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

AB-2017-1

Report of the Appellate Body

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
Ecogreen	PT Ecogreen Oleochemicals
EU Basic Anti-Dumping Regulation	Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, published in *Official Journal of the European Union*, L Series, No. 343 (22 December 2009), p. 51 ff (Panel Exhibit EU-3)
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 (11 November 2011), pp. 1-18 (Panel Exhibit IDN-4)
GATT 1994	General Agreement on Tariffs and Trade 1994
General Court	European Union's General Court
General Disclosure Document	European Commission, General Disclosure Document dated 26 August 2011, AD563, Proposal to impose definitive anti-dumping duties on Imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia (Panel Exhibit IDN-39)
ICOF-S	Inter-Continental Oils & Fats Pte Ltd (Singapore)
Interpipe Judgment	Court of Justice, Judgment of 16 February 2012 in joined Cases C-191/09 P and C-200/09 P, Council of the European Union (C-191/09 P) / European Commission (C-200/09 P) v. Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT) (concerning Judgment of the Court of First Instance of the European Union, Case T-249/06, Interpipe Niko Tube ZAT and Interpipe NTRP VAT v. Council of the European Union [2009] ECR II-383) (Panel Exhibit IDN-49)
Notice of initiation of the investigation	European Commission, Notice of initiation of an anti-dumping proceeding concerning imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, *Official Journal of the European Union*, C Series, No. 219 (13 August 2010), pp. 12-16 (Panel Exhibit IDN-12)
P&L	profit and loss statement
Panel Report	Panel Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/R
Panel's BCI Procedures	Additional Working Procedures Concerning Business Confidential Information of 13 July 2015, contained in Annex A-2 of the Panel Report
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 (11 May 2011), pp. 47-62 (Panel Exhibit IDN-3)

Abbreviation	Description
PT Musim Mas	Indonesian producer PT Perindustrian dan Perdagangan Musim Semi Mas
PT Musim Mas Judgment	Judgment of the General Court (seventh Chamber), 25 June 2015, in Case T-26/12, PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas) v. Council of the European Union (Case C-468/15P) ECLI:EU:T:2015:437 (Panel Exhibit EU-4)
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 (21 December 2012), pp. 1-5 (Panel Exhibit IDN-5)
SG&A	selling, general and administrative costs
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

PANEL EXHIBITS CITED IN THIS REPORT

Exhibit Number	Description
IDN-2	Email correspondence of 10 and 11 July 2013
IDN-3	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 (11 May 2011), pp. 47-62
IDN-4	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 (11 November 2011), pp. 1-18
IDN-5	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 (21 December 2012), pp. 1-5
IDN-8	Email correspondence of 12, 19, and 22 September 2014 between the WTO Secretariat and the parties
IDN-12	European Commission, Notice of initiation of an anti-dumping proceeding concerning imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, *Official Journal of the European Union*, C Series, No. 219 (13 August 2010), pp. 12-16
IDN-17	Excerpt from the company-specific definitive disclosure to PT Musim Mas, dated 26 August 2011 (BCI)
IDN-18	PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A-3.4: Corporate structure of the Musim Mas group (BCI)
IDN-19	PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A: List of PT Musim Mas' shareholders (BCI)
IDN-22	PT Musim Mas response to Commission questionnaire AD563 (2010) (excerpt – response to question H-2.4) (BCI)
IDN-24	Sale and Purchase Agreement between PT Musim Mas and Inter-Continental Oils & Fats Pte Ltd (1 January 2009) (BCI)
IDN-25	Sale and Purchase Agreement between PT Musim Mas and Inter-Continental Oils & Fats Pte Ltd (1 January 2010) (BCI)
IDN-26	PT Musim Mas, "Impact of the Interpipe judgment on the fatty alcohol anti-dumping investigation (AD563): PTMM situation", PowerPoint presentation at the DG Trade hearing on 16 August 2012 (BCI)
IDN-27	CMS Hasche Sigle, Company-internal memorandum dated 22 November 2010 concerning "Inspection Visit Medan 22-25.11.2010" (BCI)
IDN-33	Provisional Company-Specific Disclosure to PT Musim Mas, Annex 2: Calculation of dumping margin (BCI)
IDN-34	PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011 (BCI)
IDN-38	CMS Hasche Sigle, Company-internal memorandum dated 18-19 November 2010 concerning "Minutes Inspection Visit Singapore 18.11.2010" (verification of ICOF-S) (BCI)

Exhibit Number	Description
IDN-39	European Commission, General Disclosure Document dated 26 August 2011, AD563, Proposal to impose definitive anti-dumping duties on Imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia
IDN-47	Verification Exhibit PTMM-18 (BCI)
IDN-49	Court of Justice, Judgment of 16 February 2012 in joined Cases C-191/09 P and C-200/09 P, Council of the European Union (C-191/09 P) / European Commission (C-200/09 P) v. Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT) (concerning Judgment of the Court of First Instance of the European Union, Case T-249/06, Interpipe Niko Tube ZAT and Interpipe NTRP VAT v. Council of the European Union [2009] ECR II-383)
IDN-51	Excerpt from Jacob Viner, *Dumping: A Problem in International Trade* (1923)(reprinted, Augustus M. Kelley, 1966)
IDN-52	LCN Legal Limited, "How to Put in Place Effective Intercompany Agreements for Transfer Pricing", http://lcnlegal.com/how-to-put-in-place-effective-intercompany-agreements-for-transfer-pricing/, accessed 21 December 2015
IDN-53	LCN Legal Limited, Intercompany Agreement Template for Term Loan Agreement (2013), available at http://lcnlegal.com/template-intercompany-agreement-for-transfer-pricing-term-loan-agreement/
IDN-54	LCN Legal Limited, Intercompany Agreement Template for Limited Risk Distribution Agreement (2014), available at http://lcnlegal.com/template-intercompany-agreement-for-transfer-pricing-limited-risk-distribution-agreement/
EU-1	Letter dated 5 November 2010 from the European Commission to CMS Hasche Sigle concerning AD563 and PT Musim Mas
EU-2	Letter regarding disclosure of provisional findings dated 11 May 2011 (BCI)
EU-3	Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, published in *Official Journal of the European Union*, L Series, No. 343 (22 December 2009), p. 51 ff
EU-4	Judgment of the General Court (seventh Chamber), 25 June 2015, in Case T-26/12, PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas) v. Council of the European Union (Case C-468/15P) ECLI:EU:T:2015:437
EU-5	PT Musim Mas response to Commission questionnaire AD563 (2010), Attachment A-3.3.1: Table G – PT Musim Mas Business Organization Structure (BCI)
EU-6	PT Musim Mas response to Commission questionnaire AD563 (2010), Attachment A-3.3.2, Table G – Organization Chart – Fatty Alcohols Division (BCI)
EU-10	Letter dated 26 August 2011 from European Commission to CMS Hasche Sigle concerning AD563 Definitive Disclosure and PT Musim Mas (PTMM) (disclosure of definitive findings dated 26 August 2011) (BCI)
EU-12	Excel file "PTMM definitive disclosure.xls" (BCI)
EU-14	List of exhibits provided by the Commission to PT Musim Mas at the conclusion of three verification visits (BCI)

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
Brazil – Retreaded Tyres	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – HP-SSST (EU)	Appellate Body Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/AB/R and Add.1, adopted 28 October 2015
China – HP-SSST (EU)	Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Report WT/DS460/AB/R
China – Rare Earths	Appellate Body Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
Dominican Republic – Import and Sale of Cigarettes	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
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 – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
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

Short Title	Full Case Title and Citation
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 – Fasteners (China) (Article 21.5 – China)	Panel 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/RW and Add.1, adopted 12 February 2016, as modified by Appellate Body Report WT/DS397/AB/RW
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 – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
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)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 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
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
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
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
Thailand – Cigarettes (Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R, DSR 2011:IV, p. 2299
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
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869

Short Title	Full Case Title and Citation
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027
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 – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Shrimp (Thailand) / US – Customs Bond Directive	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008, DSR 2008:VII, p. 2385 / DSR 2008:VIII, p. 2773
US – Shrimp II (Viet Nam)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/AB/R, and Corr.1, adopted 22 April 2015
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 – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
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 – 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

Short Title	Full Case Title and Citation
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

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia	AB-2017-1
Indonesia, *Appellant/Appellee* European Union, *Other Appellant/Appellee* Korea, *Third Participant* United States, *Third Participant*	Appellate Body Division: Ramírez-Hernández, Presiding Member Kim, Member Zhao, Member

1 INTRODUCTION

1.1. Indonesia and the European Union each appeals certain issues of law and legal interpretations developed in the Panel Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*[1] (Panel Report). The Panel was established on 25 June 2013 to consider a complaint by Indonesia[2] with respect to anti-dumping measures imposed by the European Union on imports of certain fatty alcohols[3] from Indonesia[4], and certain aspects of the anti-dumping investigation underlying those measures.[5]

1.2. Additional factual aspects of this dispute are set forth in the Panel Report[6], and in subsequent sections of this Report.[7]

1.3. Following consultation with the parties, the Panel adopted its Working Procedures, together with Additional Working Procedures Concerning Business Confidential Information (Panel's BCI Procedures), on 13 July 2015.[8]

1.4. Before the Panel, Indonesia claimed that the European Union acted inconsistently with several provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). Specifically, Indonesia claimed that the European Union acted inconsistently with: (i) 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; (ii) 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 two relevant factors – namely, the "financial/economic crisis" and "issues related to the European Union's domestic industry's access to raw materials";

[1] WT/DS442/R, 16 December 2016.
[2] Request for the Establishment of a Panel by Indonesia, WT/DS442/2.
[3] Fatty alcohols are intermediary products produced from natural or synthetic sources, such as natural fats and oils, crude oil, natural gas, natural gas liquids, and coal. Fatty alcohols are mainly used as inputs for the production of surfactants, which are used to produce detergents and household, cleaning, and personal care products. (See 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 (11 May 2011), pp. 47-62 (Preliminary Determination) (Panel Exhibit IDN-3), recital 11; and Indonesia's first written submission to the Panel, para. 1.2 and fn 1 thereto)
[4] Panel Report, para. 2.1 (referring 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, *Official Journal of the European Union*, L Series, No. 293 (11 November 2011) pp. 1-18 (Final Determination) (Panel Exhibit IDN-4)).
[5] Panel Report, paras. 1.3 and 2.1.
[6] Panel Report, paras. 2.1-2.2, 7.64-7.71, 7.113-7.114, 7.131-7.136, 7.231, and 7.233.
[7] See *infra*, section 5.1.1 and paragraphs 5.117, 5.169-5.170, 5.212-5.213, and 5.245-5.249.
[8] Panel Report, para. 1.7 and Annexes A-1 and A-2.

and (iii) Article 6.7 of the Anti-Dumping Agreement because the European Union failed to disclose to the investigated Indonesian producers the results of the verification visits.[9]

1.5. The European Union requested the Panel to reject Indonesia's claims in their entirety.[10] In addition, on 8 January 2015, the European Union requested the Panel to issue a preliminary ruling that its authority had lapsed pursuant to Article 12.12 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), following an alleged suspension of the Panel proceedings for more than 12 months.[11] On 23 November 2015, following its review of the arguments raised by the parties and third parties, the Panel ruled that its authority had not lapsed pursuant to Article 12.12 of the DSU. The Panel indicated that this preliminary ruling and the underlying reasoning of the Panel would form an integral part of its Report.[12]

1.6. The Panel circulated its Report to Members of the World Trade Organization (WTO) on 16 December 2016. Pursuant to the Panel's BCI Procedures, the Panel redacted certain information that it considered to be BCI. In its Report, the Panel found that:

a. with respect to the European Union's request for a preliminary ruling:

   i. the European Union had 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 Article 12.12 of the DSU[13];

   ii. the work of the Panel had not been suspended[14]; and

   iii. the authority for the establishment of the Panel had not lapsed[15];

b. with respect to Indonesia's claims under Articles 2.3 and 2.4 of the Anti-Dumping Agreement:

   i. Indonesia had not demonstrated that the EU authorities[16] acted inconsistently with Article 2.4 by making an improper deduction for a factor that did not affect price comparability[17]; and

   ii. Indonesia had therefore not demonstrated that the EU authorities consequently acted inconsistently with Article 2.3[18];

c. with respect to Indonesia's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement:

   i. Indonesia had not demonstrated that the EU authorities acted inconsistently with Articles 3.1 and 3.5 in their analysis of the "economic crisis" factor[19]; and

   ii. Indonesia had 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[20]; and

[9] Panel Report, para. 3.1.
[10] Panel Report, para. 3.2.
[11] Panel Report, para. 7.10.
[12] Panel Report, para. 7.13.
[13] Panel Report, para. 8.1.a.i. See also para. 7.29.a.
[14] Panel Report, para. 8.1.a.ii. See also para. 7.29.b.
[15] Panel Report, para. 8.1.a.iii. See also para. 7.29.c.
[16] We understand the Panel and the parties to have used the term "EU authorities" to refer either to the European Commission, or to the European Council, or both. We do the same in this Report.
[17] Panel Report, para. 8.1.b.i. See also para. 7.160.
[18] Panel Report, para. 8.1.b.ii. See also para. 7.161.
[19] Panel Report, para. 8.1.c.i. See also para. 7.189.
[20] Panel Report, para. 8.1.c.ii. See also para. 7.205.

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 the on-the-spot investigations to the Indonesian producer, PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas), and therefore acted inconsistently with Article 6.7.[21]

1.7. Pursuant to Article 19.1 of the DSU, the Panel recommended that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement.[22]

1.8. On 10 February 2017, Indonesia notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal[23] and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review[24] (Working Procedures). On 15 February 2017, the European Union notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal[25] and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 28 February 2017, the European Union and Indonesia each filed an appellee's submission.[26] On 3 March 2017, the United States filed a third participant's submission.[27] On 16 June 2017, Korea notified its intention to appear at the oral hearing as a third participant.[28]

1.9. On 15 February 2017, Indonesia requested authorization, pursuant to Rule 18(5) of the Working Procedures, to correct a clerical error in its Notice of Appeal. In accordance with Rule 18(5), the Appellate Body Division hearing this appeal provided the European Union and the third parties with an opportunity to comment in writing on the request. No objections to Indonesia's request were received. On 20 February 2017, the Division authorized Indonesia to correct the clerical error in its Notice of Appeal.[29]

1.10. On 11 April 2017, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.[30] The Chair of the Appellate Body explained that this was due to a number of factors, including the substantial workload of the Appellate Body, scheduling difficulties arising from appellate proceedings running in parallel with an overlap in the composition of the Divisions hearing the appeals, the demands that these concurrent appeals place on the WTO Secretariat's translation services, and a shortage of staff in the Appellate Body Secretariat. On 7 August 2017, the Chair of the Appellate Body informed the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated no later than 5 September 2017.[31]

1.11. On 17 February 2017, Indonesia requested the Appellate Body Division hearing this appeal to adopt specific modalities for the treatment of certain information designated as business confidential information (BCI). Indonesia expressed the view that the requested modalities are provided for under Article 18.2 of the DSU. On 23 February 2017, the European Union indicated

[21] Panel Report, para. 8.1.d. See also para. 7.236.
[22] Panel Report, para. 8.3.
[23] WT/DS442/5.
[24] WT/AB/WP/6, 16 August 2010.
[25] WT/DS442/6.
[26] Pursuant to Rules 22 and 23(4), respectively, of the Working Procedures.
[27] Pursuant to Rule 24(1) of the Working Procedures.
[28] Korea submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For purposes of this appeal, we have interpreted Korea's action to be a notification expressing the intention of Korea to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures. Having notified the DSB of their interest in the matter before the Panel, pursuant to Article 10.2 of the DSU, India, Korea, Malaysia, Thailand, Turkey, and the United States reserved their right to participate as third parties. (Panel Report, para. 1.6) India, Malaysia, Turkey, and Thailand are not third participants in these appellate proceedings as none of them filed a written submission pursuant to Rule 24(1) of the Working Procedures or appeared at the oral hearing.
[29] WT/DS442/5/Corr.1, in English and Spanish only. The corrected version of Indonesia's Notice of Appeal is contained in Annex A-1 of the Addendum to this Report, WT/DS442/AB/R/Add.1.
[30] WT/DS442/7.
[31] WT/DS442/8.

that it shared Indonesia's understanding of Article 18.2 of the DSU. On 16 March 2017, the Division informed the participants that it did not share their understanding of Article 18.2 of the DSU. The Division explained that, to the extent that the participants in this appeal wanted the Division to undertake specific procedural steps not expressly contemplated under the DSU or the Working Procedures, then the participants needed to request the specific treatment sought and explain why the information in question warranted special and additional protection.[32]

1.12. On 11 May 2017, Indonesia addressed a letter to the Division, making two requests. First, Indonesia requested the Division to adopt, pursuant to Rule 16(1) of the Working Procedures, additional procedures for the protection of BCI in these appellate proceedings. Second, Indonesia requested leave to modify the executive summary of its appellant's submission by replacing the information enclosed within double brackets in paragraph 7.9 of that executive summary with non-confidential information. On 12 May 2017, the Division invited the European Union and the third participants to comment on Indonesia's letter. No objections to Indonesia's requests were received.

1.13. On 13 June 2017, the Division issued a Procedural Ruling informing the participants of its decision to accord additional protection, on specified terms, to the following information in these appellate proceedings: (i) the information marked by the participants as BCI and enclosed within double brackets in their submissions to the Appellate Body; and (ii) the information designated by the Panel as BCI in its Report and in the Panel record. Second, pursuant to Rules 16(1) and 18(5) of the Working Procedures, the Division accepted Indonesia's request for leave to amend the executive summary of its appellant's submission.[33]

1.14. The oral hearing in this appeal was held on 19-20 June 2017. The participants and third participants made oral statements and responded to questions posed by the Division.

1.15. On 30 June 2017, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Appellate Body had notified the Chair of the DSB of its decision to authorize Appellate Body Member Mr Ricardo Ramírez-Hernández to complete the disposition of this appeal, even though his second term of office was due to expire before the completion of the appellate proceedings.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[34] The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS442/AB/R/Add.1.

3 ARGUMENTS OF THE UNITED STATES AS A THIRD PARTICIPANT

3.1. The arguments of the United States are reflected in the executive summary of its written submission provided to the Appellate Body[35], contained in Annex C of the Addendum to this Report, WT/DS442/AB/R/Add.1.

[32] Additional details regarding the Division's letter of 16 March 2017 are reflected in the Procedural Ruling of 13 June 2017 contained in Annex D of the Addendum to this Report, WT/DS442/AB/R/Add.1.

[33] The Procedural Ruling of 13 June 2017 is contained in Annex D of the Addendum to this Report, WT/DS442/AB/R/Add.1.

[34] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015). The corrected version of the executive summary of Indonesia's appellant's submission is contained in Annex B-1 of the Addendum to this Report, WT/DS442/AB/R/Add.1.

[35] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

a. whether the Panel erred in its interpretation and application of Article 2.4 of the Anti-Dumping Agreement, and acted inconsistently with Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement, in finding that Indonesia had not demonstrated that the EU authorities made an improper deduction for a factor that did not affect price comparability (raised by Indonesia);

b. whether the Panel erred in its interpretation and application of Article 6.7 of the Anti-Dumping Agreement in finding that the EU authorities failed to make available or disclose the results of the on-the-spot investigations to PT Musim Mas, and that the European Union therefore acted inconsistently with Article 6.7 (raised by the European Union);

c. whether, in appealing the Panel Report concerning an expired measure, Indonesia acted inconsistently with the provisions of Article 3 of the DSU, and whether the Appellate Body should, for this reason, find it unnecessary to rule on the claims raised on appeal by Indonesia (raised by the European Union);

d. whether the Panel acted inconsistently with Articles 19 and 11 of the DSU in making a recommendation with respect to an expired measure (raised by the European Union);

e. whether the Panel erred, and failed to make an objective assessment of the matter under Article 11 of the DSU, in finding that the authority for the establishment of the Panel had not lapsed pursuant to Article 12.12 of the DSU (raised by the European Union); and

f. whether the Panel erroneously treated certain information as BCI, and consequently erred by redacting that information from five paragraphs of the Panel Report (raised by the European Union).

5 ANALYSIS OF THE APPELLATE BODY

5.1 Indonesia's claims of error regarding the Panel's findings under Article 2.4 of the Anti-Dumping Agreement

5.1. Indonesia appeals the Panel's finding that Indonesia had not demonstrated 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.[36] Indonesia contends that the Panel erred in its interpretation and application of Article 2.4 in assessing whether the EU authorities' downward adjustment to PT Musim Mas' export price was proper. Indonesia also argues that the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU in its analysis of Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement.[37] Consequently, Indonesia requests us to reverse the Panel's conclusion under Article 2.4 of the Anti-Dumping Agreement.[38] Indonesia also requests us to complete the legal analysis and find that the EU authorities acted inconsistently with Article 2.4 by applying an incorrect legal standard in their decision to make a downward adjustment to PT Musim Mas' export price.[39]

5.2. Before commencing our analysis of the issues raised on appeal, we provide an overview of the relevant aspects of the EU authorities' anti-dumping investigation and the specific

[36] Indonesia's appellant's submission, para. 6.1 (referring to Panel Report, paras. 7.160 and 8.1.b.i).
[37] In its Notice of Appeal and appellant's submission, Indonesia contended that the Panel also acted inconsistently with Article 17.6(ii) of the Anti-Dumping Agreement. However, at the oral hearing, Indonesia clarified that its claim regarding the standard of review applied by the Panel was limited to Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU.
[38] Panel Report, paras. 7.160 and 8.1.b.i.
[39] Indonesia's appellant's submission, para. 6.3.

anti-dumping measure at issue in this dispute. We also include a summary of the relevant Panel findings.

5.1.1 Background and the measure at issue

5.3. On 13 August 2010, the EU authorities initiated an anti-dumping investigation concerning imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia.[40]

5.4. In their Preliminary Determination[41], the EU authorities indicated that they had compared the normal values and export prices of the exporting producers on an ex-works basis. The EU authorities also indicated that they had made due allowances in the form of adjustments for differences affecting prices and price comparability in accordance with Article 2(10) of the EU Basic Anti-Dumping Regulation.[42] Where applicable and justified, adjustments had been made for differences in indirect taxes, transport, insurance, handling, loading and ancillary costs, packing costs, credit costs, and commissions.[43]

5.5. The adjustment made for commissions related to, *inter alia*, payments by one of the investigated Indonesian producers, PT Musim Mas, to Inter-Continental Oils & Fats Pte Ltd (Singapore) (ICOF-S), a related trading company based in Singapore. Specifically, the EU authorities established that PT Musim Mas paid ICOF-S a mark-up for sales made by ICOF-S on behalf of PT Musim Mas to customers in the European Union.[44] The EU authorities found that the mark-up paid by PT Musim Mas to ICOF-S represented a payment for a service for which there was no corresponding pricing component on the domestic side.[45] The EU authorities thus characterized this mark-up as a commission paid in respect of export sales to the European Union, and treated it as a difference affecting price comparability for which a downward adjustment to the export price was warranted.[46] The EU authorities made this adjustment of their own volition and not at the request of any of the interested parties in the investigation.[47]

5.6. In their Preliminary Determination, the EU authorities imposed provisional anti-dumping duties on imports of fatty alcohols from, *inter alia*, the two investigated Indonesian exporters, PT Musim Mas and PT Ecogreen Oleochemicals (Ecogreen). The provisional anti-dumping duty rates imposed on PT Musim Mas and Ecogreen were 4.3% and 6.3%, respectively.[48]

5.7. In commenting on the Preliminary Determination, PT Musim Mas argued that the EU authorities wrongly made a downward adjustment to the export price for a difference in commission in contravention of Article 2(10)(i) of the EU Basic Anti-Dumping Regulation.[49] According to PT Musim Mas, the EU authorities failed to carry out a reasoned assessment of the functions of ICOF-S and PT Musim Mas to ascertain whether "they are a single economic entity".[50]

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[40] European Commission, Notice of initiation of an anti-dumping proceeding concerning imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia, *Official Journal of the European Union*, C Series, No. 219 (13 August 2010), pp. 12-16 (Panel Exhibit IDN-12).

[41] Panel Exhibit IDN-3 (see *supra*, fn 3).

[42] Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, published in *Official Journal of the European Union*, L Series, No. 343 (22 December 2009), p. 51 ff (EU Basic Anti-Dumping Regulation) (Panel Exhibit EU-3).

[43] Panel Report, para. 7.64 (referring to Preliminary Determination (Panel Exhibit IDN-3), recitals 20-21 and 37-38).

[44] Panel Report, para. 7.63 (referring to the Provisional Company-Specific Disclosure to PT Musim Mas, Annex 2: Calculation of dumping margin (Panel Exhibit IDN-33 (BCI)), p. 4).

[45] Panel Report, para. 7.84.

[46] Panel Report, para. 7.63 (referring to Preliminary Determination (Panel Exhibit IDN-3), recital 38). As the Panel explained, the EU authorities used the terms "commission" and "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". (Ibid., fn 218 thereto)

[47] Panel Report, para. 7.61 and fn 213 thereto.

[48] Preliminary Determination (Panel Exhibit IDN-3), recitals 128-129.

[49] Article 2(10) of the EU Basic Anti-Dumping Regulation governs the adjustments that the EU authorities are to make to account for differences affecting price comparability. (See *infra*, para. 5.55.)

[50] Panel Report, para. 7.66 (quoting PT Musim Mas comments on the Preliminary Determination, 10 June 2011 (Panel Exhibit IDN-34 (BCI)), p. 3). 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 [PT Musim Mas]", which in turn suggested that no adjustment should have been made. (Ibid., para. 7.67 (quoting

Further, even accepting that the downward adjustment to the export price for the alleged differences in commissions was warranted, PT Musim Mas argued that the EU authorities failed to make a corresponding adjustment to the normal value given that ICOF-S "carries out exactly the same functions for domestic sales as for export sales".[51]

5.8. In their Final Determination[52], the EU authorities rejected the argument that no adjustment should have been made. The EU authorities instead reiterated their view that, in respect of certain of PT Musim Mas' export sales, ICOF-S performs "functions which are similar to those of an agent working on a commission basis".[53] The EU authorities based this conclusion on: (i) the "commission mentioned in a contract covering export sales only"; (ii) 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 "specific commission" received by ICOF-S for export sales that it handles on behalf of PT Musim Mas[54]; and (iii) the fact that ICOF-S also sells products manufactured by unrelated producers.[55] The EU authorities also rejected PT Musim Mas' claim that ICOF-S is involved in PT Musim Mas' sales in Indonesia and that, therefore, a corresponding adjustment should have been made to the normal value.[56]

5.9. Consequently, the EU authorities decided to impose definitive anti-dumping duties in respect of imports of fatty alcohols from, *inter alia*, PT Musim Mas and Ecogreen.[57] The definitive anti-dumping duty rates imposed on PT Musim Mas and Ecogreen were 4.2% and 7.3%, respectively.[58]

5.10. On 20 January 2012, PT Musim Mas filed an action in the European Union's General Court (General Court) for annulment of the anti-dumping duty. In particular, PT Musim Mas challenged the downward adjustment made to its export price for the mark-up paid to ICOF-S.[59] Ecogreen filed a similar action for annulment before the General Court on 21 January 2012.[60]

5.11. Separately, on 10 March 2009, in unrelated proceedings (Interpipe v. Council of the European Communities[61]), the Court of First Instance of the European Union found in favour of exporters of steel tubes contesting an analogous adjustment that had been made by the EU authorities for commissions paid by an exporter (Interpipe NTRP VAT) to its related trader.[62] This judgment was confirmed on appeal by the Court of Justice on 16 February 2012 (Interpipe Judgment[63]), less than a month after the filing of Ecogreen's and PT Musim Mas' actions for

PT Musim Mas comments on the Preliminary Determination, 10 June 2011 (Panel Exhibit IDN-34 (BCI)), p. 14))

[51] Panel Report, para. 7.66 (quoting PT Musim Mas comments on the Preliminary Determination, 10 June 2011 (Panel Exhibit IDN-34 (BCI)), p. 19).

[52] Panel Exhibit IDN-4 (see *supra*, fn 4).

[53] Panel Report, para. 7.68 (quoting Final Determination (Panel Exhibit IDN-4), recital 31).

[54] Panel Report, para. 7.68 (quoting Final Determination (Panel Exhibit IDN-4), recital 31). The EU authorities considered that the direct sales made by PT Musim Mas were "structural" and "permanent", as opposed to being an anomaly. (Ibid., para. 7.69 (quoting Final Determination (Panel Exhibit IDN-4), recital 33))

[55] Panel Report, para. 7.68 (referring to Final Determination (Panel Exhibit IDN-4), recitals 31-33).

[56] Panel Report, para. 7.69 (referring to Final Determination (Panel Exhibit IDN-4), recital 35).

[57] Panel Report, para. 2.1.

[58] See European Commission, General Disclosure Document dated 26 August 2011, AD563, Proposal to impose definitive anti-dumping duties on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia (General Disclosure Document) (Panel Exhibit IDN-39), para. 124; and Final Determination (Panel Exhibit IDN-4), recital 132.

[59] Panel Report, para. 7.133 (referring to the General Court (seventh Chamber), Judgment of 25 June 2015, in Case T-26/12, PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas) v. Council of the European Union, ECLI:EU:T:2015:437 (PT Musim Mas Judgment) (Panel Exhibit EU-4)).

[60] Panel Report, para. 7.133 (referring to General Court, Case T-28/12, PT Ecogreen Oleochemicals and Others v. Council of the European Union (2013)).

[61] Court of First Instance of the European Union, Case T-249/06, Interpipe Niko Tube and Interpipe NTRP v. Council of the European Union [2009] ECR II.

[62] Panel Report, para. 7.134.

[63] Panel Report, para. 7.134 (referring to Court of Justice, Judgment of 16 February 2012 in joined Cases C-191/09 P and C-200/09 P, Council of the European Union (C-191/09 P) / European Commission (C-200/09 P) v. Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT) (concerning Judgment of the Court of

annulment in their cases before the General Court. Following the confirmation of the Interpipe Judgment on appeal, the EU authorities decided to reassess their conclusions concerning the impugned allowances in the fatty alcohols investigation.[64]

5.12. In their Revised Determination[65], the EU authorities found that the adjustment made, pursuant to Article 2(10)(i) of the EU Basic Anti-Dumping Regulation, for the commission paid by Ecogreen to its related trading company was not warranted. The EU authorities recalculated the dumping margin established for Ecogreen, found it to be *de minimis*, and therefore terminated the anti-dumping duty applicable to Ecogreen. However, with respect to PT Musim Mas, the EU authorities maintained their view that the functions of ICOF-S were similar to those of "an agent working on a commission basis" and therefore considered that the adjustment made for the mark-up was still justified.[66] In sum, the Revised Determination eliminated the anti-dumping duty applicable to Ecogreen and confirmed the duty applicable to PT Musim Mas.[67]

5.13. On 25 June 2015, the General Court rejected the action for annulment introduced by PT Musim Mas, ruling that the EU authorities had not erred in finding that ICOF-S had functions similar to those of "an agent working on a commission basis". The General Court also found 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 EU Basic Anti-Dumping Regulation.[68]

5.1.2 The Panel's findings

5.14. Before the Panel, Indonesia claimed 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.[69] Indonesia emphasized that its main contention was that the EU authorities should not have made any adjustment to the export price in relation to the mark-up, and not that the EU authorities erred "because the amount of the adjustment was improper".[70] On this basis, the Panel observed that the amount of the allowance was not at issue in this dispute.[71]

5.15. The Panel considered the principal question before it to be whether the EU authorities had correctly characterized the mark-up that PT Musim Mas paid to ICOF-S as a difference affecting price comparability within the meaning of Article 2.4 of the Anti-Dumping Agreement. The Panel first set out its understanding of the legal standard under Article 2.4.[72] The Panel then reviewed 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 affecting price comparability.[73] Thereafter, the Panel addressed each of the three lines of argument put forward by Indonesia, namely: (i) that the EU authorities mischaracterized the mark-up as a commission, instead of an internal transfer of funds within a "single economic entity", and that this existence of a single economic entity precluded the EU authorities from making an allowance for

First Instance of the European Union, Case T-249/06, Interpipe Niko Tube ZAT and Interpipe NTRP VAT v. Council of the European Union [2009] ECR II-383) (Interpipe Judgment) (Panel Exhibit IDN-49)).

[64] Panel Report, para. 7.134.

[65] 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 (21 December 2012), pp. 1-5 (Revised Determination) (Panel Exhibit IDN-5).

[66] Panel Report, para. 7.135 (referring to Revised Determination (Panel Exhibit IDN-5), recital 12).

[67] Panel Report, para. 2.2.

[68] Panel Report, para. 7.136. (See also PT Musim Mas Judgment (Panel Exhibit EU-4), paras. 136-137) Five years after the imposition of the definitive duties, the EU authorities published a notice of expiry indicating that the anti-dumping measures prescribed by the Final Determination would expire at midnight on 12 November 2016. (European Commission, Notice of the expiry of certain anti-dumping measures, *Official Journal of the European Union*, C Series, No. 418 (12 November 2016), p. 3; and section 5.3 of this Report)

[69] Panel Report, para. 7.30 (referring to Indonesia's second written submission to the Panel, para. 5.1).

[70] Panel Report, para. 6.10 (quoting Indonesia's request for review of the Panel's interim report, para. 2.4).

[71] Panel Report, paras. 6.10-6.12, 6.83-6.85, 7.38, and 7.123.

[72] Panel Report, paras. 7.55-7.61.

[73] Panel Report, paras. 7.63-7.98.

the mark-up[74]; (ii) that the downward 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[75]; and (iii) that the EU authorities failed to provide a reasoned and adequate explanation for eventually treating the two Indonesian exporting producers (PT Musim Mas and Ecogreen) differently in relation to the mark-up received by their respective related traders.[76]

5.16. Having addressed, and rejected, the three grounds on which Indonesia based its claim under Article 2.4 of the Anti-Dumping Agreement, the Panel concluded that Indonesia had not demonstrated that the EU authorities acted inconsistently with this provision by making an improper deduction for a factor that did not affect price comparability. In addition, since Indonesia's claim under Article 2.3 of the Anti-Dumping Agreement was consequential to a finding of inconsistency with Article 2.4, the Panel concluded that Indonesia had not demonstrated that the EU authorities acted inconsistently with Article 2.3.[77]

5.17. Indonesia appeals certain aspects of the Panel's interpretation, analysis, and intermediate findings relating to Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement.[78] Indonesia challenges the Panel's interpretation of Article 2.4. In particular, Indonesia takes issue with the Panel's rejection of Indonesia's argument that the existence of what Indonesia refers to as a "single economic entity"[79] is dispositive of whether a given mark-up qualifies as a difference affecting price comparability under Article 2.4.[80] In addition, Indonesia contends that the Panel erred in its application of Article 2.4, and acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU, in its review of the EU authorities' evaluation of the relationship between PT Musim Mas and ICOF-S, as well as their treatment of the mark-up. We address each of Indonesia's grounds of appeal in turn.

5.1.3 Interpretation of Article 2.4

5.18. Indonesia's appeal calls for us to consider certain issues relating to the interpretation of Article 2.4 of the Anti-Dumping Agreement, particularly the third sentence of this provision. We begin by setting out our understanding of Article 2.4, before examining the specifics of Indonesia's challenge to the Panel's interpretation of this provision.

5.19. Article 2.4 and footnote 7 of the Anti-Dumping Agreement state:

> 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.[7] 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

[74] Panel Report, paras. 7.99-7.111.
[75] Panel Report, paras. 7.112-7.130.
[76] Panel Report, paras. 7.131-7.159.
[77] Panel Report, paras. 7.160-7.161.
[78] Indonesia's appeal is limited to the Panel's findings under Article 2.4, and does not address the Panel's consequential finding under Article 2.3 of the Anti-Dumping Agreement. In addition, Indonesia does not appeal the Panel's rejection of Indonesia's argument that the EU authorities failed to provide a reasoned and adequate explanation for eventually treating PT Musim Mas and Ecogreen differently in relation to the mark-ups paid to their respective traders.
[79] Before the Panel, and in its appellant's submission, Indonesia interchangeably used the terms "single economic entity", "very closely related companies", "closely affiliated companies", and "two entities that are closely intertwined". In response to questioning at the hearing, Indonesia confirmed that it had used these terms synonymously.
[80] Panel Report, paras. 7.103-7.106.

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.

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[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.

5.20. Article 2.4 requires investigating authorities to ensure a fair comparison between the export price and the normal value and, to this end, to make due allowance, or adjustments, for differences affecting price comparability.[81] The obligation to ensure a fair comparison "lies on the investigating authorities".[82] However, Article 2.4 does not prescribe a particular methodology by which investigating authorities must satisfy their obligation to ensure a fair comparison.

5.21. The requirement to make a fair comparison, set out in the first sentence of Article 2.4, presupposes that the component elements of the comparison - i.e. the normal value and the export price - have already been established. The focus of Article 2.4 is not merely on a comparison between the normal value and the export price, but predominantly on the means to ensure the *fairness* of that comparison.[83] For a comparison to be fair, it must be unbiased, objective, and even-handed.[84] The second sentence of Article 2.4 identifies basic parameters that further the goal of achieving a fair comparison, requiring investigating authorities to make the comparison 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.[85]

5.22. The third sentence of Article 2.4 makes clear that the "differences" for which due allowance must be made are those "which affect price comparability". As the Appellate Body has explained, this refers to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the prices of the transactions.[86] Conversely, Article 2.4 prohibits investigating authorities from making adjustments in relation to differences in characteristics of the compared transactions when such differences have no impact on price comparability.[87] The overarching obligation to ensure a fair comparison between the export price and the normal value informs the understanding of the adjective "due" in the third sentence of Article 2.4. This adjective qualifies the word "allowances", with these allowances being the means by which to achieve the fair comparison between the export price and the normal value. The Appellate Body has emphasized that, if proper "allowances" are not made, then the comparison made by the investigating authorities between the export price and the normal value will, by definition, not be "fair".[88] Similarly, making allowances that are not warranted will render the comparison unfair.

5.23. The third sentence of Article 2.4 also includes a list of differences that may affect price comparability − namely, "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics". Footnote 7 to the provision acknowledges that some of the listed factors may overlap, and cautions investigating authorities to ensure that they do not duplicate adjustments resulting from such overlaps. The list in the third sentence of Article 2.4 is preceded by the term "including" and succeeded by "and any other differences which are also demonstrated to affect price comparability", indicating that this list is illustrative and not exhaustive.[89] As the Appellate Body has clarified, "[t]here are … no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance'."[90] Moreover, even with respect to the differences explicitly listed in the third sentence, there may be situations when those differences do not affect price comparability. In such situations, these differences must not be the subject of allowances.

[81] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.204.
[82] Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.163; *EC – Fasteners (China)*, para. 487; *US – Hot-Rolled Steel*, para. 178.
[83] Panel Report, *Egypt – Steel Rebar*, para. 7.333.
[84] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138.
[85] Appellate Body Report, *US – Hot-Rolled Steel*, para. 168; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.235.
[86] Appellate Body Report, *US – Zeroing (EC)*, para. 157.
[87] Appellate Body Report, *US – Zeroing (EC)*, paras. 156-157.
[88] Appellate Body Report, *US – Hot-Rolled Steel*, para. 176.
[89] Appellate Body Report, *US – Zeroing (EC)*, para. 157.
[90] Appellate Body Report, *US – Hot-Rolled Steel*, para. 177.

5.24. Findings by panels and the Appellate Body in prior disputes illustrate, to an extent, certain differences that may affect price comparability within the meaning of Article 2.4.[91] While instructive, past disputes do not serve to delineate precise parameters for "differences which affect price comparability" within the meaning of Article 2.4. To the contrary, the text of Article 2.4 makes clear that "[d]ue allowance shall be made *in each case*, *on its merits*".[92] This means that the need to make due allowance must be assessed in light of the specific circumstances of each case.[93] Article 2.4 does not exclude *a priori* "due allowances" being made with respect to any type of difference, as long as it is a difference affecting price comparability.

5.25. Bearing these considerations in mind, we turn to Indonesia's claim that the Panel erred in its interpretation of Article 2.4 of the Anti-Dumping Agreement.

5.1.4 Whether the Panel erred in its interpretation of Article 2.4

5.26. Indonesia asserts that "[t]he key question in deciding how to treat revenues and expenses of entities … is whether the entities are part of the same [single economic entity]."[94] This assertion underlies Indonesia's claim that the Panel erred in its interpretation of Article 2.4 of the Anti-Dumping Agreement. Indonesia argues, first, that the Panel erred by articulating a legal standard that contained no reference to the relevance of a single economic entity. Specifically, Indonesia asserts that, in its interpretation of Article 2.4, the Panel did not address whether the existence of a single economic entity or the relationship between parties could affect the determination of whether a factor affected price comparability, even though Indonesia's arguments identified that as a key issue.[95] Second, Indonesia contends that the Panel erred in stating that it was "not convinced that the existence of what Indonesia denotes as a 'single economic entity' is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4."[96]

5.27. The European Union highlights that Article 2.4 does not contain any textual element suggesting that the circumstance that a trader and the exporter/producer are related or constitute a single economic entity plays a decisive role for the purpose of making an adjustment in order to ensure a fair comparison.[97] The European Union also argues that Indonesia's claims on appeal are the result of a "manifestly partial and incorrect" reading of the Panel Report and that, for this reason, they should be rejected.[98]

5.28. The United States agrees with the Panel that whether an entity constitutes a single economic entity would not be dispositive of the need for adjustments under Article 2.4 of the Anti-Dumping Agreement, and that, depending on the underlying facts, transactions between affiliated entities may impact price comparability.[99]

5.29. We begin with Indonesia's first line of argument on appeal. Indonesia contends that the Panel erred because it articulated a legal standard that contained no reference to whether the existence of a single economic entity or the relationship between parties could affect the determination of whether a factor affected price comparability within the meaning of Article 2.4.[100] The Panel structured its analysis of Indonesia's claim under Article 2.4 as follows. After setting out its understanding of the legal standard under Article 2.4[101], the Panel reviewed whether the EU authorities' explanations revealed a sufficient evidentiary basis for treating the mark-up in

[91] See e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 168; and Panel Reports, *Korea – Certain Paper*, para. 7.147; and *US – Softwood Lumber V*, para. 7.357.
[92] Emphasis added.
[93] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.87. See also Appellate Body Report, *US – Hot-Rolled Steel*, para. 179.
[94] Indonesia's appellant's submission, para. 3.114.
[95] Indonesia's appellant's submission, paras. 2.54 and 3.91 (quoting Panel Report, para. 7.103 (fns omitted); and referring to paras. 7.54-7.62).
[96] Indonesia's appellant's submission, para. 3.110 (referring to Panel Report, paras. 7.102-7.107).
[97] European Union's appellee's submission, para. 93 (quoting Appellate Body Report, *India – Patents (US)*, para. 45).
[98] European Union's appellee's submission, paras. 111 and 139.
[99] United States' third participant's submission, para. 8.
[100] Indonesia's appellant's submission, para. 3.91 (referring to Panel Report, paras. 7.54-7.62).
[101] Panel Report, paras. 7.55-7.61.

question as a difference which affects price comparability.[102] Next, the Panel specifically and separately addressed each of Indonesia's arguments, namely: (i) that the existence of a single economic entity precluded the EU authorities from making an allowance for the mark-up[103]; (ii) that the allowance resulted in an asymmetrical comparison with the normal value[104]; and (iii) that the different outcomes for the two Indonesian producers demonstrate that the EU authorities' analysis was arbitrary.[105]

5.30. In setting out its "understanding of the legal standard under Article 2.4 as relevant to the claim and arguments before [it]"[106], the Panel focused on the terms of the treaty as explicitly spelled out in Article 2.4. The Panel's understanding of Article 2.4[107] is consonant with our interpretation of the provision as discussed in section 5.1.3 above.

