4." It appears that both the European Union and Indonesia share the U.S. view that the essential requirement for any adjustment under Article 2.4 is that a factor must affect price comparability. Thus, under Article 2.4, making a "fair comparison" requires a consideration of how differences in conditions and terms of sale, taxation, levels of trade, quantities, and physical characteristics impact price comparability.

19. In this respect, the Appellate Body has stated that under Article 2.4, the obligation to ensure fair comparison lies on the investigating authorities, and not the exporters. Although the investigating authority has the burden to ensure a fair comparison, the interested parties also have the burden to substantiate any requested adjustments for differences that affect price comparability. As the Appellate Body has found, an investigating authority does not have to accept a request for an adjustment that is unsubstantiated.

20. Indonesia and the European Union appear to agree that a sales commission can affect price comparability within the meaning of Article 2.4 because it may reflect a difference in conditions and terms of sale. However, the parties disagree on whether it is necessary to determine that a single economic entity ("SEE") does not exist in order to make a downward adjustment to export price for sales commissions.

21. While the United States agrees with the European Union that an analysis of whether an SEE exists is not required under Article 2.4, it may sometimes be relevant to consider the relationship between two entities as part of an evaluation of price comparability. In this respect, it would not be inappropriate to consider the various factors discussed by the panel in *Korea − Certain Paper* and referenced by the Appellate Body in *EC-Fasteners (China)*. While we recognize that, as stated by the European Union, the analyses in those cases arose in a different context − *i.e.*, for purposes of determining whether related companies should be assigned a single dumping margin − these factors may nonetheless be relevant to determining what, if any, adjustment should be made under Article 2.4.

22. In reviewing the investigating authority's determination, the Panel may wish to consider whether the evidence and explanation provided − regardless of the specific methodology applied − supports a finding that the sales entity did not form part of a single entity with PTMM and that, therefore, an adjustment was necessary to ensure a fair comparison under Article 2.4. If the Panel concludes that the facts support a finding that the producer and the trading company are not affiliated, there is no dispute that an adjustment for a commission paid to the trader was appropriate.

23. Finally, the United States considers that it is permissible for an investigating authority to make a price adjustment to address circumstances of sale, if the facts on the record support it. An investigating authority must ensure price comparability regardless of whether affiliated or non-affiliated parties are involved. As explained earlier, a comparison between normal value and export price is usually made at the ex factory level. If, for example, the producer sells in the home market directly to its customers, but sells through a trading company (affiliated or not) to its export market, the differences in the circumstances of sale may warrant an adjustment to ensure that comparison is made at the ex-factory level in both markets.

24. The views expressed by the United States in relation to Indonesia's claims under Article 2.4 are relevant to the substance of Indonesia's Article 2.3 claim. The United States agrees with the European Union that Indonesia's Article 2.3 claim is purely a consequential claim.

## III. INDONESIA'S CLAIMS REGARDING ARTICLE 3 OF THE AD AGREEMENT

25. The third sentence of Article 3.5 provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. As the Appellate Body has found, if a known factor other than dumped imports is a cause of injury, the third sentence requires the authority to engage in a non-attribution analysis to ensure that the effects of that other factor are not attributed to the dumped imports.

26. The Appellate Body has further stated that the AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis. In this regard, the United States disagrees with Indonesia that only a particular kind of analysis − e.g., quantitative analysis − meets the requirements of Article 3.5. The question of whether an investigating authority's analysis is consistent with Article 3 should turn on whether the authority has in fact evaluated these factors and whether its evaluation is supported by positive evidence and reflects an objective examination, as required by Article 3.1.

27. Article 3.5 further requires that "[t]he demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities." Hence, the authorities are obliged to consider all relevant evidence in the record. While the United States does not take a view on the weight the European Union gave to certain evidence, the European Union must demonstrate that it examined these factors in its analysis. Whether or not, as Indonesia claims, the European Union was required specifically to consider these factors under the third sentence of Article 3.5 would depend on whether these factors were known to the investigating authority and whether they were in fact contributing at the same time as the imports to any difficulties experienced by the domestic industry.

28. Thus, the panel must determine if the investigating authority demonstrated that it examined other "known factors" within the meaning of Article 3.5 of the AD Agreement, and based its causation analysis on an examination of all relevant evidence.

## IV. INDONESIA'S CLAIM UNDER ARTICLE 6 OF THE AD AGREEMENT

29. Article 6.7 of the AD agreement requires investigating authorities conducting verification to "make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9 to the firms which they pertain and may make such results available to the applicants." Article 6.9 in turn provides that an investigating authority "shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." The United States agrees with both Indonesia and the European Union that under its ordinary meaning, the term

"results" in Article 6.7 refers to "outcomes" of the verification process. The United States agrees with the European Union that Articles 6.7, 6.8, and 6.9 form a continuum of obligations under Article 6, and that each obligation is grounded in the context of the specific provision.

30. While the United States does not believe that trivial or immaterial aspects of what occurred at the verification must be included in the report, at a minimum the report should include discussion of information that was verified, not verified, or corrected with respect to essential facts referenced in Article 6.9. The United States agrees with the European Union that the text of Article 6.7 contains no requirements on form or format. Articles 6.7 and 6.9 do require disclosure of verification "results" and the "essential facts under consideration." To the extent the European Union characterizes the lack of disclosure of results and essential facts as a question of form, not substance, the United States disagrees with that characterization. For example (without opining on the factual issues presented in this dispute), the United States believes that the term "essential facts," as defined in Article 6.9, relates necessarily to the determination of normal value and export prices, *as well as* to the data underlying those determinations. Accordingly, the United States believes that information verified or corrected at verification relating to these "essential facts" should be disclosed pursuant to Article 6.7 and Article 6.9.

31. These provisions of the AD Agreement promote transparency and procedural fairness by ensuring that "disclosure…take[s] place in sufficient time for the parties to defend their interests." Failure to provide such disclosure could prevent an interested party from effectively defending its interests in the proceeding, and potentially, before national courts. In this respect, the United States agrees with the panel in *Korea – Certain Paper*, which noted that disclosing both verified and unverified information could "be relevant to the presentation of the interested parties' cases."

32. Similarly, a basic tenet of the AD Agreement, as reflected in Article 6, is that the investigating authority "must provide timely opportunities for all interested parties to see all information … relevant to the presentation of their cases that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation," and "shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests…[and these opportunities] must take account of the need for confidentiality." Articles 6.4 and 6.2 have specific obligations which may apply to the disclosure of verification results. Therefore, bearing in mind the obligations of Article 6.5, the United States agrees with Indonesia that failing to disclose information under Article 6.7, particularly as it relates to the "essential facts" of an investigation under Article 6.9, would deprive parties of the full opportunity to defend their interests.