5.31. The text of Article 2.4 does not contain the words "single economic entity", nor does it contain any explicit reference to affiliations or relationships between different entities.[108] Accordingly, we do not consider it problematic that, in setting out its understanding of Article 2.4, the Panel focused on the terms of the treaty and did not refer, in the abstract, to the relevance of the relationship between entities.

5.32. We also note that, in focusing on the terms of the treaty, the Panel highlighted that the list of factors that could potentially affect price comparability, in the third sentence of Article 2.4, is an illustrative list, not an exhaustive list. The Panel also referred to the Appellate Body's reasoning that, given that this list is followed by the phrase "and any other differences which are also demonstrated to affect price comparability", "[t]here are … no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance'."[109]

5.33. Furthermore, we recall that the third sentence of Article 2.4 states that due allowance shall be made "in each case, on its merits". Article 2.4 thus establishes that the need to make due allowance must be assessed in light of the specific circumstances of each case.[110] It follows that the existence of a close relationship between transacting companies would be pertinent to the extent that the relationship affects the relevant transactions in such a way as to affect the comparability of the export price and the normal value.

5.34. In any event, we observe that the Panel examined Indonesia's assertions regarding the relevance of a "single economic entity" in a subsequent part of its analysis when it addressed Indonesia's argument that, in this case, the existence of a single economic entity precluded the EU authorities from making an allowance for the mark-up. The Panel expressly considered the question of whether the existence of a single economic entity necessarily means that the payment of a mark-up between related entities can never affect price comparability.[111]

5.35. Indonesia advances a second line of argument on appeal. Indonesia asks us to reverse what Indonesia describes as the Panel's finding that "the relationship between closely affiliated entities, including a closely affiliated 'downstream participant', is not relevant to the determination of a price adjustment under Article 2.4 because those entities 'could transact for goods and services at

[102] Panel Report, paras. 7.63-7.98.
[103] Panel Report, paras. 7.99-7.111.
[104] Panel Report, paras. 7.112-7.130.
[105] Panel Report, paras. 7.131-7.159.
[106] Panel Report, para. 7.54.
[107] Panel Report, paras. 7.55-7.61.
[108] We note that Article 2.3 of the Anti-Dumping Agreement, which concerns construction of the export price, recognizes that an "association" between an exporter and another company may be relevant to the determination of the export price and may make the price paid between these two entities "unreliable". The fourth and fifth sentences of Article 2.4 identify additional factors that are to be taken into consideration when the situation contemplated in Article 2.3 arises. However, these provisions are not relevant to the issues raised in this appeal.
[109] Panel Report, para. 7.56 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 177).
[110] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.87.
[111] Panel Report, paras. 7.103-7.107.

arm's-length, regardless of how closely intertwined their control and ownership might be'."[112] However, we see no such finding in the Panel Report. Instead, the Panel stated:

> We are not convinced that the existence of what Indonesia denotes as a "single economic entity" 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.[113]

5.36. Thus, the Panel did not find the relationship between entities to be irrelevant to an investigating authority's assessment under Article 2.4. The Panel found that such a relationship was not "dispositive" of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4. This is in keeping with the Panel's earlier statement that "[t]here are … no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance'."[114] Moreover, the Panel explicitly recognized that "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."[115] The Panel explained that, in its 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 the investigating authority in a given case where the proper characterization of the payment in question is at issue.[116] We do not understand the Panel's reasoning to stand for the proposition that the nature and degree of affiliation between related companies are irrelevant to the issue of whether any allowances should be made in order to ensure a fair comparison between the normal value and the export price. Rather, we consider that the Panel properly emphasized the case-specific nature of an investigating authority's assessment under Article 2.4.

5.37. For Indonesia, the Panel erred in stating that it was not convinced that the existence of what Indonesia denotes as a "single economic entity" is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4.[117] While acknowledging that Article 2.4 does not specifically refer to the treatment of transactions between affiliated parties in the calculation of anti-dumping duties, Indonesia nevertheless contends that it is "axiomatic … that whether transactions take place between closely affiliated or independent parties is highly relevant for the dumping analysis."[118] Indonesia relies upon the Appellate Body's findings in *US – Hot-Rolled Steel* to support its assertion that a price charged by one company within a "single economic entity" to another within the same entity might not reflect commercial considerations.[119]

5.38. The European Union contends that the Appellate Body report in *US – Hot-Rolled Steel* does not demonstrate that the affiliation between entities is key to assessing whether or not an adjustment under Article 2.4 is warranted. For the European Union, that case demonstrates the contrary because it is an example of when an affiliation or close links between the producer/exporter and the downstream seller were immaterial to the calculation of the dumping margin.[120]

5.39. The Appellate Body's reasoning in *US – Hot-Rolled Steel* concerned transactions "in the ordinary course of trade" within the meaning of Article 2.1 of the Anti-Dumping Agreement, rather than "due allowances" within the meaning of Article 2.4. Nonetheless, the observations made in that dispute illustrate the diversity of possible permutations of transactions between related companies that an investigating authority may encounter in establishing the normal value, or the

[112] Indonesia's appellant's submission, para. 3.132 (quoting Panel Report, para. 7.103).
[113] Panel Report, para. 7.103. (fn omitted)
[114] Panel Report, para. 7.56 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 177).
[115] Panel Report, para. 7.103.
[116] Panel Report, paras. 7.105-7.106.
[117] Indonesia's appellant's submission, para. 3.110 (quoting Panel Report, para. 7.103).
[118] Indonesia's appellant's submission, para. 3.17.
[119] Indonesia's appellant's submission, paras. 3.18-3.21.
[120] European Union's appellee's submission, paras. 68-72.

export price.[121] The examples referred to by the Appellate Body in that dispute also illustrate that there are instances when the affiliation between transacting entities will have an impact on the dumping analysis, and there are other instances when such affiliation will not have an impact on the dumping analysis. This is consonant with the requirement in the third sentence of Article 2.4 that investigating authorities make due allowances "in each case, on its merits, for differences which affect price comparability". *A contrario*, investigating authorities must not make allowances for differences that do not affect price comparability.

5.40. Indonesia also invokes the Appellate Body's reference in *US – Hot-Rolled Steel* to a "single economic enterprise" in support of its arguments.[122] We understand the Appellate Body to have used the words "single economic enterprise"[123] in its report in that dispute as a short-hand to describe entities that are legally distinct but share common ownership. The use of these words was not intended to convey a general legal concept under the Anti-Dumping Agreement in respect of which certain consequences would automatically follow if a single economic enterprise were found to exist. Instead, the Appellate Body's reasoning in *US – Hot-Rolled Steel* reinforces our view that the focus of the investigating authority's assessment is not on the nature of the relationship between related companies *per se*, but rather on whether that relationship can be demonstrated to be a factor that impacts the prices of the relevant transactions.[124]

5.41. Indonesia draws further support for its argument from the reasoning of the panel in *Korea – Certain Paper* and that of the Appellate Body in *EC – Fasteners (China)* relating to claims under Article 6.10 of the Anti-Dumping Agreement.[125] According to Indonesia, "[t]he key question is whether, in the words of the *Korea – Certain Paper* panel, two entities are in a relationship close enough to warrant their treatment as a single entity for the purposes of the dumping analysis."[126]

5.42. The reasoning relied upon by Indonesia in those disputes relates to Article 6.10, rather than Article 2.4 of the Anti-Dumping Agreement. Article 6.10 requires investigating authorities "as a rule" to "determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." Given the different wording and functions of Article 2.4 and Article 6.10, we are not persuaded that the criteria applicable to an investigating authority's assessment under Article 6.10 are necessarily relevant to the understanding of Article 2.4. In any event, unlike Indonesia, we do not read the panel's reasoning in *Korea – Certain Paper* or that of the Appellate Body in *EC – Fasteners (China)* as prescribing uniform treatment of the transactions between affiliated companies. Instead, the adjudicators' reasoning in those disputes underscores that whether multiple exporters may be considered as a single entity for the purposes of Article 6.10 is dependent on the circumstances of each case.[127]

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[121] The Appellate Body provided, as an example, a situation in which the parties to a transaction have common ownership, noting that, although the parties are legally distinct persons, usual commercial principles "might not" be respected between them. At the same time, the Appellate Body noted that there may be instances in which, even where the parties to a sales transaction are entirely independent, a transaction might not be "in the ordinary course of trade". (Appellate Body Report, *US – Hot-Rolled Steel*, paras. 141 and 143 and fn 106 thereto)

[122] Indonesia's appellant's submission, paras. 2.33-2.35, 3.18, 3.21-3.23, and 3.79.

[123] The Appellate Body explained that, instead of a sale between two enterprises that are economically independent and transacting at market prices, transactions between entities with common ownership might not reflect market prices when such transactions are "used as a vehicle for transferring resources within the *single economic enterprise*." (Appellate Body Report, *US – Hot-Rolled Steel*, para. 141 (emphasis added))

[124] We observe that the concept of a "single economic entity" has legal significance under EU law. (See PT Musim Mas Judgment (Panel Exhibit EU-4), paras. 43-48)

[125] Indonesia's appellant's submission, paras. 3.62-3.68 (quoting Panel Report, *Korea – Certain Paper*, paras. 7.161 and 7.165; and referring to Appellate Body Report, *EC – Fasteners (China)*, paras. 358, and 371-374).

[126] Indonesia's appellant's submission, fn 111 to para. 3.67.

[127] The panel in *Korea – Certain Paper* emphasized that "whether or not the circumstances of a given investigation justify" the treatment of multiple exporters as a single exporter for purposes of determination of the dumping margin "must be determined on the basis of the record of that investigation". (Panel Report, *Korea – Certain Paper*, para. 7.161) Similarly, in *EC – Fasteners (China)*, the Appellate Body considered that assessing whether a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Article 6.10 will depend on the existence of a number of situations, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity. (Appellate Body Report, *EC – Fasteners (China)*, para. 376)

5.43. At the oral hearing, Indonesia acknowledged that transactions between closely affiliated companies could be the subject of allowances under Article 2.4, but maintained that the affiliation between such companies would necessarily influence the investigating authorities' calculation of the *amount* of the allowance to be made. However, as the European Union highlighted at the oral hearing, Indonesia repeatedly asserted before the Panel that its main contention was that the EU authorities should not have made any adjustment to the export price in relation to the mark-up, and not that the EU authorities erred "because the amount of the adjustment was improper".[128] Hence, the amount of the allowance is not at issue in this dispute.[129]

5.44. For all of these reasons, the Panel did not err in setting out its "understanding of the legal standard under Article 2.4 as relevant to the claim and arguments before [it]".[130] Nor did the Panel err in stating that it was "not convinced that the existence of what Indonesia denotes as a 'single economic entity' is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4."[131] Consequently, we find that Indonesia has not demonstrated that the Panel erred in its interpretation of Article 2.4 of the Anti-Dumping Agreement.

5.45. Having so found, we wish to be clear on what we are not saying. We are not ruling, nor do we consider that the Panel ruled, that the nature and degree of affiliation between related companies is irrelevant to the issue of whether any allowances should be made in order to ensure a fair comparison between the normal value and the export price. Nor do we rule, in the abstract, on the circumstances in which an inquiry into the nature of the relationship between transacting entities will suffice or be determinative of the issue of whether allowances should be made pursuant to Article 2.4 of the Anti-Dumping Agreement.

5.1.5 Whether the Panel erred in its application of Article 2.4

5.46. In appealing the Panel's application of Article 2.4 of the Anti-Dumping Agreement, Indonesia challenges the Panel's review of whether the EU authorities' explanations revealed a sufficient evidentiary basis for treating the mark-up paid by PT Musim Mas to ICOF-S as a difference affecting price comparability.[132] Indonesia also challenges the Panel's evaluation and rejection of Indonesia's arguments: (i) that the existence of a single economic entity precluded the EU authorities from making an allowance for the mark-up[133]; and (ii) that the allowance resulted in an asymmetrical comparison with the normal value.[134] Indonesia does not appeal the Panel's evaluation of the different treatment accorded to Ecogreen and to PT Musim Mas in the Revised Determination.[135]

5.47. The European Union requests us to reject Indonesia's arguments.[136] The European Union submits that all of Indonesia's claims of error are predicated on Indonesia's assertion that "[t]he key question in deciding how to treat revenues and expenses of entities … is whether the entities are part of the same [single economic entity]."[137] For the European Union, if we find that this assertion is not well founded, we should consequently reject all of Indonesia's claims that the Panel erred in its application of Article 2.4 to the facts of this case.[138] The European Union avers that Indonesia's claims on appeal are the result of a partial and incorrect reading of the Panel Report and that, for this reason too, they should be rejected.[139]

5.48. Indonesia underlines that the relevance of the existence of a "single economic entity" was the key question to have been addressed by the Panel, and that the Panel failed to address it

[128] Panel Report, para. 6.10 (referring to Indonesia's request for review of the Panel's interim report, para. 2.4).
[129] Panel Report, paras. 6.10-6.12, 6.83-6.85, 7.38, and 7.123.
[130] Panel Report, paras. 7.54-7.61.
[131] Panel Report, para. 7.103. (fn omitted)
[132] Panel Report, paras. 7.63-7.98.
[133] Panel Report, paras. 7.99-7.111.
[134] Panel Report, paras. 7.112-7.130.
[135] Panel Report, paras. 7.131-7.159.
[136] European Union's appellee's submission, paras. 105 and 312.
[137] Indonesia's appellant's submission, para. 3.114.
[138] European Union's appellee's submission, paras. 105-110.
[139] European Union's appellee's submission, para. 139.

properly. For example, according to Indonesia, the costs of services performed by entities within a single economic entity are, for dumping purposes, indirect selling expenses that are included in the normal value and export price, and may therefore not be deducted from the normal value or export price.[140] Indonesia goes on to state that:

> … the Panel fundamentally misconstrued the importance of the question of whether [a single economic entity] exists. As explained above, this is, very simply, that if money is paid from outside to an entity within [a single economic entity], that money is revenue for the [single economic entity] as whole. If an entity transfers money to another entity within the same [single economic entity], that transfer is not an expense to the [single economic entity] as a whole. … The key question in deciding how to treat revenues and expenses of entities, therefore, is whether the entities are part of the same [single economic entity].[141]

5.49. These statements, and many more in Indonesia's appellant's submission[142], lend credence to the European Union's assertion that Indonesia's claims of error are predicated on our acceptance of Indonesia's view as to the correct interpretation of Article 2.4. As discussed in section 5.1.4 above, we do not consider that the Panel erred in its interpretation of Article 2.4, or that the existence of a single economic entity is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4.

5.50. In response to questioning at the hearing, Indonesia identified what it considered to be examples of the independent bases for its claim that the Panel erred in its application of Article 2.4, beyond its assertion that the Panel articulated and applied an incorrect legal standard under Article 2.4. Indonesia referred to the Panel's statement that the Panel considered "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."[143] According to Indonesia, having made this statement, the Panel erred by not scrutinizing whether the EU authorities had properly examined whether the relevant transactions were at arm's length.

5.51. We do not consider this argument by Indonesia to be a distinct challenge to the Panel's application of Article 2.4. The statement to which Indonesia refers was made by the Panel in the context of its rejection of Indonesia's argument that a "single economic entity" is dispositive of whether a given mark-up qualifies as a difference affecting price comparability under Article 2.4.[144] The Panel was not espousing a stand-alone criterion under Article 2.4 that was then to be applied to the facts of this case. Instead, as discussed above, the Panel correctly emphasized that an inquiry under Article 2.4 is dependent on the particular situation and evidence before the investigating authorities in a given case.[145] Thus, to the extent that Indonesia's claim that the Panel erred in its application of Article 2.4 is premised on Indonesia's argument that the existence of a single economic entity is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4, we consider it unnecessary to examine further these aspects of Indonesia's claim.

5.52. That said, we recall that, in response to questioning at the hearing, Indonesia also pointed to its argument that the Panel erred by implying that, when confronted with transactions between closely affiliated parties, an investigating authority may replace the expenses actually incurred by those parties with the expenses that would have been incurred had the producing entity obtained the service from an independent provider.[146]

5.53. We address below what we consider to be the remaining aspects of Indonesia's claim that the Panel erred in its application of Article 2.4 of the Anti-Dumping Agreement, namely, that the Panel erred: (i) in its review of whether the EU authorities' explanations revealed a sufficient

[140] Indonesia's appellant's submission, para. 3.83.
[141] Indonesia's appellant's submission, para. 3.114.
[142] See e.g. Indonesia's appellant's submission, paras. 3.97, 3.115, 3.119, 3.129-3.131, 3.137, 3.148, 3.152, 3.168, and 3.182.
[143] Panel Report, para. 7.103.
[144] Panel Report, para. 7.103.
[145] Panel Report, paras. 7.106-7.107.
[146] Indonesia's appellant's submission, para. 3.165 (referring to Panel Report, paras. 7.126-7.130).

evidentiary basis for treating the mark-up paid by PT Musim Mas to ICOF-S as a difference affecting price comparability[147]; and (ii) in its evaluation and rejection of Indonesia's argument that the allowance resulted in an asymmetrical comparison with the normal value, including by allegedly finding that the investigating authorities may replace the expenses actually incurred by the exporter with hypothetical expenses.[148]

5.1.5.1 Whether the Panel erred in its review of the EU authorities' treatment of the mark-up

5.54. Indonesia challenges the Panel's analysis of whether the EU authorities' explanations revealed a sufficient evidentiary basis for treating the mark-up in question as a difference which affects price comparability.[149]

5.55. We recall that, in making the downward adjustment to the export price, the EU authorities acted pursuant to Article 2(10)(i) of the EU Basic Anti-Dumping Regulation, which mandates:

> An adjustment shall be made for differences in commissions paid in respect of the sales under consideration.
>
> 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.[150]

5.56. We also recall that Indonesia has not, in these proceedings, challenged Article 2(10)(i) "as such" and the Panel did not assess the conformity of Article 2(10)(i) itself with Article 2.4 of the Anti-Dumping Agreement. Rather, the Panel observed that Article 2.4 does not prescribe a specific methodology for ensuring a fair comparison.[151] The Panel also underlined that its evaluation of the EU authorities' approach was to be understood "within the parameters of the particular investigation at issue in these proceedings".[152]

5.57. In its evaluation, the Panel observed that the EU authorities' finding that ICOF-S had "functions … similar to those of an agent working on a commission basis" was based on a number of considerations. The Panel noted the EU authorities' reliance on PT Musim Mas' direct sales to domestic and export customers as support for its finding that ICOF-S was not an internal sales department of PT Musim Mas.[153] The Panel also took into account the EU authorities' reliance on the fact that a substantial proportion of ICOF-S' trade was in products of unrelated entities. The EU authorities had relied on this fact to support their inference that ICOF-S was not dependent to any significant degree on PT Musim Mas for its revenue stream or the operation of its business.[154] In addition, the Panel considered that the Sale and Purchase Agreement relied upon by the EU authorities supported their view that ICOF-S had "functions … similar to those of an agent working on a commission basis", rather than Indonesia's characterization of ICOF-S as PT Musim Mas' closely intertwined internal sales department.[155]

5.58. Following its review, the Panel concluded:

> [T]he EU authorities had a sufficient evidentiary basis … for establishing that the mark-up was a factor that impacts the prices of the product and that was linked

[147] Panel Report, paras. 7.63-7.98.
[148] Panel Report, paras. 7.112-7.130.
[149] Indonesia's appellant's submission, paras. 3.201-3.213.
[150] Panel Exhibit EU-3.
[151] Panel Report, para. 7.92 (referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 146; and *US – Softwood Lumber V*, para. 175; and Panel Report, *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).
[152] Panel Report, para. 7.92.
[153] Panel Report, para. 7.93.
[154] Panel Report, para. 7.94 (referring to PT Musim Mas Judgment (Panel Exhibit EU-4), para. 54).
[155] Panel Report, para. 7.95 (referring to Sale and Purchase Agreement between PT Musim Mas and Inter-Continental Oils & Fats Pte Ltd (ICOF-S) (1 January 2009) (Panel Exhibit IDN-24 (BCI)), Section 7.3).

exclusively to the export side, therefore constituting a difference which affects price comparability under Article 2.4.[156]

5.59. In our view, the Panel critically examined the findings by the EU authorities, including the evidence that the EU authorities identified as the basis for their findings. In particular, the Panel found that, in examining the role of ICOF-S under the framework of Article 2(10)(i) of the EU Basic Anti-Dumping Regulation, the EU authorities relied on several evidentiary bases to arrive at their finding that ICOF-S had functions similar to an agent working on a commission basis.[157] Moreover, the Panel considered that the EU authorities' explanations corroborated their finding that the mark-up paid by PT Musim Mas to ICOF-S represented a payment for which there was no corresponding pricing component on the domestic side.[158] Accordingly, the Panel held that the EU authorities' explanations supported their finding that the mark-up constituted a difference affecting price comparability within the meaning of Article 2.4.[159]

5.60. Hence, in reviewing the EU authorities' evaluation, the Panel correctly focused on whether that evaluation was consistent with Article 2.4 of the Anti-Dumping Agreement. We therefore disagree with Indonesia that "the Panel made no effort … to address whether or how the relationship between closely affiliated entities might affect the determination of price adjustments."[160]

5.1.5.2 Whether the Panel erred in its analysis of whether the EU authorities incorrectly deducted ICOF-S' selling, general and administrative costs and profit

5.61. Indonesia also contends that the Panel erred in its analysis of whether the allowance for the mark-up resulted in an asymmetrical comparison with the normal value.[161] We recall that the Panel first addressed and rejected Indonesia's contention that there was an asymmetry between the ex-factory export price and the ex-factory normal value established by the EU authorities for PT Musim Mas.[162] Second, the Panel addressed and rejected Indonesia's argument that the EU authorities were precluded from deducting an allowance that was calculated based on ICOF-S' profit and loss statement (P&L) and what the EU authorities considered to be a reasonable profit margin for the chemical sector.[163] Indonesia appeals both aspects of the Panel's finding. We summarize the factual background relating to this argument before addressing Indonesia's specific challenges to the Panel's finding.

5.62. The Panel observed that the P&L submitted by PT Musim Mas as part of its response to the EU authorities' anti-dumping questionnaire provided a breakdown of the prices to be compared.[164] Both the export price and the normal value included similar allocations of amounts for selling, general and administrative costs (SG&A), encompassing identical percentage amounts for marketing and selling expenses.[165] Further, the P&L submitted by PT Musim Mas reflected amounts of profit pertaining to the product concerned both for PT Musim Mas' domestic sales in Indonesia and for PT Musim Mas' export sales through ICOF-S that were destined for the European Union.[166]

5.63. As discussed at paragraph 5.59. above, the EU authorities found that the mark-up paid by PT Musim Mas to ICOF-S represented a payment for which there was no corresponding pricing component on the domestic side.[167] The EU authorities also found that the mark-up constituted a

[156] Panel Report, para. 7.97.
[157] Panel Report, para. 7.96.
[158] Panel Report, para. 7.93.
[159] Panel Report, paras. 7.96-7.97. See also paras. 7.73-7.88.
[160] Indonesia's appellant's submission, para. 3.93.
[161] Panel Report, paras. 7.112-7.130.
[162] Panel Report, para. 7.125.
[163] Panel Report, para. 7.130.
[164] Panel Report, para. 7.119 (referring to Excel file "PTMM definitive disclosure.xls" (Panel Exhibit EU-12 (BCI)), spreadsheet 2.3 (TABLE G - PL - (Profit and Loss) - of the exporting producer and each related company), row 45 columns F and G).
[165] Panel Report, para. 7.120.
[166] Panel Report, para. 7.121 (referring to Excel file "PTMM definitive disclosure.xls" (Panel 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).
[167] Panel Report, paras. 7.84, 7.93, and 7.120.

difference affecting price comparability.[168] In establishing the amount of the allowance to be made in respect of this mark-up, the EU authorities considered that the close ties between PT Musim Mas and ICOF-S had the potential to affect the reliability of the mark-up of 5% spelled out in their Sale and Purchase Agreement.[169] Hence, the EU authorities calculated the amount of the mark-up on the basis of the SG&A reflected in ICOF-S' P&L.[170] To this, the EU authorities added what they considered to be a reasonable profit margin for the chemical sector. The EU authorities used the sum of these two amounts rather than the margin specified in the Sale and Purchase Agreement between PT Musim Mas and ICOF-S.[171] The resulting amount "was actually very close to the mark-up ICOF-S was entitled to according to the Sale and Purchase Agreement."[172] The EU authorities then deducted this amount from the export price.[173]

5.64. On appeal, Indonesia asserts that the EU authorities treated PT Musim Mas and ICOF-S together as the collective seller of the product for the purpose of assigning a single dumping margin, pursuant to Article 6.10 of the Anti-Dumping Agreement.[174] Indonesia maintains that the Panel ignored Indonesia's argument that, "if ICOF-S and PT Musim Mas form part of" a single economic entity, then both ICOF-S' and PT Musim Mas' expenses are the expenses of the single economic entity as a whole, "for whom a dumping margin [is] being calculated".[175] Indonesia's argument appears to recast its principal assertion that the EU authorities should have characterized the mark-up as an internal transfer of funds within a "single economic entity", instead of a difference affecting price comparability.[176] We have already addressed and rejected this argument above.

5.65. Moreover, we note that Indonesia has not pointed to any evidence on the record supporting its assertion that the EU authorities treated ICOF-S and PT Musim Mas collectively as a single entity for purposes of assigning the dumping margin pursuant to Article 6.10 of the Anti-Dumping Agreement.[177] Nor did the Panel "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."[178] Given that the case before us does not involve any finding that the EU authorities treated PT Musim Mas and ICOF-S as a single entity for purposes of assigning the dumping margin, we need not further address Indonesia's argument.

5.66. Indonesia also argues that the Panel erred to the extent that its reasoning implies that, when confronted with transactions between closely affiliated parties, investigating authorities may replace the expenses actually incurred with the expenses that would have been incurred had the producing entity obtained the service from an independent provider.[179]

5.67. We recall that the amount of the allowance is not at issue in this dispute. For this reason, the Panel opined that the mark-up paid by PT Musim Mas to ICOF-S had to be viewed as a whole and not from the perspective of its constituent elements. The Panel considered it apparent from the record that the EU authorities only disaggregated the mark-up into the components for SG&A and profit in order to quantify the proper *amount* of the adjustment, having already concluded that

[168] Panel Report, para. 7.88.
[169] Panel Report, para. 7.113.
[170] We recall that PT Musim Mas' P&L reflected similar amounts for SG&A and profit for both PT Musim Mas' domestic sales in Indonesia and for PT Musim Mas' export sales through ICOF-S that were destined for the European Union. (See *supra*, para. 5.62.) Hence, we understand the EU authorities to have considered that ICOF-S' P&L reflected the additional amounts that corresponded only to export sales.
[171] Panel Report, paras. 7.113-7.114.
[172] Panel Report, fn 340 to para. 7.114 (quoting European Union's second written submission to the Panel, para. 69).
[173] Panel Report, para. 7.114.
[174] Indonesia's appellant's submission, para. 2.42.
[175] Indonesia's appellant's submission, para. 3.168 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 160).
[176] Panel Report, para. 7.32.
[177] Indonesia's appellant's submission, paras. 3.168-3.169. The European Union contests Indonesia's assertion, stating that the EU authorities did not impose a single anti-dumping duty for PT Musim Mas and ICOF-S together. The European Union explained that, were ICOF-S to export to the European Union Indonesian fatty alcohols manufactured by another company, it would have faced the duty applicable to that manufacturer. (European Union's appellee's submission, para. 154)
[178] Panel Report, fn 366 to para. 7.130.
[179] Indonesia's appellant's submission, para. 3.165 (referring to Panel Report, paras. 7.126-7.130).

the adjustment for the mark-up was warranted.[180] Accordingly, the Panel reasoned that the question before it was not whether it was permissible for the EU authorities to deduct the SG&A and profit of the related trader. Instead, the Panel considered the question to be whether, in the process of making an allowance for the mark-up, the EU authorities were allowed to use the SG&A and profit as a basis for calculating the amount of that allowance.[181] The Panel's response to that question was as follows:

> 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. 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.
>
> 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.[182]

5.68. We understand Indonesia's appeal to challenge this part of the Panel's reasoning. We do not share Indonesia's position that these Panel statements represent a view that "the investigating authority may replace the expenses actually incurred."[183] To the contrary, the Panel acknowledged that the close relationship between two entities may result in the reported value of the expenses being different from the actual value. The Panel considered that, in circumstances where such a relationship exists, investigating authorities would be justified in examining whether the actual value of the expense differs from its reported value. Having reviewed the facts before it, the Panel found that the EU authorities were justified in undertaking such an inquiry. The Panel also found, based on the evidence on the record, that ICOF-S' SG&A and profit represented a reasonable basis for the EU authorities to calculate the actual value of the mark-up.[184] We see no error in the Panel's reasoning or conclusion.

5.69. Based on the foregoing, we find that Indonesia has not demonstrated that the Panel erred in applying Article 2.4 of the Anti-Dumping Agreement to the facts of this case. We turn now to Indonesia's claim that the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU.

5.1.6 Whether the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU

5.70. Indonesia submits that the Panel's findings under Article 2.4 of the Anti-Dumping Agreement should also be reversed because the Panel failed to apply the standard of review applicable pursuant to Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU. Indonesia contends that the Panel repeatedly "stepped into the shoes"[185] of the investigating authority and conducted its own analysis as if it were the investigating authority, including by engaging *de novo* with evidence and arguments from the investigation in an effort to inject meaning into the EU authorities' reasoning.

5.71. Specifically, Indonesia argues that the Panel: (i) improperly concluded that the EU authorities had complied with Article 2.4 before it even addressed Indonesia's arguments;

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[180] Panel Report, para. 7.128 (referring to Provisional Company-Specific Disclosure to PT Musim Mas, Annex 2: Calculation of dumping margin (Panel Exhibit IDN-33 (BCI)), p. 4).
[181] Panel Report, para. 7.129.
[182] Panel Report, paras. 7.129-7.130 (referring in fn 365 to PT Musim Mas response to Commission questionnaire AD563 (2010) (excerpt – response to question H-2.4) (Panel Exhibit IDN-22 (BCI)), pp. 43-44). (other fns omitted)
[183] Indonesia's appellant's submission, para. 3.165 (referring to Panel Report, paras. 7.126-7.130).
[184] Panel Report, para. 7.129.
[185] Indonesia's appellant's submission, para. 4.3.

(ii) repeatedly engaged in a *de novo* review of the record evidence; and (iii) ignored or summarily dismissed key evidence and arguments by Indonesia. We address each of these arguments in turn.

5.1.6.1 Whether the Panel improperly concluded that the EU authorities had complied with Article 2.4 before it addressed Indonesia's arguments

5.72. Indonesia alleges that, without having considered Indonesia's arguments and evidence, the Panel concluded that the EU authorities had not acted inconsistently with Article 2.4 of the Anti-Dumping Agreement.[186] Indonesia contends that, by the time the Panel turned to consider Indonesia's arguments and evidence, the Panel had already "made up and closed its mind".[187] According to Indonesia, the Panel's approach cannot be reconciled with the most basic duties of panels, with due process, or with the rules on the allocation of the burden of proof.[188] Indonesia adds that another way to look at the Panel's analysis is that the Panel made the case for the European Union, which is contrary to Article 11 of the DSU.[189]

5.73. The European Union disagrees with Indonesia's characterization of the Panel's analysis in section 7.3.5.1 of the Panel's Report, arguing that this section must be read in the context of the Panel's analysis of Indonesia's claim under Article 2.4 as a whole. The European Union therefore requests us to reject Indonesia's arguments.[190]

5.74. To us, Indonesia's arguments seem to take issue with how the Panel structured its analysis. Indonesia's claims under Articles 2.4 and 2.3 of the Anti-Dumping Agreement are addressed in section 7.3 of the Panel Report. The Panel characterized the "principal question" in that section as "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."[191]

5.75. Section 7.3 of the Panel Report is entitled "Indonesia's claims under Articles 2.3 and 2.4 of the Anti-Dumping Agreement", and contains six subsections. In the first four of these, the Panel set out an introduction, the relevant provisions of the covered agreements, the summaries of the arguments of the parties, and the summaries of the arguments of the third parties. In the last subsection, the Panel set out its conclusion on these claims by Indonesia. The fifth subsection (section 7.3.5), entitled "Evaluation by the Panel", contains the main part of the Panel's analysis. It is broken down into four further subsections.[192] As mentioned at paragraph 5.15. above, following a brief overview of its understanding of Article 2.4[193], the Panel began by reviewing whether the EU authorities' explanations revealed a sufficient evidentiary basis for treating the mark-up in question as a difference affecting price comparability.[194] Thereafter, the Panel specifically and separately addressed the three lines of argument raised by Indonesia.[195]

5.76. On appeal, Indonesia focuses on one segment of the Panel's analysis under Article 2.4, namely, the Panel's review of the EU authorities' determination to make an adjustment to the export price for the mark-up.[196]

5.77. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it. This obligation embraces all aspects of a panel's examination of the "matter", both factual and legal.[197] Article 12.7 of the DSU requires a panel to set out, in its report, "the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes". Provided that it satisfies its duties under Articles 11 and 12.7, a

[186] Indonesia's appellant's submission, paras. 4.43-4.44 and 4.52 (referring to Panel Report, paras. 7.88 and 7.95-7.98).
[187] Indonesia's appellant's submission, para. 4.47. See paras. 4.45-4.48.
[188] Indonesia's appellant's submission, para. 4.42.
[189] Indonesia's appellant's submission, para. 4.49.
[190] European Union's appellee's submission, paras. 231-263.
[191] Panel Report, para. 7.33.
[192] The Panel outlined its order of analysis at paragraph 7.33 of its Report.
[193] Panel Report, paras. 7.55-7.61.
[194] Panel Report, paras. 7.63-7.98.
[195] *Supra*, para. 5.29. .
[196] Panel Report, subsection 7.3.5.1, paras. 7.63-7.98.
[197] Appellate Body Report, *US – Hot-Rolled Steel*, para. 54.

WTO panel enjoys wide discretion in deciding how to structure and elaborate the reasons for its findings and conclusions.

5.78. In this case, although Indonesia's challenge focuses on one segment of the Panel's analysis, this segment must be considered in its proper context: as part of the Panel's overall analysis of Indonesia's claim under Article 2.4. Indonesia highlights that the Panel did not address any of the parties' arguments between paragraphs 7.54 and 7.98 of its Report.[198] However, this segment of the Panel Report is immediately preceded by the Panel's overview of the parties' arguments. Second, the Panel identified the claim by Indonesia under Article 2.4 as the principal inquiry informing the Panel's subsequent elaboration of its understanding of Article 2.4.[199] In articulating its understanding of Article 2.4, the Panel explicitly recognized that, although the "mark-up" at issue in the present case was not included in the list in the third sentence of Article 2.4 of factors that could potentially affect price comparability, that list is not exhaustive.[200] Third, in the segment at issue, the Panel relied upon evidence submitted by Indonesia for its analysis.[201] Thus, while the Panel, in subsection 7.3.5.1 of its Report, did not expressly engage with Indonesia's specific allegation that PT Musim Mas and ICOF-S formed a single economic entity, the Panel's references in its footnotes show that it was well aware of Indonesia's arguments and that the Panel had opted to address these arguments in later sections of its analysis. Fourth, in the sections of the Panel's analysis that follow the challenged segment, the Panel specifically and separately addressed each line of argument raised by Indonesia challenging the EU authorities' treatment of the mark-up.

5.79. Accordingly, the Panel did not act inconsistently with Article 11 of the DSU merely by situating its review of the EU authorities' treatment of the mark-up where it did in its Report.

5.80. We also take note of Indonesia's assertion that the Panel concluded that the European Union had not acted inconsistently with Article 2.4 of the Anti-Dumping Agreement before even considering Indonesia's arguments and evidence.[202] In this regard, we understand Indonesia to be challenging the following statements that the Panel made at the end of section 7.3.5.1 of its Report:

> 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" ...
>
> 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.[203]

5.81. In *US − Shrimp II (Viet Nam)* and *EU − Biodiesel (Argentina)*, the Appellate Body addressed claims on appeal that the respective panels, in assessing the meaning of municipal law, had arrived at their conclusion on the basis of only one of several relevant elements. In both disputes, the Appellate Body noted that specific panel statements, "read in isolation, might unfortunately give the impression that the [p]anel was drawing a conclusion" on the basis of only one of the relevant elements.[204] However, in each case, having reviewed the panel's reasoning in its entirety, the Appellate Body concluded that the panel had not erred in making intermediate findings, had

[198] Indonesia's appellant's submission, para. 4.37.
[199] Panel Report, para. 7.54.
[200] Panel Report, para. 7.56 (quoting Appellate Body Report, *US − Hot-Rolled Steel*, para. 177).
[201] The exhibits referred to throughout this section of the Panel's analysis were submitted by Indonesia. Additionally, the Panel made explicit references to certain of Indonesia's arguments. (See e.g. Panel Report, para. 7.83 and fn 272 thereto, para. 7.91 and fn 285 thereto, and para. 7.95)
[202] Indonesia's appellant's submission, paras. 4.7, 4.37, and 4.41.
[203] Panel Report, paras. 7.96-7.97.
[204] Appellate Body Report, *EU − Biodiesel (Argentina)*, para. 6.205 (quoting Appellate Body Report, *US − Shrimp II (Viet Nam)*, para. 4.36).

not failed to assess all the relevant elements, and had therefore complied with its duty under Article 11 of the DSU.[205]

5.82. Similarly, in the present dispute, the use of the words "we conclude" at paragraph 7.97 of the Panel Report may seem premature. Although the Panel used those words in an early segment of its analysis, having reviewed the Panel's reasoning in its entirety, we consider the finding in that paragraph to be an intermediate finding, and not its final conclusion with respect to Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement. Indeed, the Panel proceeded to engage, at some length, with Indonesia's specific arguments and evidence before arriving at its overall conclusion with respect to Indonesia's claims under Articles 2.4 and 2.3 of the Anti-Dumping Agreement.[206] Accordingly, we do not consider that the structure of the Panel's analysis in its Report, nor its use of the words "we conclude" in an early segment of its analysis, amount to a violation of Article 11 of the DSU. Nor do we accept Indonesia's assertion that, in its analysis of the EU authorities' determination, the Panel acted inconsistently with Article 11 of the DSU by making the case for the defendant.

5.1.6.2 Whether the Panel engaged in a *de novo* review of the record evidence

5.83. Indonesia submits that the Panel failed to apply the correct standard of review, in multiple instances, by engaging in a *de novo* review of record evidence, including: (i) the email in Verification Exhibit PTMM-18[207]; (ii) evidence concerning ownership links between PT Musim Mas and ICOF-S[208]; (iii) evidence concerning the existence of a sales and marketing department for fatty alcohols in PT Musim Mas[209]; and (iv) an Excel spreadsheet submitted by PT Musim Mas as part of its Questionnaire response.[210]

5.84. Pursuant to Article 11 of the DSU, in assessing whether a competent authority has complied with its obligations in making its determination, a panel is not permitted to conduct a *de novo* review of the facts of the case or substitute its judgement for that of the authority.[211] Rather, the panel must examine "whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate".[212] At the same time, the panel cannot simply defer to the conclusions of the domestic authorities. Instead, a panel's examination of those conclusions must be critical and searching, and be based on the information contained on the record and the explanations given by the authorities in their published report.[213] A panel must ascertain whether the investigating authorities have evaluated all of the relevant evidence in an objective and unbiased manner, including by taking sufficient account of conflicting evidence and responding to competing plausible explanations of that evidence.[214]

5.85. For disputes under the Anti-Dumping Agreement, Article 17.6(i) provides:

> [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[.]

5.86. Under Article 17.6(i), the task of a panel is to review the investigating authorities' "establishment" and "evaluation" of the facts.[215] A panel must not "engage in a new and

[205] Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.209; and *US – Shrimp II (Viet Nam)*, paras. 4.50-4.51.
[206] Panel Report, paras. 7.160-7.161.
[207] Indonesia's appellant's submission, paras. 4.56-4.125.
[208] Indonesia's appellant's submission, paras. 4.126-4.152.
[209] Indonesia's appellant's submission, paras. 4.153-4.170.
[210] Indonesia's appellant's submission, paras. 4.171-4.192.
[211] Appellate Body Reports, *US – Steel Safeguards*, para. 299; *Argentina – Footwear (EC)*, para. 121; *US – Anti-Dumping and Countervailing Duties (China)*, para. 379; and *US – Cotton Yarn*, para. 74.
[212] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[213] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[214] Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 516.
[215] Appellate Body Report, *US – Hot-Rolled Steel*, para. 55.

independent fact-finding exercise".[216] Instead, a panel must assess whether the establishment of the facts by the investigating authorities was "proper" and whether the evaluation of those facts by those authorities was "unbiased and objective".[217] Furthermore, while a panel's review of the investigating authorities' determination is limited to the information on the record of the investigation, neither Article 17.6(i) of the Anti-Dumping Agreement nor Article 11 of the DSU bar a panel from examining evidence that was on the investigation record but not expressly reflected in the investigating authorities' determination.

5.87. If a panel conducts its examination within the parameters described above, "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings"[218], and the mere fact that a panel did not explicitly refer to each and every piece of evidence in its reasoning is insufficient to establish that the panel applied an improper standard of review.[219] Moreover, not every error committed by a panel amounts to a violation of Article 11 of the DSU, but only those that are so material that, taken together or singly, they undermine the objectivity of the panel's assessment of the matter before it.[220]

5.88. Turning to the present case, we observe that, before the Panel, Indonesia relied upon Verification Exhibit PTMM-18[221] and the record evidence concerning the existence of a sales and marketing department for PT Musim Mas in support of its assertion that ICOF-S was involved in PT Musim Mas' domestic sales in Indonesia.[222] Indonesia also submitted evidence of the close corporate links between PT Musim Mas and ICOF-S to demonstrate that PT Musim Mas and ICOF-S formed a "single economic entity".[223] On appeal, Indonesia contends that the Panel engaged in a *de novo* review of these pieces of evidence and substituted the judgment of the EU authorities with its own.

5.89. For instance, Indonesia argued before the Panel that the EU authorities' failure to analyse Verification Exhibit PTMM-18 meant that they failed to analyse a crucial part of the evidentiary backdrop.[224] On appeal, Indonesia argues that the Panel conducted a *de novo* review of Verification Exhibit PTMM-18, thereby improperly supplementing the work of the EU authorities.[225]

5.90. Verification Exhibit PTMM-18 is an email dated 22 April 2010 from a representative of the ICOF Group to a representative of PT Musim Mas. The email forwards two sales contracts for domestic sales in Indonesia, both printed on the letterhead of PT Musim Mas. According to

[216] Appellate Body Reports, *EC – Bed Linen (Article 21.5 – India)*, para. 169; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 84. See also Appellate Body Reports, *US – Lamb*, para. 106; and *US – Cotton Yarn*, para. 74.

[217] Appellate Body Report, *US – Hot-Rolled Steel*, para. 56.

[218] Appellate Body Reports, *China – Rare Earths*, para. 5.178; *EC – Hormones*, para. 135.

[219] Appellate Body Reports, *EC – Fasteners (China)*, paras. 441-442; and *Brazil – Retreaded Tyres*, para. 202.

[220] Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.61; *China – Rare Earths*, para. 5.179; *EC – Fasteners (China)*, paras. 442 and 499; and *EC and certain member States – Large Civil Aircraft*, para. 1318.

[221] Verification Exhibit PTMM-18 (Panel Exhibit IDN-47 (BCI).

[222] Indonesia's appellant's submission, paras. 4.153 and 4.168 (referring to PT Musim Mas response to Commission questionnaire AD563 (2010), Attachment A-3.3.1: Table G – PT Musim Mas Business Organization Structure (Panel Exhibit EU-5 (BCI)); PT Musim Mas response to Commission questionnaire AD563 (2010), Attachment A-3.3.2, Table G – Organization Chart – Fatty Alcohols Division (Panel Exhibit EU-6 (BCI)); and Excel file "PTMM definitive disclosure.xls" (Panel Exhibit EU-12 (BCI))).

[223] Indonesia's appellant's submission, paras. 4.126-4.127 (referring to PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A-3.4: Corporate structure of the Musim Mas Group (Panel Exhibit IDN-18 (BCI)); PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A: List of PT Musim Mas' shareholders (Panel Exhibit IDN-19 (BCI)); PT Musim Mas, "Impact of the Interpipe judgment on the fatty alcohol anti-dumping investigation (AD563): PTMM situation", PowerPoint presentation at the DG Trade hearing on 16 August 2012, slides 5 and 6 (Panel Exhibit IDN-26 (BCI)), slides 5 and 6; and PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011 (Panel Exhibit IDN-34 (BCI))).

[224] Indonesia's appellant's submission, para. 4.69 (referring to Verification Exhibit PTMM-18 (Panel Exhibit IDN-47 (BCI)).

[225] Indonesia's appellant's submission, paras. 4.73-4.94 (referring to Panel Report, para. 7.85).

Indonesia, PT Musim Mas submitted this document to the EU authorities to demonstrate that ICOF-S was involved in PT Musim Mas' domestic sales in Indonesia.[226]

5.91. In its appellant's submission, Indonesia challenges the very examination by the Panel of Verification Exhibit PTMM-18[227], and contends that, in this examination, the Panel should have limited itself to assessing whether the EU authorities' explanation regarding the role of ICOF-S in domestic sales was reasoned and adequate. Instead, according to Indonesia, the Panel went further and substituted the EU authorities' judgement with its own.

5.92. We observe that the EU authorities' Final Determination does not contain an explicit reference to Verification Exhibit PTMM-18. We recall that, while a panel's review of an investigating authority's determination is limited to the information on the record of the investigation[228], neither Article 17.6(i) of the Anti-Dumping Agreement nor Article 11 of the DSU bar a panel from examining evidence that was on the investigation record but not expressly reflected in the investigating authority's determination. Hence, we do not consider it improper for the Panel to have examined Verification Exhibit PTMM-18 as it was on the record of the EU authorities' anti-dumping investigation.

5.93. The Panel stated, in relevant part:

> 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. 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.[229]

5.94. We highlight the Panel's statement above that, "[i]n our view, it was not unreasonable for the EU authorities to ascribe limited probative value to this document." Read in isolation, this statement could imply that the EU authorities indicated in their determination that they attached "limited probative value to" Verification Exhibit PTMM-18. However, reading the paragraph in its entirety, we understand the Panel's reasoning to be a rejection of the assertion by Indonesia that the evidence on the record of the EU authorities clearly established that ICOF-S was the internal sales department of PT Musim Mas. We do not understand the Panel to have set out an explanation of how the EU authorities assessed the probative value of Verification Exhibit PTMM-18. Importantly, the Panel did not, in its reasoning, provide a "different conclusion"[230] from that of the EU authorities with respect to the alleged involvement by ICOF-S in PT Musim Mas' domestic sales.

5.95. For these reasons, we find that Indonesia has not demonstrated that the Panel conducted a *de novo* review of Verification Exhibit PTMM-18, or that the Panel substituted the EU authorities' judgement with its own.

5.96. Indonesia makes similar arguments in respect of the record evidence regarding the close corporate links between the two entities in support of the argument that PT Musim Mas and ICOF-S formed a "single economic entity".[231] Indonesia contends that, while the Panel engaged with this evidence, the EU authorities did not.

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[226] Indonesia's appellant's submission, para. 4.62; Indonesia's opening statement at the first Panel meeting, para. 15; Panel Report, para. 7.42.

[227] Indonesia's appellant's submission, paras. 4.73-4.94.

[228] Appellate Body Report, *Thailand – H-Beams*, para. 118.

[229] Panel Report, para. 7.85. (fn omitted)

[230] Article 17.6(i) of the Anti-Dumping Agreement.

[231] Indonesia's appellant's submission, paras. 4.126-4.127 (referring to PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A-3.4: Corporate structure of the Musim Mas Group (Panel Exhibit IDN-18 (BCI)); PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A: List of PT Musim Mas' shareholders (Panel Exhibit IDN-19 (BCI)); PT Musim Mas, "Impact of the Interpipe judgment on the fatty alcohol anti-dumping investigation (AD563): PTMM situation", PowerPoint presentation at the

5.97. Indonesia is correct in stating that the EU authorities made no explicit reference to the document illustrating the corporate structure of the Musim Mas Group[232], or to the list of PT Musim Mas' shareholders.[233] However, we note that the EU authorities responded to the information concerning ownership and control of PT Musim Mas and ICOF-S contained in the documents submitted to the Panel as Exhibits IDN-26 and IDN-34.[234] We agree with the Panel that, in their 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."[235] Accordingly, it is not accurate for Indonesia to assert that the EU authorities "never responded to these arguments".[236]

5.98. Indonesia also argues that the Panel conducted a *de novo* review of the document illustrating the corporate structure of the Musim Mas Group[237] and the list of PT Musim Mas' shareholders.[238] According to Indonesia, the Panel made an "*arguendo*" assumption that evidence of commonality in ownership, operational management, and control was "critical", and found that the evidence before the EU authorities did not demonstrate the precise nature of the relationship between PT Musim Mas and ICOF-S as alleged by Indonesia.[239] The Panel stated:

> 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. 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.[240]

5.99. We do not agree with Indonesia's characterization of these Panel statements as amounting to a *de novo* review of the record evidence.[241] The Panel was responding directly to allegations by Indonesia regarding the significance of the record evidence concerning ownership and control that the EU authorities allegedly ignored, or on which they placed insufficient weight, or from which they drew incorrect inferences. We do not read the Panel's statements as an attempt to substitute its judgement for that of the EU authorities. Instead, the Panel was assessing whether, in light of the evidence on the record, the conclusions reached by those authorities were reasoned and adequate, given the facts and circumstances of this case.[242]

5.100. Regarding the existence of a sales and marketing department for fatty alcohols in PT Musim Mas, Indonesia identifies two documents showing PT Musim Mas' corporate structure.[243]

DG Trade hearing on 16 August 2012 (Panel Exhibit IDN-26 (BCI)) , slides 5 and 6; and PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011 (Panel Exhibit IDN-34 (BCI))).

[232] PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A-3.4: Corporate structure of the Musim Mas Group (Panel Exhibit IDN-18 (BCI)).

[233] PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A: List of PT Musim Mas' shareholders (Panel Exhibit IDN-19 (BCI)).

[234] PT Musim Mas, "Impact of the Interpipe judgment on the fatty alcohol anti-dumping investigation (AD563): PTMM situation", PowerPoint presentation at the DG Trade hearing on 16 August 2012 (Panel Exhibit IDN-26 (BCI)); PT Musim Mas' Comments on the Preliminary Determination, 10 June 2011 (Panel Exhibit IDN-34 (BCI)). The EU authorities did not expressly reference these two documents by name. However, the EU authorities responded directly to the arguments raised by PT Musim Mas in Panel Exhibits IDN-34 and IDN-26. (See General Disclosure Document (Panel Exhibit IDN-39), paras. 31-38; and Revised Determination (Panel Exhibit IDN-5), recitals 19-23)

[235] Panel Report, para. 7.68 (referring to Final Determination (Panel Exhibit IDN-4), recitals 31-33).

[236] Indonesia's appellant's submission, para. 4.128.

[237] PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A-3.4: Corporate structure of the Musim Mas Group (Panel Exhibit IDN-18 (BCI)).

[238] PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A: List of PT Musim Mas' shareholders (Panel Exhibit IDN-19 (BCI)).

[239] Indonesia's appellant's submission, paras. 4.132-4.133 (quoting Panel Report, para. 7.109).

[240] Panel Report, para. 7.109. (fns omitted)

[241] PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A-3.4: Corporate structure of the Musim Mas Group (Panel Exhibits IDN-18 (BCI)); PT Musim Mas response to Commission questionnaire AD563 (2010), Annex A: List of PT Musim Mas' shareholders (IDN-19 (BCI)).

[242] See Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 93.

[243] Indonesia's appellant's submission, para. 4.153 (referring to PT Musim Mas response to Commission questionnaire AD563 (2010), Attachment A-3.3.1: Table G − PT Musim Mas Business Organization Structure

According to Indonesia, while the EU authorities never analysed these two documents, the Panel not only examined them but also drew its own conclusions about the probative value of these documents.[244] Similarly, before the Panel, Indonesia relied upon the spreadsheet that PT Musim Mas had submitted as part of its questionnaire response in support of its argument that the deduction of ICOF-S' SG&A and profits led to an asymmetry between the prices of domestic and export sales. On appeal, Indonesia argues that the Panel erred in reviewing this document because this spreadsheet was never addressed by the EU authorities in the manner that the Panel did.[245] These arguments are akin to those made by Indonesia concerning Verification Exhibit PTMM-18. Thus, for the reasons discussed at paragraphs 5.86. -5.87. and 5.92. -5.94. above, we find that Indonesia has not demonstrated that the Panel conducted a *de novo* review of the record evidence in question, or that the Panel substituted the EU authorities' judgement with its own.

5.1.6.3 Whether the Panel ignored or summarily dismissed key evidence and arguments by Indonesia

5.101. Indonesia asserts that the Panel erred by ignoring or summarily dismissing key arguments and evidence submitted by Indonesia. Indonesia stresses that it is not requesting us to agree with Indonesia's view of what this evidence demonstrates as a matter of fact. Rather, Indonesia asks us to find that certain evidence and arguments were relevant to the Panel's analysis of the EU authorities' determination and supported Indonesia's case, and that, therefore, the Panel should not have ignored or summarily dismissed them.[246] In particular, Indonesia argues that the Panel summarily dismissed or ignored Indonesia's arguments and evidence relating to the Sale and Purchase Agreement between PT Musim Mas and ICOF-S.[247]

5.102. The European Union does not agree. In its view, the Panel properly addressed and rejected these arguments.[248]

5.103. We observe that the Panel addressed Indonesia's argument, that the Sale and Purchase Agreement should not have been relied upon by the EU authorities to find that the role of ICOF-S was one of an agent working on a commission basis, as follows:

> 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". … These aspects [of the Sale and Purchase Agreement] suggest that ICOF-S has a functional capacity to provide certain services as an international trader that is lacking in PT Musim Mas. 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. 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". Moreover, the provision that "[n]othing in this Agreement shall create any partnership, joint venture or relationship of principal

(Panel Exhibit EU-5 (BCI)); and PT Musim Mas response to Commission questionnaire AD563 (2010), Attachment A-3.3.2, Table G − Organization Chart − Fatty Alcohols Division (Panel Exhibit EU-6 (BCI)).

[244] Indonesia's appellant's submission, paras. 4.155-4.157 (quoting Panel Report, para. 7.84 and fn 277 thereto).

[245] Indonesia's appellant's submission, paras. 4.171-4.175 (referring to Panel Report, paras. 7.119-7.120; and Excel file "PTMM definitive disclosure.xls" (Panel Exhibit EU-12 (BCI))).

[246] Indonesia's appellant's submission, paras. 4.221-4.290.

[247] Sale and Purchase Agreement between PT Musim Mas and Inter Continental Oils & Fats Pte Ltd (ICOF-S) (1 January 2009) (Panel Exhibit IDN-24 (BCI)).

[248] European Union's appellee's submission, paras. 303-312.

and agent between the Parties" contradicts the characterization of ICOF-S as PT Musim Mas' closely-intertwined internal sales department.[249]

5.104. Moreover, in response to Indonesia's comments at the interim review stage, the Panel clarified why it considered the evidence submitted by Indonesia to be irrelevant to its consideration of the content and significance of the Sale and Purchase Agreement.[250] In particular, the Panel explained that Panel Exhibits IDN-52 to IDN-54, which contain general documentation on inter-company agreements, complement, and do not contradict, the provisions of the Sale and Purchase Agreement. In addition, the Panel noted that Panel Exhibits IDN-53 and IDN-54 contain a disclaimer indicating the generality of these documents and clarifying that their application to specific situations would depend on the particular circumstances involved.[251]

5.105. The Panel also highlighted that its interim report had addressed in detail why the Panel had 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.[252]

5.106. We consider that the Panel addressed the main thrust of Indonesia's arguments and even went further to explain why it had found certain evidence to be irrelevant. The fact that the Panel did not explicitly refer to each and every piece of evidence submitted by Indonesia in its reasoning is, in itself, insufficient to establish that the Panel applied an incorrect standard of review.[253]

5.107. In addition, we observe that the arguments that Indonesia made before the Panel largely replicated the arguments that PT Musim Mas had made to the EU authorities, and which the EU authorities rejected. The Panel expressly addressed and rejected Indonesia's arguments, finding that it was not unreasonable for the EU authorities to have relied upon the terms of the Sale and Purchase Agreement in their assessment of the role of ICOF-S.[254] We recall that, in reviewing the determinations of competent authorities, panels must not "engage in a new and independent fact-finding exercise".[255] Yet, some of Indonesia's assertions on appeal seem to suggest that the Panel breached its duty under Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement because it did not consider Indonesia's evidence and arguments independently of the determination by the EU authorities.[256] We disagree. In our view, the Panel conducted a critical and searching examination of the EU authorities' conclusions, including by ascertaining whether the EU authorities had evaluated all of the relevant evidence in an objective and unbiased manner, taking account of the allegedly conflicting evidence, and responding to that evidence.[257] The Panel's review fell within the scope of its discretion as the trier of facts.[258] Accordingly, the Panel did not improperly ignore or summarily dismiss Indonesia's evidence and arguments.

5.108. For all of the reasons discussed above, we find that Indonesia has not demonstrated that the Panel acted inconsistently with Article 11 of the DSU or Article 17.6(i) of the Anti-Dumping Agreement in addressing Indonesia's claim under Article 2.4.

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[249] Panel Report, para. 7.95. (fns omitted)

[250] Panel Report, paras. 6.30-6.47.

[251] Panel Report, para. 6.35 (referring to LCN Legal Limited, Intercompany Agreement Template for Term Loan Agreement (2013), available at http://lcnlegal.com/template-intercompany-agreement-for-transfer-pricing-term-loan-agreement/ (Panel Exhibit IDN-53): and LCN Legal Limited, Intercompany Agreement Template for Limited Risk Distribution Agreement (2014), available at http://lcnlegal.com/template-intercompany-agreement-for-transfer-pricing-limited-risk-distribution-agreement/ (Panel Exhibit IDN-54)).

[252] Panel Report, para. 6.36.

[253] Appellate Body Reports, *EC – Fasteners (China)*, paras. 441-442; and *Brazil – Retreaded Tyres*, para. 202.

[254] Panel Report, para. 7.95.

[255] Appellate Body Reports, *EC – Bed Linen (Article 21.5 – India)*, para. 169; *Mexico – Corn Syrup (Article 21.5 – US)*, para. 84.

[256] For example, at paragraphs 4.240-4.247 of its appellant's submission, Indonesia discusses the significance of specific pieces of evidence, devoid of any connection to the EU authorities' explanation or determination.

[257] Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; *US - Anti-Dumping and Countervailing Duties (China)*, para. 516.

[258] See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 170.

5.1.7 Conclusion

5.109. The focus of Article 2.4 of the Anti-Dumping Agreement is not merely on a comparison between the normal value and the export price, but predominantly on the means to ensure the fairness of that comparison. To this end, investigating authorities are required to make due allowance for differences affecting price comparability. There are no differences affecting price comparability that are precluded, as such, from being the object of an allowance. Instead, the need to make due allowances must be assessed in light of the specific circumstances of each case. The Panel's articulation of the legal standard under Article 2.4 of the Anti-Dumping Agreement is consonant with our understanding of this provision. The existence of a close relationship between transacting companies would be pertinent to the extent that it affects the relevant transactions in such a way as to affect the comparability of the export price and the normal value. Thus, the Panel did not err in rejecting Indonesia's argument that the existence of what Indonesia denotes as a "single economic entity" is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement.

5.110. Accordingly, we find that Indonesia has not demonstrated that the Panel erred in its interpretation of Article 2.4 of the Anti-Dumping Agreement.

5.111. Having so found, we recall that we are not ruling that the nature and degree of affiliation between related companies is irrelevant to the issue of whether any allowances should be made in order to ensure a fair comparison between the normal value and the export price. Nor do we rule, in the abstract, on the circumstances in which an inquiry into the nature of the relationship between transacting entities will suffice or be determinative of the issue of whether allowances should be made pursuant to Article 2.4.

5.112. With respect to Indonesia's claim that the Panel erred in its application of Article 2.4 of the Anti-Dumping Agreement to the facts of this case, we consider that the Panel's review of the EU authorities' evaluation was properly focused on whether that evaluation was consistent with Article 2.4. The Panel did not err in finding that the EU authorities had a sufficient evidentiary basis for establishing that the mark-up paid by PT Musim Mas to ICOF-S in connection with export sales to the European Union was a difference affecting price comparability under Article 2.4. Moreover, contrary to Indonesia's argument, the Panel's reasoning does not imply that, when confronted with transactions between closely affiliated parties, investigating authorities may replace the expenses actually incurred with the expenses that would have been incurred had the producing entity obtained the service from an independent provider.

5.113. Accordingly, we find that Indonesia has not demonstrated that the Panel erred in its application of Article 2.4 of the Anti-Dumping Agreement to the facts of this case.

5.114. We also find that Indonesia has not demonstrated that the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement or Article 11 of the DSU in its analysis of Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement.

5.115. Consequently, we uphold the Panel's finding, in paragraphs 7.160 and 8.1.b.i of its Report, that Indonesia has not demonstrated that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by treating the mark-up paid by PT Musim Mas to ICOF-S as a difference affecting price comparability, and therefore making a downward adjustment to the export price.

5.2 The European Union's claims of error regarding the Panel's findings under Article 6.7 of the Anti-Dumping Agreement

5.116. The European Union requests us to reverse the Panel's finding that the EU authorities acted inconsistently with Article 6.7 of the Anti-Dumping Agreement because they failed to make available or disclose the results of the on-the-spot investigations they had conducted on the premises of PT Musim Mas and its related companies.[259] In particular, the European Union alleges

[259] European Union's other appellant's submission, para. 163 (referring to Panel Report, para. 8.1.d).

that the Panel erred by interpreting Article 6.7 as imposing an obligation to provide a document setting out a complete description of the verification process.[260]

5.117. On 5 November 2010, the EU authorities sent a letter to PT Musim Mas announcing that they would conduct on-the-spot investigations at the premises of PT Musim Mas in Indonesia and at certain of its related companies, including ICOF-S in Singapore.[261] These visits occurred in the course of November 2010.[262] The EU authorities informed PT Musim Mas of their provisional findings on 11 May 2011[263], and of their definitive findings on 26 August 2011.[264] On 8 November 2011, the European Union issued the Final Determination imposing a definitive anti-dumping duty on imports of fatty alcohols from, *inter alia*, Indonesia.[265] The duty for PT Musim Mas was confirmed by the Revised Determination of 11 December 2012.[266]

5.118. We begin with a brief overview of the relevant Panel findings before turning to our interpretation of Article 6.7 of the Anti-Dumping Agreement. Thereafter, we consider whether the Panel erred, either in its interpretation or application of Article 6.7, in reaching the above finding.

5.2.1 The Panel's findings

5.119. Before the Panel, Indonesia argued that the disclosure to the investigated Indonesian producers did not meet the requirements of Article 6.7 of the Anti-Dumping Agreement because no separate report was made available following the verification visits[267] and because the disclosure of essential facts contained only general and cursory statements that did not properly disclose the "results" of the verification visits.[268] Indonesia argued that the lack of proper disclosure prevented the investigated producers from defending their interests and, in particular, that it prevented PT Musim Mas from effectively defending its interests on the issue of the existence of a "single economic entity" in the subsequent stages of the proceedings.[269]

5.120. In response, the European Union submitted that it had complied with Article 6.7 by either "making available" or "disclosing" the results of the verification visits to the investigated producers and, in particular, by informing the Indonesian interested parties beforehand about the information that was going to be verified, providing a list of exhibits collected during on-the-spot investigations, and 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.[270]

5.121. The Panel's analysis focused on the meaning of the phrase "results of any such investigations" in Article 6.7 of the Anti-Dumping Agreement. The Panel found that Article 6.7 elaborates on the more general obligation in Article 6.6 for investigating authorities to "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based". On this basis, the Panel found that the purpose of on-the-spot investigations

[260] European Union's other appellant's submission, para. 82.
[261] Letter dated 5 November 2010 from European Commission to CMS Hasche Sigle concerning AD563 and PT Musim Mas (Panel Exhibit EU-1).
[262] See CMS Hasche Sigle, Company-internal memorandum dated 22 November 2010 concerning "Inspection Visit Medan 22-25.11.2010" (Panel Exhibit IDN-27 (BCI)) and CMS Hasche Sigle, Company-internal memorandum dated 18-19 November 2010 concerning "Minutes Inspection Visit Singapore 18.11.2010" (verification of ICOF-S) (Panel Exhibit IDN-38 (BCI)).
[263] Letter dated 11 May 2011 from the European Commission to CMS Hasche Sigle concerning AD563 Disclosure of provisional findings and PT Musim Mas (Panel Exhibit EU-2 (BCI)).
[264] Letter dated 26 August 2011 from the European Commission to CMS Hasche Sigle concerning AD563 Definitive Disclosure and PT Musim Mas (PTMM) (Disclosure of definitive findings dated 26 August 2011) (Panel Exhibits EU-10 (BCI) and IDN-17 (BCI) (excerpt)).
[265] Panel Report, para. 2.1.
[266] Panel Report, para. 2.2.
[267] Panel Report, para. 7.209 (referring to Indonesia's first written submission to the Panel, para. 6.50; and second written submission to the Panel, para. 4.3).
[268] Indonesia's first written submission to the Panel, paras. 6.6-6.12 and 6.52-6.54.
[269] Panel Report, para. 7.213 (referring to Indonesia's first written submission to the Panel, para. 6.60).
[270] Panel Report, para. 7.216 (referring to European Union's first written submission to the Panel, paras. 190-195; and second written submission to the Panel, para. 168 and fns 121 and 123 thereto).

is to enable the investigating authorities to confirm the accuracy of the information supplied by the investigated firms.[271]

5.122. Furthermore, the Panel considered that on-the-spot investigations involve a specific means by which investigating authorities request the exporter to supply evidence demonstrating the accuracy of the information supplied by the entities subject to verification. For the Panel, therefore, the "results" of the verification visit, in the sense of Article 6.7, should reflect the outcome of this process. The Panel held that, 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.[272]

5.123. The Panel further noted that the panel in *Korea – Certain Paper* had found that disclosure pursuant to Article 6.7 must contain "adequate information regarding *all aspects of the verification*".[273] The Panel contrasted the text of Article 6.7 with that of Article 6.9 of the Anti-Dumping Agreement and noted that, while the disclosure obligation under the latter provision is limited to "essential facts", the disclosure obligation under Article 6.7 relates to "results", rather than to "essential" results.[274] From this, the Panel concluded that the obligation to make available the results of on-the-spot investigations is not limited to the "essential" results of such investigations, nor to the facts that will eventually form the basis of the decision to impose anti-dumping measures.[275]

5.124. The Panel then turned to assess whether the European Union had complied with Article 6.7 in this case. The Panel noted the European Union's argument that it had satisfied the obligation in Article 6.7 by providing information to PT Musim Mas in the following three documents: (i) the Disclosure of definitive findings dated 26 August 2011[276]; (ii) the provisional company-specific disclosure concerning PT Musim Mas of May 2011[277]; and (iii) 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.[278]

5.125. The Panel examined each of these documents in order to assess whether they contain, individually or in combination, information that could be characterized as the "results" of the verification visits conducted by the EU authorities. Ultimately, the Panel concluded that the EU authorities had not made available or disclosed 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 because they also failed to explain: (i) whether further information was requested; (ii) whether PT Musim Mas and its related companies had made available the evidence and additional information requested; and (iii) whether the EU authorities were or were not able to confirm the accuracy of the information supplied by the verified companies in, *inter alia*, their questionnaire responses.[279]

5.126. Accordingly, the Panel concluded that the European Union had not complied with Article 6.7 of the Anti-Dumping Agreement.

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[271] Panel Report, para. 7.222.
[272] Panel Report, para. 7.224.
[273] Panel Report, para. 7.209 (quoting Panel Report, *Korea – Certain Paper*, para. 7.192) (emphasis added by the Panel).
[274] Panel Report, para. 7.226.
[275] Panel Report, para. 7.226.
[276] Panel Report, para. 7.231 (referring to AD563 Disclosure of definitive findings dated 26 August 2011 (Panel Exhibit EU-10 (BCI))).
[277] Panel Report, para. 7.231 (referring to European Union's response to Panel question No. 49, para. 44; second written submission to the Panel, para. 166; and Provisional Company-Specific Disclosure to PT Musim Mas, Annex 2: Calculation of dumping margin (Panel Exhibit IDN-33 (BCI))).
[278] Panel Report, para. 7.231 (referring to List of exhibits provided by the Commission to PT Musim Mas at the conclusion of three verification visits (Panel Exhibit EU-14 (BCI))).
[279] Panel Report, para. 7.236.

5.2.2 Interpretation of Article 6.7

5.127. On appeal, the European Union's claim of error raises the question of the scope of the "results" of the on-the-spot investigation that must be made available or disclosed pursuant to Article 6.7 of the Anti-Dumping Agreement. In particular, the European Union argues that the results of the investigation are the essential factual outcomes of the on-the-spot investigations, which may bear on the investigating authorities' decision whether to impose an anti-dumping measure, and the content of any such measure.[280] Indonesia responds that the European Union conflates the requirements of Article 6.7 regarding the disclosure of the results of verification visits, and those of Article 6.9 regarding the disclosure of essential facts. Indonesia argues that these concepts are different, and that the results to be made available or disclosed pursuant to Article 6.7 are not limited to the "essential" results of the verification visits.[281]

5.128. Article 6.7 of the Anti-Dumping Agreement provides:

Article 6

Evidence

> 6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. 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.

5.129. We note that, pursuant to Article 6.7, investigating authorities *may* carry out investigations. Authorities are therefore not obliged to conduct an on-the-spot investigation.[282] However, when an on-the spot investigation is carried out, the "results" must be provided to the firm subject to such investigation. This disclosure may take place either as a discrete step in the overall investigation, or together with the disclosure of the "essential facts" pursuant to Article 6.9.

5.130. The first sentence of Article 6.7 indicates that this provision is concerned with two specific aspects of the treatment of evidence, namely, verifying information provided to the investigating authorities, and obtaining further information. In identifying the verification of information provided to the authorities as a purpose of on-the-spot investigations, Article 6.7 is linked to the general obligation in Article 6.6 for investigating authorities to "satisfy themselves as to the accuracy of the information supplied by interested parties" upon which the findings of the authorities are based.

5.131. More detailed procedures concerning on-the-spot investigations are set out in Annex I to the Anti-Dumping Agreement. The second sentence of Article 6.7 stipulates that these procedures shall apply to investigations carried out in the territory of other Members. In *China - HP-SSST (EU),* the Appellate Body noted that Article 6.7 lays out the basic framework on-the-spot investigations in the territory of another Member, and that Annex I sets out further parameters for the conduct of such investigations.[283] Echoing the opening phrase of Article 6.7,

[280] European Union's other appellant's submission, paras. 106-107.
[281] Indonesia's appellee's submission, para. 2.18 (referring to Panel Report, para. 7.226).
[282] See also Panel Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.191; *Argentina – Ceramic Tiles*, fn 65 to para. 6.57; *Egypt – Steel Rebar*, paras. 7.326-7.327; and *US – DRAMS*, para. 6.78. At the same time, we note that Article 6.7 does not grant an unlimited right for investigating authorities to carry out investigations in the territory of another Member. Rather, Article 6.7 provides that the authorities must obtain the agreement of the firms concerned, and they must notify the representatives of the government of the Member in question. Moreover, investigating authorities cannot carry out an on-the-spot investigation in the territory of another Member if that Member objects.
[283] Appellate Body Report, *China – HP-SSST (EU)*, para. 5.70.

paragraph 7 of Annex I expressly identifies the verification of information provided and obtaining further details as the "main purpose" of on-the-spot investigations. This suggests that on-the-spot investigations constitute one possible mechanism that investigating authorities may employ in satisfying their duty under Article 6.6 to ensure the accuracy of information supplied by interested parties.

5.132. Article 6.7 distinguishes between two different groups of recipients with regard to the obligation to make available or disclose the results of the on-the-spot investigations: (i) the investigated firms to which the information pertains; and (ii) the applicants, that is, those entities of the domestic industry that initiated the anti-dumping investigation. If investigating authorities opt to carry out on-the-spot investigations, then they "shall" communicate the results to the investigated firms. However, with regard to the applicants, the wording is permissive. Thus, investigating authorities are not obliged to communicate the results of the on-the-spot investigations to the applicants.

5.133. With regard to the information to be provided, Article 6.7 stipulates that the "results" of on-the-spot investigations shall be made available or disclosed. We note that definitions of the word "result" include the "effect, consequence, or outcome of some action, process, or design".[284] In Article 6.7, the word "results" thus refers to the outcome of the on-the-spot investigations. We further observe that the word "results" is not explicitly limited or qualified in this provision.

5.134. We consider that the "results" of on-the-spot investigations are necessarily connected to the overall process of such investigations. Paragraph 7 of Annex I provides that such investigations should generally be carried out after the investigating authorities have received the responses to the questionnaires used in the anti-dumping investigation. Thus, this process will usually relate to information that has already been provided to the investigating authorities by the relevant producer or interested party in response to a request by the investigating authorities. Moreover, the process involves an on-site visit aimed at verifying the accuracy of such information and soliciting additional relevant information. Paragraph 7 of Annex I further indicates that the process requires that the firms concerned be advised in advance of the general nature of the information to be verified and of any other information to be provided. Such advance notice forms part of the process of the on-the-spot investigation and it also informs the scope of the "results" that must subsequently be made available. Accordingly, the scope of the on-the-spot investigations and the ensuing results to be communicated to the investigated firms vary from case to case, and are informed by the integral parts of the process of the on-the-spot investigations, which include the questions posed by the investigating authorities, the responses thereto, the scope of the advance notice, and the collection of any additional evidence during the on-the-spot investigation.

5.135. Furthermore, we consider that the "results" of on-the-spot investigations encompass both the fact that certain information could be verified, as well as the fact that certain information could not. Some parts of an on-the-spot investigation may confirm the accuracy of information already provided and other parts of the same on-the-spot investigation may fail to do so or even demonstrate that certain information originally provided is inaccurate or incomplete. Whether or not these parts confirm the accuracy of information, they all constitute "results" of the on-the-spot investigation.

5.136. This is not to suggest that disclosure of the results of on-the-spot investigations must address each item of information or each piece of evidence reviewed by the investigating authorities. The extent to which specific types or items of information and evidence were verified or collected during the on-the-spot investigation needs to be disclosed will depend in each case on what information is requested by and provided to the investigating authorities and how the process of ensuring its accuracy unfolds during the specific verification visits.

5.137. We consider that the remainder of Article 6, within which Article 6.7 is situated, is helpful for understanding what "results" must be communicated by the investigating authorities. Article 6 is entitled "Evidence" and contains fourteen paragraphs relating to the treatment of evidence in an anti-dumping investigation. The rules concerning the conduct of on-the-spot investigations are thus situated within a broader set of provisions regulating the process of identifying and gathering

[284] Oxford English Dictionary online, definition of "result": http://www.oed.com/view/Entry/164061.

evidence in anti-dumping duty investigations.[285] The Appellate Body has noted that Article 6, in addition to laying down evidentiary rules that apply throughout the course of an anti-dumping investigation, speaks to the due process rights that are enjoyed by interested parties during the investigation.[286]

5.138. Due process is promoted in various ways in the provisions of Article 6. For example, Article 6.2 stipulates that, throughout the anti-dumping investigation, all interested parties shall have a full opportunity for the defence of their interests. In addition, Article 6.4 serves a due process function by requiring 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 not confidential, and that is used by the authorities in an anti-dumping investigation. Article 6.4 also fosters due process by providing that the interested parties are to be given timely opportunity to prepare presentations on the basis of this information. Similarly, Article 6.9 articulates an aspect of due process in providing that disclosure of essential facts shall take place in time for the parties to be able to defend their interests. In short, due process as set out in the various provisions of Article 6 requires affording an investigated firm a meaningful opportunity to defend its interests. This context supports the view that, under Article 6.7, investigated firms must be informed of the "results" in sufficient detail and in a timely manner so as to be placed in a position to defend effectively their interests in the remaining stages of the anti-dumping investigation.

5.139. In our view, a meaningful exercise of an investigated firm's opportunity to defend its interests throughout the anti-dumping investigation pursuant to Article 6.2 is closely tied to the availability of information regarding the evidence being considered by the investigating authorities. In order to defend effectively their interests, the firms to which the results of the investigation pertain must be accorded access to the results of the verification visits, regardless of whether information could or could not be verified. This is so because information that was successfully verified, just as information that could not be verified, may be relevant to the presentation of the interested parties' cases.[287]

5.140. In sum, on-the-spot investigations are one mechanism that investigating authorities may employ in satisfying their duty, under Article 6.6 of the Anti-Dumping Agreement, to ensure the accuracy of information supplied by interested parties. When on-the-spot investigations are conducted, Article 6.7 requires that the firms subject to such visits be provided with the "results", or outcomes, of this verification process. The scope of the on-the-spot investigations and the ensuing results to be communicated to the investigated firms vary from case to case and are informed by the integral parts of the process of the on-the-spot investigations, which include the questions posed by the investigating authorities, the responses thereto, the scope of the advance notice, and the collection of any additional evidence during the on-the-spot investigations. The disclosure of the "results" of the on-the-spot investigation must enable the firms to which they are communicated to discern the information that the authorities considered to have been successfully verified, as well as the information that could not be verified, and to be informed of the results in sufficient detail and in a timely manner so as to be placed in a position to defend effectively their interests in the remaining stages of the anti-dumping investigation.

5.141. With these considerations in mind, we turn to assess of whether the Panel erred in its interpretation of Article 6.7 or in finding that the EU authorities acted inconsistently with Article 6.7 of the Anti-Dumping Agreement by failing to make available or disclose the "results" of the on-the-spot investigations to PT Musim Mas.

5.2.3 Whether the Panel erred in its interpretation of Article 6.7

5.142. The European Union contends that the Panel erred by interpreting Article 6.7 of the Anti-Dumping Agreement as imposing an obligation to provide a document setting out a complete description of the verification process.[288] In particular, the European Union takes issue with the

[285] Appellate Body Reports, *China – HP-SSST (EU)*, para. 5.73; *EC – Tube or Pipe Fittings*, para. 138; *EC – Bed Linen (Article 21.5 – India)*, para. 136; *US – Carbon Steel (India)*, para. 4.418.

[286] Appellate Body Report, *China – HP-SSST (EU)*, para. 5.73.

[287] In this respect, we note that, pursuant to Article 6.8 of the Anti-Dumping Agreement, investigating authorities may, under certain circumstances, have recourse to facts available.

[288] European Union's other appellant's submission, para. 82.

content of paragraph 7.224 of the Panel Report, where the Panel found that the "results" of the verification process must include "at a minimum" five specific elements. The European Union alleges that it does not follow from the Panel's analysis of Article 6.7 that "results" in the sense of Article 6.7 must always include these specific elements.[289]

5.143. For the European Union, the context provided by other paragraphs of Article 6 suggests that the term "results" in Article 6.7 refers to a category of information closely related to "essential facts" within the meaning of Article 6.9. According to the European Union, the "results of any such investigations", together with other information available, form the universe of essential facts considered by the investigating authorities in their determination. The European Union argues that therefore, the "results" of the on-the-spot investigation to be disclosed are only those that may have a bearing on the authorities' decision whether or not to impose an anti-dumping measure and, when a measure is applied, on what that measure should be.[290]

5.144. For its part, Indonesia requests us to uphold the Panel's findings in paragraphs 7.236 and 8.1.d of its Report that the EU authorities acted inconsistently with Article 6.7 of the Anti-Dumping Agreement.[291] Indonesia alleges that the European Union conflates the requirements of Article 6.7 regarding the disclosure of the verification results with those of Article 6.9 regarding disclosure of the essential facts. Indonesia argues that these concepts are different, and it supports the Panel's reasoning that what must be disclosed under Article 6.7 is not limited to the "essential" results of the verification.[292]

5.145. The United States supports the Panel's finding that, at a minimum, Article 6.7 requires that the results disclosed by the authorities include discussion of information that was verified, not verified, or corrected. The United States further submits that trivial or immaterial aspects of what occurred during verification need not be disclosed.[293]

5.146. We note that the European Union's appeal focuses on statements made by the Panel in paragraph 7.224 of the Panel Report as part of its interpretation of Article 6.7 spanning several pages of the Report. In that paragraph, the Panel first summarized its general view regarding the connection between the "results" of the verification visit and the process by which investigating authorities discharge their duty to ensure the accuracy of information provided to them. The Panel then identified five specific elements that, in its view, authorities should disclose "at a minimum". In particular, the Panel stated:

> 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.[294]

5.147. We recall our explanation above regarding the relationship of Article 6.7 with the general obligation in Article 6.6 for investigating authorities to "satisfy themselves as to the accuracy of the information supplied by interested parties" upon which the findings of the authorities are based. For the reasons set out above, we agree with the first two sentences of the above-quoted Panel statement that on-the-spot investigations involve a specific means for verifying the accuracy

[289] European Union's other appellant's submission, para. 125.
[290] European Union's other appellant's submission, paras. 106-107.
[291] Indonesia's appellee's submission, para. 2.63.
[292] Indonesia's appellee's submission, para. 2.18 (referring to Panel Report, para. 7.226).
[293] United States' third participant's submission, para. 74.
[294] Panel Report, para. 7.224.

of information supplied and that the "results", in the sense of Article 6.7, should reflect the outcome of that verification process.[295]

5.148. However, the European Union appeals the Panel's further statement that, "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.[296] The European Union argues that the reference in the text of Article 6.7 to the disclosure of essential facts pursuant to Article 6.9 suggests that the scope of the "results" of the on-the-spot investigation is limited to the essential factual outcomes of the verification, which may have a bearing on the authorities' decision to impose an anti-dumping measure.[297]

5.149. We do not view the elements listed by the Panel in paragraph 7.224 as a closed list of items that must be included in every disclosure of the results of an on-the-spot investigation, or that will always suffice to meet the requirements of Article 6.7. Nor do we understand the Panel to have implied this. While disclosure of this information will typically be required, additional information may need to be disclosed in some cases, and less information may suffice in others. This comports with our view, expressed above, that the scope of on-the-spot investigations and the ensuing "results" to be communicated to the investigated firms vary from case-to-case.

5.150. Like the Panel[298], we disagree with the European Union that the reference to Article 6.9 in Article 6.7 suggests that the scope of the "results" of on-the-spot investigations to be disclosed is limited to results that are "essential". Article 6.7 identifies two ways in which investigating authorities may communicate the results of an on-the-spot investigation to the firms to which they pertain. The authorities shall either make the results of the investigation available, or they shall provide disclosure thereof to the firms to which they pertain pursuant to Article 6.9. In the latter case, the results of the on-the-spot investigation are disclosed to the firms to which they pertain along with the "essential facts" under consideration, which form the basis for the imposition of the anti-dumping measure. Article 6.7 and Article 6.9 contain distinct obligations, each of which applies regardless of whether the "results" of the on-the-spot investigations are disclosed around the same time as the "essential facts" or separately. The fact that the "results" of an on-the-spot investigation may be disclosed at the same time as the "essential facts" has no bearing on the scope of the "results" of the on-the-spot investigation to be disclosed.

5.151. We consider the Panel's statement that 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, to be concordant with our interpretation of Article 6.7 above. In particular, we have explained the link between the scope of the "results" to be disclosed and the process of the on-the-spot investigation and the specific steps that occur within that process. We concluded that the "results" of the verification are connected to and informed by the questions posed by the investigating authorities, the responses thereto, the advance notice provided by the authorities to the investigated firm, and the additional evidence collected during the on-the-spot investigation. Moreover, the text of Article 6.7 expressly states that on-the-spot investigations shall serve to "obtain further details". Thus, the question of whether further details were requested and obtained describes a "result" of the verification process and, accordingly, we agree with the Panel that this forms part of the information to be disclosed pursuant to Article 6.7.

5.152. The European Union also challenges the Panel's statement that 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.[299] We recall that the purpose of on-the-spot investigations is the verification of the information provided by the

[295] Panel Report, para. 7.224.
[296] European Union's other appellant's submission, para. 162 (referring to Panel Report, paras. 7.224 and 7.228).
[297] European Union's other appellant's submission, paras. 106-107.
[298] Panel Report, para. 7.226.
[299] European Union's other appellant's submission, para. 162 (referring to Panel Report, paras. 7.224 and 7.228).

investigated firms. In this regard, we have noted that paragraph 7 of Annex I to the Anti-Dumping Agreement provides that the "main purpose" of on-the-spot investigations is to verify information provided or to obtain further details. We consider the question of whether or not the investigating authorities were able to confirm the accuracy of the information supplied by the verified companies to be a key "result" of on-the-spot investigations described in Article 6.7. Moreover, we consider the due process function of the disclosure requirement supports the view that the "results" of on-the-spot investigations also include the response to the question of whether or not the accuracy of certain information could be verified. This is because the ability of all interested parties to defend their interests requires that they be informed in a timely manner of the extent to which the investigating authorities considered information to have been verified. Accordingly, we consider that both the fact that the accuracy of information was confirmed and the fact that the accuracy of information could not be confirmed constitute "outcomes" of the verification exercise and are thus "results" that must be disclosed pursuant to Article 6.7.

5.153. In light of the above considerations, we emphasize that the scope of on-the-spot investigations and the ensuing "results" to be communicated to the investigated firms vary from case to case. We do not view the elements listed by the Panel in paragraph 7.224 of its Report as constituting a closed list of items that must be included in every disclosure of the results of an on-the-spot investigation, or that will necessarily satisfy the requirements of Article 6.7. Nor do we understand the Panel to have implied this. We therefore consider that the Panel did not err in its explanation of the scope of on-the-spot investigations and the results thereof to be communicated to the investigated firms.[300]

5.2.4 Whether the Panel erred in finding that the EU authorities failed to make available or disclose the results of the on-the-spot investigations to PT Musim Mas

5.154. Finally, we turn to the European Union's claim that the Panel erred in the application of Article 6.7 of the Anti-Dumping Agreement. In this respect, the European Union highlights that the verified company, PT Musim Mas, cooperated with the EU authorities and that, as a result of the verification visit, the corrections to be made to the original responses were agreed between the company and the EU authorities. The European Union further explains that a list of documents collected during the verification was drafted jointly by the investigating team and the verified firm. For the European Union, the Panel erred in denying any relevance to these factual elements.[301]

5.155. We recall that in November 2010 the EU authorities conducted on-the-spot investigations at the premises of PT Musim Mas in Indonesia and at certain of its related companies, including ICOF-S in Singapore.[302] The EU authorities informed PT Musim Mas of their provisional findings on 11 May 2011, and of their definitive findings on 26 August 2011.[303]

5.156. In response to Indonesia's allegation before the Panel that the European Union failed to disclose the "results" of the on-the-spot investigations, the European Union contended that those "results" had been disclosed in the following documents: (i) the Disclosure of definitive findings dated 26 August 2011[304]; (ii) the provisional company-specific disclosure concerning PT Musim

[300] Panel Report, para. 7.224.
[301] European Union's other appellant's submission, paras. 117-118.
[302] Letter dated 5 November 2010 from the European Commission to CMS Hasche Sigle concerning AD563 and PT Musim Mas (Panel Exhibit EU-1); CMS Hasche Sigle, Company-internal memorandum dated 22 November 2010 concerning "Inspection Visit Medan 22-25.11.2010" (Panel Exhibit IDN-27 (BCI)); and CMS Hasche Sigle, Company-internal memorandum dated 18-19 November 2010 concerning "Minutes Inspection Visit Singapore 18.11.2010" (verification of ICOF-S) (Panel Exhibit IDN-38 (BCI)).
[303] Disclosure of definitive findings dated 26 August 2011) (Panel Exhibit EU-10 (BCI)).
[304] Panel Report, para. 7.231 (referring to Disclosure of definitive findings dated 26 August 2011 (Panel Exhibit EU-10 (BCI)). The Panel noted that the Disclosure of definitive findings sent to PT Musim Mas on 26 August 2011 included three annexes: the General Disclosure Document, which was attached as Panel Exhibit IDN-39; the Definitive dumping calculation; and the company-specific reply to arguments not addressed in detail in the General Disclosure Document.

Mas of May 2011[305]; and (iii) 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.[306]

5.157. With respect to the Disclosure of definitive findings dated 26 August 2011[307], the Panel found that the information contained in this document was largely unrelated to the on-the-spot investigations at issue, because it refers to verification visits conducted at the premises of investigated producers in Malaysia and India, and at the premises of enterprises forming part of the EU domestic industry. The Panel noted that only one recital of the document refers in passing to the verification visits at PT Musim Mas, and found that this was insufficient to comply with the requirements of Article 6.7.[308]

5.158. The Panel then considered the company-specific disclosure documents provided to PT Musim Mas at the provisional stage of the investigation and the list of exhibits agreed with PT Musim Mas at the end of the on-the-spot investigation. The Panel noted that the company-specific disclosure documents include a confidential appendix containing an electronic copy of the company's response to the anti-dumping questionnaire and that this copy reflects the corrections made to PT Musim Mas' electronic response by PT Musim Mas itself and by the EU authorities following the verification visits.[309]

5.159. In this respect, the Panel agreed with the European Union that the corrections made to PT Musim Mas' original questionnaire response and the lists of exhibits collected on-the-spot are outcomes of the verification visit.[310] However, the Panel concluded that the various documents, taken together, did not comprise the full extent of the "results" of the on-the-spot investigation, because they failed to put PT Musim Mas or the Panel in a position to understand in respect of which part of the questionnaire response or other information supplied supporting evidence had been requested. Similarly these documents did not convey whether any further information had been requested, whether PT Musim Mas had made available the evidence and additional information requested, and whether the EU authorities had or had not been able to confirm the accuracy of the information supplied by PT Musim Mas.[311] In particular, the Panel explained that, 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, but that it was impossible to relate the corrections made to any evidence that was verified or not verified by the EU authorities during the on-the-spot investigations.[312]

5.160. The European Union takes issue with these Panel findings. The European Union contends that the interaction between the EU authorities and the officers of the verified company shows that PT Musim Mas understood which part of the questionnaire response had been verified, as well as the EU authorities' assessment of the information provided and verified.[313]

5.161. Based on our analysis above, we consider that Article 6.7 imposes an objective standard to determine which "results" have to be disclosed subsequent to verification. It does not call for an inquiry into what the employees of the firm subject to the verification visit understood at the time of that visit. In any event, we do not see that the Panel erred in considering that the EU authorities had not identified which elements of the information provided by the investigated firm in its questionnaire response they had sought to verify, which elements they had been able to verify successfully, and which elements they had been unable to verify. We have found above that the requirement to disclose the results of a verification visit requires that such information be provided

[305] Panel Report, para. 7.231 (referring to European Union's response to Panel question No. 49, para. 44; second written submission to the Panel, para. 166; and Provisional Company-Specific Disclosure to PT Musim Mas, Annex 2: Calculation of dumping margin (Panel Exhibit IDN-33 (BCI))).

[306] Panel Report, para. 7.231 (referring to List of exhibits provided by the Commission to PT Musim Mas at the conclusion of three verification visits (Panel Exhibit EU-14 (BCI))).

[307] Panel Exhibit IDN-39.

[308] Panel Report, para. 7.232.

[309] Panel Report, para. 7.233 (referring to Excel file "PTMM definitive disclosure.xls" (Panel Exhibit EU-12 (BCI))).

[310] Panel Report, para. 7.235.

[311] Panel Report, para. 7.235.

[312] Panel Report, para. 7.235.

[313] European Union's other appellant's submission, para. 159.

to the investigated firm because the ability of all interested parties to defend fully their interests depends also on an understanding of what information the investigating authorities considered to have been verified.

5.162. Moreover, we consider that the Panel correctly assessed whether the documents disclosed to PT Musim Mas enabled it to understand whether the EU authorities had or had not been able to confirm the accuracy of the information supplied. In this respect, we note the Panel's observation that several worksheets were amended on the basis of Exhibit 1, which is described in Panel Exhibit EU-14 as "Corrections to Tables (hard copy + CD-ROM with 6 Excel files)".[314] The Panel further noted that Exhibits 8, 17, and 21 collected during the on-the-spot investigations are the corrected versions of PT Musim Mas' original response for worksheets 2.6, 2.4, and 2.2 respectively.[315] However, the Panel found that, on the basis of these documents, it was not possible to tell whether the changes and corrections were made as a result of what happened during the verification visits or for some other reason. In this respect, the Panel referred, as an example, to corrections made to the Worksheet 2.2, Cost of Production table for PT Musim Mas. The Panel explained that it could not discern if these corrections had been made by the company itself or if they had resulted 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.[316]

5.163. The Panel took the view that the disclosure of the results of the on-the-spot investigations in this case did not allow PT Musim Mas to understand whether the EU authorities had or had not been able to confirm the accuracy of the information supplied. On appeal, the European Union has not established that the Panel erred in applying Article 6.7 when reviewing the disclosure made to PT Musim Mas. Accordingly, we find that the Panel did not err in concluding that the EU authorities did not comply with the obligation to make available or disclose the "results of any such investigations" to PT Musim Mas, as required by Article 6.7 of the Anti-Dumping Agreement.

5.2.5 Conclusion

5.164. We have found that on-the-spot investigations are one mechanism that investigating authorities may employ in satisfying their duty, under Article 6.6 of the Anti-Dumping Agreement, to ensure the accuracy of information supplied by interested parties. When such on-the-spot investigations are conducted, Article 6.7 requires that the firms subject to such visits be provided with the "results", or outcomes, of this verification process. The scope of on-the-spot investigations and the ensuing "results" to be communicated to the investigated firms vary from case to case, and are informed by the integral parts of the process of the on-the-spot investigations, which include the questions posed by the investigating authorities, the responses thereto, the scope of the advance notice, and the collection of any additional evidence during the on-the-spot investigations. In addition, the disclosure of the "results" of the on-the-spot investigations must enable the firms to which they are communicated to discern the information that the authorities considered to have been successfully verified, as well as the information that could not be verified, and to be informed of the results in sufficient detail and in a timely manner so as to be placed in a position to defend effectively their interests in the remaining stages of the anti-dumping investigation.

5.165. On this basis, we find that the Panel did not err in its interpretation or application of Article 6.7 in determining the scope of the on-the-spot investigations and the ensuing "results" to be communicated to the investigated firms. Consequently, we uphold the Panel's finding, in paragraphs 7.236 and 8.1.d of its Report, that the EU authorities failed to make available or disclose the "results of any such investigations" to PT Musim Mas, and therefore acted inconsistently with Article 6.7 of the Anti-Dumping Agreement.

[314] Panel Report, fn 578 to para. 7.235 (referring to "List of exhibits provided by the European Commission to PT Musim Mas at the conclusion of three verification visits" (Panel Exhibit EU-14 (BCI))).

[315] Panel Report, fn 578 to para. 7.235 (referring to "List of exhibits provided by the European Commission to PT Musim Mas at the conclusion of three verification visits" (Exhibit EU-14 (BCI)).

[316] Panel Report, fn 579 to para. 7.235 (referring to Worksheet 2.2 of Panel Exhibit EU-12, Cost of Production table for PT Musim Mas, showing corrections made from the combined exhibits 1 and 21).

5.3 The European Union's claims under Articles 3 and 19 of the DSU

5.166. The European Union requests us to dismiss Indonesia's appeal in its entirety as inconsistent with Article 3 of the DSU because it relates to an expired measure and, for that reason, to find it unnecessary to rule on the substance of Indonesia's appeal.[317] In its opening statement at the oral hearing, the European Union framed its request as seeking a finding that the present dispute has been resolved and that the relevant issues have therefore become moot.

5.167. The European Union also requests us to find that the Panel erred in making a recommendation pursuant to Article 19.1 of the DSU even though the measure at issue had expired.[318]

5.168. We begin by addressing the European Union's allegation that Indonesia's appeal is inconsistent with Article 3 of the DSU. In the event that we find such an inconsistency, we will consider the consequences of such a finding and, in particular, the European Union's request to find it unnecessary to rule on the appeal and/or declare the Panel's findings moot and of no legal effect. Thereafter, we turn to the separate request by the European Union to find that the Panel erred in making a recommendation pursuant to Article 19.1 of the DSU with respect to an expired measure.

5.3.1 The European Union's request to dismiss Indonesia's appeal as inconsistent with Article 3 of the DSU

5.3.1.1 Procedural background

5.169. The Panel issued its final report to the parties to the dispute on 23 September 2016. While that report was being translated, and before the Panel Report was circulated to all WTO Members, the European Union, on 16 November 2016, sent an email to the Panel: (i) inquiring as to the date for circulation of the Panel Report; (ii) asking for at least two weeks' advance notice of such circulation date; (iii) informing the Panel that the measure at issue had expired on 12 November 2016; and (iv) enclosing a copy of the notice of expiry from the Official Journal of the European Union.[319] Indonesia was copied on this email.

5.170. The Panel Report was circulated to WTO Members on 16 December 2016. It contains no reference to the above-mentioned documents and no mention of the expiry of the measure at issue.

5.3.1.2 Claims and arguments on appeal

5.171. The European Union requests us to find that Indonesia's appeal is inconsistent with Article 3 of the DSU because it relates to an expired measure and, for that reason, to find it unnecessary to rule on the substance of Indonesia's appeal.[320] Conditional upon being granted this relief, the European Union withdraws all other elements of its other appeal pursuant to Rule 30 of the Working Procedures.[321]

5.172. The European Union argues that almost all paragraphs of Article 3 of the DSU, as well as WTO case law, support the proposition that an appeal is not appropriate when the measure at issue is withdrawn or has expired during the panel proceedings.[322] The European Union presents specific arguments in relation to various paragraphs of Article 3 of the DSU. We address these arguments below in the context of our legal analysis.

[317] European Union's other appellant's submission, para. 4.
[318] European Union's other appellant's submission, para. 23.
[319] European Commission, Notice of the expiry of certain anti-dumping measures, *Official Journal of the European Union*, C Series, No. 418 (12 November 2016), p. 3.
[320] European Union's other appellant's submission, paras. 4 and 21.
[321] European Union's other appellant's submission, para. 21.
[322] European Union's other appellant's submission, para. 6.

5.173. Indonesia, for its part, requests us to reject the European Union's request not to rule on the substance of the matter raised by Indonesia.[323] Indonesia submits that the Appellate Body's jurisdiction is governed by Article 17 of the DSU, and that the European Union has failed to point to any basis suggesting that Indonesia's appeal is inconsistent with this provision. Indonesia refers to Article 17.12 of the DSU, which states that the Appellate Body shall address each of the issues raised in accordance with Article 17.6 in appellate proceedings, and asserts that the Appellate Body would fail to comply with this duty if it were to decline to rule on Indonesia's appeal.[324]

5.174. The United States supports Indonesia's position. In particular, the United States submits that the expiry of the measure at issue is not a fact that was found by the Panel, and that the Appellate Body is, for that reason, precluded from considering the expiry of the measure at issue.[325] The United States adds that, in any event, because the Panel was tasked with determining whether the measure at issue was consistent with the covered agreements at the time of the establishment of the Panel, any expiry of the measure at issue just before circulation of the Panel Report was irrelevant to the Panel's analysis.[326]

5.3.1.3 Whether Indonesia's appeal is inconsistent with Article 3

5.175. At the outset of our analysis, we note that it is uncontested by the participants that the measure at issue has expired.[327] We recall that appellate review is governed primarily by Article 17 of the DSU. In particular, Article 17.4 stipulates that the parties to the dispute may appeal a panel report. It also provides that third parties have no right to appeal a panel report. However, Article 17.4 does not impose limitations on the parties' right to appeal a panel report.

5.176. Article 17.12 of the DSU provides that the Appellate Body shall address each of the issues raised in accordance with Article 17.6 of the DSU during appellate proceedings. Article 17.6 stipulates that an appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel. Neither of these provisions contains any indication that expired measures are excluded from appellate review or that it might be unnecessary for the Appellate Body to rule on such measures.

5.177. We note that, in some cases, the Appellate Body has decided that it was not necessary to rule on a particular claim of error.[328] However, the European Union's appeal under Article 3 of the DSU in the present case is different from such situations. While the Appellate Body has occasionally considered it unnecessary to rule on a specific claim on appeal once it had addressed another claim in the same appeal, the European Union's claim under Article 3 relates to Indonesia's conduct in bringing the appeal at all. Moreover, when coupled with its own conditional withdrawal of the appeal, the European Union is effectively requesting us to make no ruling at all. At the same time, it is important to note that the European Union does not contest the Appellate Body's jurisdiction or request us to decline to exercise such jurisdiction.[329] Rather, the European Union submits that an appeal is not appropriate, and is inconsistent with Article 3 of the DSU, when the measure at issue has been withdrawn or has expired in the course of the panel proceedings.

5.178. The European Union invokes several provisions of Article 3 of the DSU in support of its position. In particular, the European Union refers to Article 3.2[330], which provides that the dispute

[323] Indonesia's appellee's submission, para. 4.61.
[324] Indonesia's appellee's submission, paras. 4.19 and 4.21.
[325] United States' third participant's submission, para. 21.
[326] United States' third participant's submission, para. 28.
[327] Indonesia's appellee's submission, para. 4.15; European Union's other appellant's submission, para. 3.
[328] Appellate Body Reports, *China – Auto Parts*, para. 209. See also Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.89; and *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 285.
[329] European Union's opening statement and response to questioning at the oral hearing .
[330] Article 3.2 of the DSU provides:
The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of

settlement system of the WTO serves to preserve the rights and obligations of Members under the covered agreements, and argues that once the measure at issue has expired there is nothing left to "preserve".[331] The European Union also refers to Article 3.4[332], which provides that recommendations or rulings made by the DSB shall be aimed at achieving a "satisfactory settlement of the matter" in accordance with the rights and obligations under the DSU and the covered agreements. For the European Union, when the measure at issue has expired, then a "satisfactory settlement" of the matter has already been achieved.[333] In the same vein, the European Union refers to Article 3.7, which expresses as an aim of the dispute settlement mechanism the securing of a "positive solution" to a dispute. The European Union asserts that the first objective of the dispute settlement mechanism is usually to secure withdrawal of the measure at issue. For the European Union, it follows that because in the present case, a positive solution to the dispute has been achieved with the withdrawal of the measure, pursuing the appeal would be "pointless"[334], rather than "fruitful", as required by Article 3.7 of the DSU. In addition, the European Union refers to Article 3.10, which provides that all Members will engage in the procedures set out in the DSU in good faith in an effort to resolve the dispute. The European Union argues that, following the expiry of the measure, there is no longer any dispute between the parties, and that Article 3.10 therefore also supports its view that an appeal is inappropriate in this case.

5.179. These arguments reflect different permutations of the proposition that a dispute no longer exists after the withdrawal of the measure at issue. However, the Appellate Body has expressly rejected the proposition that the repeal of a measure necessarily constitutes, without more, a "satisfactory settlement of the matter", and has recognized that benefits accruing to a Member may be impaired by measures whose legislative basis has expired.[335] The Appellate Body has also recognized that the fact that a measure has expired is not dispositive of the question of whether a panel can address claims in respect of that measure.[336] Similarly, we consider that the expiry of the measure at issue does not, without more, render it unnecessary for us to rule on Indonesia's appeal. Significantly, pursuant to Article 3.7, Members are expected to be largely self-regulating in deciding if any action under the DSU would be "fruitful".[337]

5.180. As a general matter, the Appellate Body has held that it is within the panel's discretion to decide how it takes into account subsequent modifications to, or the repeal of, the measure at issue.[338] This encompasses discretion either to make findings or not with respect to an expired measure. In exercising this discretion, panels have considered, *inter alia*, whether the measure could easily be re-imposed.[339] In the present case, the European Union has not advanced specific arguments relating to the nature of the measure at issue in support of its contention that this dispute has been resolved. Rather, the European Union's submission focuses on the expiry of the measure itself. However, for the reasons above, we consider that Indonesia is not barred from pursuing an appeal just because the measure at issue has expired.

5.181. The European Union also refers to Article 3.3 of the DSU[340], arguing that the reference to "prompt settlement" in this provision implies that additional steps in WTO dispute settlement

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public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

[331] European Union's other appellant's submission, para. 10.

[332] Article 3.4 of the DSU provides:

Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

[333] European Union's other appellant's submission, para. 12.

[334] European Union's other appellant's submission, para. 15.

[335] Appellate Body Report, *US – Upland Cotton*, para. 270.

[336] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270.

[337] Appellate Body Report, *EC – Bananas III*, para. 135.

[338] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270.

[339] Panel Report, *India – Additional Import Duties*, paras. 7.69-7.70. In particular, that panel relied upon its observation that India faced no meaningful obstacle in reinstating the measure.

[340] Article 3.3 of the DSU provides:

The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by

proceedings after the expiry of the measure at issue are both non-essential and contrary to the objectives of the WTO dispute settlement system. The European Union adds that such proceedings threaten to delay unnecessarily and prevent the prompt settlement of other disputes and hence the effective functioning of the WTO dispute settlement system.[341]

5.182. In our view, the European Union's reading of Article 3.3 of the DSU is at odds with the interpretation given by the Appellate Body in *US – Upland Cotton* and *EC – Bananas III (Article 21.5 – US)*. The Appellate Body found contextual support in Article 3.3 of the DSU for interpreting the words "measures at issue" in Article 6.2 as not excluding expired measures from its scope. The Appellate Body highlighted that Article 3.3 connects the words "prompt settlement", *not* to "existing" measures or measures "currently in force", but to "measures taken" by a Member, which includes measures taken in the past.[342] Thus, the proposition underpinning this part of the European Union's argument has been expressly rejected by the Appellate Body.

5.183. The European Union further invokes Article 3.8 of the DSU, arguing that the fact that a measure has expired constitutes at least a *prima facie* rebuttal of the presumption enshrined in this provision that one Member's breach of a WTO obligation results in the nullification and impairment of benefits enjoyed by other Members.[343] We note, however, that demonstrating continuing nullification or impairment is not a prerequisite for pursuing an appeal.

5.184. Finally, the European Union refers to Article 3.9[344] of the DSU, and alleges that Indonesia is using the appeal procedure to seek an authoritative interpretation of particular provisions of the covered agreements, even though other procedures are set out for this purpose in the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). The European Union asserts that Indonesia is requesting clarification or interpretation of certain provisions of the covered agreements in abstract terms, and that it is seeking an "advisory opinion" in a manner disconnected from any ongoing dispute.[345]

5.185. In the present case, Indonesia has not requested an interpretation in the abstract, but the reversal of specific findings in the Panel Report. In particular, Indonesia has requested us to reverse the Panel's finding that the EU authorities did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement.[346] Indonesia is requesting us to review, *inter alia*, the Panel's interpretation of a specific provision of the covered agreements, and, in this sense, it is no different from other appeals brought before the Appellate Body.

5.3.1.4 Conclusion

5.186. For the reasons above, we find that, in appealing the Panel Report notwithstanding the expiry of the measure at issue, Indonesia did not act inconsistently with Article 3 of the DSU. We reject the European Union's requests to find it unnecessary to rule on the matter raised in Indonesia's appeal or to declare moot and of no legal effect all of the findings and conclusions made by the Panel.

5.3.2 The European Union's claim that the Panel erred in making a recommendation with respect to an expired measure (Article 19.1 of the DSU)

5.187. We now turn to the European Union's appeal under Article 19.1 of the DSU. The European Union requests us to find that the Panel erred because it made a recommendation with

another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

[341] European Union's other appellant's submission, para. 11.

[342] Appellate Body Reports, *US – Upland Cotton*, para. 264; *and EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 268.

[343] European Union's other appellant's submission, para. 16.

[344] Article 3.9 of the DSU provides:

The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

[345] European Union's other appellant's submission, para. 17.

[346] Indonesia's Notice of Appeal, para. 10 (referring to Panel Report, paras. 7.96-7.97, 7.160-7.161 and 8.1.b.i).

respect to an expired measure, and to reverse paragraph 8.3 of the Panel Report, in which the Panel recommended that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement.[347] For its part, Indonesia requests us to reject the European Union's request and to find that the Panel did not err in making a recommendation with respect to the measure at issue.[348]

5.3.2.1 The Panel's findings

5.188. In Section 8 of its Report, the Panel concluded that the European Union had acted inconsistently with Article 6.7 of the Anti-Dumping Agreement[349] and recommended that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement.[350] The Panel Report contains no reference to the expiry of the measure at issue.

5.3.2.2 Claims and arguments on appeal

5.189. The European Union argues that, by making a recommendation with respect to an expired measure, the Panel acted inconsistently with its obligation to make an objective assessment of the matter before it, thereby contravening Articles 11 and 19.1 of the DSU. The European Union contends that these provisions envisage a situation in which a measure (and hence a violation) exists. However, when the measure and thus the violation have ceased to exist, it does not make sense for a panel to make a recommendation.[351]

5.190. The European Union further contends that the Panel's failure to address, in its Report, the European Union's communication concerning the expiry of the measure at issue constituted a separate and additional breach of its duty under Article 11 to make an objective assessment of the matter before it. The European Union acknowledges that it notified the Panel very late in the proceedings. However, work still continued under the Panel's authority at that point in time such that, for the European Union, the Panel could and should have addressed a matter as fundamental as the expiry of the measure, which was not contested by Indonesia.[352]

5.191. For its part, Indonesia requests us to reject the European Union's request and to find that the Panel did not err in making a recommendation with respect to the measure at issue. Indonesia does not contest that the measure at issue has expired.[353] However, for Indonesia, the expiry of the measure at issue occurred too late to be taken into account by the Panel. Because the European Union notified the expiry of the measure more than three months after the interim report had been issued to the parties, the Panel was no longer entitled to incorporate this fact into its decision.[354]

5.192. In support of its position, Indonesia highlights that the panel in *China – GOES (Article 21.5 – US)* declined to admit as new evidence China's notification that the measure at issue in that dispute had been terminated, because China had notified the panel only after the interim report had been issued.[355] In addition, Indonesia refers to the panel report in *EC - Bananas III (Article 21.5 – US)*, explaining that the panel in that dispute declined to take into account changes in the measure at issue, because the request to do so was made only at the interim review stage.[356]

5.193. Moreover, Indonesia asserts that for the Panel to have admitted evidence concerning the expiry of the measure at issue after the interim report had been issued would have been contrary

[347] European Union's other appellant's submission, para. 23.
[348] Indonesia's appellee's submission, para. 4.51.
[349] Panel Report, para. 8.1.d.
[350] Panel Report, para. 8.3.
[351] European Union's other appellant's submission, para. 23 (referring to Appellate Body Report, *US - Certain EC Products*, para. 81).
[352] European Union's other appellant's submission, para. 23.
[353] Indonesia's appellee's submission, para. 4.60.
[354] Indonesia's appellee's submission, para. 4.52.
[355] Indonesia's appellee's submission, para. 4.54 (referring to Panel Report, *China – GOES (Article 21.5 – US)*, paras. 6.20–6.25.
[356] Indonesia's appellee's submission, para. 4.54 (referring to Panel Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 6.18).

to paragraph 7 of the Panel's Working Procedures. This provision requires all factual evidence to be submitted to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, answers to questions and comments on answers provided by the other party. Paragraph 7 also provides that exceptions to this procedure shall be granted only upon a showing of good cause.[357]

5.194. Finally, Indonesia submits that the Appellate Body's mandate does not permit it to take into account the expiry of the measure. Indonesia asserts that the Appellate Body must base its review on the factual record as established by the panel and that no new evidence may be admitted in the appellate proceedings.[358]

5.195. The United States submits that the Panel's making of a recommendation is consistent with the requirements of the DSU. It is the challenged measures as they existed at the time of panel establishment that are within the terms of reference. When a panel has found a measure within its terms of reference to be inconsistent with the covered agreements, the panel must make a recommendation.[359] Moreover, the United States agrees with Indonesia that evidence regarding the expiry of the measure at issue is not part of the Panel record, and therefore cannot be taken into account by the Appellate Body.[360]

5.3.2.3 Whether the Panel erred in making a recommendation pursuant to Article 19.1 with respect to an expired measure

5.196. We begin with the text of Article 19.1 of the DSU:

> *Article 19*
>
> *Panel and Appellate Body Recommendations*
>
> 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.[361]

5.197. We note that the provision refers to "a measure". It does not further qualify the "measure" and, in particular, it does not exclude from its scope any particular measures, such as expired measures. We consider Article 6.2 of the DSU to have contextual relevance for the interpretation of the term "measure" in Article 19.1, because the former provision describes the type of measures that may fall within the ambit of panel proceedings, and thus, may ultimately be subject to a panel's recommendation pursuant to Article 19.1. Article 6.2 stipulates:

> *Article 6*
>
> *Establishment of Panels*
>
> 2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

5.198. Article 6.2 refers to "measures at issue". The Appellate Body has noted that the words "at issue" further qualify the "measure" in Article 6.2. The Appellate Body has also expressly rejected

[357] Indonesia's appellee's submission, para. 4.55.
[358] Indonesia's appellee's submission, para. 4.57 (referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 9).
[359] United States' third participant's submission, paras. 46-50.
[360] United States' third participant's submission, para. 24.
[361] Footnotes omitted.

the proposition that an expired measure could not be a measure "at issue" in terms of Article 6.2 of the DSU.[362] Instead, referring to the relevant context provided by Article 3.3 of the DSU, the Appellate Body has highlighted that this provision does not refer to "existing" measures or measures "currently in force", but to "measures taken" by a Member. Accordingly, the Appellate Body considered this reference to encompass measures taken in the past. We consider that Article 3.3 also has contextual relevance for the interpretation of Article 19.1, similarly suggesting that the term "measures" in that provision is not limited to "existing", but also covers expired measures.

5.199. Article 19.1 further stipulates that panels and the Appellate Body "shall recommend" that the Member concerned bring the measure into conformity with the covered agreements when they conclude that a measure is inconsistent with a covered agreement. We attach significance to the fact that Article 19.1 is expressed in mandatory terms and linked directly to the findings made by a panel. This suggests that it is not within a panel's or the Appellate Body's discretion to make a recommendation in the event that a finding of inconsistency has been made.

5.200. At the same time, the Appellate Body has found that the expiry of the measure may affect what recommendations a panel may make.[363] In this vein, some panels have found it not appropriate to make a recommendation to the DSB after they had found that the measure was no longer in force.[364] Other panels have made a recommendation in such circumstance, albeit limited in scope.[365] In *US – Certain EC Products*, the Appellate Body found an inconsistency between the finding of the panel that the relevant measure was no longer in existence and the subsequent recommendation of the panel that the DSB request the United States bring that measure into conformity with its WTO obligations.[366]

5.201. We note that those cases differ from the present case in that the Panel in the present case made *no* finding on, or mention of, the expiry of the measure at issue in the Panel Report. Absent any finding or acknowledgement by the Panel that the measure at issue is no longer in force, there was no basis for the Panel to have departed from the requirement in Article 19.1 of the DSU to make a recommendation after having found that measure to be inconsistent with the covered agreements. In this vein, we note that, while the Appellate Body has held that, as a general matter, it is within the panel's discretion to decide how to take into account subsequent modifications to, or the repeal of, the measure at issue[367], the Appellate Body has also clarified that, where a measure has expired, a panel is not precluded from making a recommendation on such a measure.[368] In light of these considerations, we conclude that the Panel in this dispute did not err in making a recommendation pursuant to Article 19.1 of the DSU.

5.202. As a separate matter, the European Union alleges that the Panel erred by failing to refer in its Report to the European Union's communication concerning the expiry of the measure at issue. The European Union contends that the Panel thus failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU.

5.203. We recall that the European Union sent its communication to the Panel on 16 November 2016. At that point in time, the Panel had concluded the interim review and had issued, on 23 September 2016, its final report to the parties. This claim thus raises the question as to whether the Panel could or should have considered evidence submitted after completion of all formal procedural steps except the circulation of its Report to Members.

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[362] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 - US)*, para. 268.

[363] Appellate Body Report, *US – Upland Cotton*, para. 272.

[364] Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.359–7.363, 7.389-7.393, and 7.415–7.419; *US – Poultry (China)*, para. 8.7.

[365] For instance, the panel in *Thailand – Cigarettes (Philippines)* made a recommendation with respect to expired measures "only to the extent they continue to have effects". (Panel Report, *Thailand – Cigarettes (Philippines)*, para. 8.8. See also paras. 6.24-6.25)

[366] Appellate Body Report, *US – Certain EC Products*, para. 81.

[367] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270.

[368] Appellate Body Reports, *China – Raw Materials*, para. 264.

5.204. We note that panel proceedings consist of two main stages, the first of which involves each party setting out its "case in chief, including a full presentation of the facts on the basis of submission of supporting evidence", and the second is designed to permit the rebuttal by each party of the arguments and evidence submitted by the other parties.[369] The Appellate Body and panels have consistently held that the interim review stage is not an appropriate time to introduce new evidence.[370] For instance, in *EC – Sardines*, the Appellate Body concluded that the panel did not act inconsistently with Article 11 of the DSU in refusing to take into account new evidence during the interim review.[371] In the present dispute, information regarding the expiry of the measure at issue was not submitted during interim review, but much later, after the final report had been issued to the parties.

5.205. In addition, we note that paragraph 7 of the Panel's Working Procedures provides that 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 and comments on answers provided by the other party. The Working Procedures further provide that exceptions to this procedure shall be granted only upon a showing of good cause, and that, where such an 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.

5.206. Information regarding the expiry of the measure at issue was submitted after the time foreseen in the Panel's Working Procedures for the submission of evidence. Accordingly, pursuant to paragraph 7 of those Working Procedures, the European Union should have shown good cause for providing information at a late stage in the proceedings. However, the European Union provided no explanation for the late submission of information regarding the expiry of the measure at issue. Moreover, the European Union did not specifically request that the expiry of the measure be addressed by the Panel in its Report.

5.207. For all of these reasons, we find that the Panel did not exceed the bounds of its discretion by not referring to the European Union's communication concerning the expiry of the measure at issue in its Report.

5.3.2.4 Conclusion

5.208. We have found that, as a general matter, it is within a panel's discretion to decide how to take into account subsequent modifications to, or the repeal of, the measure at issue. In the absence of any finding or acknowledgement by the Panel that the measure at issue is no longer in force, there was no basis for the Panel to have departed from the requirement in Article 19.1 of the DSU to make a recommendation after having found that measure to be inconsistent with the covered agreements. Accordingly, we find that the Panel did not err or act inconsistently with Article 19.1 or Article 11 of the DSU in making a recommendation, at paragraph 8.3 of its Report, with respect to the measure at issue.

5.4 The European Union's claim under Article 12.12 of the DSU

5.209. The European Union requests us to reverse the Panel's findings that:

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

[369] Appellate Body Reports, *Thailand – Cigarettes (Philippines)*, para. 149; *Argentina – Textiles and Apparel*, para. 79; and *US – FSC (Article 21.5 – EC)*, para. 240.
[370] Appellate Body Reports, *EC – Sardines*, para. 301; and *EC – Selected Customs Matters*, para. 259.
[371] Appellate Body Report, *EC – Sardines*, para. 301. See also Panel Reports, *EC – IT Products*, paras. 6.47–6.48; and *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 6.18.

iii. the authority for the establishment of this Panel had not lapsed.[372]

5.210. In addition, the European Union requests us to complete the legal analysis, find that the authority for the establishment of the Panel had lapsed pursuant to Article 12.12 of the DSU, and, for that reason, to reverse or declare moot all of the other conclusions and recommendations of the Panel.[373]

5.211. We begin with a brief description of the factual background relevant to this claim. We then provide an overview of the relevant Panel findings before turning to our interpretation of Article 12.12 of the DSU and our assessment of whether the Panel erred in reaching the above conclusions.

5.4.1 Factual background

5.212. On 1 May 2013, Indonesia requested the establishment of a panel.[374] At its meeting on 25 June 2013, the DSB established the Panel. On 10 July 2013, the WTO Secretariat requested to hear the parties' preferences with respect to possible panelists, and proposed a meeting for that purpose on 12 July 2013. That same day, the European Union indicated that it would be able to attend the meeting. The next day, Indonesia responded by email that it would like "to suspend the meeting while waiting the development from Brussel". On the same day, the WTO Secretariat responded to Indonesia's communication, indicating to the parties that the meeting was cancelled pending further communication.[375]

5.213. On 12 September 2014, Indonesia informed the EU Delegation in Geneva of its intention to proceed with the dispute and, on 19 September, the Indonesian Delegation sent a message to the WTO Secretariat and the EU Delegation requesting to "re-activate" the process of panel composition. A meeting to discuss panel composition was held on 29 September 2014[376], and, on 18 December 2014, the Panel was composed by the Director-General.[377]

5.4.2 The Panel's findings

5.214. On 8 January 2015, the European Union requested the Panel to issue a preliminary ruling and find that its authority had lapsed, pursuant to Article 12.12 of the DSU, as a consequence of an alleged suspension of the Panel proceedings for more than 12 months. The European Union reiterated its request at the organizational meeting of the Panel on 30 June 2015.[378]

5.215. The European Union asserted that Indonesia had sent a request to the WTO Secretariat on 11 July 2013 with a view to suspending the work of the Panel in accordance with the first sentence of Article 12.12 of the DSU.[379] For the European Union, the fact that Indonesia's request was made before the composition of the Panel did not affect its legal significance. In the view of the European Union, pending panel composition, a request to suspend the work of a panel can be disposed of by the WTO Secretariat as part of its right to exercise "reasonable executive action" on behalf of the panel.[380]

5.216. Indonesia requested the Panel to reject the European Union's request and to rule instead that the Panel's authority had not lapsed. Indonesia argued that the 11 July 2013 email correspondence from the Permanent Mission of Indonesia to the WTO Secretariat was not a request to suspend the work of the Panel under Article 12.12. Indonesia highlighted that the communication neither expressly referred to the "suspension" of the Panel's "work", nor included a

[372] European Union's other appellant's submission, paras. 24 and 79 (referring to Panel Report, paras. 7.29 and 8.1.a).
[373] European Union's other appellant's submission, para. 80.
[374] WT/DS442/2.
[375] Email correspondence of 10 and 11 July 2013 between the WTO Secretariat and the parties (Panel Exhibit IDN-2).
[376] Email correspondence of 12, 19, and 22 September 2014 between the WTO Secretariat and the parties (Panel Exhibit IDN-8).
[377] WT/DS442/3.
[378] Panel Report, para. 7.10.
[379] Panel Report, para. 7.14 (referring to European Union's request for a preliminary ruling, para. 13).
[380] Panel Report, para. 7.14 (referring to European Union's request for a preliminary ruling, para. 35).

reference to Article 12.12 of the DSU. According to Indonesia, the message was simply a response to an invitation by the WTO Secretariat to attend a meeting regarding panel composition.[381] In addition, Indonesia argued that the work of the Panel could not have been suspended before the Panel had been composed, since Article 12.12 calls for a panel to decide whether or not a suspension should be granted. According to Indonesia, this discretion conferred on panels to deliberate and decide on such requests presupposes that panelists have been appointed.[382]

5.217. On 23 November 2015, the Panel issued a preliminary ruling finding that its authority had not lapsed pursuant to Article 12.12 of the DSU. The Panel considered that three conditions must be fulfilled before it can be concluded that a panel's authority has lapsed: (i) the complaining party must have submitted a request to suspend the work of the panel; (ii) the panel must have suspended its work; and (iii) the work of the panel must have been suspended for more than 12 months.[383]

5.218. The Panel then turned to the facts of this dispute and assessed Indonesia's communication of 11 July 2013. In this respect, the Panel referred to the Appellate Body reports in *EC - Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, highlighting that the Appellate Body had held that, because the relinquishment of rights granted by the DSU cannot be lightly assumed, the language in any documents alleged to waive such rights must "reveal clearly that the parties intended to relinquish their rights".[384] The Panel considered this to be relevant, because the practical effect of Article 12.12 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.

5.219. Turning to the facts of this dispute, the Panel then considered that it had to determine, as a threshold matter, whether Indonesia had made a request to suspend the work of the Panel.[385] The Panel reviewed the text of Indonesia's communication of 11 July 2013 and found that the European Union had not demonstrated that Indonesia had made a request in the sense of the first sentence of Article 12.12 of the DSU. The Panel concluded that, in the absence of such a request, the Panel's work had not been suspended and the Panel's authority had therefore not lapsed.[386]

5.4.3 Interpretation of Article 12.12

5.220. The European Union's claim of error raises the question of whether panel proceedings may be suspended before panel composition has been completed. In this section, we provide an interpretation of Article 12.12 of the DSU, focusing on this question. In the next section, we assess whether, in light of the interpretation of Article 12.12 and taking into account the specific circumstances of this case, the Panel erred in finding that, in this dispute, the Panel's authority had not lapsed.

5.221. We begin by considering the text of Article 12.12 of the DSU, which provides:

> *Article 12*
>
> *Panel Procedures*
>
> 12. 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

[381] Panel Report, para. 7.15.a (referring to Indonesia's response to European Union's request for a preliminary ruling, paras. 4.5 and 4.7-4.8).
[382] Panel Report, para. 7.15.b (referring to Indonesia's response to European Union's request for a preliminary ruling, paras. 4.16 and 4.40-4.41).
[383] Panel Report, para. 7.20.
[384] Panel Report, para. 7.22 (quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 217).
[385] Panel Report, para. 7.24.
[386] Panel Report, para. 7.29.

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.

5.222. The first sentence of Article 12.12 provides that a panel may suspend its work at any time at the request of the complaining party. Suspension pursuant to this provision thus requires a request by the complainant. We further note that this provision stipulates that the panel "may" suspend its work. Accordingly, a request by a complainant does not automatically lead to suspension of panel proceedings. Rather, suspension ensues from the exercise of discretion and a decision in a particular case.

5.223. The subject of the first sentence of Article 12.12 is "[t]he panel". This indicates that it is for the panel to decide whether or not to suspend its work. This is further confirmed by the fact that the sentence makes no reference to any other entity, such as the DSB or the WTO Secretariat.

5.224. This raises the question of whether the decision to suspend the work of a panel can be taken at any point after panel establishment or only once panel composition is complete. In this respect, we note that Article 12.12 does not further qualify or elaborate upon the word "panel". In particular, it does not refer to an "established" or "composed" panel. Article 12.12 does, however, identify what may be suspended - "its work" - that is, the work of the panel. The verb "suspend" suggests putting a stop to something that has already begun, and the use of the possessive "its" implies that there is a composed panel that has begun work relating to the dispute.

5.225. Looking beyond Article 12.12, the word "panel" is used throughout the DSU in several provisions concerning various stages of dispute settlement. For instance, in the context of consultations, Article 4.7 contains the word "panel", and it is clear from the context that this must refer to a panel that has not yet been established. Article 6.2 sets out the rules for the establishment of panels. Since a panel must be established before it can be composed, the word "panel" in Article 6.2, which refers to the panel to be established, cannot be a reference to a composed panel. At the same time, there are other provisions in the DSU that, in referring to "the panel", are clearly referring to a panel that has been composed. For instance, Article 15.2, which provides that the panel shall issue an interim report, can be referring only to a panel that has been composed. Accordingly, the word "panel" may refer to an established panel or to a composed panel, depending on the context within which it is used in a particular provision of the DSU. In this connection, we see merit in the observation made by Indonesia and the United States that, in general, the articles of the DSU proceed sequentially, from the initial phases of the dispute settlement process through to its final stages, and that, therefore, the word "panel" in any given provision must be interpreted taking into consideration the location of the provision within the overall sequence and structure of the DSU.[387] In this vein, we note that Article 12.12 of the DSU relating to the suspension of panel proceedings comes after Article 8 relating to the composition of panels.

5.226. We have observed above that the text of Article 12.12 envisages that a decision is taken, and discretion is exercised by a panel. Similarly, other provisions relating to panel procedures contemplate action by the panel. For instance, Article 12.5 stipulates that panels should set precise deadlines for written submissions by the parties, and Article 13 provides a right for panels to seek information and technical advice from any individual or body they deem appropriate. This contrasts with other references to "a panel" or "the panel" in provisions relating to earlier stages of a dispute, which do not contemplate action by the panel. Article 6.1, for instance, provides that a panel shall be established by the DSB if certain conditions are met. However, this provision does not refer to any action to be taken by the panel at that point in time. We consider that this, along with the fact that Article 12.12 envisages that discretion be exercised, as well as the placement of Article 12.12 in the overall structure of the DSU, suggests that it is a composed panel that is to take the decision to suspend panel proceedings.

5.227. The European Union argues that the reference to suspension of work "at any time" in Article 12.12 suggests that a panel's work could be suspended before panel composition.[388] We

[387] Indonesia's appellee's submission, paras. 3.42-3.57; United States' third participant's submission, para. 56.

[388] European Union's other appellant's submission, para. 41.

observe, however, that this reference to "at any time" immediately follows the phrase "[t]he panel may suspend its work". As we have set out above, this phrase reveals that suspension of a panel's work involves a deliberate decision of a panel that has already been composed.

5.228. The European Union also invokes what it refers to as the WTO Secretariat's competence to exercise "reasonable executive action" on behalf of the panel. According to the European Union, the WTO Secretariat could dispose of a request under Article 12.12 on behalf of a panel.[389] We note that the role of the WTO Secretariat is set out, primarily, in Article 27 of the DSU. The WTO Secretariat has the responsibility of assisting panelists, especially on the legal, historical, and procedural aspects of the matters dealt with, and providing secretarial and technical support. However, there is no reference in the DSU to what the European Union refers to as "reasonable executive action" to be exercised by the WTO Secretariat on behalf of a panel that has not yet been composed.

5.229. With these considerations in mind, we now turn to review the Panel's analysis in order to assess whether the Panel erred in finding that its authority had not lapsed pursuant to Article 12.12 of the DSU.

5.4.4 Whether the Panel erred in finding that its authority had not lapsed pursuant to Article 12.12

5.230. The European Union requests us to reverse the Panel's finding that the European Union had not sufficiently demonstrated that Indonesia had made a "request" in the sense of the first sentence of Article 12.12 of the DSU. The European Union further asks us to reverse the consequential findings that the work of the Panel had not been suspended, and that the Panel's authority had not lapsed.[390]

5.231. The European Union alleges that the Panel applied an incorrect legal standard by relying on the Appellate Body reports in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* that address the relinquishment of rights granted by the DSU. In the present case, Indonesia was not relinquishing a right under the DSU. On the contrary, Indonesia was exercising a right specifically afforded to it by Article 12.12 of the DSU. Therefore, the Panel should have applied the standard set out in Article 11 of the DSU and undertaken an objective assessment of the matter before it, assessing whether Indonesia's communication, the WTO Secretariat's response to it, and the lapse of time, taken together, suggested that Indonesia sought to exercise its right under Article 12.12 of the DSU.[391] The European Union adds that the Panel erred in being overly formalistic and failing to consider the substance of Indonesia's communication.[392] The Panel should have looked past the form to the substance, and in particular to the content of the request, the response to the request, and the ensuing inactivity for a period of more than 12 months.[393]

5.232. Indonesia requests us to: (i) uphold the Panel's findings in paragraphs 7.29 and 8.1.a of the Panel Report; (ii) reject the European Union's claim of error relating to Article 12.12 of the DSU; and (iii) reject the allegation that the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU.[394]

5.233. Indonesia agrees with the Panel's finding that the work of the Panel was not "suspended" within the meaning of Article 12.12 of the DSU. Indonesia explains that the message it sent to the WTO Secretariat on 11 July 2013 was not a "request" but a response to an email from the WTO Secretariat seeking to schedule a meeting with the parties in order to discuss panel composition.[395] According to Indonesia, the reasons for seeking to delay panel composition were the prospect of reaching an amicable solution, as well as the re-opening of the fatty alcohols investigation by the EU authorities following the issuance of the Interpipe Judgment, which

[389] European Union's other appellant's submission, para. 61.
[390] European Union's other appellant's submission, para. 79 (referring to Panel Report, para. 7.29).
[391] European Union's other appellant's submission, para. 69 (referring to Panel Report, para. 7.22).
[392] European Union's other appellant's submission, para. 75 (referring to Panel Report, para. 7.26.a).
[393] European Union's other appellant's submission, para. 75 (referring to Panel Report, para. 7.26.b).
[394] Indonesia's appellee's submission, para. 3.104.
[395] Indonesia's appellee's submission, para. 3.27.

addressed issues similar to those in the fatty alcohols investigation.[396] Indonesia also disagrees with the European Union's contention, that in the circumstances of the present case, the WTO Secretariat acted "in the name of the Panel" when it communicated to the parties that the meeting was cancelled.[397]

5.234. The United States agrees with the Panel's finding that its authority had not lapsed. The United States submits that Indonesia's communication to the WTO Secretariat to suspend a meeting to discuss panel composition was not a request to the Panel that it "suspend its work" pursuant to Article 12.12.[398]

5.235. We have explained above that a panel's work can be suspended pursuant to Article 12.12 only once the panel has been composed. In the present case, the Panel did not address this issue. Instead, the Panel posed the question of whether the European Union had established that Indonesia's 13 July 2013 email requesting "to suspend the meeting" constituted a request to suspend the work of the Panel in the sense of Article 12.12 of the DSU. However, for the reasons explained above, any request contained in the communication from Indonesia to the Panel could not have triggered the beginning of the 12-month period provided for under Article 12.12 because no panel had been composed that could have taken a decision on a request for suspension.

5.236. In the circumstances of this case, the WTO Secretariat's response to Indonesia's request to "suspend" a meeting to discuss panel composition was equally irrelevant.[399] Because the Panel had not yet been composed, the response sent by the WTO Secretariat could not have constituted any decision by the Panel to suspend proceedings pursuant to Article 12.12 of the DSU. In light of these considerations, the first of the three findings made by the Panel was not pertinent to the question of whether the Panel's authority had lapsed. We therefore declare moot and of no legal effect the Panel's first finding, namely, that "the European Union ha[d] 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."[400] Furthermore, as we have explained above, the Panel proceedings could not have been suspended at that point, because the Panel had not yet been composed. For this reason, the Panel did not err in making its second and third findings, namely, that the Panel's work had not been suspended and that its authority had not lapsed.[401]

5.237. This brings us to the additional claim of error raised by the European Union with respect to the Panel's analysis under Article 12.12 of the DSU. The European Union alleges that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU for two reasons. First, the Panel erred by failing to attribute the proper weight to the WTO Secretariat's response to Indonesia's communication of 11 July 2013. The European Union asserts that omitting from consideration a central element of the evidence is inconsistent with the Panel's obligation to make an objective assessment of the matter pursuant to Article 11 of the DSU.[402] Second, the European Union contends that the Panel's references to the European Union having "insufficiently demonstrate[ed]" that Indonesia's communication of 11 July 2013 constituted a request to suspend the work of the Panel are inapposite and legally erroneous, demonstrate a lack of objectivity, and are inconsistent with the Panel's obligation to undertake an objective assessment of the matter pursuant to Article 11 of the DSU.[403]

[396] Indonesia's appellee's submission, para. 3.25 (referring to Interpipe Judgment (Panel Exhibit IDN-49)).
[397] Indonesia's appellee's submission, para. 3.28 (quoting European Union's other appellant's submission, paras. 35, 36, 42, 51 and 61).
[398] United States' third participant's submission, para. 60.
[399] Email correspondence of 10 and 11 July 2013 between the WTO Secretariat and the parties (Panel Exhibit IDN-2), p. 1.
[400] Panel Report, paras. 7.29.a and 8.1.a.i.
[401] Panel Report, paras. 7.29.b and c, and 8.1.a.ii and iii.
[402] European Union's other appellant's submission, para. 73 (referring to Panel Report, para. 7.25).
[403] European Union's other appellant's submission, para. 74 (referring to Panel Report, paras. 7.27 and 7.29.a).

5.238. Indonesia contends that the European Union's claims under Article 11 of the DSU are not sufficiently developed, do not stand by themselves, and should be rejected.[404]

5.239. We observe that the European Union's claims of error under Article 11 of the DSU relate to the Panel's analysis of whether 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 Article 12.12 of the DSU. We have declared the finding of the Panel based on this analysis to be moot and of no legal effect. Accordingly, we find it unnecessary to rule on the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU in its analysis under Article 12.12 of the DSU.

5.4.5 Conclusion

5.240. We have found that only a composed panel can take the decision to suspend panel proceedings. We therefore concluded that the first of the three findings made by the Panel was not pertinent to the question of whether the Panel's authority had lapsed. Having so found, we declare moot and of no legal effect the Panel's finding, in paragraphs 7.29.a and 8.1.a.i of its Report, that the European Union had not demonstrated 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 Article 12.12 of the DSU.

5.241. We have also found that, in finding that the Panel's work had not been suspended and that its authority had not lapsed, the Panel did not act inconsistently with Article 12.12 of the DSU. Consequently, we uphold these findings.[405]

5.5 The European Union's claim that the Panel erred in its treatment of certain information as BCI

5.242. The European Union requests us to find that the Panel erroneously treated certain information as BCI and consequently erred by redacting that information from five paragraphs of its Report.[406] The European Union challenges the Panel's treatment of this information on the grounds that the information was already in the public domain and that the Panel's BCI Procedures, therefore, prevented the Panel from treating that information as BCI.[407]

5.243. Indonesia requests us to reject the European Union's appeal. According to Indonesia, in asserting that certain information was already in the public domain, the European Union bore the burden of demonstrating that the information had been properly released into the public domain, despite it being marked as confidential during the anti-dumping investigation.[408]

5.244. The European Union's claim on appeal does not challenge a specific finding, conclusion, or procedural ruling of the Panel. Instead, the European Union argues that, with respect to five paragraphs of its Report, the Panel acted inconsistently with Articles 10.1, 11, 12.1, and 12.7 of the DSU, as read together with paragraphs 1 and 9 of the Panel's BCI Procedures, by erroneously treating certain information as BCI. In order to situate the European Union's appeal in its proper context, we set out below a summary of the relevant aspects of the Panel proceedings.

5.245. Following consultation with the parties, the Panel adopted its Working Procedures and BCI Procedures.[409] The Panel's BCI procedures were applicable to any BCI submitted in the course of the Panel proceedings. Pursuant to paragraph 1 of the Panel's BCI Procedures, BCI was defined as any information that had been designated as such by the party submitting the information, and that had previously been treated by the EU authorities, in their anti-dumping investigation, as confidential within the meaning of Article 6.5 of the Anti-Dumping Agreement. However,

[404] Indonesia's appellee's submission, para. 3.101.
[405] Panel Report, paras. 7.29.b and c, and 8.1.a.ii and iii.
[406] European Union's other appellant's submission, para. 182 (referring to Panel Report, paras. 7.64, 7.74, 7.80, 7.82, and 7.83).
[407] European Union's other appellant's submission, paras. 171-180 (referring to PT Musim Mas Judgment (Panel Exhibit EU-4)).
[408] Indonesia's appellee's submission, paras. 5.15-5.16.
[409] Panel Report, para. 1.7. The BCI Procedures are contained in Annex A-2 to the Panel Report.

paragraph 1 of the Panel's BCI procedures explicitly provided that these procedures would not apply to, *inter alia*, any information that was available in the public domain.

5.246. On 29 July 2016, the Panel provided the parties with its interim report, and invited the parties to request the revision of precise aspects of the interim report. In its comments at interim review, the European Union requested the Panel to review certain information treated as BCI in the interim report. The BCI was identified by being enclosed within double brackets, and this bracketed information was to be redacted from the Panel Report. The European Union asserted that much of the bracketed information in the interim report was already in, or coming into, the public domain.[410] Of particular relevance, the European Union suggested the removal of all bracketing in paragraphs 7.64, 7.74, 7.80, 7.82, and 7.83. The European Union identified two Panel exhibits[411] as examples of documents that were in the public domain and that contained some of the information treated by the Panel as BCI and bracketed in the interim report.

5.247. In response to the European Union's comments, Indonesia acknowledged that some of the information for which it had sought BCI protection may have been made publicly available. However, Indonesia questioned whether the disclosure of that information had been discussed or agreed with the investigated producer/exporter.[412] At the same time, Indonesia agreed with the European Union that the readability of the Panel Report ought not to be compromised any more than necessary, and provided some suggestions on how to reduce the amount of redacted information in the Report.[413]

5.248. On 23 September 2016, the Panel issued its final report to the parties. Overall, the Panel significantly reduced the extent of the bracketed information in its final report as compared to the interim report. In particular, the Panel reduced the extent of the bracketing of information in paragraphs 7.64 and 7.83. The Panel also deleted part of the bracketed information in paragraph 7.82. However, the Panel maintained the bracketing in paragraphs 7.74 and 7.80.

5.249. In its cover letter forwarding its final report to the parties, the Panel confirmed that it had taken into account the comments of the parties in relation to the protection of BCI. The Panel indicated that, "in line with the [Panel's BCI Procedures], only information identified by the Panel as not in the public domain was treated as confidential in the Final Report and its annexes."[414] Pursuant to paragraph 9 of the Panel's BCI Procedures, the Panel invited the parties to request any amendments to the final report, with specific respect to the Panel's treatment of certain information as BCI.[415] Neither of the parties submitted a request for amendment of the final report in response to this invitation. On 16 December 2016, the Panel Report was circulated to all WTO Members. This Report redacted the information that the Panel had treated as BCI and bracketed in its final report to the parties.

5.250. On appeal, the European Union contests the Panel's redacting of certain information from five paragraphs of its Report: paragraphs 7.64, 7.74, 7.80, 7.82, and 7.83. However, the contested redactions in these five paragraphs relate to only three pieces of information.[416] The information subject of the European Union's claim is company-specific. It concerns details of the relationship between PT Musim Mas and ICOF-S, and of the responsibilities and risks that ICOF-S undertook on behalf of PT Musim Mas. Moreover, the five paragraphs containing the information at issue form part of the Panel's analysis addressing Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement. We recall that, in section 5.1 above, we have addressed Indonesia's appeal of the issues of law and the legal interpretations underpinning the Panel's findings and conclusions under Article 2.4. In disposing of Indonesia's claim of error, we did not find it

[410] European Union's comments on the interim report.
[411] European Union's comments on the interim report (referring to Final Determination (Panel Exhibit IDN-4); PT Musim Mas Judgment (Panel Exhibit EU-4)).
[412] Indonesia's comments on the European Union's comments on the interim report, para. 3.2.
[413] Indonesia's comments on the European Union's comments on the interim report, paras. 3.3-3.10.
[414] Letter dated 23 September 2016 from the Chairman of the Panel to Indonesia and the European Union.
[415] Letter dated 23 September 2016 from the Chairman of the Panel to Indonesia and the European Union.
[416] This is because, while the challenged references in paragraphs 7.74 and 7.83 are distinct, the sentence that first appears in paragraph 7.64 is reproduced with only slight modifications in paragraphs 7.80 and 7.82 of the Panel Report.

necessary to refer to any of the information subject of the European Union's claim. Hence, we are not convinced that examining the European Union's claim on appeal will facilitate further the achievement of a satisfactory settlement of this dispute.

5.251. Furthermore, as mentioned in section 5.3 above, the anti-dumping measure at issue in this dispute expired on 12 November 2016.[417]

5.252. In light of the Panel's consideration of the appropriate extent of BCI protection based upon the parties' interim review comments, the company-specific nature of the information, as well as the expiry of the measure at issue, an examination of whether the Panel should have included the information in question in the circulated version of its Report is not necessary to secure a positive solution to this dispute. For these reasons, we find it unnecessary to rule on whether the Panel erroneously designated certain information as BCI and consequently erred by redacting that information from five paragraphs of the Panel Report.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

Article 2.4 of the Anti-Dumping Agreement

6.2. The focus of Article 2.4 of the Anti-Dumping Agreement is not merely on a comparison between the normal value and the export price, but predominantly on the means to ensure the fairness of that comparison. To this end, investigating authorities are required to make due allowance for differences affecting price comparability. There are no differences affecting price comparability that are precluded, as such, from being the object of an allowance. Instead, the need to make due allowances must be assessed in light of the specific circumstances of each case. The Panel's articulation of the legal standard under Article 2.4 is consonant with our understanding of this provision. The existence of a close relationship between transacting companies would be pertinent to the extent that it affects the relevant transactions in such a way as to affect the comparability of the export price and the normal value. Thus, the Panel did not err in rejecting Indonesia's argument that the existence of what Indonesia denotes as a "single economic entity" is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4.

a. Accordingly, we find that Indonesia has not demonstrated that the Panel erred in its interpretation of Article 2.4 of the Anti-Dumping Agreement.

6.3. With respect to Indonesia's claim that the Panel erred in its application of Article 2.4 to the facts of this case, we consider that the Panel's review of the EU authorities' evaluation was properly focused on whether that evaluation was consistent with Article 2.4 of the Anti-Dumping Agreement. The Panel did not err in finding that the EU authorities had a sufficient evidentiary basis for establishing that the mark-up paid by PT Musim Mas to ICOF-S in connection with export sales to the European Union was a difference affecting price comparability under Article 2.4. Moreover, contrary to Indonesia's argument, the Panel's reasoning does not imply that, when confronted with transactions between closely affiliated parties, investigating authorities may replace the expenses actually incurred with the expenses that would have been incurred had the producing entity obtained the service from an independent provider.

a. Accordingly, we find that Indonesia has not demonstrated that the Panel erred in its application of Article 2.4 of the Anti-Dumping Agreement to the facts of this case.

6.4. We also find that Indonesia has not demonstrated that the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement or Article 11 of the DSU in its analysis of Indonesia's claim under Article 2.4 of the Anti-Dumping Agreement.

[417] European Commission, Notice of the expiry of certain anti-dumping measures, *Official Journal of the European Union*, C Series, No. 418 (12 November 2016), p. 3.

a. Consequently, we uphold the Panel's finding, in paragraphs 7.160 and 8.1.b.i of the Panel Report, that Indonesia has not demonstrated that the EU authorities acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by treating the mark-up paid by PT Musim Mas to ICOF-S as a difference affecting price comparability, and therefore making a downward adjustment to the export price.

Article 6.7 of the Anti-Dumping Agreement

6.5. On-the-spot investigations are one mechanism that investigating authorities may employ in satisfying their duty, under Article 6.6 of the Anti-Dumping Agreement, to ensure the accuracy of information supplied by interested parties. When such on-the-spot investigations are conducted, Article 6.7 requires that the firms subject to such visits be provided with the "results", or outcomes, of this verification process. The scope of on-the-spot investigations and the ensuing "results" to be communicated to the investigated firms vary from case to case, and are informed by the integral parts of the process of the on-the-spot investigations, which include the questions posed by the investigating authorities, the responses thereto, the scope of the advance notice, and the collection of any additional evidence during the on-the-spot investigations. In addition, the disclosure of the "results" of the on-the-spot investigations must enable the firms to which they are communicated to discern the information that the authorities considered to have been successfully verified, as well as the information that could not be verified, and to be informed of the results in sufficient detail and in a timely manner so as to be placed in a position to defend effectively their interests in the remaining stages of the anti-dumping investigation. We therefore find that the Panel did not err in its interpretation or application of Article 6.7 in determining the scope of the on-the-spot investigations and the ensuing "results" to be communicated to the investigated firms.

a. Consequently, we uphold the Panel's finding, in paragraphs 7.236 and 8.1.d of the Panel Report, that the EU authorities failed to make available or disclose the "results of any such investigations" to PT Musim Mas, and therefore acted inconsistently with Article 6.7 of the Anti-Dumping Agreement.

Article 3 of the DSU

6.6. We find that, in appealing the Panel Report notwithstanding the expiry of the measure at issue, Indonesia did not act inconsistently with Article 3 of the DSU. We therefore reject the European Union's requests to find it unnecessary to rule on the matter raised in Indonesia's appeal or to declare moot and of no legal effect all of the findings and conclusions made by the Panel.

Article 19 of the DSU

6.7. We have found that, as a general matter, it is within a panel's discretion to decide how to take into account subsequent modifications to, or the repeal of, the measure at issue. In the absence of any finding or acknowledgement by the Panel that the measure at issue is no longer in force, there was no basis for the Panel to have departed from the requirement in Article 19.1 of the DSU to make a recommendation after having found that measure to be inconsistent with the covered agreements.

a. Accordingly, we find that the Panel did not err or act inconsistently with Article 19.1 or Article 11 of the DSU in making a recommendation, at paragraph 8.3 of the Panel Report, with respect to the measure at issue.

Article 12.12 of the DSU

6.8. We have found that only a composed panel can take the decision to suspend panel proceedings. We therefore concluded that the first of the three findings made by the Panel was not pertinent to the question of whether the Panel's authority had lapsed.

a. Having so found, we declare moot and of no legal effect the Panel's finding, in paragraphs 7.29.a and 8.1.a.i of the Panel Report, that the European Union had not demonstrated 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 Article 12.12 of the DSU.

6.9. We have also found that, in concluding that its work had not been suspended and that its authority had not lapsed, the Panel did not act inconsistently with Article 12.12 of the DSU. Moreover, we have found it unnecessary to address the European Union's claim that the Panel failed to undertake an objective assessment of the matter.

a. Consequently, we uphold the Panel's findings, in paragraphs 7.29.b and c, and 8.1.a.ii and iii of the Panel Report that the work of the Panel was not suspended and the authority for the establishment of the Panel did not lapse.

The Panel's treatment of certain information as BCI

6.10. We find it unnecessary to rule on whether the Panel erroneously designated certain information as BCI and consequently erred by redacting that information from five paragraphs of the Panel Report.

Recommendation

6.11. For the reasons set out in this Report, the Panel's recommendation at paragraph 8.3 of the Panel Report, that the European Union bring its measures into conformity with its obligations under the Anti-Dumping Agreement, stands.

Signed in the original in Geneva this 31st day of July 2017 by:

Ricardo Ramírez-Hernández
Presiding Member

Hyun Chong Kim
Member

Hong Zhao
Member

WORLD TRADE ORGANIZATION

WT/DS442/AB/R/Add.1

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

WT/DS442

AB-2017-1

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS442/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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NOTICES OF APPEAL AND OTHER APPEAL

ANNEX A-1

INDONESIA'S NOTICE OF APPEAL*

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20 of the Working Procedures for Appellate Review, Indonesia hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report entitled *European Union - Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (WT/DS442), which was circulated on 16 December 2016 (the "Panel Report"). Pursuant to Rules 20(1) and 21(1) of the Working Procedures for Appellate Review, Indonesia is simultaneously filing this Notice of Appeal and its Appellant's Submission with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submission to the Appellate Body, Indonesia appeals and requests the Appellate Body to reverse the findings, conclusions, and recommendations of the Panel, with respect to the following errors contained in the Panel Report:[1]

I. The Panel's finding under Article 2.4 of the Anti-Dumping Agreement

1. The Panel erred in the interpretation and application of Article 2.4 of the Anti-Dumping Agreement when finding that Indonesia had not demonstrated that, in its determinations in the anti-dumping investigation at issue in this dispute, the EU Commission had acted inconsistently with this provision by making an adjustment to the export price for one of the investigated producer/exporters to account for intra-company transfers between the producer and its closely affiliated sales entity.[2]

2. In particular, and without prejudice to the arguments developed in Indonesia's appellant's submission, the Panel incorrectly interpreted and applied Article 2.4 by not addressing Indonesia's arguments or taking into account the need to determine whether a closely affiliated sales entity is in a sufficiently close relationship to the producing entity to warrant being treated as a single producer/exporter for the purpose of its price comparison analysis.[3]

3. The Panel also incorrectly interpreted and applied Article 2.4 by concluding that the relationship between closely affiliated entities is not relevant to the determination of price adjustments and a fair comparison between export price and normal value under Article 2.4.[4]

4. The Panel also incorrectly interpreted and applied Article 2.4 by concluding that it is permissible to deduct the profits and indirect selling expenses of a closely affiliated sales entity from the export price under Article 2.4.[5]

5. The Panel also incorrectly interpreted and applied Article 2.4 by finding that the deduction of certain indirect selling expenses and profit from the export price while no corresponding deductions were made from the normal value did not result in an asymmetrical, unfair comparison under Article 2.4.[6]

6. The Panel also incorrectly interpreted and applied Article 2.4 by finding that it was permissible to make deductions from the export price for indirect selling expenses and, in

* This Notice, dated 10 February 2017, was circulated to Members as document WT/DS442/5. This document also reflects the correction contained in WT/DS442/5/Corr.1, in English and Spanish only.

[1] Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Indonesia's right to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] Panel Report, paras. 7.96-7.97, 7.160-7.161, and 8.1.b.i.

[3] Panel Report, paras. 7.54-7.97.

[4] Panel Report, paras. 7.99-7.111.

[5] Panel Report, paras. 7.112-7.117.

[6] Panel Report, paras. 7.118-7.125.

particular, profit on the basis of what the investigating authority considered to be reasonable for the sector at issue.[7]

7. The Panel also incorrectly interpreted and applied Article 2.4 by dismissing the relevance of the Commission's decision to treat the producer and it's closely affiliated sales entity as a single entity for the purpose of identifying the starting price for the dumping analysis.[8]

II. The Panel's duties under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU

8. The Panel also acted inconsistently with Articles 17.6(i) and 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by reaching a conclusion that the measures at issue were consistent with Article 2.4 of the Anti-Dumping Agreement without first considering Indonesia's arguments and evidence.[9] Specifically, the Panel acted inconsistently with Articles 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by failing to consider Indonesia's legal arguments and failing to interpret Article 2.4 in accordance with customary rules of interpretation of public international law, thereby failing to make an objective assessment of the matter, including the applicability and the conformity of the measures at issue. The Panel also acted inconsistently with Articles 17.6(i) and 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by applying the legal standard that it articulated without considering Indonesia's arguments and evidence, reaching a conclusion of WTO consistency on that basis and subsequently imposing on Indonesia the burden of disproving the Panel's finding.[10]

9. The Panel also acted inconsistently with Articles 17.6(i) and 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by engaging in prohibited *de novo* review of the evidence, and by ignoring or summarily dismissing material arguments and evidence that favoured Indonesia's case.[11]

III. Request for findings and completion of the analysis

10. For the above reasons, Indonesia, therefore, respectfully requests the Appellate Body to reverse the Panel's finding contained in paragraphs 7.96-7.97, 7.160-7.161, and 8.1.b.i of the Panel Report, that the EU Commission did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement.

11. Indonesia also respectfully requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6(ii) of the Anti-Dumping Agreement for the reasons provided in section II of this Notice of Appeal.

12. Finally, Indonesia requests the Appellate Body to complete the legal analysis and find that the EU Commission acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in its determination of dumping margins in the underlying investigation. The factual findings contained in the Panel Report, as well as the undisputed facts on the record in the determinations of the EU Commission, constitute a sufficient basis to conclude that the measures at issue were inconsistent with Article 2.4 of the Anti-Dumping Agreement.

[7] Panel Report, paras. 7.126-7.130.
[8] Panel Report, footnote 366.
[9] Panel Report, paras. 7.54-7.97.
[10] Panel Report, paras. 7.97, 7.110, and 7.149.
[11] Panel Report, paras. 7.84 and footnote 277 and paras. 7.85, 7.119, and 7.120.

ANNEX A-2

EUROPEAN UNION'S NOTICE OF OTHER APPEAL[*]

Pursuant to Article 16.4 and Article 17.1 of the *DSU* the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (WT/DS442). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to modify, reverse and/or declare moot and with no legal effect the findings and conclusions of the Panel and complete the analysis with respect to the following errors of law and legal interpretations contained in the Panel Report.[1]

- As a preliminary issue the European Union respectfully submits that Indonesia's appeal is inconsistent with Articles 3(1), 3(2), 3(3), 3(4), 3(5), 3(7), 3(8), 3(9) and 3(10) of the DSU, or any combination thereof, and that the Appellate Body should find that it is unnecessary to rule on the substance of the matters raised by Indonesia as the contested measure has expired, and indeed ceased to exist before the termination of the panel proceedings. If the Appellate Body grants this relief the European Union withdraws all other aspects of its cross-appeal, pursuant to Rule 30 of the Working Procedures for Appellate Review.

However, where the Appellate Body does not grant the relief requested in the preceding paragraph, the EU respectfully submits that:

- First, by failing to engage with and address the EU communication concerning expiry of the measure and by making recommendations with regard to a measure, which had ceased to exist before the termination of the Panel's proceedings – a fact that was uncontroversial and not contested by Indonesia – the Panel violated Articles 11 and 19.1 of the DSU[2], and for that reason the European Union requests the Appellate Body to reverse paragraph 8.3 of the Panel Report;

- Second, the Panel erred in interpreting and applying Article 12(12) of the DSU, by considering that the panel authority had not lapsed. In this respect, it erroneously referred to the standard (or guidance) provided by the Appellate Body in *EC – Bananas III*, which concerns a different situation. It also erroneously interpreted and applied Articles 8 and 12(12) of the DSU, by finding, expressly or by implication, that they are in some unspecified respect mutually exclusive, as opposed to containing concurrent obligations. Moreover, the panel violated Article 11 of the DSU because, in addition to the preceding errors: it did not take into account all of the evidence submitted to the panel to demonstrate that the panel work was indeed suspended for more than twelve months; by finding that there was no request by Indonesia within the meaning of Article 12(12); by charactering as findings of facts matters that concern the legal characterisation of those facts; by adopting a formalistic and erroneous analysis relying on the absence in Indonesia's request of any express reference to Article 12(12), a false distinction between "work" and "meeting", and

[*] This Notice, dated 15 February 2017, was circulated to Members as document WT/DS442/6.

[1] Pursuant to Rule 23(2)(c)(ii)(C) of the *Working Procedures for Appellate Review* this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] As a separate matter, in the event that the Panel did not include that communication concerning expiry of the measure on the Panel's record, the EU appeals that action or omission as a violation of Article 11 of the DSU, since keeping a complete record of the panel proceedings and transmitting that complete record to the Appellate Body in the event of an appeal, pursuant to Article 17(9) of the DSU and Rule 25 of the Working Procedures for Appellate Review, is a necessary corollary to the Panel's obligations under Article 11 of the DSU to assist the DSB in discharging its responsibilities, by making an objective assessment of the matter before it, including an objective assessment of the facts of the case; and make such other findings as will assist the DSB in making the appropriate recommendations or rulings.

the addressee of Indonesia's request; and by failing to properly address the question of the relationship between Articles 8 and 12(12) of the DSU, which was raised by the parties (and thereby also violating those provisions of the DSU). Any one of the foregoing errors or any combination therefore would justify reversal. Accordingly, the EU requests the Appellate Body to reverse the Panel's findings and conclusion on these matters[3], and respectfully requests the Appellate Body to complete the legal analysis, by finding that, with respect to these panel proceedings, the DSB's authority lapsed pursuant to Article 12(12) of the DSU. Consequently, we ask the Appellate Body to reverse all of the Panel's findings and recommendations, or declare them moot and of no legal effect.

- Third, the panel erred in the interpretation and application of Article 6.7 ADA, by considering that the European Union had not disclosed the results of the investigation to PTMM, *inter alia*, by imposing, in practice, an obligation to disclose a description of the investigation process rather than the results of the verification visit, requiring moreover that such a description should be sufficiently detailed so as to enable the Panel to trace back any correction that was made to the information supplied to specific evidence that was verified or not during the investigation or other events, and by setting out a list of items that must always be disclosed in order to comply with Article 6.7 ADA, regardless of the specific facts of each case. Accordingly, the European Union requests the Appellate Body to reverse the Panel's findings and conclusion with regard to the interpretation and application of Article 6.7 ADA.[4]

- Fourth, the panel erred in the interpretation and application of the DSU, particularly Article 12.1 of the DSU, and its Additional Working Procedures Concerning Business Confidential Information, because it bracketed information that was already in the public domain and failed to require Indonesia to advance justifications for its requests for specific instances of bracketing and to provide non-confidential summaries of the bracketed information sufficient to permit a reasonable understanding of the matter. At the same time the Panel also violated Article 12.7 of the DSU because by unduly over-bracketing it submitted an incomplete report to the DSB. For the same reasons, the Panel acted inconsistently with Article 10.1 of the DSU, which requires that the interests of other Members be fully taken into account during the panel process. Finally, by failing to require the necessary justifications and make the appropriate adjudications, and by failing to comply with its own BCI Procedures, the Panel acted inconsistently with its obligation to make an objective assessment, pursuant to Article 11 of the DSU.[5]

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[3] Panel Report, paras. 8.1.a.i-iii, paras. 1.9-1.11, and paras. 7.17-7.29.
[4] Panel Report, paras. 7.224-7.229, 7.235-7.236, and 8.1.d.
[5] Panel Report, paras. 7.64, 7.74 and 7.80, 7.82, 7.83.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF INDONESIA'S APPELLANT'S SUBMISSION

1 INTRODUCTION[1]

1.1. Indonesia appeals the Panel's finding that the Commission acted consistently with Article 2.4 of the Anti-Dumping Agreement by making an adjustment to the export price for an investigated Indonesian producer/exporter to reflect transactions between the producing entity and its closely affiliated sales entity. Indonesia considers that in finding that this adjustment was not inconsistent with Article 2.4, the Panel erred in interpreting and applying Article 2.4 of the Anti-Dumping Agreement.

1.2. In addition, Indonesia considers that the Panel acted inconsistently with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU in how it addressed Indonesia's arguments and evidence and in conducting *de novo* review of evidence on the record before the Commission.

2 BACKGROUND

2.1. The measures at issue in this dispute are anti-dumping measures imposed by the EU on imports of certain fatty alcohols from Indonesia. In its determinations, the Commission made an adjustment to the export price of the investigated Indonesian producer/exporters for transactions between the producers and their closely affiliated sales companies in Singapore, as if the producers and the sales companies were not related.

2.2. The Commission originally investigated two Indonesian producer/exporters, Musim Mas Group and Ecogreen. Both made their sales to the EU using the same sales structure. The producers in Indonesia (PT Musim Mas and PT Ecogreen Oleochemicals, respectively) sold to a closely affiliated, separately incorporated sales company located in Singapore (ICOF-S and EOS, respectively). These sales companies then re-sold the goods to customers in the EU.

2.3. For both producer/exporters, the sales office in Singapore negotiated with the EU customer on price. Once the price was agreed with the EU customer, two invoices were prepared: first, the producing entity in Indonesia invoiced the sales office in Singapore for 95% of the price agreed by the EU customer. Second, the sales office in Singapore invoiced the unrelated customer in the EU for 100% of the agreed price. The difference between the price received for the sale by the sales office (100%) and the amount paid to the producing entity (95%) is referred to as the "mark-up" between the producing entities and their sales offices. For both producer/exporters, in each case, the sales office in Singapore was wholly controlled by the same holding entity or shareholders as the producing entity in Indonesia.

2.4. In calculating the export price for both producer/exporters in its provisional and final determinations, the Commission characterized the sales companies in Singapore as an independent "agent[s] working on a commission basis". The Commission did not address whether the producers in Indonesia and their closely affiliated sales offices in Singapore were part of an SEE for the purpose of determining dumping margins. In the final determination, the deduction consisted of the SG&A expenses of the sales entity in Singapore and "profit of 5% which is considered a reasonable profit for the activities carried out by trading companies in the chemical sector". Without this adjustment, both producer/exporters would have had *de minimis* dumping margins.

2.5. The Commission made this adjustment pursuant to Article 2.10(i) of the EU's Basic Regulation, which permits a "notional" adjustment where an exporter sells through an affiliated trading company. Article 2.10(i) provides that "[t]he term 'commission' shall be understood to include the mark-up received by a [related] trader of the product or the like product if the functions of such a [related] trader are similar to those of an [independent] agent working on a

[1] This executive summary contains a total of 5,623 words (including footnotes). Indonesia's appellant's submission contains a total of 63,245 words (including footnotes).

commission basis". This has been described as enabling the Commission to "deduct[] from the export price a commission that was never paid, thereby artificially decreasing the export price". This provision of the Basic Regulation has no direct counterpart in the Anti-Dumping Agreement.

2.6. After the final determination, the Commission initiated a procedure to review the dumping measure. Having previously treated Musim Mas Group and Ecogreen identically, the Commission now found differences between the two producer/exporters. It decided to revise Ecogreen's dumping margin by removing the adjustment. As Ecogreen now had a *de minimis* dumping margin, the measure was terminated for Ecogreen. The Commission made no change to Musim Mas Group's dumping margin.

3 THE ISSUE BEFORE THE PANEL

3.1. Indonesia argued that in making price adjustments under Article 2.4 of the Anti-Dumping Agreement to reflect the involvement of a closely affiliated sales entity, an investigating authority must address whether the producing entity and its closely affiliated sales entity are in a sufficiently close relationship to warrant being treated as an SEE for the purpose of determining dumping margins. This question must be resolved using criteria such as those articulated by the panel in *Korea – Certain Paper* and the Appellate Body in *EU – Footwear* regarding the common ownership, management, and control of the entities involved.

3.2. Transactions between entities within the SEE are not reliable, for the reasons explained by the Appellate Body in *US – Hot-Rolled Steel*, paragraph 141. Moreover, these transactions do not represent expenses to the SEE as a whole. The determination of prices and price adjustments for dumping purposes must be based on the revenues and expenses of the SEE as a whole, not on the transfers within the SEE, and on how the producer/exporter actually structures its sales and the expenses it actually incurs.

3.3. Where a producer/exporter uses an unaffiliated agent to help make sales, the commission paid to that agent is a direct selling expense that can be deducted from the export price or normal value. Where a producer/exporter instead uses a closely affiliated sales entity with which it forms part of an SEE, the transfers within the SEE are not an expense to the SEE as a whole and may not be deducted. Instead, the actual expenses incurred are the expenses of the closely affiliated sales entity to pay its salespersons' salaries, office costs, etc. These are indirect selling expenses that are not deducted from the normal value or export price. The purpose of a dumping analysis is to identify price discrimination between markets. Hence, the deduction of any profit accruing to an entity for which a dumping margin is being determined would distort the price comparison.

3.4. Indonesia argued that the Commission's treatment of the producer in Indonesia and the sales office in Singapore as if they were independent entities, and the deduction of amounts for the sales office's selling expenses and the profit of traders in this sector did not accurately reflect the expenses actually incurred in making the investigated sales. It also distorted the comparison between export price and normal value, resulting in an unfair comparison under Article 2.4 of the Anti-Dumping Agreement.

4 THE PANEL'S RULING

4.1. The Panel rejected Indonesia's claim. The Panel stated that an adjustment may be appropriate where a factor "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" and found 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". However, the Panel's evaluation of the relevant legal standard in section 7.3.5 and its application of that standard to reach its conclusion in section 7.3.5.1 of the Report do not contain a *single* reference to the issue of closely affiliated companies, SEEs, or whether or how transactions between them may affect price comparability within the meaning of Article 2.4, or Indonesia's arguments on this issue.

4.2. Having concluded that the Commission acted consistently with Article 2.4, the Panel "turn[ed] to" Indonesia's arguments to see whether they "affected" the Panel's conclusion or provided "reason to set aside our conclusions".

4.3. The Panel stated that the question of whether two entities were part of an SEE was not "dispositive" because it was "possible" that transactions between two entities "could be" at arm's length, "regardless of how closely intertwined their control and ownership might be". The Panel concluded that even where transactions are not at arm's length, a transaction between them "could reflect an expense" that must be adjusted for.

4.4. The Panel rejected Indonesia's argument that the deduction of amounts representing selling expenses and profit from the export price when no selling expenses or profit were deducted from the normal value resulted in an asymmetric comparison. The Panel reasoned that there was no asymmetry as the export price reflected *some* profits and selling expenses, those of the producing entity.

4.5. The Panel also rejected Indonesia's argument that it is not permissible to deduct selling expenses and profits, on the ground that the selling expenses and profits of a "downstream participant" in the sales process may be a direct selling expense to the producer. However, the Panel did not address whether there was a distinction between an *independent* and a *closely affiliated* "downstream participant".

5 THE LEGAL STANDARD UNDER ARTICLE 2.4

5.1. Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to conduct a "fair comparison" between the normal value and the export price "at the same level of trade, normally the ex-factory level". In order to comply with this requirement, investigating authorities are required to make "[d]ue allowance … for differences which affect price comparability".

5.2. The process of determining the ex-factory normal value and export price requires the "netting back" from the starting price charged to the first unrelated customer. This is done by making adjustments to ensure that comparisons are not distorted by factors extraneous to the central issue of price discrimination between markets. If a domestic customer and an export customer both appeared to buy the goods at the factory gate, the price charged to the export customer should be no less than the price charged to the domestic customer. Under Article 2.4, "allowances should *not* be made for differences that do *not* affect price comparability". This means that an adjustment should be made when, and only when, a factor affects price comparability.

5.3. Article 2.4 does not expressly address transactions between closely affiliated parties. However, the Appellate Body has explained in *US – Hot-Rolled Steel* that transactions between affiliated parties may not be reliable and that it is consistent with the Anti-Dumping Agreement to use the price of a closely affiliated reseller as the starting price in the analysis of normal value. This rationale applies equally to the determination of the starting price and adjustments on the export side.

5.4. A producer/exporter may choose to make its sales using an internal sales department, an affiliated sales company, or an independent agent. The choice will affect the producer/exporter's costs and his net return on the sale. These choices must be reflected accurately in the investigating authority's dumping analysis. In trying to identify whether the producer/exporter is engaged in price discrimination between markets, the investigating authority cannot achieve a fair comparison under Article 2.4 if it ignores the producer/exporter's actual sales structure. It cannot replace the producer/exporter's actual expenses with the expenses that would have been incurred had it sold under a different hypothetical sales structure.

5.5. An investigating authority must, therefore, address whether a producing entity and its closely affiliated sales entity are in a sufficiently close relationship to warrant being treated as an SEE, using the criteria in *Korea – Certain Paper* and *EU – Footwear.*

5.6. When two entities form part of a SEE, the revenues, profits, and expenses of each entity in the SEE become the revenues, profits, and expenses of the SEE as a whole. For dumping purposes, this means that the prices, profits, and expenses of the sales entity within the SEE must be treated in the same way as if the producer/exporter were a single legal entity.

5.7. Commissions paid to an independent agent may be deducted from the normal value or export price, as appropriate. Transactions between entities within the SEE are not reliable or relevant for

determining adjustments. Any selling expenses incurred by a sales entity within the SEE must be treated in the same way as indirect selling expenses of a producer/exporter that consists of a single legal entity. These expenses are not deducted from the normal value or export price.

6 THE PANEL ERRED IN INTERPRETING AND APPLYING ARTICLE 2.4

6.1. The Panel failed to articulate the correct legal standard under Article 2.4 for examining adjustments in circumstances involving transactions between closely affiliated parties. In sections 7.3.5 and 7.3.5.1 of its Report, the Panel interpreted and applied Article 2.4 to find that the Commission did not act inconsistently with Article 2.4 without ever addressing Indonesia's arguments regarding the importance of examining the relationship between the parties at issue. This, in itself, is a failure to interpret and apply Article 2.4 correctly.

6.2. The Panel articulated a standard whereby an adjustment can be made where a factor exists on one side of the comparison but not the other. This suggests that the manner in which the investigating authority quantifies or describes an adjustment that may be made on only one side is beyond review for "fairness" under Article 2.4. This cannot be.

6.3. The Panel also erred in dismissing the importance of whether two entities form part of an SEE by stating that this cannot be dispositive because it is "possible" that transactions between these entities "could" be at "arm's length". Even assuming this were correct, the Panel also erred in failing to identify a proper legal standard for determining whether transactions between the closely affiliated entities in this case were at "arm's length" and where in its determinations the Commission provided a reasoned and adequate explanation of how it applied that standard.

6.4. The Panel also erred in confusing the issue of whether prices between closely affiliated entities approximate "arm's length" transactions under a transfer pricing agreement and the issue of whether entities are in "a relationship close enough to support" "properly treat[ing] multiple companies as a single exporter or producer in the context of [the] dumping determinations in an investigation".

6.5. The Panel did not even address the fact that even if a transfer between entities within an SEE is at the amount at which independent parties do business, it remains an intra-SEE transfer. The amount transferred to the sales entity remains cash in the hands of the SEE. It is not the same as a transfer to an independent entity *outside* the SEE, no matter what its amount is.

6.6. The Panel also erred in finding that an investigating authority may make adjustments to normal value or export price for the selling expenses and profits of a "downstream participant" in the sales process, without distinction between *closely affiliated* downstream participants and *independent* downstream participants. The Panel correctly stated that payments to an *independent* downstream participant are a direct selling expense to the producer/exporter that may be deducted. However, the Panel erred in suggesting that exactly the same approach may be used for "downstream participants" that are part of an SEE with the producing entity.

6.7. The Panel also erred in suggesting that deductions may be based on the "value" of a factor (the "reasonable profit" in the "chemical sector") rather than on the basis of the expenses actually incurred by the producer/exporter. Nothing in the Anti-Dumping Agreement permits the investigating authority to ignore actual expenses and to use what it considers "reasonable" or to be the correct "value" of the expense.

6.8. The Panel also erred in its analysis of the consequences of the Commission's decision to treat the producer in Indonesia and its closely affiliated sales office in Singapore as a single entity for the purposes identifying the "starting price" in the Commission's analysis. The Commission's decision to use the re-sale price of the closely affiliated sales entity as the starting price in the analysis price implies a judgment about the relationship between the sales entity and the producing entity. This should also affect the determination of adjustments to that starting price. The Panel erred in dismissing this issue, in a footnote, as merely a "conception" of Indonesia.

6.9. The Panel also erred in its analysis of whether the Commission properly adjusted for "indirect selling expenses". The Panel correctly noted that indirect selling expenses/SG&A and profit are to be *included* in the normal value and export price. However, the Panel erred in stating that there

was no unfair comparison where the normal value and export price included *some* indirect selling expenses and profit, even if other selling expenses and profit were deducted from the export price.

6.10. The Panel also erred in its analysis of the Commission's criterion of whether a closely affiliated sales entity performs the same "functions" as an independent agent. Salespersons are likely to perform the same function whether they are closely affiliated to or independent of the producer: they will make sales. Thus, their functions are scarcely relevant to the issue of whether they are making sales *independently* or *as part of the producer/exporter*.

6.11. Ultimately, the Panel's ruling means that investigating authorities may simply ignore the relationship between a sales entity and a producing entity and proceed on the basis that they are independent of each other. This would, in effect, deprive producer/exporters of their right to have their dumping margins based on their actual sales processes and their actual revenues and profits. It would deprive them, in the calculation of margins, of any benefits or efficiencies they achieve by performing sales functions through a closely affiliated sales entity rather than through an independent trader with its own profit motive. This cannot be a permissible means of achieving a "fair comparison" within the meaning of Article 2.4.

6.12. Indonesia requests the Appellate Body to reverse the Panel's finding that the Commission did not act inconsistently with Article 2.4 in making the contested adjustment. In addition, Indonesia requests the Appellate Body to complete the analysis. On the basis of the undisputed facts on the face of the Commission's determinations, the Appellate Body can and should find that the Commission acted inconsistently in making the contested adjustment without properly examining whether the sales and producing entities were in a sufficiently close relationship to warrant being treated as a single entity for dumping purposes.

7 THE PANEL FAILED TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER UNDER ARTICLE 17.6 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 11 OF THE DSU

7.1 The proper standard of review in disputes under the Anti-Dumping Agreement

7.1. Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU contain the proper standard of review for panels in disputes under the Anti-Dumping Agreement. This standard requires a panel to examine whether the report of the investigating authority contains a "reasoned and adequate explanation of how the facts support the authority's determination. This explanation must be discernible from the published determinations and cannot be provided by the defending Member in a WTO proceeding. A panel's examination of this explanation must be based exclusively on the information contained on the record and the explanations given by the authority in its published report. A panel may not conduct a *de novo* review of evidence from the investigation record where the investigating authority itself failed to assess that evidence. It is not for a panel to examine - as the first trier of fact - a piece of evidence, to assess its probatory value, or to weigh it against other record evidence. This is the task of the investigating authority.

7.2. This is also important for safeguarding the procedural rights of the investigated company enjoys in an investigation. When an investigated company provides evidence, the investigating authority must use that evidence. If the evidence is deemed insufficient or otherwise unreliable, the investigated company has a right to know and to have an opportunity to provide further explanations. If a panel examines evidence *de novo*, without granting the company those rights, it essentially undermines the due process safeguards of the Anti-Dumping Agreement. Moreover, as it does not have the complete investigation record before it, a panel is not in a position to make "judgment calls" about the evidence.

7.2 The Panel acted inconsistently with Articles 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU by finding the measure at issue to be consistent with Article 2.4 of the Anti-Dumping Agreement before addressing Indonesia's arguments and evidence

7.3. In paragraphs 7.54-7.94 of its report, the Panel conducted a stand-alone analysis of the measure at issue and concluded that it was consistent with Article 2.4 of the Anti-Dumping Agreement. The Panel reached that finding without considering any of the arguments and evidence that Indonesia had placed before the panel that were at the core of Indonesia's case. In the

remainder of its analysis, the Panel "turned to" whether Indonesia's arguments or evidence could "affect" that previously reached finding of consistency or persuade the Panel to "set aside" its earlier findings.

7.4. This approach is inconsistent with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU. WTO law does not permit a panel to reach a conclusion on a claim divorced from arguments and evidence of complaining parties. Indonesia was entitled to have its arguments and evidence addressed by a panel with an open mind on the case, not one that had already concluded that the measure was WTO-consistent. In effect, the Panel imposed a burden on Indonesia to "disprove" the panel's view that the measure was WTO-consistent. Effectively, the Panel created an "extra hurdle" for Indonesia, tilted the playing field against Indonesia, and made the case for the defendant.

7.3 The Panel acted inconsistently with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU by repeatedly conducting *de novo* review of record evidence

7.5. The Panel repeatedly engaged in *de novo* review of record evidence. It examined evidence that had not been analysed by the investigating authority and conducted its own evaluation of that evidence to determine, for itself, the most plausible reading of that evidence. However, the role of a WTO panel is limited to examining whether the authority provided a reasoned and adequate explanation of its determination, in the light of record evidence and other potential alternative explanations.

7.6. The Panel relied on the Appellate Body reports in *US – Countervailing Duty Investigation on DRAMS* and *Thailand – H-Beams*. In those cases, the Appellate Body approved references by the panels to evidence, to which the investigating authorities had not referred, in specific, limited circumstances not present in this case. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body approved the panel's reference to a newspaper article referred to by the United States as additional support for a finding by the investigating authority that was based explicitly on a vast range of evidence, including numerous other newspaper articles, all of which pointed to the same conclusion. In these circumstances, a panel may review additional supporting evidence, because it is clear from the remainder of the analysis what the investigating authority thought about that evidence. But this is not the case when the evidence contradicts the authority's conclusion and is capable of multiple plausible readings. In *Thailand – H-Beams*, the Appellate Body approved a reference by the panel to supporting evidence that was not referred to by the investigating authority in order to protect its confidentiality. Neither of these specific circumstances were present in this case.

7.7. The Panel also articulated a new legal standard that it may examine evidence *de novo* as long as that evidence is "connected" to the explanation of the authority. This is too broad, because all record evidence in a dumping determination could ultimately be said to be "connected" to the investigating authority's explanation. If the Panel's new standard is left to stand, panels will be given *carte blanche* to engage in *de novo* review of virtually any evidence on the record. This will read the Appellate Body's previously articulated explanation-based standard out of WTO dispute settlement.

7.8. The Panel engaged in *de novo* review by determining the probatory value of the email in Exhibit PTMM-18 (Exhibit IDN-47). The authority never examined this evidence. This evidence contradicted the investigating authority's view that ICOF-S does not conduct marketing and sales activities for PT Musim Mas's domestic sales. The document was provided to show, by way of an example, a domestic sale in which ICOF-S is involved. The Panel evaluated this evidence, chose between what it considered to be plausible readings, and weighed the document against some, but not all, other evidence that was before it (and that also had not been examined by the investigating authority). This is not permissible. The Panel was also incorrect to say that the authority "ascribed limited evidentiary value" to the document. There is no indication of what the authority actually thought, as its silence can be read in many different ways.

7.9. The Panel also conducted an impermissible *de novo* review of the list of PT Musim Mas's shareholders. Indonesia explained that PT Musim Mas and ICOF-S had the same shareholders, who in addition were in a particularly close relationship and that the investigating authority had failed to analyse this point. The Panel found that the evidence did not unambiguously establish the close

nature of the shareholders' relationship. But this is not only irrelevant, because the identity of the shareholders is sufficient, regardless of their relationship. In addition, the Panel addressed an argument never made by the investigated company during the proceedings; and it weighed and balanced the evidence. The evidence was perfectly consistent with the proposition that the shareholders are closely related. Moreover, the investigating authority never sought further information or explanations on this point. As such, the Panel's approach deprives the investigated company of its due process rights during the investigation.

7.10. The Panel also found that the shareholders of PT Musim Mas and ICOF-S were not identical, although the company stated that they were the "same", which is normally understood to mean identical. The Panel thus decided to interpret for itself what the company had stated during the investigation.

7.11. The Panel also engaged in a *de novo* review of certain organizational charts filed by PT Musim Mas as part of its questionnaire response. The Commission never even mentioned these charts. The Panel engaged in a *de novo* analysis of the evidence to determine that the "marketing and sales department" in PT Musim Mas's chart was not ICOF-S. The Panel essentially determined what the investigated company sought to depict when it prepared the charts. This makes no sense. Besides being an impermissible *de novo* review, the Panel's analysis is also inconsistent with uncontested facts.

7.12. The Panel also developed its own reasoning about PT Musim Mas's marketing and sales activities. The Panel analysed a spreadsheet in PT Musim Mas's questionnaire response, to which the Commission never referred in its Determinations. The Panel discovered identical percentage amounts allocated to marketing and sales activities across different product groups and, from this, deduced that PT Musim Mas was conducting identical activities. The Panel used this to support its finding that ICOF-S was involved only with export sales and, therefore, an adjustment for its expenses and profits was warranted.

7.13. In reality, in this spreadsheet, the producer/exporter was simply allocating its expenses on the basis of turnover because that is what it was instructed to do by the Commission. It was not supposed to, and did not, reflect the actual activities and expenses on a product- or market-specific basis. The Panel thus arrived at its own (questionable) reading of evidence that could have been read in multiple ways, without even exploring why the information was presented in this manner. Moreover, the Panel's conclusion is inconsistent with the theory that PT Musim Mas conducted all of its domestic marketing and sales activities, but left the corresponding export activities to ICOF-S. In that case, the percentage amounts should have been different.

7.14. The Panel report contains further instances of *de novo* review. For instance, the Panel developed its own theory about PT Musim Mas's "direct" export sales, without any basis in the record evidence and in the absence of any statement by the Commission. In order to resolve a contradiction between assumptions concerning PT Musim Mas's marketing capacity, the Panel made up out of whole cloth a theory whereby PT Musim Mas had capacity to market its sales in certain markets, but not in others. There is no record evidence to support this, while there is evidence that contradicts the Panel.

7.15. The Panel also provided a *de novo* analysis of PT Musim Mas's Financial Statements, in its interim report. This analysis was also incorrect as a matter of basic accounting precepts. After vigorous protestations by Indonesia in its interim comments, the Panel deleted this finding. However, this finding is further useful evidence of the unprecedented willingness of this Panel to step into the shoes of the investigating authority and do its work for it.

7.4 The Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by disregarding or summarily dismissing relevant evidence that favoured Indonesia

7.16. The Panel also violated Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by disregarding or summarily dismissing relevant evidence that favoured Indonesia. This evidence pertained to the S&P Agreement between PT Musim Mas and ICOF-S.

7.17. Panels have the discretion not to examine each and every argument and piece of evidence of a party. However, this discretion does not extend to evidence that is relevant for a party's case, as presented by that party, and that "appears to favour" that party. All of the evidence at issue here is evidence that is relevant, because it pertains to issues explicitly relied on by the investigating authority, the EU in the WTO proceedings, and the Panel itself. Moreover, it all favours Indonesia, in one way or the other.

7.18. Indonesia submitted multiple pieces of evidence that demonstrated that the S&P Agreement could not be reasonably read to suggest that the two companies were unrelated. Also, the existence of a written contract and the specific content did not suggest that the agreement was something "more" than a normal transfer pricing agreement. This evidence included transfer pricing guidelines from international organizations such as the OECD and the United Nations, as well as from national jurisdictions. It also included recommendations from a specialized law firm for related companies wishing to conclude transfer pricing agreements, as well as template/model transfer pricing agreements that contained exactly the same clauses as the S&P Agreement.

7.19. The Panel either ignored this evidence or dismissed it summarily as irrelevant. For instance, the Panel initially ignored the law firm and model agreement evidence. In response to Indonesia's interim comments, the Panel made a brief statement that one of the model transfer pricing agreements was irrelevant because it pertained to a different type of commercial activity, or because the law firm recommendations contained disclaimers. These statements reflect a refusal to engage with the evidence and they entirely miss the point. The issue was that a model transfer pricing agreement included the same clauses as the S&P Agreement at issue. In another instance, the Panel relied on the OECD Guideline to make an (incorrect) point about "arm's length", but entirely ignored another section of the same document on which Indonesia had based its arguments. This is also an un-even-handed approach to the evidence that vitiates the objectivity of the analysis.

8 CONCLUSION AND REQUEST FOR FINDINGS

8.1. For these reasons, Indonesia requests the Appellate Body to reverse the Panel's finding that the Commission did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement in making the contested adjustment.

8.2. Indonesia also requests the Appellate Body to find that the Panel acted inconsistently with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU in making its finding under Article 2.4.

8.3. In addition, Indonesia requests the Appellate Body to complete the analysis. On the basis of the undisputed facts on the face of the Commission's Determinations, the Appellate Body can and should find that the Commission acted inconsistently with Article 2.4 in making the contested adjustment without properly examining whether the sales and producing entities were in a sufficiently close relationship to warrant being treated as a single entity for dumping purposes.

ANNEX B-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION

1 FACTUAL BACKGROUND AND THE MEASURES AT ISSUE

1. In 2010 the EU initiated an anti-dumping investigation regarding imports of certain fatty alcohols and their blends, originating *inter alia* in Indonesia. The findings of the investigation were crystalized in three acts – Council Regulation (EU) No. 446/2011 of 10 May 2011 ("Provisional Determination"), Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 ("Final Determination"), and Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012 ("Revised Determination"). These measures were the object of Panel proceedings between the EU and Indonesia.

2 INDONESIA'S APPEAL RELATES TO AN EXPIRED MEASURE AND SHOULD BE DISMISSED

2. As the contested measure expired on 12 November 2016 and the EU informed the Panel and Indonesia of this on 16 November 2016, the EU thinks that Indonesia's appeal is inconsistent with Articles 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 3.9 and 3.10 of the DSU and that ruling on the matters raised by Indonesia is unnecessary, since an appeal is not appropriate when *the sole measure at issue* no longer exists, because it has been withdrawn/expired. Should the Appellate Body uphold this claim of the EU, the EU withdraws the remainder of its cross-appeal.

3. Article 3 of the DSU sets out *inter alia* the objectives of the WTO dispute settlement system, such as preservation of rights and obligations of Members, prompt settlement of situations in which a Member considers that a benefit it is entitled to is being impaired, satisfactory settlement of the matter, and the initiation of dispute settlement procedures only when they may be fruitful and lead to a positive solution to the dispute and not in order to obtain an advisory opinion on legal issues.

4. In the present case, however, since the contested measure has ceased to apply, there is nothing left to "preserve", nor is any benefit being impaired. Bringing such a case risks to unnecessarily delay and prevent the prompt settlement of other disputes. Instead, the withdrawal/expiry of the measure has achieved a satisfactory settlement of the matter, in accordance with the rights and obligations under the DSU and the covered agreements. Furthermore, bringing an appeal regarding withdrawn/expired measures cannot be fruitful, since a positive and mutually acceptable solution has already been achieved, withdrawal being the first objective of the dispute settlement mechanism.

5. Since there is no longer any concrete and ongoing dispute between the parties, Indonesia appears to be seeking an "advisory opinion", a clarification or interpretation of certain provisions in the abstract. However, other WTO procedures are set out for that purpose.

6. Additionally, the EU submits that the Panel erred in making recommendations on a withdrawn/expired measure, in violation of established case-law and the Panel's obligations pursuant to Articles 11 and 19.1 of the DSU. Indeed, these provisions envisage a situation in which a measure (and hence a violation) still exists. Furthermore, the Panel's failure to address the EU communication on the expiry of the measure constitutes in itself a failure to make an objective assessment pursuant to Article 11 of the DSU.

3 THE PANEL ERRED IN FINDING THAT THE DSB AUTHORITY FOR THESE PANEL PROCEEDINGS HAD NOT LAPSED

7. The EU appeals the Panel's findings concerning its request for a preliminary ruling that the DSB authority for the Panel proceedings lapsed pursuant to Article 12.12 of the DSU.

8. There can be no doubt that an Article 12.12 request can be made between Panel establishment and composition.

9. First, a textual interpretation of Article 12.12 supports the EU position. Like in many other provisions in the DSU, the term "Panel" in Article 12.12 refers to an established panel, regardless of the stage of its composition. Further, the verb "suspended" includes putting something into abeyance from the very start. "[T]he work of the Panel" includes anything lawfully done in the name of the Panel, including by the Secretariat pursuant to Article 27 DSU. Finally, after 12 months without any activity, the authority of the Panel automatically lapses. Suspension can be initiated by a "request" by the complaining Member – an indication of its wishes to suspend the Panel's work. The suspension can commence "at any time" from the moment of the Panel's establishment.

10. Next, the EU submits that the final sentence of Article 12.12 has several objects/purposes, common to other provisions of the DSU which support the EU interpretation. These include setting parameters to the authority of the DSB, providing for security and predictability, limiting the reputational consequences for the accused Member, promoting the prompt settlement of disputes, and allowing both the defending Members, as well as the Secretariat to organize their limited resources so as to participate efficiently and effectively in dispute settlement or to assist Panels. Therefore, the duration of the authority flowing from the DSB is not indefinite and not in the hands of the complaining Member alone.

11. Moreover, the Panel did not consider the entirety of Article 12.12 and its reference to Article 12.9. According to the latter provision, the total period between Panel establishment and the adoption of the Panel report should not exceed 9 months, with the possibility of a suspension of 12 months (21 months in total). Allowing for an indefinite suspension after Panel establishment but before Panel composition, in addition to an Article 12.12 suspension, is irreconcilable with the time limit of Article 12.9, which begins running from the date of Panel establishment.

12. In the present case, on 11 July 2013 Indonesia informed the Secretariat that it wished to *suspend* a meeting (the only work happening at that moment), a "request", to which the Secretariat sent a confirmatory response. On 22 September 2014, more than 12 months later, the Secretariat sent a communication to the Parties, pursuant to a request from Indonesia from 19 September 2014, to resume the work of the Panel. Indonesia's suspension request was made between the Panel establishment and Panel composition and had the consequence of suspending any *future* work of the Panel for more than 12 months. The Panel, therefore, had no authority or jurisdiction to consider the matters that Indonesia raised.

13. The Panel erred by referring to the standard in *EC – Bananas III*. Indonesia was exercising, rather than relinquishing a right under Article 12.12 DSU. Furthermore, the expiry of the 12 month period did not imply that Indonesia was surrendering its right to bring dispute settlement proceedings as Indonesia had the right to bring fresh dispute settlement proceedings concerning the same matter and ask for the establishment of a new panel. Moreover, regardless of any ambiguities in Indonesia's request, it resulted in a Secretariat response, pursuant to which no panel work occurred for more than 12 months. The Panel should have made an objective assessment based on all the facts before it, pursuant to Article 11 of the DSU. The Panel, therefore, committed an error in interpretation and/or application of the law, including Article 12.12 DSU.

14. Furthermore, the Panel omitted any reference to the response to Indonesia's request from its analysis, despite it being central to the EU's argument, thereby violating Article 11 of the DSU. Moreover, the Panel's erroneously refers to the EU "insufficiently demonstrating", although there were no issues of fact and evidence. Rather, the Panel's conclusion rests upon the legal characterisation of the facts, specifically that there was no Article 12.12 request. Additionally, the Panel's comments on Indonesia's request are purely formalistic, rather than looking to the substance of the request, the response to the request and the ensuing inactivity. Finally, the Panel accepts that Article 8 and Article 12.12 of the DSU are mutually exclusive, while they actually contain concurrent obligations. Therefore, the Panel failure to analyse these matters constitutes an error in interpretation and/or application of

the DSU. All of these errors constitute a violation of the obligation to make an objective assessment pursuant to Article 11 of the DSU.

15. Having reversed the Panel's findings and conclusion on this point, the European Union requests the Appellate Body to complete the legal analysis, by finding that the DSB's authority lapsed pursuant to Article 12.12 of the DSU and reverse all of the Panel's findings and recommendations.

4 THE PANEL ERRED IN THE INTERPRETATION AND APPLICATION OF ARTICLE 6.7 OF THE ANTI-DUMPING AGREEMENT

16. The Panel erred by considering that Article 6.7 ADA requires in practice the disclosure of a description of the verification process rather than its results. While the EU agrees with the Panel that "results" in Article 6.7 refers to what is achieved or obtained during the verification, it points to the relationship between Article 6.7 and Article 6.9 and argues that the "results" are closely related to the essential factual outcomes of the verification, which may have a bearing on the authorities' decisions, enabling companies to defend their interests.

17. The Panel wrongly interpreted Article 6.7 and found that disclosure of the results of the verification requires, as a minimum, an indication of: (1) the previously supplied information for which supporting evidence was requested, (2) any other information requested, (3) the documents that were collected, (4) whether the additional information was made available, and (5) whether the accuracy of the information supplied was confirmed by the investigating authority. Most of these elements refer to the process of verification, rather than its results. Instead, the verification visit is essentially a documentary exercise that focuses upon documentary evidence.

18. In this case, there is no dispute that the requirement sub (3) was respected.

19. Moreover, since the verified firms cooperated, there was no document requested that was not supplied. In any event, information not supplied does not constitute a "result" since it was not obtained as a result of the verification.

20. Information already submitted, for which supporting evidence is required is also manifestly not an outcome of the visit. In any case, PTMM representatives were present during the visit and they were informed beforehand of the documents to be prepared for the verification. Hence, what has been verified resulted from the circumstances of the procedure.

21. Requests for information are equally not a result of the visit, but pertain to the process of verification.

22. Finally, the requirement to include a statement setting out whether or not the authorities were able to confirm the accuracy of the information supplied implies that the investigating team should assess the information collected. However, the evaluation of the evidence and information is the task of the authority and the result of the antidumping investigation and is disclosed as essential facts pursuant to Article 6.9. It cannot be performed by the verification team.

23. Additionally, the Panel considered that the behaviour of the investigated firm is irrelevant in assessing the compliance with Article 6.7. However, as no particular disclosure format is prescribed, compliance with Article 6.7 should be assessed by considering all facts of the case, including the behaviour of the investigating authority and the investigated firms. In the present case, the EU and PTMM agreed on the necessary corrections and drafted a list of documents collected during the verification. PTMM never made the point that any result of the verification had not been disclosed. By denying any relevance to those factual elements, the Panel interpreted Article 6.7 in an abstract and formalistic way.

24. Finally, the Panel went even further than the minimum disclosure that itself identified. It required a description of the verification process, detailed enough to enable the Panel to

connect any correction that was made with specific evidence that was verified or not during the investigation or with other events.

25. Therefore, the EU requests the Appellate Body to reverse the Panel's conclusion in para. 8.1.d.

5 THE PANEL ERRED IN THE INTERPRETATION AND APPLICATION OF THE DSU, PARTICULARLY ARTICLE 12.1 OF THE DSU, AND ITS ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

26. The Panel designated as BCI and redacted from the public version of its report information which was already in the public domain. The decision to bracket this information prejudges the comprehension of the Panel report. Furthermore, the Panel erred by not requiring justifications for Indonesia's requests for specific bracketing, as well as by not requiring non-confidential summaries of the bracketed information.

27. The above constitutes an error in the interpretation and application of Article 12.1 of the DSU and Paragraphs 1 and 9 of the Panel's Additional Working Procedures Concerning BCI. For the same reasons, the Panel also acted inconsistently with Article 12.7 of the DSU by over-bracketing and, therefore, under-reporting to the DSB, as well as with Article 10.1 of the DSU. Finally, it also acted inconsistently with Article 11 of the DSU by failing to require justifications to Indonesia and by failing to comply with its own Procedures.

ANNEX B-3

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION

1 INTRODUCTION

1. In this executive summary, the European Union ("EU") summarizes the arguments presented to the Appellate Body in its Appellee Submission.

2 BACKGROUND AND THE MEASURES AT ISSUE

2. The contested measure expired on 12 November 2016, as communicated to the Panel and Indonesia soon after. Since the sole measure at issue no longer exists, Indonesia's appeal is inconsistent with provisions within Article 3 of the DSU, and, therefore, ruling on the matters raised by Indonesia is unnecessary. These claims are incorporated by reference in the present submission from the EU's Other Appellant Submission.

3. Turning to the case, in 2010 the EU initiated an anti-dumping investigation regarding imports of certain fatty alcohols and their blends, originating *inter alia* in Indonesia. Two Indonesian producers − PT Musim Mas ("PTMM") and Ecogreen, as well as their related traders − ICOF-S and EOS, respectively, were investigated.

4. A Sale and Purchase Agreement ("SPA") between PTMM and ICOF-S was among the evidence. It provides for an ICOF-S "mark-up", charged exclusively on export sales of PTMM products as payment for certain "functions, obligations and risks" − and their associated expenses − assumed by ICOF-S in respect of these sales. The SPA constitutes the entire agreement between the companies.

5. During the investigation, the issue of the appropriateness of export price adjustments for PTMM and Ecogreen, reflecting the involvement of their related traders, was deliberated. Pursuant to the EU Basic Anti-Dumping Regulation ("Basic Regulation"), an adjustment was made for both. ICOF-S was found to have similar functions to an agent on a commission basis pursuant Article 2(10)(i) of the Basic Regulation. No adjustment was made for PTMM's domestic sales. The adjustment for Ecogreen was later revised, however, PTMM's adjustment remained due to its different factual situation.

6. Another issue was whether PTMM and ICOF-S constituted a single economic entity ("SEE"). The EU did not consider so, in light of the content of the SPA, the export ICOF-S mark-up, the direct invoicing of domestic sales to PTMM and the sale activities of ICOF-S of products from other producers.

7. The findings of the investigation were crystalized in three acts − Council Regulation (EU) No. 446/2011 of 10 May 2011, Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011, and Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012. The three determinations were the subject of the panel proceedings between the parties.

3 INDONESIA'S CLAIM OF THE PANEL'S LEGAL ERROR UNDER ARTICLE 2.4 OF THE ADA

8. The Panel established its understanding of Article 2.4 as mandating for investigating authorities to make a fair comparison between export price and normal value by making allowances for proven differences which have an impact, or are likely to have an impact, on the price of the transactions in an unequal manner. It based this on the text of Article 2.4 and WTO jurisprudence, finding that adjustments must be made only for expenses linked to either the export or domestic side of a transaction, or to both but in different amounts.

9. Indonesia's claim of error is predicated on the assumption that the correct legal standard under Article 2.4 of the ADA requires an examination of the relationship between affiliated

parties. However, Indonesia did not demonstrate how the relationship between affiliated parties is relevant for adjustments for commissions paid to a related trader only for export sales. Indonesia's reading finds no support in the text of the provision, nor in the case law referred to. In fact, the Appellate Body held, in one case referred to, that an Article 2.4 adjustment may be necessary even when the reseller is an affiliated company. Moreover, in another case, "supporting" Indonesia's deliberation of the criteria for delimiting when legally separate entities form an SEE, Indonesia itself argued that an adjustment was necessary for the interference of a trader that formed a SEE with a producer.

10. Indonesia's claim of error is also based on a partial and incorrect reading of the Panel Report, further examined below. Indonesia disputes the sequence, whereby the Panel established the Article 2.4 legal standard, examined the EU's actions and only then analysed Indonesia's arguments, criticizing the drafting technique chosen by the Panel rather than the legal standard applied. However, the Report should be read in a holistic way.

11. The Panel examined Indonesia's SEE argument, however, determined that the existence of a SEE was not dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4. Regardless of the existence of a SEE, a transaction could affect export prices and normal value in different manners and, would, therefore, require allowances to be made. The Panel did not ignore the argument, nor did it misconstrue the importance of the question whether a SEE exists.

12. Finally, with regard to the amount of the adjustment, Indonesia never made a separate claim disputing it and, therefore, the Panel did not examine the issue. As this issue was not covered in the Panel Report, it should also not be examined in the appeal procedure, pursuant to Article 17.6 of the DSU.

13. Moving to the EU's factual findings, the adjustments made by the EU authorities were based on the findings that (1) the ICOF-S mark-up was exclusively linked to export sales and (2) ICOF-S had functions similar to those of an agent working on a commission basis. The Panel deemed both findings reasonable.

14. Indonesia argues that the Panel erred by finding that ICOF-S had functions similar to an agent on a commission basis, and by characterising this as a "factual" finding. The finding is irrelevant from a WTO law viewpoint and for the Panel, since no claim of "as such" inconsistency of EU domestic law with WTO law was made. The Panel rightly characterized these determinations as "factual" findings. Furthermore, the Panel did not consider this to be part of the Article 2.4 legal standard, but only examined the evidentiary support for the authorities' findings. It, nevertheless, looked at Indonesia's arguments and did not err in finding that the SPA had further functions besides being a transfer pricing agreement. ICOF-S' agent-like functions are also supported by Indonesia's own agent definition as "[n]o sale, no commission".

15. The Panel did not err in analysing whether adjustments may be made to export price for sales, general and administrative (SG&A) expenses and profits. According to Indonesia, within an SEE expenses and profits are incurred for the SEE as a whole. Its claim of error is predicated on the assumption that the degree of affiliation is crucial for Article 2.4 adjustments. The arguments of this claim were rejected by the Panel.

16. The Panel relied on jurisprudence to argue that price components reflect the particular circumstances of the sale, beginning with the cost of production and sale and an amount of profit and adding an amount for costs and profits for each successive participant in the distribution chain (their SG&A and profit). EU authorities disaggregated the mark-up into SG&A and profit components only to properly quantify the adjustment, since the mark-up was designed to cover the costs of ICOF-S' services. The Panel rejected Indonesia's SEE argument, since intervention of downstream participants may result in additional costs and profits regardless of the existence of a SEE.

17. The Panel also did not err in finding that the adjustment did not result in an asymmetrical comparison. Indonesia claims that making adjustments for SG&A expenses and profits for entities within a SEE leads to an asymmetrical, unfair comparison under Article 2.4. This is

predicated on the wrong assumption that the existence of a SEE is a key issue for Article 2.4 adjustments, which was rejected by the Panel. Furthermore, as a matter of fact, the EU did not establish a dumping margin for the SEE constituted by PTMM and ICOF-S, but established duties only with regard to PTMM's products.

18. Regarding the section of the Panel Report challenged, the Panel examined the price components of both export price and normal value, to determine whether their comparison was fair. Rightly basing itself on the P&L submitted by PTMM, the Panel found that PTMM incurred the same costs for both domestic sales and export sales, the only difference being the involvement of ICOF-S with regard, exclusively, to export sales. The Panel did not assess the correctness of the value of the allowance made, since Indonesia did not dispute it.

19. Contrary to Indonesia's argument that the deduction of SG&A costs and profits within a SEE depends on the location of the related trader (in or outside of the importing market), the EU argues that the text of Article 2.4 confirms that the existence of affiliation between companies is not dispositive of whether adjustments are warranted.

20. Finally, despite Indonesia's arguments, the EU did not treat PTMM and ICOF-S as a SEE under Article 6.10 of the ADA. This new claim was introduced at a late stage of the Panel proceedings, limiting the EU's due process rights and the interests of third parties, who could not be aware of it. Unsurprisingly, the Panel did not explore it in depth. Furthermore, Indonesia's claim would mean that the export price of a SEE should be constructed in compliance with Article 2.3, rather than through an adjustment under Article 2.4, however the Panel request does not contain any independent or principal claims based on Article 2.3. Therefore, it did not fall within the Panel's remit and should not be considered by the Appellate Body.

21. In any event, Indonesia's claim is unfounded. First, no single dumping margin under Article 6.10 was established for PTMM and ICOF-S. Second, EU authorities treated the two companies as related throughout the proceedings, but never made a SEE finding, as this was not required under WTO law. Third, since they were related, the EU, naturally, took the price for the first sale to an unaffiliated customer in the importing country as a start. Fourth, the EU did not construct the export price, but distinguished between sales from ICOF-S to unrelated customers in the EU and to the related EU trader ICOF-E. Furthermore, since ICOF-S and PTMM were related, the authorities re-examined the ICOF-S mark-up, basing their findings on facts of the case and reaching an adjustment close to the mark-up in the SPA.

4 THE PANEL'S STANDARD OF REVIEW

22. Although Indonesia claims the Panel erred in applying the relevant standard of review and sets arguments to that end, it does not seek to reverse any part of the Report, setting out such standard. Nevertheless, the EU sets out its understanding of the Panel's proper standard of review.

23. First, a balanced approach is required by the Panel with regard to the degree of control exercised over an authority – lying between complete deference and *de novo* review. Similarly, there is no absolute rule on the submission of arguments before the panel – not all arguments must have been submitted during the investigation, nor must they all be apparent from the reasoning of the contested measure. The same applies with regard to the standard of reasoning and the presentation of evidence. These should be assessed on a case-by-case basis.

24. Additionally, the entire record of evidence could be relevant in WTO proceedings. Contrary to Indonesia's view, defendants and the panel should be able to make comments on the substance of contradicting evidence, not specifically referred to in a measure, without these comments being automatically considered *ex post* rationalization or a *de novo* assessment. This depends on the substantive and procedural context of each case. Furthermore, it should be permissible for a WTO litigant to be able to refer to material beyond the "record" of a particular dispute, instead of artificially sealing it off.

25. "Silence" on the part of an authority should not entitle an interested party to assume that the evidence submitted will be expressly "used" in the measure. The authority is to examine and weigh the evidence and make determinations. A requirement to avoid "silence" would create an interminable re-iteration between the authority and parties. A better approach would be to require a panel to take into account the overall substantive and procedural context when addressing evidence on the record, which is not specifically referenced in the measure or disclosure. As panel litigation may be very complex, this approach would be balanced and reasonable.

5 SECTION 7.3.5.1. OF THE PANEL REPORT

26. Indonesia accuses the Panel of pre-judging the EU's compliance with Article 2.4 before addressing its arguments, claiming a violation of Article 2.4 and (potentially) of Article 11 of the DSU. The fact that the Panel was then, supposedly, influenced by its own analysis was a breach of the burden of proof and Indonesia's due process rights under Article 17.6 of the ADA and Article 11 of the DSU.

27. First, these claims are directed against the structure and procedure, rather than the substance of the Panel Report. Second, Section 7.3.5.1 must be assessed in the context of Section 7.3 of the Report as a whole. Before Section 7.3.5.1., the Panel set out the disputed issue, the parties' positions, and the applicable legal standard, demonstrating understanding of the matter. After it, the Panel examined Indonesia's arguments regarding the compliance of the mark-up adjustment with Article 2.4 in light of the relationship between PTMM and ICOF-S.

28. Many of the arguments, submitted by Indonesia, are matters of EU, rather than WTO law. The Panel was careful to distinguish between EU and WTO law, mindful of its obligation to make an objective assessment under WTO law, while examining the reasonableness of the EU authorities' findings in the circumstances of the measure's adoption. The EU law characterisation of a particular fact pattern as consistent or not with the Basic Regulation is a question of fact, while the consistency of the contested measure with Article 2.4 of the ADA is a question of both law and fact. The Panel first engaged with the EU law facts before proceeding to its WTO law analysis and it, therefore, did not pre-judge its assessment under WTO law. Even after finding there was sufficient evidence to support the authorities' finding of a difference affecting price comparability, the Panel examined the objectivity of the authorities' evaluation before deeming the standard of Article 17.6(i) met.

29. Indonesia neglects the carefully structured Panel Report. Indonesia disputes a section which is intermediary, rather than final for the Panel's conclusions. This drafting approach was necessitated due to the blend of WTO and EU legal arguments, presented by Indonesia to the Panel.

30. Furthermore, Indonesia wrongly claims that the Panel's actions are in violation of Article 2.4. Article 2.4 does not impose any obligations on panels. Furthermore, Indonesia does not dispute the parts of the Report, setting out the legal standard of Article 2.4 (even if it claims that the Panel did not articulate a legal standard). Moreover, a Panel Article 2.4 violation could exist only as a consequential claim to a violation of Article 11 of the DSU, however, how one follows from the other is unclear.

31. Finally, Indonesia invokes Articles 17.6(i) and (ii) of the ADA within an appeal under Article 11 of the DSU, however, those provisions refer to interpretation, while Article 11 of the DSU relates to the facts. Furthermore, Indonesia turns to the Appellate Body for "comprehensive guidance" as to how to properly present its claim, which it is not entitled to do. The same applies with regard to Indonesia's lack of explanation as to its "direct export sales" argument.

6 THE PANEL'S ALLEGED "*DE NOVO* REVIEW" OF CERTAIN EXHIBITS SUBMITTED BY INDONESIA AND THE EUROPEAN UNION

32. Indonesia accuses the Panel of conducting a *de novo* review of certain exhibits and complains that the EU offered an *ex post* explanation. It claims that a silence in the measure

precludes a panel from reviewing such matters without violating the due process rights of interested parties and conducing a *de novo* review.

33. Indonesia's extreme approach to the problem would mean that any document that is on the record but not expressly referenced in the measure that is "ambiguous" can be brought to a panel by the complainant, but in no case are the defendant or the panel allowed to engage in *ex post* explanation or *de novo* review. The complainant would, then, win on this point regardless of the substantive merits of the document in question. We argue for a more even-handed approach. In the present case the Panel was responsive to the evidence presented by Indonesia and its representations regarding it. This would not justify reversal and completion of the legal analysis of the Panel.

34. The EU also disagrees as to what *de novo* review means. A panel should not be precluded from making substantive comments on a specific piece of evidence. Indeed, the panel is obliged by Article 11 of the DSU to make an objective assessment, including of the facts.

35. Indonesia also raises certain arguments with regard to the specific exhibits of evidence it refers to. With regard to Exhibit IND-47, Indonesia does not appeal the factual findings in the Report and, therefore, the Appellate Body should rely on it, rather than Indonesia's factual assertions concerning the "nature and significance" of that evidence. The claim is a procedural, not a substantive one.

36. Regarding the company-internal verification notes, since there are no agreed written minutes of the verification, the EU argues they can only be used against Indonesia, due to their nature of an admission against interest. Regarding IND−18, 19, and 34, the Panel did indeed address the evidence, referred to. As it found the Article 2.4 legal standard to be independent of determinations on the existence of SEEs, it did not err in holding that the authority was under no obligation to refer to this evidence.

37. Regarding the substance of the Panel's analysis, it should be read in its entirety. The Panel set out the content of the SPA and considered the analysis carried out by the EU authority, and the opportunity given to PTMM to rebut these findings, concluding that the authority's findings were sound. It was reasonable for the Panel to consider these circumstances in making an objective assessment of the matter.

7 ALLEGED IGNORING OR SUMMARY DISMISSAL OF ALLEGEDLY KEY ARGUMENTS AND EVIDENCE CONCERNING THE SPA

38. Since the existence of the SPA was uncontested, the Panel relied on it and extensively referred to it in its Report. Although the Panel did not refer to each exhibit specifically, it explained why it rejected Indonesia's arguments − the irrelevance of a SEE for Article 2.4, the mark-up in the SPA as a price difference necessitating an adjustment, the "entire agreement" clause in the SPA and the exclusive application of the SPA to export sales, the allocation of risk clause, the difference in factual situations between PTMM and Ecogreen. The Panel, therefore, did not ignore any of Indonesia's arguments, even if it did not refer to them one by one.

8 INDONESIA'S REQUEST FOR COMPLETION OF THE LEGAL ANALYSIS

39. Although the Appellate Body will not reach this question, as it would not reverse the Panel's findings under Article 2.4, the EU considers that it could not complete the analysis, as the applied EU law does not indicate inconsistency with Article 2.4 of the ADA.

ANNEX B-4

EXECUTIVE SUMMARY OF INDONESIA'S APPELLEE'S SUBMISSION

1 THE EU'S APPEAL OF THE PANEL'S FINDING UNDER ARTICLE 6.7 SHOULD BE REJECTED[1]

1.1. Indonesia claimed before the Panel that the EU had failed to disclose the results of the verification visit, contrary to Article 6.7 of the Anti-Dumping Agreement. The Panel agreed.

1.2. The Panel properly interpreted Article 6.7 to require the investigating authority to provide results of verification in the sense of "what is achieved, brought about or obtained in the course of the on-the-spot verifications". The Article 6.7 obligation is a due process right of interested parties, including the investigated company and the applicants. The Panel clarified that the obligation was "unqualified" and "rest[ed] entirely on the investigating authorities".

1.3. The EU appeals both against the Panel's interpretation of Article 6.7 and its application of its interpretation to the case before it. Both aspects of the EU's appeal should be rejected.

1.4. The EU makes a general claim that the Panel required the investigating authority to provide excessively detailed "results" of the verification. However, the EU fails to show how the Panel erred in its legal interpretation of Article 6.7 or to show that the Panel's interpretation would burden investigating authorities. The EU has also failed to show any error in the Panel's application of its standard in this case.

1.5. The EU improperly attempts to conflate the requirements of Article 6.7 regarding the disclosure of the verification results with those of Article 6.9 regarding the essential facts. These are different concepts. The EU's argument that the results of the verification are limited to those matters that become "essential facts" would, in effect, read the obligation to provide the results of the verification out of the Anti-Dumping Agreement. As the Panel correctly noted, the term "results of the verification" is not limited to the facts that will eventually form the basis of the decision to impose measures.

1.6. The term "results" must also be read in the context of the information the investigating authority requests from companies during verifications. The EU is incorrect to argue that the results of a verification "are essentially the documentary evidence that th[e] firm provides … but not assertions, statements, arguments (by the firm or the investigating authority"). The answers to the verifiers' questions may provide important context for documents supplied in the questionnaire responses or at verification. This context may not be self-evident on the face of the documents themselves. In these circumstances, the answers provided by company officials may be at least as important as the documents themselves.

1.7. The four elements listed by the Panel as comprising the minimum requirements of the "results" encompass the core elements of any on-the-spot verification. The EU has failed to show in concrete terms that the Panel's standard requires an excessive level of detail, either in general or in the specific circumstances of this case.

1.8. The requirement to disclose the results of the verification is, in essence, a transparency and due process obligation. These obligations are not to be taken lightly. It is not clear why the EU resists compliance with this obligation so strenuously.

1.9. For these reasons, the EU's appeal should be rejected.

[1] This executive summary contains a total of 2,603 words (including footnotes). Indonesia's appellee's submission contains a total of 29,582 words (including footnotes).

2 THE EU'S APPEAL ON THE LAPSE OF THE PANEL'S AUTHORITY SHOULD BE REJECTED

2.1. Shortly after the establishment of the Panel, a counsellor of the WTO Secretariat sent an email to the parties to propose a meeting to hear the parties' preferences for panellists. Indonesia replied by asking to postpone the meeting "while [a]waiting the development from Brussel[s]".

2.2. Before the Panel, the EU submitted that Indonesia's reply amounted to a suspension of the Panel's work under Article 12.12 of the DSU. In its Report, the Panel rejected the EU's objection. It correctly set out a three-pronged legal standard of whether its authority had expired under Article 12.12 of the DSU. The Panel found that the EU had not met the first prong of the legal standard - i.e. whether Indonesia had made a request to suspend the work of the Panel. The Panel correctly declined to address the second and third prongs under Article 12.12.

2.3. The Appellate Body has flexibility to approach the EU's appeal from two different angles. It may assess whether, as a matter of law, the suspension of the panel's work in Article 12.12 of the DSU refers to the work of a panel that has been composed and begun its work. Alternatively, the Appellate Body may follow the Panel's approach and assess whether the EU sufficiently demonstrated that Indonesia indeed made a request to suspend the Panel's work through its email to the Secretariat.

2.4. The EU misstates the role of the Secretariat to argue that the Secretariat "act[ed] in the name of the Panel". Article 27.1 tasks the Secretariat with *assisting* panels. This provision must be read in the context of Article 8.6, which requires the Secretariat to propose names of panellists to the parties. When performing that function, the Panel is assisting the parties, not the panel.

2.5. In advancing its argument that the Secretariat acts "in the name of" a panel, the EU refers to the role of panel secretaries. Yet the EU fails to explain whether the WTO counsellor with whom Indonesia communicated was the secretary to the uncomposed panel so that it could be said that Indonesia in fact addressed the Panel in its email to this counsellor. In addition, panel secretaries merely perform tasks pursuant to the panel's instructions; they do not make decisions "in the name of the panels".

2.6. Only a composed panel may decide to suspend its work. Article 12.12 of the DSU, first sentence, starts with "[t]he panel may suspend its work at any time ...". The use of "may" affords discretion to the panel in determining whether to suspend its work following a request of the complainant. Moreover, the active voice in the phrase "[t]he panel may suspend its work ..." in the first sentence of Article 12.12 reflects the intention of the DSU negotiators to require a positive decision by the panel to suspend its work. It follows, logically, that only composed panels may take decisions pertaining to panels' work.

2.7. The context confirms that Article 12.12 refers to a *composed* panel. As is clear from Articles 6 to 16, the DSU contains a logical sequence governing all facets of a panel. The DSU does not contain a "back-and-forth" set of provisions. In addition, Article 12 of the DSU concentrates on the procedure of the panel *vis-à-vis* the parties. Article 12 thus relates to the *work* of a *composed* panel.

2.8. The EU erroneously relies on Article 12.9 to assert that Article 12 also concerns matters prior to panel composition. A holistic reading of Articles 12.8 and 12.9 yields the opposite conclusion. Article 12.8 provides a general rule of six months for panel procedures counting from the composition of a panel, at the earliest. Article 12.9 establishes the possibility of an exception to the general rule. The time-frame in the last sentence of Article 12.9 is not a time-frame for the panel's "work". Rather, it contains the maximum time a complainant may expect to have a panel report from the moment a panel is established.

2.9. Accordingly, the logical sequence of the DSU, and the structure of Article 12, confirm that the work of the panel under Article 12.12 refers to that of a composed panel.

2.10. Moreover, prior practice confirms that Article 12.12 refers to a composed panel. Panels in about 29 disputes have made a positive decision to "agree" to suspend its work upon a request of the complainant. This confirms that a panel must be composed in order to decide on the suspension of its work.

2.11. In response, the EU relies on document WT/DS420/7 in *US – Carbon Steel (Korea)* to argue that Article 12.12 may apply between panel establishment and composition. This document, however, served the purpose of informing WTO Members of Korea's communication to suspend that uncomposed panel's work. The Secretariat did not assess whether the Korean request effectively constituted a suspension under Article 12.12 of the DSU. In fact, the relevant dispute settlement sections of the WTO website reveal that the Secretariat has not treated Korea's request as a suspension under Article 12.12.

2.12. Finally, the EU raises six claims under Article 11 of the DSU. First, the EU erroneously challenges the interpretation and application of Article 12.12 under Article 11 of the DSU. This is an issue of law under Article 17.6. Second, the EU unjustifiably criticizes the Panel for adopting the standard of review it did. However, this standard complies with the Panel's duty under Article 11 of the DSU. Third and fourth, the EU incorrectly faults the Panel for not addressing issues concerning the second prong of the legal standard under Article 12.12 - whether the Panel suspended its work. Since the Panel found that the EU had not met the first prong - that Indonesia never made a request under Article 12.12 - the Panel correctly declined analysing arguments and evidence concerning the second step of the legal standard. Fifth, the EU is not correct in criticizing the Panel for regarding its finding "as a matter of fact". This finding falls under Article 17.6 of the DSU regardless of the Panel's characterization of its finding. Sixth, the Panel gave relevant and sufficient reasons to support its finding that Indonesia had not requested the suspension of the Panel's work under Article 12.12. Accordingly, all claims under Article 11 of the DSU should fail.

2.13. Accordingly, Indonesia requests the Appellate Body to dismiss the EU's other appeal concerning the Panel's finding in paragraphs 7.29 and 8.1(a) of its Report.

3 THE EU'S APPEAL CONCERNING THE APPELLATE BODY'S JURISDICTION

3.1. Indonesia is very disappointed by the EU's assertion that Indonesia is "misus[ing]" the appeal procedure. Indonesia is simply making use of its right to appeal parts of a WTO panel report.

3.2. The EU fails to provide any arguments under Article 17 of the DSU, which is the provision governing Appellate Body jurisdiction. The EU questions the Appellate Body's jurisdiction on the basis of the measure at issue. But once a measure is properly before a panel, nothing in Article 17 (or, indeed, Article 6) of the DSU suggests that the Appellate Body may not have or may lose jurisdiction of appeals of questions of law contained in the panel report regarding that measure. The EU never argued before the Panel that the measure challenged by Indonesia was not properly within the Panel's jurisdiction.

3.3. The EU also appears to argue that the Appellate Body should decline to exercise its validly established jurisdiction. But Article 17.12 directly contradicts the EU's argument. Moreover, the Appellate Body has previously stated that Articles 11 and 23 of the DSU preclude a panel from declining to exercise validly established jurisdiction. These considerations apply equally to the Appellate Body. It is impossible to see how the Appellate Body would fulfil its obligations under Articles 11, 17.6 and 17.12 of the DSU if it were to decline to exercise its jurisdiction.

3.4. Moreover, when the Appellate Body is called upon to review a panel's findings, these findings already exist and could be adopted by the DSB, with all the legal consequences that this adoption entails. Before the Panel's findings have these effects, Indonesia is entitled by the DSU to have these findings reviewed by the Appellate Body. This is precisely why Article 17.12 requires the Appellate Body to address "each of the issues" brought before it. This is also why the Appellate Body does not exercise "judicial economy".

3.5. The EU also argues that, because the measure has expired, the dispute has ceased to exist. But the Appellate Body has consistently found that panels maintain jurisdiction with respect to measures that expired after the panel's establishment. The only difference is that panels are not entitled to make recommendations. These principles continue to apply when the Appellate Body is seized of an appeal against a panel report. The Appellate Body's jurisdiction builds on that of the Panel. The Appellate Body's task also does not hinge on the continued legal force of a measure. The Appellate Body is not called to determine, principally, whether a measure is consistent or not with WTO law. Instead, the Appellate Body's mandate is to review a panel's findings.

3.6. Moreover, contrary to what the EU alleges, Indonesia is not seeking to obtain an authoritative interpretation under the WTO Agreement. The EU also incorrectly quotes Indonesia's statements to the panel, arguing that this demonstrates that Indonesia agreed with the EU on certain points of principle. These quotes have nothing to do with the issue at hand, and were made at the beginning of the panel proceedings, on a different issue, well before a panel ruling was issued and before the measure expired.

3.7. The Panel also correctly maintained its recommendations in this dispute, because the expiry of the EU's measure came after the panel record had closed. This was entirely consistent with the Appellate Body's guidance concerning new evidence in late stages of panel proceedings.

4 THE EU'S APPEAL CONCERNING THE PANEL'S TREATMENT OF BCI SHOULD BE REJECTED

4.1. The EU further challenges on appeal the Panel's treatment of three sentences as business confidential information (BCI). These three sentences were submitted by Indonesia as Exhibit IDN-33 (BCI) and Exhibit IDN-24 (BCI) appended to Indonesia's first written submission and were clearly marked as BCI.

4.2. The EU's arguments should be rejected for several reasons. First, Indonesia bracketed the information that had been treated as confidential during the investigation. Moreover, the fact that the EU's General Court disclosed that information is not sufficient to remove protection of that information. The question is whether that information has properly been disclosed. Second, the EU bore the burden to prove that the General Court was authorized to disclose this information, despite it being treated as confidential during the investigation. The EU failed to meet that burden. Third, the EU raised its objection too late in the Panel's proceedings - a year after Indonesia submitted the bracketed information. The EU's objection was, therefore, untimely.

4.3. Moreover, the EU's argument that the Panel should have asked Indonesia to provide justifications for treating certain information as confidential and to submit a non-confidential summary has no foundation in the DSU or in previous practice. The EU's appeal would place an excessive burden on the parties (especially developing countries) and panels. Particularly, as a recurrent user of the WTO dispute settlement mechanism, the EU should reflect on whether this is the standard it wishes to be adopted.

4.4. Accordingly, the Appellate Body should reject the EU's appeal concerning the treatment of certain information as BCI.

5 CONCLUSION

5.1. For the above reasons, Indonesia respectfully requests that the EU's appeal be dismissed in its entirety and the Appellate Body uphold all of the Panel's findings challenged by the EU.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION

I. ARTICLE 2.4 OF THE AD AGREEMENT[1]

1. Indonesia argues that the Panel applied an incorrect legal interpretation of Article 2.4 in determining that the authorities' deduction to the export price for a commission paid to a trader was not improper. Indonesia claims the Panel erred in finding that a determination of whether the producer and trader formed part of a single economic entity ("SEE") was not dispositive.

2. The essential requirement for any adjustment under Article 2.4 is that the relevant factor must affect price comparability. The United States agrees with the Panel that whether an entity constitutes an SEE would not be dispositive of the need for adjustments under Article 2.4, and that depending on the underlying facts, transactions between affiliated entities may impact price comparability.

II. ARTICLE 17.6 OF THE AD AGREEMENT AND DSU ARTICLE 11

3. Indonesia claims the Panel failed to engage in an objective assessment, as required by Article 11, because it concluded that the authorities did not act inconsistently with Article 2.4 of the AD Agreement *before* addressing Indonesia's arguments and evidence. The United States does not view a panel's task to be resolving claims independent of the specific arguments that are raised by the parties. However, not every error rises to the level of a breach of Article 11. In this case, the Panel did address Indonesia's arguments later in its report. The United States also notes that a panel has no obligation to address in its report all arguments and evidence raised by a party.

III. THE CONTESTED MEASURE'S ALLEGED EXPIRY

4. The EU argues that the Panel erred in making recommendations and that Indonesia's appeal should be dismissed because the contested measure expired before the Panel's report was circulated. However, this alleged expiry is not a fact found by the Panel, and the Appellate Body may not consider new facts on appeal. Therefore, the EU's appeal must be rejected.

5. The Appellate Body and panels have consistently refused to consider new evidence submitted during interim review. Since the EU submitted evidence of the expiry after the Panel concluded its interim review, the Panel appropriately did not consider it. The Appellate Body also may not consider it, since DSU Article 17.6 limits the scope of Appellate Body review to legal matters developed by the panel. Nothing in the DSU suggests that the Appellate Body or the Director-General could modify the record of the Panel's proceedings to add the evidence of expiry.

6. The evidence of expiry was also irrelevant. Panels are tasked with determining whether the measures at issue are consistent with the relevant obligations at the time of establishment of the Panel. The alleged expiry of the EU measure just before circulation of the panel report is not relevant to the legal situation as of the date of the Panel's establishment.

7. Based on the foregoing, the Appellate Body's analysis of the EU's appeal should end there.

8. To the extent the Appellate Body considers the EU's substantive arguments, the United States considers the Panel's making of recommendations on the contested measure to be consistent with the requirements of the DSU. Pursuant to Articles 7.1 and 6.2, it is the challenged measures, as they existed at the time of the panel's establishment, that are within the panel's terms of reference and on which the panel should make findings. Pursuant to Article 19.1, a panel *must* make a recommendation where it has found a measure within its terms of reference to be

[1] This executive summary contains a total of 1230 words (including footnotes), and the U.S. third participant submission contains 13241 words (including footnotes).

inconsistent with the relevant Member's obligations. The expiry of the measure does not change this.

9. Other panels and the Appellate Body have reached similar conclusions. Statements by the Appellate Body suggesting that a recommendation may not be required, for example in *US – Certain EC Products*, were made in *obiter dicta*. That Appellate Body report does not examine the text of DSU Article 19.1 nor seek to reconcile its *obiter dicta* with the clear meaning of that text.

10. Defining the scope of a dispute based on the measures at the time of panel establishment benefits parties by balancing the interests of complainants and respondents, and by preventing Members from avoiding compliance by withdrawing, then re-imposing, offending measures.

11. The United States also views the EU's request that Indonesia's appeal be dismissed to be inappropriate and without legal authority. The Appellate Body is charged by the DSU to address the issues raised by the parties and to recommend that an offending Member bring any WTO-inconsistent measure, as it existed at the time of panel establishment, into conformity. This duty is not affected by expiry of the measure.

IV. ARTICLE 12.12 OF THE DSU

12. The EU appeals the Panel's finding that the DSB authority for the panel proceedings had not lapsed under Article 12.12.

13. The United States submits that 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. Further, the "work" of the panel refers to the examination by the panel, once composed, of the matter referred to it. 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*." The United States also considers that the proper interpretation and application of Article 12.12 lead to a desirable policy outcome.

V. ARTICLE 6.7 OF THE AD AGREEMENT

14. The EU argues that the Panel's interpretation of Article 6.7 requires, in practice, a description of the investigation process.

15. The United States considers that, at a minimum, Article 6.7 requires that the authority's verification report include discussion of information that was verified, not verified, or corrected with respect to essential facts referenced in Article 6.9. For example, the term "essential facts" relates necessarily to the determination of normal value and export prices, *as well as* to the data underlying those determinations. Accordingly, information verified or corrected at verification relating to these "essential facts" must be disclosed. On the other hand, trivial or immaterial aspects of the verification need not be disclosed.

VI. BUSINESS CONFIDENTIAL INFORMATION ("BCI")

16. The EU argues that the Panel's handling of BCI was inconsistent with DSU Articles 12.1 and 12.7 and the Panel's Additional Working Procedures.

17. The United States considers that Article 12.1 does not provide an adequate legal basis for the EU's claim. Even if the Panel's bracketing could be considered contrary to DSU Appendix 3 or the Additional Working Procedures, there is no basis to say that the Panel's decision to do "otherwise" after consulting the parties is inconsistent with the requirements of Article 12.1. The United States also considers that Article 12.7 does not require a panel to disclose all factual findings in its report. In determining whether the Panel complied with Article 12.7, there must be consideration of the degree to which a bracketed fact is material to the "basic rationale behind any findings and recommendations."

ANNEX D

PROCEDURAL RULINGS

ANNEX D-1

PROCEDURAL RULING OF 13 JUNE 2017

1 REQUESTS BY INDONESIA

1.1. On 11 May 2017, Indonesia addressed a letter to the Presiding Member of the Appellate Body Division hearing this appeal. In its letter, Indonesia made two requests. First, Indonesia requested the Division to adopt, pursuant to Rule 16(1) of the Working Procedures for Appellate Review (Working Procedures), additional procedures for the protection of certain business confidential information (BCI) in these appellate proceedings. Second, Indonesia requested leave to modify the executive summary of its appellant's submission, which was submitted on 10 February 2017, by replacing the information enclosed within double brackets in paragraph 7.9 of that executive summary with non-confidential information.

2 BACKGROUND AND ARGUMENTS OF THE PARTICIPANTS

2.1. On 13 July 2015, following consultations with the parties, the Panel in this dispute adopted Additional Working Procedures Concerning Business Confidential Information (Panel's BCI Procedures)[1]. For purposes of the Panel proceedings, the first paragraph of those procedures defined BCI as follows:

> … 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.

2.2. The Panel's BCI procedures set out a number of modalities concerning how the parties, third parties, and the Panel would treat BCI in the course of the Panel proceedings. In accordance with those procedures, the Panel redacted certain BCI from the version of its Report that was circulated to WTO Members on 16 December 2016.[2]

2.3. On 10 February 2017, Indonesia appealed certain issues of law and legal interpretation covered in the Panel Report. Indonesia's appellant's submission, the executive summary thereof, and its appellee's submission are all marked as containing BCI, and certain information in those documents is enclosed within double brackets. On 15 February 2017, the European Union filed a Notice of Other Appeal and an other appellant's submission. The cover page of the European Union's other appellant's submission states "[[Contains information designated by Indonesia and the Panel as "BCI", subject to adjudication, as marked]]". The European Union's appellee's submission similarly states "[[Contains BCI as marked, subject to adjudication]]", and both of these EU submissions contain information enclosed within double brackets.

2.4. At the time of filing its other appellant's submission, the European Union noted that no procedures governing the treatment of BCI had been adopted in these appellate proceedings. The European Union observed that, while the Panel's BCI Procedures do not bind the Appellate

[1] Panel Report, para. 1.7. The Panel's BCI Procedures are attached as Annex A-2 to its Report.

[2] The information redacted from the circulated version of the Panel Report was less extensive than the information placed within double brackets in the interim report provided by the Panel to the parties on 29 July 2016. During the interim review stage, the European Union requested the Panel to review the designation of certain information as BCI in the interim report on the grounds that some such information was in the public domain and should thus not be treated as BCI. The extent of bracketing of BCI and of redaction of the same from the circulated version of the Panel Report is the subject of a claim of error raised by the European Union on appeal. (See the European Union's Notice of Other Appeal, WT/DS442/6, pp. 2-3)

Body, Indonesia had designated certain information as BCI in its appellant's submission and bracketed it accordingly. For the European Union, Indonesia was in effect requesting confidential treatment of such information pursuant to Article 18.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). According to the European Union, this meant that the European Union and the third participants were to treat such information as confidential. Likewise, the Appellate Body was required not to disclose the designated information in its Appellate Body Report. The European Union considered this to be an acceptable way of proceeding, adding that this approach had the "advantage of not troubling the Appellate Body with the adoption of BCI procedures where that is not necessary."[3]

2.5. The European Union explained that, based on this understanding, it had also bracketed certain information in its other appellant's submission. However, the European Union emphasized that this was without prejudice to its claim that the Panel "over-designated" information as confidential in the Panel proceedings. Furthermore, the European Union reserved its right to address the extent of the bracketing in Indonesia's appellant's submission.[4]

2.6. On 17 February 2017, Indonesia sent a letter requesting the Appellate Body Division hearing this appeal to agree to the confidential treatment of certain information designated as BCI pursuant to Article 18.2 of the DSU. Indonesia indicated that it had designated certain confidential information in its submissions as BCI by means of double brackets ("[[" and "]]"), and that this information matched the information designated and treated as BCI by the Panel in this dispute. In its letter, Indonesia set out its understanding of what confidential treatment under Article 18.2 would entail in the appeal proceedings. Indonesia further stated that, to the extent that the Appellate Body agreed with its understanding, Indonesia did not request the adoption of separate procedures for the protection of BCI for these appellate proceedings.

2.7. By letter dated 20 February 2017, the Division invited the European Union and the third parties to comment on Indonesia's letter. By letter dated 23 February 2017, the European Union indicated that it shared Indonesia's understanding of the nature and consequences of Indonesia's request that certain information be treated as confidential, namely that such treatment flows directly from the DSU and that, therefore, no additional ruling was necessary. The European Union nevertheless cautioned that this was without prejudice to its challenge regarding "the extent of the bracketing of information in the public domain, and the need for meaningful non-confidential summaries". None of the third parties commented on Indonesia's letter.

2.8. By letter dated 16 March 2017, the Division informed the participants that it did not "share the understanding of the treatment of sensitive information pursuant to Article 18.2, outlined in Indonesia's letter of 17 February 2017". The Division explained that, pursuant to Articles 17.10 and 18.2 of the DSU, the confidentiality of any submissions or information submitted in these appellate proceedings was to be maintained. However, to the extent the participants in this appeal wanted the Division to undertake specific procedural steps not expressly contemplated under the DSU or the Working Procedures, such as excluding or redacting certain information from its Report, or imposing conditions on the composition of delegations or the content of discussions in an oral hearing, then the participants needed to request the specific treatment sought, explain why it was needed, and why the information in question warrants special and additional protection.

2.9. In addition, the Division noted that paragraph 7.9 of Indonesia's executive summary of its appellant's submission contained information enclosed within double brackets. The Division understood such brackets to indicate that the information contained therein was designated as BCI in the proceedings before the Panel. The Division pointed out, however, that, as indicated in the last paragraph of the Guidelines in respect of Executive Summaries of Written Submissions in Appellate Proceedings set out in the Appellate Body's Communication of 11 March 2015 (WT/AB/23), as well as in the letter dated 6 January 2017, from the Director of the Appellate Body Secretariat to the European Union and Indonesia, executive summaries submitted by participants are annexed in an addendum to the Appellate Body Report, and the content of such executive summaries is neither revised nor edited by the Appellate Body.

2.10. Lastly, the Division indicated that although it was unable to agree to the request as formulated by Indonesia in its letter of 17 February 2017, this was without prejudice to any

[3] European Union's other appellant's submission, para. 1.
[4] European Union's other appellant's submission, para. 2.

decision that the Division might take if it were to receive a request containing reasons for adopting additional procedures for the protection of BCI in this appeal.

2.11. On 11 May 2017, Indonesia submitted a revised request to the Division. First, Indonesia requests the Division to adopt additional procedures pursuant to Rule 16(1) of the Working Procedures. Indonesia considers that the adoption of these procedures, above and beyond the standard or "general" layer of protection of confidential information reflected in Articles 18.2 and 13.1 of the DSU, is necessary in the interest of fairness and orderly procedures. Indonesia proposes BCI procedures similar to those adopted by the Appellate Body in *US – Washing Machines*.[5] Indonesia further suggests that, pending the Appellate Body's findings on the European Union's claims on appeal regarding the Panel's treatment of certain information as BCI, the Appellate Body extend BCI protection to all the information covered by Indonesia's request on a provisional basis, including the information for which the European Union argues that no BCI treatment is warranted. Second, pursuant to Rules 16(1) and 18(5) of the Working Procedures, Indonesia requests leave to replace the bracketed information, at paragraph 7.9 of the executive summary of its appellant's submission, with non-confidential information. In Indonesia's view, such an adjustment would in no way change the meaning of this paragraph.

2.12. Indonesia explains that it seeks BCI protection for the following two categories of information: (i) information contained and treated as BCI in the Panel Report; and (ii) any additional information submitted as BCI by either party to the Panel, in the course of the Panel proceedings, where that information was marked as BCI and was treated as BCI in the anti-dumping investigation and fell into the same categories as the information marked as BCI by the Panel.

2.13. Indonesia advances several reasons to justify its request, and contends that the identified information warrants additional protection on the basis of "objective criteria", including some of those identified by the Appellate Body in *EC and certain member States – Large Civil Aircraft*.[6] Indonesia highlights that, other than the three instances of BCI protection in the Panel Report that have been explicitly challenged by the European Union on appeal, there appears to be "full agreement" between the European Union and Indonesia that the information designated as BCI by the Panel warranted additional protection. Indonesia emphasizes the importance of ensuring continuity between the protection of BCI in domestic investigations, as provided for under Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and the protection of BCI in WTO dispute settlement proceedings. For Indonesia, it follows that the fact that the information for which BCI protection is being sought in WTO dispute settlement was accorded BCI treatment in the underlying anti-dumping investigation is a relevant objective criterion for adopting BCI procedures in WTO dispute settlement. Indonesia adds that additional procedures are needed so as to ensure that the protection afforded to certain information in the domestic anti-dumping proceedings and in the Panel proceedings is not lost in these appellate proceedings.

2.14. In its request, Indonesia also explains that the information treated as BCI by the Panel is proprietary to the two privately held companies concerned, PT Musim Mas (Indonesia) and ICOF-S (Singapore). These companies are not required to, and do not, publish information such as their corporate and ownership structure, nor about their operations, sales procedures, or mode of interaction between various sub-entities. Indonesia also maintains that the information for which BCI protection is being sought is, by its nature, confidential, because it relates to the corporate structure, ownership, or operations of the two companies, including the details of their respective responsibilities in sales and marketing activities. In Indonesia's view, disclosure of this information could give rise to commercial harm and to an unfair advantage for the companies' competitors. In further support of its request, Indonesia sets out a table identifying in detail the five types of information in respect of which BCI protection is being sought[7], and, for each of these: (i) an

[5] Appellate Body Report, *United States –Anti-Dumping and Countervailing Measures on large Residential Washers from Korea*, WT/DS464/AB/R/Add.1, Annex D-1, Procedural Ruling of 9 May 2016, paras. 17-20.

[6] Appellate Body Report, *EC and certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[7] Indonesia seeks BCI protection for: (i) information concerning ownership and control structures with respect to PT Musim Mas, ICOF-S, and the Musim Mas Group, as well as the relationship between shareholders; (ii) information on the detailed content of investigation exhibit "Attachment PTMM-18"; (iii) the content of organizational charts setting out PT Musim Mas' corporate structure; (iv) PT Musim Mas' and ICOF-S' financial and other business data and figures from annual reports, other documents submitted in the investigation

indication of where in the Panel Report and in Indonesia's submissions such information is included; and (ii) identification of the "objective criteria" that justify the adoption of additional procedures to protect the information.

2.15. On 12 May 2017, the Division invited the European Union and the third participants to comment on Indonesia's letter. By letter dated 16 May 2017, the European Union stated that it has no objection, in principle, to BCI procedures of the kind proposed by Indonesia, even though it is of the view that such additional procedures may not always be necessary. The European Union also agrees with Indonesia's proposal to designate provisionally certain information as BCI, pending the outcome of the bracketing issues that the European Union has raised in this appeal. However, the European Union stresses that the fact that its challenge on appeal concerns only a limited number of instances of bracketing in the Panel Report does not mean that it agrees with all other instances of BCI designation by the Panel. Thus, notwithstanding that it does not object to Indonesia's request, the European Union expresses doubts as to the merits of some of Indonesia's arguments. For instance, the European Union has difficulty accepting the proposition that information about ownership and control structures is by nature confidential because the companies concerned are not publicly held and therefore do not publish their financial reports. The European Union also questions the confidential nature of information contained in a document submitted in the investigation (Attachment PTMM-18[8]) that allegedly shows how the two companies concerned cooperate. However, the European Union acknowledges that it has not raised the bracketing of such information on appeal and doubts that these issues warrant further consideration.

2.16. As regards Indonesia's second request, the European Union has no objection, given the specific factual circumstances of this case, to Indonesia's request to amend the executive summary of its appellant's submission.

2.17. None of the third participants commented on Indonesia's letter of 11 May 2017.

3 ANALYSIS

3.1. Turning first to consider Indonesia's request for additional procedures to protect BCI, we recall the Appellate Body's observation in *EC and certain member States – Large Civil Aircraft* that:

> The confidentiality requirements set out in [Articles 17.10 and 18.2 of the DSU, as well as paragraph VII:1 of the Rules of Conduct for the [DSU]] are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect adequately the confidentiality of that information.[9]

3.2. On such occasions, it is the duty of the participants to request and justify the need for additional protection of confidential information.[10] While it is for the participants to request additional protection of confidential information, pursuant to Article 17.9 of the DSU and Rule 16(1) of the Working Procedures, it is for the Appellate Body, relying upon objective criteria, to determine whether the information submitted by the participants deserves additional protection, as well as the degree of protection that is warranted.[11] Such objective criteria could include, for example: whether the information is proprietary; *whether it is in the public domain or protected*;

(e.g. spreadsheets) and documents provided by the European Commission to PT Musim Mas and ICOF-S (e.g. disclosures); and (v) direct quotations, data, or figures from the PT Musim Mas and ICOF-S Sales & Purchase Agreement.

[8] Panel Exhibit IDN-47.

[9] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8. See also Appellate Body Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless steel Seamless Tubes ("HP-SSST") from the European Union,* WT/DS460/AB/R, para. 5.315.

[10] Appellate Body Reports, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by* Mexico, WT/DS381/AB/RW, para. 5.3; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 10; *China – HP-SSST (EU)*, para. 5.311.

[11] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3, referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

whether it has a high commercial value for the originator of the information, its competitors, customers, or suppliers; the degree of potential harm in the event of disclosure; the probability of such disclosure; the age of the information and the duration of the industry's business cycle; and the structure of the market.[12]

3.3. Any additional procedures adopted by the Appellate Body to protect sensitive information must conform to the requirement in Rule 16(1) of the Working Procedures that such procedures not be inconsistent with the DSU, the other covered agreements, or the Working Procedures themselves.[13] Moreover, the Appellate Body must ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudicative process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other hand.[14] Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. The measures should go no further than required to guard against a determined risk of harm that could result from disclosure.[15] When additional procedures to protect BCI are adopted, the Appellate Body must also "adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential".[16]

3.4. Turning to the case before us, we consider whether, in the circumstances of this appeal, and taking account of the nature of the relevant information, the general confidentiality requirements of the DSU and the Rules of Conduct for the DSU should be particularized through the adoption of special procedures to protect the confidentiality of that information. [17]

3.5. Indonesia explains that it seeks BCI protection for the following two broad categories of information: (i) information contained and treated as BCI in the Panel Report; and (ii) any additional information submitted as BCI by either party to the Panel, in the course of the Panel proceedings, where that information was marked and treated as BCI in the underlying anti-dumping investigation and fell into the same categories as the information marked as BCI by the Panel. We understand the second category identified by Indonesia to encompass only that information which the Panel treated as BCI in the course of its proceedings. In this regard, we recall that, at the interim review stage of the Panel proceedings, the European Union objected to the treatment of certain information as BCI in the Panel Report. Consequently, the Panel made some changes to its bracketing of information, resulting in an overall reduction of redacted information in the Panel Report.[18] We also bear in mind that the European Union has appealed the Panel's redaction of information from five paragraphs of its Report. We observe that Indonesia requests, and the European Union does not object to, provisional BCI protection being granted to the contested information pending the outcome of the European Union's claims on appeal.

3.6. Indonesia classifies the information in respect of which BCI protection is being sought into five types: (i) information concerning ownership and control structures with respect to PT Musim Mas, ICOF-S, and the Musim Mas Group, as well as the relationship between shareholders; (ii) information on the detailed content of investigation exhibit "Attachment PTMM-18"; (iii) the content of organizational charts setting out PT Musim Mas' corporate structure; (iv) PT Musim Mas' and ICOF-S' financial and other business data and figures from annual reports, other documents submitted in the investigation (e.g. spreadsheets) and documents provided by the European Commission to PT Musim Mas and ICOF-S (e.g. disclosures); and (v) direct quotations,

[12] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[13] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8.

[14] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15).

[15] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 9.

[16] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (quoting Appellate Body Report, *China – HP-SSST (EU)*, para. 5.311).

[17] Appellate Body Report, *China – HP-SSST (EU),* para. 5.315 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8).

[18] Examples of paragraphs of the Panel Report in which the Panel reduced the extent of the redacted information include paragraphs 7.64 and 7.83.

data, or figures from the Sales and Purchase Agreement between PT Musim Mas and ICOF-S. With respect to each of these types, Indonesia maintains that the information is, by its nature, confidential and proprietary, and that any publication of the information could potentially provide an unfair advantage for the companies' competitors.

3.7. We note that in its request, Indonesia refers to examples of objective criteria identified by the Appellate Body as relevant for an adjudicator's assessment of whether to grant BCI protection to information submitted to it, as discussed at paragraph 3.2. above. In particular, Indonesia claims that the following criteria apply to the information for which it requests additional protection: whether the information is proprietary; whether it is in the public domain or protected; and the degree of potential harm in the event of disclosure.[19] We note that the European Union is doubtful as to whether some of Indonesia's arguments can be justified. In particular, the European Union finds it difficult to accept the proposition that information about ownership and control structures is by nature confidential because PT Musim Mas and ICOF-S are not publicly held companies and therefore do not publish their financial reports. We observe that, in some jurisdictions, the ownership and control structures of certain types of companies are a matter of public record, as the European Union points out. However, we recognize that different rules on corporate regulation apply in different jurisdictions. Accordingly, we do not dismiss the possibility that the information for which BCI protection is being sought in this case is sensitive and proprietary within the context of the markets within which the two companies operate.

3.8. Furthermore, in our view, the potential risk of harm to the two companies in question, highlighted by Indonesia, should not be ignored. At the same time, we are alive to our obligation to preserve the integrity of the adjudication process, the participants' rights to due process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large.[20] As mentioned above, the European Union has raised a claim on appeal challenging the Panel's treatment of certain information, in five paragraphs of its Report. We also observe that the significance of Attachment PTMM-18 is one aspect of Indonesia's appeal of the Panel's findings under Article 2.4 of the Anti-Dumping Agreement. Accordingly, we consider that there will be an opportunity in the course of these appellate proceedings for us to adjudicate on whether BCI treatment is warranted for the specific information in respect of which the European Union has raised its concerns. Moreover, Indonesia's request does not propose denying access to the information designated as BCI to the third participants in these proceedings. It follows that we do not consider that according additional protection would undermine the rights of the third participants. Nor do we consider that the proposed BCI protection would prejudice the rights and systemic interests of the WTO Membership at large while these appellate proceedings are ongoing. At the same time, we are cognizant that the interests of Members in having access to reasoning that discloses the basis for findings and conclusions must also be protected, and that the public version of our Report, circulated to all Members, be understandable.[21]

3.9. As Indonesia and the European Union acknowledge, the scope and extent of protection of sensitive business information in WTO dispute settlement proceedings must be determined by WTO panels and the Appellate Body, and not by domestic investigation authorities. As the Appellate Body has noted, "any additional procedures to protect the confidentiality of sensitive business information should go no further than necessary to guard against a determined risk of harm (actual or potential) that could result from disclosure, and must be consistent with the DSU, the other covered agreements including the Anti-Dumping Agreement."[22] We further note that the information covered by Indonesia's request for additional protection was treated as BCI in the Panel proceedings and that it was treated as confidential by the EU authorities in the underlying anti-dumping investigation. In this regard, we observe that the Panel did not simply accept, without question, the BCI nature of documents submitted to it and designated as such by the parties. Rather, the Panel employed certain objective criteria to define BCI, and provided for a procedure to adjudicate any disagreements between the parties on the BCI treatment of information submitted into the Panel record. Indeed, at the interim review stage of its

[19] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[20] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15).

[21] Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R, para. 279.

[22] Appellate Body Report, *China – HP-SSST (EU)*, para. 5.311.

proceedings, the Panel adjudicated a dispute between the parties regarding whether some information was properly designated as BCI.

3.10. Moreover, the fact that both the EU authorities and the Panel granted BCI protection to the information at issue is relevant but not dispositive as to whether that information warrants BCI protection at the appellate review stage. As the Appellate Body stated in *China – HP-SSST (EU)*, while Article 6.5 of the Anti-Dumping Agreement regulates the issue of designation of information in domestic anti-dumping duty proceedings, Article 17.7 deals with the issue of confidentiality in an anti-dumping proceeding before a WTO panel. Thus, whether information treated by the domestic investigating authority as confidential, upon a showing of "good cause" pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the WTO adjudicator.[23] We also consider it useful to recall that whether information warrants BCI protection may evolve over the course of dispute settlement proceedings.

3.11. In this dispute, we note that the Panel Report contains 55 references to information that was designated as BCI, and these 55 references have been redacted from the circulated version of that Report. All of the submissions by the participants in this appeal contain multiple instances in which information that was treated as BCI in the Panel proceedings has been cited and enclosed within double brackets. Moreover, the European Union has raised a claim of error on appeal challenging the Panel's designation of some information as BCI. We further note that the BCI procedures proposed by Indonesia in this appeal are modelled on the BCI procedures adopted by the Appellate Body in *US – Washing Machines.* Yet, we see important differences between the circumstances of that dispute and those in this dispute. The panel report in *US – Washing Machines* did not include any BCI, no redactions were made in the circulated version of the report and the submissions filed by the participants on appeal likewise contained no BCI. By contrast, in this dispute, it cannot be ruled out at this stage that it may be necessary to refer to information that the Panel treated as BCI in our eventual Report. This suggests that there may be need for us to adopt further modalities to supplement the BCI procedures proposed by Indonesia in this appeal.

3.12. On balance, and without prejudice to our adjudication of the participants' claims on appeal, we consider that additional protection is warranted for the information marked by the participants as BCI and enclosed within square brackets in their submissions to the Appellate Body. We also consider that additional protection is warranted for the information designated by the Panel as BCI in its Report and in the Panel record. This excludes any information in respect of which the Panel removed the BCI designation following the parties' comments at the interim review stage.

4 RULING

4.1. First, for the above reasons, and in light of the previous rulings by the Appellate Body on the issue of additional protection of BCI, we have decided to accord additional protection to the following information in these proceedings: (i) the information marked by the participants as BCI and enclosed within square brackets in their submissions to the Appellate Body; and (ii) the information designated by the Panel as BCI in its Report and in the Panel record. With specific respect to the information that the European Union has claimed on appeal did not warrant BCI protection by the Panel, the additional protection that we are granting is provided on a provisional basis, pending resolution of the claims raised by the European Union. The additional BCI protection in these appellate proceedings is provided according to the following terms, bearing in mind that the participants and third participants have already filed their written submissions:

a. No person may have access to information that qualifies as BCI, except a member of the Appellate Body or the staff of the Appellate Body Secretariat, an employee of a participant or third participant, or an outside advisor for the purposes of this dispute to a participant or third participant. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the underlying anti-dumping investigations in this dispute.

[23] Appellate Body Report, *China – HP-SSST (EU)*, paras. 5.315-5.316.

b. A participant or third participant having access to BCI shall treat it as confidential, and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant and third participant shall have responsibility in this regard for its employees as well as for any outside advisors employed for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

c. A participant or third participant that submits a document (including written submissions and oral statements) containing BCI to the Appellate Body after the adoption of these BCI procedures shall clearly identify such information in the document filed. Submissions filed prior to the adoption of these BCI procedures need not be marked retroactively. The participant or third participant shall mark the cover and/or first page of the document containing BCI, and each subsequent page of the document, to indicate the presence of such information. The specific information in question shall be placed within double brackets, as follows: [[…]].

d. A participant or third participant that intends to make an oral statement at the hearing containing BCI shall inform the Division in advance, such that the Division can ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

e. The Appellate Body 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 Appellate Body may, however, make statements of conclusion drawn from that information.

f. Before circulating its Report to the Members, the Appellate Body will decide whether to adopt further modalities, for example to verify the designation of certain information as BCI, and to ensure both the non-disclosure of BCI in the Report to be circulated and that the analysis and findings set out in that Report can be readily understood in the event of any redaction of such BCI.

4.2. Second, pursuant to Rules 16(1) and 18(5) of the Working Procedures, the Division accepts Indonesia's request for leave to amend the executive summary of its appellant's submission as set out in its letter dated 11 May 2017. More specifically, the Division authorizes the removal of all references to BCI markings on the cover page of Indonesia's Executive Summary as well as in the headers on each page and, with respect to paragraph 7.9 of that Executive Summary, accepts Indonesia's request to: (i) replace the text enclosed within the first set of double brackets with the words "particularly close relationship"; (ii) replace the text within the second set of double brackets with the word "close"; and (iii) remove all double brackets. The amended version of this executive summary will be annexed to our Report in this dispute, in accordance with the Guidelines in respect of Executive Summaries of Written Submissions in Appellate Proceedings (WT/AB/23).

WORLD TRADE ORGANIZATION

WT/DS442/AB/R/Add.1

5 September 2017

(17-4703)

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

WT/DS442

AB-2017-1

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS442/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

ANNEX A-1

INDONESIA'S NOTICE OF APPEAL*

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20 of the Working Procedures for Appellate Review, Indonesia hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report entitled *European Union - Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (WT/DS442), which was circulated on 16 December 2016 (the "Panel Report"). Pursuant to Rules 20(1) and 21(1) of the Working Procedures for Appellate Review, Indonesia is simultaneously filing this Notice of Appeal and its Appellant's Submission with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submission to the Appellate Body, Indonesia appeals and requests the Appellate Body to reverse the findings, conclusions, and recommendations of the Panel, with respect to the following errors contained in the Panel Report:[1]

I. The Panel's finding under Article 2.4 of the Anti-Dumping Agreement

1. The Panel erred in the interpretation and application of Article 2.4 of the Anti-Dumping Agreement when finding that Indonesia had not demonstrated that, in its determinations in the anti-dumping investigation at issue in this dispute, the EU Commission had acted inconsistently with this provision by making an adjustment to the export price for one of the investigated producer/exporters to account for intra-company transfers between the producer and its closely affiliated sales entity.[2]

2. In particular, and without prejudice to the arguments developed in Indonesia's appellant's submission, the Panel incorrectly interpreted and applied Article 2.4 by not addressing Indonesia's arguments or taking into account the need to determine whether a closely affiliated sales entity is in a sufficiently close relationship to the producing entity to warrant being treated as a single producer/exporter for the purpose of its price comparison analysis.[3]

3. The Panel also incorrectly interpreted and applied Article 2.4 by concluding that the relationship between closely affiliated entities is not relevant to the determination of price adjustments and a fair comparison between export price and normal value under Article 2.4.[4]

4. The Panel also incorrectly interpreted and applied Article 2.4 by concluding that it is permissible to deduct the profits and indirect selling expenses of a closely affiliated sales entity from the export price under Article 2.4.[5]

5. The Panel also incorrectly interpreted and applied Article 2.4 by finding that the deduction of certain indirect selling expenses and profit from the export price while no corresponding deductions were made from the normal value did not result in an asymmetrical, unfair comparison under Article 2.4.[6]

6. The Panel also incorrectly interpreted and applied Article 2.4 by finding that it was permissible to make deductions from the export price for indirect selling expenses and, in

* This Notice, dated 10 February 2017, was circulated to Members as document WT/DS442/5. This document also reflects the correction contained in WT/DS442/5/Corr.1, in English and Spanish only.

[1] Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Indonesia's right to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] Panel Report, paras. 7.96-7.97, 7.160-7.161, and 8.1.b.i.

[3] Panel Report, paras. 7.54-7.97.

[4] Panel Report, paras. 7.99-7.111.

[5] Panel Report, paras. 7.112-7.117.

[6] Panel Report, paras. 7.118-7.125.

particular, profit on the basis of what the investigating authority considered to be reasonable for the sector at issue.[7]

7. The Panel also incorrectly interpreted and applied Article 2.4 by dismissing the relevance of the Commission's decision to treat the producer and it's closely affiliated sales entity as a single entity for the purpose of identifying the starting price for the dumping analysis.[8]

II. The Panel's duties under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU

8. The Panel also acted inconsistently with Articles 17.6(i) and 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by reaching a conclusion that the measures at issue were consistent with Article 2.4 of the Anti-Dumping Agreement without first considering Indonesia's arguments and evidence.[9] Specifically, the Panel acted inconsistently with Articles 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by failing to consider Indonesia's legal arguments and failing to interpret Article 2.4 in accordance with customary rules of interpretation of public international law, thereby failing to make an objective assessment of the matter, including the applicability and the conformity of the measures at issue. The Panel also acted inconsistently with Articles 17.6(i) and 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by applying the legal standard that it articulated without considering Indonesia's arguments and evidence, reaching a conclusion of WTO consistency on that basis and subsequently imposing on Indonesia the burden of disproving the Panel's finding.[10]

9. The Panel also acted inconsistently with Articles 17.6(i) and 17.6(ii) of the Anti-Dumping Agreement, as well as Article 11 of the DSU, by engaging in prohibited *de novo* review of the evidence, and by ignoring or summarily dismissing material arguments and evidence that favoured Indonesia's case.[11]

III. Request for findings and completion of the analysis

10. For the above reasons, Indonesia, therefore, respectfully requests the Appellate Body to reverse the Panel's finding contained in paragraphs 7.96-7.97, 7.160-7.161, and 8.1.b.i of the Panel Report, that the EU Commission did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement.

11. Indonesia also respectfully requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6(ii) of the Anti-Dumping Agreement for the reasons provided in section II of this Notice of Appeal.

12. Finally, Indonesia requests the Appellate Body to complete the legal analysis and find that the EU Commission acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in its determination of dumping margins in the underlying investigation. The factual findings contained in the Panel Report, as well as the undisputed facts on the record in the determinations of the EU Commission, constitute a sufficient basis to conclude that the measures at issue were inconsistent with Article 2.4 of the Anti-Dumping Agreement.

[7] Panel Report, paras. 7.126-7.130.
[8] Panel Report, footnote 366.
[9] Panel Report, paras. 7.54-7.97.
[10] Panel Report, paras. 7.97, 7.110, and 7.149.
[11] Panel Report, paras. 7.84 and footnote 277 and paras. 7.85, 7.119, and 7.120.

ANNEX A-2

EUROPEAN UNION'S NOTICE OF OTHER APPEAL[*]

Pursuant to Article 16.4 and Article 17.1 of the *DSU* the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (WT/DS442). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to modify, reverse and/or declare moot and with no legal effect the findings and conclusions of the Panel and complete the analysis with respect to the following errors of law and legal interpretations contained in the Panel Report.[1]

- As a preliminary issue the European Union respectfully submits that Indonesia's appeal is inconsistent with Articles 3(1), 3(2), 3(3), 3(4), 3(5), 3(7), 3(8), 3(9) and 3(10) of the DSU, or any combination thereof, and that the Appellate Body should find that it is unnecessary to rule on the substance of the matters raised by Indonesia as the contested measure has expired, and indeed ceased to exist before the termination of the panel proceedings. If the Appellate Body grants this relief the European Union withdraws all other aspects of its cross-appeal, pursuant to Rule 30 of the Working Procedures for Appellate Review.

However, where the Appellate Body does not grant the relief requested in the preceding paragraph, the EU respectfully submits that:

- First, by failing to engage with and address the EU communication concerning expiry of the measure and by making recommendations with regard to a measure, which had ceased to exist before the termination of the Panel's proceedings – a fact that was uncontroversial and not contested by Indonesia – the Panel violated Articles 11 and 19.1 of the DSU[2], and for that reason the European Union requests the Appellate Body to reverse paragraph 8.3 of the Panel Report;

- Second, the Panel erred in interpreting and applying Article 12(12) of the DSU, by considering that the panel authority had not lapsed. In this respect, it erroneously referred to the standard (or guidance) provided by the Appellate Body in *EC – Bananas III*, which concerns a different situation. It also erroneously interpreted and applied Articles 8 and 12(12) of the DSU, by finding, expressly or by implication, that they are in some unspecified respect mutually exclusive, as opposed to containing concurrent obligations. Moreover, the panel violated Article 11 of the DSU because, in addition to the preceding errors: it did not take into account all of the evidence submitted to the panel to demonstrate that the panel work was indeed suspended for more than twelve months; by finding that there was no request by Indonesia within the meaning of Article 12(12); by charactering as findings of facts matters that concern the legal characterisation of those facts; by adopting a formalistic and erroneous analysis relying on the absence in Indonesia's request of any express reference to Article 12(12), a false distinction between "work" and "meeting", and

[*] This Notice, dated 15 February 2017, was circulated to Members as document WT/DS442/6.

[1] Pursuant to Rule 23(2)(c)(ii)(C) of the *Working Procedures for Appellate Review* this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] As a separate matter, in the event that the Panel did not include that communication concerning expiry of the measure on the Panel's record, the EU appeals that action or omission as a violation of Article 11 of the DSU, since keeping a complete record of the panel proceedings and transmitting that complete record to the Appellate Body in the event of an appeal, pursuant to Article 17(9) of the DSU and Rule 25 of the Working Procedures for Appellate Review, is a necessary corollary to the Panel's obligations under Article 11 of the DSU to assist the DSB in discharging its responsibilities, by making an objective assessment of the matter before it, including an objective assessment of the facts of the case; and make such other findings as will assist the DSB in making the appropriate recommendations or rulings.

the addressee of Indonesia's request; and by failing to properly address the question of the relationship between Articles 8 and 12(12) of the DSU, which was raised by the parties (and thereby also violating those provisions of the DSU). Any one of the foregoing errors or any combination therefore would justify reversal. Accordingly, the EU requests the Appellate Body to reverse the Panel's findings and conclusion on these matters[3], and respectfully requests the Appellate Body to complete the legal analysis, by finding that, with respect to these panel proceedings, the DSB's authority lapsed pursuant to Article 12(12) of the DSU. Consequently, we ask the Appellate Body to reverse all of the Panel's findings and recommendations, or declare them moot and of no legal effect.

- Third, the panel erred in the interpretation and application of Article 6.7 ADA, by considering that the European Union had not disclosed the results of the investigation to PTMM, *inter alia*, by imposing, in practice, an obligation to disclose a description of the investigation process rather than the results of the verification visit, requiring moreover that such a description should be sufficiently detailed so as to enable the Panel to trace back any correction that was made to the information supplied to specific evidence that was verified or not during the investigation or other events, and by setting out a list of items that must always be disclosed in order to comply with Article 6.7 ADA, regardless of the specific facts of each case. Accordingly, the European Union requests the Appellate Body to reverse the Panel's findings and conclusion with regard to the interpretation and application of Article 6.7 ADA.[4]

- Fourth, the panel erred in the interpretation and application of the DSU, particularly Article 12.1 of the DSU, and its Additional Working Procedures Concerning Business Confidential Information, because it bracketed information that was already in the public domain and failed to require Indonesia to advance justifications for its requests for specific instances of bracketing and to provide non-confidential summaries of the bracketed information sufficient to permit a reasonable understanding of the matter. At the same time the Panel also violated Article 12.7 of the DSU because by unduly over-bracketing it submitted an incomplete report to the DSB. For the same reasons, the Panel acted inconsistently with Article 10.1 of the DSU, which requires that the interests of other Members be fully taken into account during the panel process. Finally, by failing to require the necessary justifications and make the appropriate adjudications, and by failing to comply with its own BCI Procedures, the Panel acted inconsistently with its obligation to make an objective assessment, pursuant to Article 11 of the DSU.[5]

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[3] Panel Report, paras. 8.1.a.i-iii, paras. 1.9-1.11, and paras. 7.17-7.29.
[4] Panel Report, paras. 7.224-7.229, 7.235-7.236, and 8.1.d.
[5] Panel Report, paras. 7.64, 7.74 and 7.80, 7.82, 7.83.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF INDONESIA'S APPELLANT'S SUBMISSION

1 INTRODUCTION[1]

1.1. Indonesia appeals the Panel's finding that the Commission acted consistently with Article 2.4 of the Anti-Dumping Agreement by making an adjustment to the export price for an investigated Indonesian producer/exporter to reflect transactions between the producing entity and its closely affiliated sales entity. Indonesia considers that in finding that this adjustment was not inconsistent with Article 2.4, the Panel erred in interpreting and applying Article 2.4 of the Anti-Dumping Agreement.

1.2. In addition, Indonesia considers that the Panel acted inconsistently with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU in how it addressed Indonesia's arguments and evidence and in conducting *de novo* review of evidence on the record before the Commission.

2 BACKGROUND

2.1. The measures at issue in this dispute are anti-dumping measures imposed by the EU on imports of certain fatty alcohols from Indonesia. In its determinations, the Commission made an adjustment to the export price of the investigated Indonesian producer/exporters for transactions between the producers and their closely affiliated sales companies in Singapore, as if the producers and the sales companies were not related.

2.2. The Commission originally investigated two Indonesian producer/exporters, Musim Mas Group and Ecogreen. Both made their sales to the EU using the same sales structure. The producers in Indonesia (PT Musim Mas and PT Ecogreen Oleochemicals, respectively) sold to a closely affiliated, separately incorporated sales company located in Singapore (ICOF-S and EOS, respectively). These sales companies then re-sold the goods to customers in the EU.

2.3. For both producer/exporters, the sales office in Singapore negotiated with the EU customer on price. Once the price was agreed with the EU customer, two invoices were prepared: first, the producing entity in Indonesia invoiced the sales office in Singapore for 95% of the price agreed by the EU customer. Second, the sales office in Singapore invoiced the unrelated customer in the EU for 100% of the agreed price. The difference between the price received for the sale by the sales office (100%) and the amount paid to the producing entity (95%) is referred to as the "mark-up" between the producing entities and their sales offices. For both producer/exporters, in each case, the sales office in Singapore was wholly controlled by the same holding entity or shareholders as the producing entity in Indonesia.

2.4. In calculating the export price for both producer/exporters in its provisional and final determinations, the Commission characterized the sales companies in Singapore as an independent "agent[s] working on a commission basis". The Commission did not address whether the producers in Indonesia and their closely affiliated sales offices in Singapore were part of an SEE for the purpose of determining dumping margins. In the final determination, the deduction consisted of the SG&A expenses of the sales entity in Singapore and "profit of 5% which is considered a reasonable profit for the activities carried out by trading companies in the chemical sector". Without this adjustment, both producer/exporters would have had *de minimis* dumping margins.

2.5. The Commission made this adjustment pursuant to Article 2.10(i) of the EU's Basic Regulation, which permits a "notional" adjustment where an exporter sells through an affiliated trading company. Article 2.10(i) provides that "[t]he term 'commission' shall be understood to include the mark-up received by a [related] trader of the product or the like product if the functions of such a [related] trader are similar to those of an [independent] agent working on a

[1] This executive summary contains a total of 5,623 words (including footnotes). Indonesia's appellant's submission contains a total of 63,245 words (including footnotes).

commission basis". This has been described as enabling the Commission to "deduct[] from the export price a commission that was never paid, thereby artificially decreasing the export price". This provision of the Basic Regulation has no direct counterpart in the Anti-Dumping Agreement.

2.6. After the final determination, the Commission initiated a procedure to review the dumping measure. Having previously treated Musim Mas Group and Ecogreen identically, the Commission now found differences between the two producer/exporters. It decided to revise Ecogreen's dumping margin by removing the adjustment. As Ecogreen now had a *de minimis* dumping margin, the measure was terminated for Ecogreen. The Commission made no change to Musim Mas Group's dumping margin.

3 THE ISSUE BEFORE THE PANEL

3.1. Indonesia argued that in making price adjustments under Article 2.4 of the Anti-Dumping Agreement to reflect the involvement of a closely affiliated sales entity, an investigating authority must address whether the producing entity and its closely affiliated sales entity are in a sufficiently close relationship to warrant being treated as an SEE for the purpose of determining dumping margins. This question must be resolved using criteria such as those articulated by the panel in *Korea – Certain Paper* and the Appellate Body in *EU – Footwear* regarding the common ownership, management, and control of the entities involved.

3.2. Transactions between entities within the SEE are not reliable, for the reasons explained by the Appellate Body in *US – Hot-Rolled Steel*, paragraph 141. Moreover, these transactions do not represent expenses to the SEE as a whole. The determination of prices and price adjustments for dumping purposes must be based on the revenues and expenses of the SEE as a whole, not on the transfers within the SEE, and on how the producer/exporter actually structures its sales and the expenses it actually incurs.

3.3. Where a producer/exporter uses an unaffiliated agent to help make sales, the commission paid to that agent is a direct selling expense that can be deducted from the export price or normal value. Where a producer/exporter instead uses a closely affiliated sales entity with which it forms part of an SEE, the transfers within the SEE are not an expense to the SEE as a whole and may not be deducted. Instead, the actual expenses incurred are the expenses of the closely affiliated sales entity to pay its salespersons' salaries, office costs, etc. These are indirect selling expenses that are not deducted from the normal value or export price. The purpose of a dumping analysis is to identify price discrimination between markets. Hence, the deduction of any profit accruing to an entity for which a dumping margin is being determined would distort the price comparison.

3.4. Indonesia argued that the Commission's treatment of the producer in Indonesia and the sales office in Singapore as if they were independent entities, and the deduction of amounts for the sales office's selling expenses and the profit of traders in this sector did not accurately reflect the expenses actually incurred in making the investigated sales. It also distorted the comparison between export price and normal value, resulting in an unfair comparison under Article 2.4 of the Anti-Dumping Agreement.

4 THE PANEL'S RULING

4.1. The Panel rejected Indonesia's claim. The Panel stated that an adjustment may be appropriate where a factor "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" and found 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". However, the Panel's evaluation of the relevant legal standard in section 7.3.5 and its application of that standard to reach its conclusion in section 7.3.5.1 of the Report do not contain a *single* reference to the issue of closely affiliated companies, SEEs, or whether or how transactions between them may affect price comparability within the meaning of Article 2.4, or Indonesia's arguments on this issue.

4.2. Having concluded that the Commission acted consistently with Article 2.4, the Panel "turn[ed] to" Indonesia's arguments to see whether they "affected" the Panel's conclusion or provided "reason to set aside our conclusions".

4.3. The Panel stated that the question of whether two entities were part of an SEE was not "dispositive" because it was "possible" that transactions between two entities "could be" at arm's length, "regardless of how closely intertwined their control and ownership might be". The Panel concluded that even where transactions are not at arm's length, a transaction between them "could reflect an expense" that must be adjusted for.

4.4. The Panel rejected Indonesia's argument that the deduction of amounts representing selling expenses and profit from the export price when no selling expenses or profit were deducted from the normal value resulted in an asymmetric comparison. The Panel reasoned that there was no asymmetry as the export price reflected *some* profits and selling expenses, those of the producing entity.

4.5. The Panel also rejected Indonesia's argument that it is not permissible to deduct selling expenses and profits, on the ground that the selling expenses and profits of a "downstream participant" in the sales process may be a direct selling expense to the producer. However, the Panel did not address whether there was a distinction between an *independent* and a *closely affiliated* "downstream participant".

5 THE LEGAL STANDARD UNDER ARTICLE 2.4

5.1. Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to conduct a "fair comparison" between the normal value and the export price "at the same level of trade, normally the ex-factory level". In order to comply with this requirement, investigating authorities are required to make "[d]ue allowance … for differences which affect price comparability".

5.2. The process of determining the ex-factory normal value and export price requires the "netting back" from the starting price charged to the first unrelated customer. This is done by making adjustments to ensure that comparisons are not distorted by factors extraneous to the central issue of price discrimination between markets. If a domestic customer and an export customer both appeared to buy the goods at the factory gate, the price charged to the export customer should be no less than the price charged to the domestic customer. Under Article 2.4, "allowances should *not* be made for differences that do *not* affect price comparability". This means that an adjustment should be made when, and only when, a factor affects price comparability.

5.3. Article 2.4 does not expressly address transactions between closely affiliated parties. However, the Appellate Body has explained in *US – Hot-Rolled Steel* that transactions between affiliated parties may not be reliable and that it is consistent with the Anti-Dumping Agreement to use the price of a closely affiliated reseller as the starting price in the analysis of normal value. This rationale applies equally to the determination of the starting price and adjustments on the export side.

5.4. A producer/exporter may choose to make its sales using an internal sales department, an affiliated sales company, or an independent agent. The choice will affect the producer/exporter's costs and his net return on the sale. These choices must be reflected accurately in the investigating authority's dumping analysis. In trying to identify whether the producer/exporter is engaged in price discrimination between markets, the investigating authority cannot achieve a fair comparison under Article 2.4 if it ignores the producer/exporter's actual sales structure. It cannot replace the producer/exporter's actual expenses with the expenses that would have been incurred had it sold under a different hypothetical sales structure.

5.5. An investigating authority must, therefore, address whether a producing entity and its closely affiliated sales entity are in a sufficiently close relationship to warrant being treated as an SEE, using the criteria in *Korea – Certain Paper* and *EU – Footwear.*

5.6. When two entities form part of a SEE, the revenues, profits, and expenses of each entity in the SEE become the revenues, profits, and expenses of the SEE as a whole. For dumping purposes, this means that the prices, profits, and expenses of the sales entity within the SEE must be treated in the same way as if the producer/exporter were a single legal entity.

5.7. Commissions paid to an independent agent may be deducted from the normal value or export price, as appropriate. Transactions between entities within the SEE are not reliable or relevant for

determining adjustments. Any selling expenses incurred by a sales entity within the SEE must be treated in the same way as indirect selling expenses of a producer/exporter that consists of a single legal entity. These expenses are not deducted from the normal value or export price.

6 THE PANEL ERRED IN INTERPRETING AND APPLYING ARTICLE 2.4

6.1. The Panel failed to articulate the correct legal standard under Article 2.4 for examining adjustments in circumstances involving transactions between closely affiliated parties. In sections 7.3.5 and 7.3.5.1 of its Report, the Panel interpreted and applied Article 2.4 to find that the Commission did not act inconsistently with Article 2.4 without ever addressing Indonesia's arguments regarding the importance of examining the relationship between the parties at issue. This, in itself, is a failure to interpret and apply Article 2.4 correctly.

6.2. The Panel articulated a standard whereby an adjustment can be made where a factor exists on one side of the comparison but not the other. This suggests that the manner in which the investigating authority quantifies or describes an adjustment that may be made on only one side is beyond review for "fairness" under Article 2.4. This cannot be.

6.3. The Panel also erred in dismissing the importance of whether two entities form part of an SEE by stating that this cannot be dispositive because it is "possible" that transactions between these entities "could" be at "arm's length". Even assuming this were correct, the Panel also erred in failing to identify a proper legal standard for determining whether transactions between the closely affiliated entities in this case were at "arm's length" and where in its determinations the Commission provided a reasoned and adequate explanation of how it applied that standard.

6.4. The Panel also erred in confusing the issue of whether prices between closely affiliated entities approximate "arm's length" transactions under a transfer pricing agreement and the issue of whether entities are in "a relationship close enough to support" "properly treat[ing] multiple companies as a single exporter or producer in the context of [the] dumping determinations in an investigation".

6.5. The Panel did not even address the fact that even if a transfer between entities within an SEE is at the amount at which independent parties do business, it remains an intra-SEE transfer. The amount transferred to the sales entity remains cash in the hands of the SEE. It is not the same as a transfer to an independent entity *outside* the SEE, no matter what its amount is.

6.6. The Panel also erred in finding that an investigating authority may make adjustments to normal value or export price for the selling expenses and profits of a "downstream participant" in the sales process, without distinction between *closely affiliated* downstream participants and *independent* downstream participants. The Panel correctly stated that payments to an *independent* downstream participant are a direct selling expense to the producer/exporter that may be deducted. However, the Panel erred in suggesting that exactly the same approach may be used for "downstream participants" that are part of an SEE with the producing entity.

6.7. The Panel also erred in suggesting that deductions may be based on the "value" of a factor (the "reasonable profit" in the "chemical sector") rather than on the basis of the expenses actually incurred by the producer/exporter. Nothing in the Anti-Dumping Agreement permits the investigating authority to ignore actual expenses and to use what it considers "reasonable" or to be the correct "value" of the expense.

6.8. The Panel also erred in its analysis of the consequences of the Commission's decision to treat the producer in Indonesia and its closely affiliated sales office in Singapore as a single entity for the purposes identifying the "starting price" in the Commission's analysis. The Commission's decision to use the re-sale price of the closely affiliated sales entity as the starting price in the analysis price implies a judgment about the relationship between the sales entity and the producing entity. This should also affect the determination of adjustments to that starting price. The Panel erred in dismissing this issue, in a footnote, as merely a "conception" of Indonesia.

6.9. The Panel also erred in its analysis of whether the Commission properly adjusted for "indirect selling expenses". The Panel correctly noted that indirect selling expenses/SG&A and profit are to be *included* in the normal value and export price. However, the Panel erred in stating that there

was no unfair comparison where the normal value and export price included *some* indirect selling expenses and profit, even if other selling expenses and profit were deducted from the export price.

6.10. The Panel also erred in its analysis of the Commission's criterion of whether a closely affiliated sales entity performs the same "functions" as an independent agent. Salespersons are likely to perform the same function whether they are closely affiliated to or independent of the producer: they will make sales. Thus, their functions are scarcely relevant to the issue of whether they are making sales *independently* or *as part of the producer/exporter*.

6.11. Ultimately, the Panel's ruling means that investigating authorities may simply ignore the relationship between a sales entity and a producing entity and proceed on the basis that they are independent of each other. This would, in effect, deprive producer/exporters of their right to have their dumping margins based on their actual sales processes and their actual revenues and profits. It would deprive them, in the calculation of margins, of any benefits or efficiencies they achieve by performing sales functions through a closely affiliated sales entity rather than through an independent trader with its own profit motive. This cannot be a permissible means of achieving a "fair comparison" within the meaning of Article 2.4.

6.12. Indonesia requests the Appellate Body to reverse the Panel's finding that the Commission did not act inconsistently with Article 2.4 in making the contested adjustment. In addition, Indonesia requests the Appellate Body to complete the analysis. On the basis of the undisputed facts on the face of the Commission's determinations, the Appellate Body can and should find that the Commission acted inconsistently in making the contested adjustment without properly examining whether the sales and producing entities were in a sufficiently close relationship to warrant being treated as a single entity for dumping purposes.

7 THE PANEL FAILED TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER UNDER ARTICLE 17.6 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE 11 OF THE DSU

7.1 The proper standard of review in disputes under the Anti-Dumping Agreement

7.1. Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU contain the proper standard of review for panels in disputes under the Anti-Dumping Agreement. This standard requires a panel to examine whether the report of the investigating authority contains a "reasoned and adequate explanation of how the facts support the authority's determination. This explanation must be discernible from the published determinations and cannot be provided by the defending Member in a WTO proceeding. A panel's examination of this explanation must be based exclusively on the information contained on the record and the explanations given by the authority in its published report. A panel may not conduct a *de novo* review of evidence from the investigation record where the investigating authority itself failed to assess that evidence. It is not for a panel to examine - as the first trier of fact - a piece of evidence, to assess its probatory value, or to weigh it against other record evidence. This is the task of the investigating authority.

7.2. This is also important for safeguarding the procedural rights of the investigated company enjoys in an investigation. When an investigated company provides evidence, the investigating authority must use that evidence. If the evidence is deemed insufficient or otherwise unreliable, the investigated company has a right to know and to have an opportunity to provide further explanations. If a panel examines evidence *de novo*, without granting the company those rights, it essentially undermines the due process safeguards of the Anti-Dumping Agreement. Moreover, as it does not have the complete investigation record before it, a panel is not in a position to make "judgment calls" about the evidence.

7.2 The Panel acted inconsistently with Articles 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU by finding the measure at issue to be consistent with Article 2.4 of the Anti-Dumping Agreement before addressing Indonesia's arguments and evidence

7.3. In paragraphs 7.54-7.94 of its report, the Panel conducted a stand-alone analysis of the measure at issue and concluded that it was consistent with Article 2.4 of the Anti-Dumping Agreement. The Panel reached that finding without considering any of the arguments and evidence that Indonesia had placed before the panel that were at the core of Indonesia's case. In the

remainder of its analysis, the Panel "turned to" whether Indonesia's arguments or evidence could "affect" that previously reached finding of consistency or persuade the Panel to "set aside" its earlier findings.

7.4. This approach is inconsistent with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU. WTO law does not permit a panel to reach a conclusion on a claim divorced from arguments and evidence of complaining parties. Indonesia was entitled to have its arguments and evidence addressed by a panel with an open mind on the case, not one that had already concluded that the measure was WTO-consistent. In effect, the Panel imposed a burden on Indonesia to "disprove" the panel's view that the measure was WTO-consistent. Effectively, the Panel created an "extra hurdle" for Indonesia, tilted the playing field against Indonesia, and made the case for the defendant.

7.3 The Panel acted inconsistently with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU by repeatedly conducting *de novo* review of record evidence

7.5. The Panel repeatedly engaged in *de novo* review of record evidence. It examined evidence that had not been analysed by the investigating authority and conducted its own evaluation of that evidence to determine, for itself, the most plausible reading of that evidence. However, the role of a WTO panel is limited to examining whether the authority provided a reasoned and adequate explanation of its determination, in the light of record evidence and other potential alternative explanations.

7.6. The Panel relied on the Appellate Body reports in *US – Countervailing Duty Investigation on DRAMS* and *Thailand – H-Beams*. In those cases, the Appellate Body approved references by the panels to evidence, to which the investigating authorities had not referred, in specific, limited circumstances not present in this case. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body approved the panel's reference to a newspaper article referred to by the United States as additional support for a finding by the investigating authority that was based explicitly on a vast range of evidence, including numerous other newspaper articles, all of which pointed to the same conclusion. In these circumstances, a panel may review additional supporting evidence, because it is clear from the remainder of the analysis what the investigating authority thought about that evidence. But this is not the case when the evidence contradicts the authority's conclusion and is capable of multiple plausible readings. In *Thailand – H-Beams*, the Appellate Body approved a reference by the panel to supporting evidence that was not referred to by the investigating authority in order to protect its confidentiality. Neither of these specific circumstances were present in this case.

7.7. The Panel also articulated a new legal standard that it may examine evidence *de novo* as long as that evidence is "connected" to the explanation of the authority. This is too broad, because all record evidence in a dumping determination could ultimately be said to be "connected" to the investigating authority's explanation. If the Panel's new standard is left to stand, panels will be given *carte blanche* to engage in *de novo* review of virtually any evidence on the record. This will read the Appellate Body's previously articulated explanation-based standard out of WTO dispute settlement.

7.8. The Panel engaged in *de novo* review by determining the probatory value of the email in Exhibit PTMM-18 (Exhibit IDN-47). The authority never examined this evidence. This evidence contradicted the investigating authority's view that ICOF-S does not conduct marketing and sales activities for PT Musim Mas's domestic sales. The document was provided to show, by way of an example, a domestic sale in which ICOF-S is involved. The Panel evaluated this evidence, chose between what it considered to be plausible readings, and weighed the document against some, but not all, other evidence that was before it (and that also had not been examined by the investigating authority). This is not permissible. The Panel was also incorrect to say that the authority "ascribed limited evidentiary value" to the document. There is no indication of what the authority actually thought, as its silence can be read in many different ways.

7.9. The Panel also conducted an impermissible *de novo* review of the list of PT Musim Mas's shareholders. Indonesia explained that PT Musim Mas and ICOF-S had the same shareholders, who in addition were in a particularly close relationship and that the investigating authority had failed to analyse this point. The Panel found that the evidence did not unambiguously establish the close

nature of the shareholders' relationship. But this is not only irrelevant, because the identity of the shareholders is sufficient, regardless of their relationship. In addition, the Panel addressed an argument never made by the investigated company during the proceedings; and it weighed and balanced the evidence. The evidence was perfectly consistent with the proposition that the shareholders are closely related. Moreover, the investigating authority never sought further information or explanations on this point. As such, the Panel's approach deprives the investigated company of its due process rights during the investigation.

7.10. The Panel also found that the shareholders of PT Musim Mas and ICOF-S were not identical, although the company stated that they were the "same", which is normally understood to mean identical. The Panel thus decided to interpret for itself what the company had stated during the investigation.

7.11. The Panel also engaged in a *de novo* review of certain organizational charts filed by PT Musim Mas as part of its questionnaire response. The Commission never even mentioned these charts. The Panel engaged in a *de novo* analysis of the evidence to determine that the "marketing and sales department" in PT Musim Mas's chart was not ICOF-S. The Panel essentially determined what the investigated company sought to depict when it prepared the charts. This makes no sense. Besides being an impermissible *de novo* review, the Panel's analysis is also inconsistent with uncontested facts.

7.12. The Panel also developed its own reasoning about PT Musim Mas's marketing and sales activities. The Panel analysed a spreadsheet in PT Musim Mas's questionnaire response, to which the Commission never referred in its Determinations. The Panel discovered identical percentage amounts allocated to marketing and sales activities across different product groups and, from this, deduced that PT Musim Mas was conducting identical activities. The Panel used this to support its finding that ICOF-S was involved only with export sales and, therefore, an adjustment for its expenses and profits was warranted.

7.13. In reality, in this spreadsheet, the producer/exporter was simply allocating its expenses on the basis of turnover because that is what it was instructed to do by the Commission. It was not supposed to, and did not, reflect the actual activities and expenses on a product- or market-specific basis. The Panel thus arrived at its own (questionable) reading of evidence that could have been read in multiple ways, without even exploring why the information was presented in this manner. Moreover, the Panel's conclusion is inconsistent with the theory that PT Musim Mas conducted all of its domestic marketing and sales activities, but left the corresponding export activities to ICOF-S. In that case, the percentage amounts should have been different.

7.14. The Panel report contains further instances of *de novo* review. For instance, the Panel developed its own theory about PT Musim Mas's "direct" export sales, without any basis in the record evidence and in the absence of any statement by the Commission. In order to resolve a contradiction between assumptions concerning PT Musim Mas's marketing capacity, the Panel made up out of whole cloth a theory whereby PT Musim Mas had capacity to market its sales in certain markets, but not in others. There is no record evidence to support this, while there is evidence that contradicts the Panel.

7.15. The Panel also provided a *de novo* analysis of PT Musim Mas's Financial Statements, in its interim report. This analysis was also incorrect as a matter of basic accounting precepts. After vigorous protestations by Indonesia in its interim comments, the Panel deleted this finding. However, this finding is further useful evidence of the unprecedented willingness of this Panel to step into the shoes of the investigating authority and do its work for it.

7.4 The Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by disregarding or summarily dismissing relevant evidence that favoured Indonesia

7.16. The Panel also violated Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by disregarding or summarily dismissing relevant evidence that favoured Indonesia. This evidence pertained to the S&P Agreement between PT Musim Mas and ICOF-S.

7.17. Panels have the discretion not to examine each and every argument and piece of evidence of a party. However, this discretion does not extend to evidence that is relevant for a party's case, as presented by that party, and that "appears to favour" that party. All of the evidence at issue here is evidence that is relevant, because it pertains to issues explicitly relied on by the investigating authority, the EU in the WTO proceedings, and the Panel itself. Moreover, it all favours Indonesia, in one way or the other.

7.18. Indonesia submitted multiple pieces of evidence that demonstrated that the S&P Agreement could not be reasonably read to suggest that the two companies were unrelated. Also, the existence of a written contract and the specific content did not suggest that the agreement was something "more" than a normal transfer pricing agreement. This evidence included transfer pricing guidelines from international organizations such as the OECD and the United Nations, as well as from national jurisdictions. It also included recommendations from a specialized law firm for related companies wishing to conclude transfer pricing agreements, as well as template/model transfer pricing agreements that contained exactly the same clauses as the S&P Agreement.

7.19. The Panel either ignored this evidence or dismissed it summarily as irrelevant. For instance, the Panel initially ignored the law firm and model agreement evidence. In response to Indonesia's interim comments, the Panel made a brief statement that one of the model transfer pricing agreements was irrelevant because it pertained to a different type of commercial activity, or because the law firm recommendations contained disclaimers. These statements reflect a refusal to engage with the evidence and they entirely miss the point. The issue was that a model transfer pricing agreement included the same clauses as the S&P Agreement at issue. In another instance, the Panel relied on the OECD Guideline to make an (incorrect) point about "arm's length", but entirely ignored another section of the same document on which Indonesia had based its arguments. This is also an un-even-handed approach to the evidence that vitiates the objectivity of the analysis.

8 CONCLUSION AND REQUEST FOR FINDINGS

8.1. For these reasons, Indonesia requests the Appellate Body to reverse the Panel's finding that the Commission did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement in making the contested adjustment.

8.2. Indonesia also requests the Appellate Body to find that the Panel acted inconsistently with Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU in making its finding under Article 2.4.

8.3. In addition, Indonesia requests the Appellate Body to complete the analysis. On the basis of the undisputed facts on the face of the Commission's Determinations, the Appellate Body can and should find that the Commission acted inconsistently with Article 2.4 in making the contested adjustment without properly examining whether the sales and producing entities were in a sufficiently close relationship to warrant being treated as a single entity for dumping purposes.

ANNEX B-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION

1 FACTUAL BACKGROUND AND THE MEASURES AT ISSUE

1. In 2010 the EU initiated an anti-dumping investigation regarding imports of certain fatty alcohols and their blends, originating *inter alia* in Indonesia. The findings of the investigation were crystalized in three acts – Council Regulation (EU) No. 446/2011 of 10 May 2011 ("Provisional Determination"), Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011 ("Final Determination"), and Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012 ("Revised Determination"). These measures were the object of Panel proceedings between the EU and Indonesia.

2 INDONESIA'S APPEAL RELATES TO AN EXPIRED MEASURE AND SHOULD BE DISMISSED

2. As the contested measure expired on 12 November 2016 and the EU informed the Panel and Indonesia of this on 16 November 2016, the EU thinks that Indonesia's appeal is inconsistent with Articles 3.1, 3.2, 3.3, 3.4, 3.5, 3.7, 3.8, 3.9 and 3.10 of the DSU and that ruling on the matters raised by Indonesia is unnecessary, since an appeal is not appropriate when *the sole measure at issue* no longer exists, because it has been withdrawn/expired. Should the Appellate Body uphold this claim of the EU, the EU withdraws the remainder of its cross-appeal.

3. Article 3 of the DSU sets out *inter alia* the objectives of the WTO dispute settlement system, such as preservation of rights and obligations of Members, prompt settlement of situations in which a Member considers that a benefit it is entitled to is being impaired, satisfactory settlement of the matter, and the initiation of dispute settlement procedures only when they may be fruitful and lead to a positive solution to the dispute and not in order to obtain an advisory opinion on legal issues.

4. In the present case, however, since the contested measure has ceased to apply, there is nothing left to "preserve", nor is any benefit being impaired. Bringing such a case risks to unnecessarily delay and prevent the prompt settlement of other disputes. Instead, the withdrawal/expiry of the measure has achieved a satisfactory settlement of the matter, in accordance with the rights and obligations under the DSU and the covered agreements. Furthermore, bringing an appeal regarding withdrawn/expired measures cannot be fruitful, since a positive and mutually acceptable solution has already been achieved, withdrawal being the first objective of the dispute settlement mechanism.

5. Since there is no longer any concrete and ongoing dispute between the parties, Indonesia appears to be seeking an "advisory opinion", a clarification or interpretation of certain provisions in the abstract. However, other WTO procedures are set out for that purpose.

6. Additionally, the EU submits that the Panel erred in making recommendations on a withdrawn/expired measure, in violation of established case-law and the Panel's obligations pursuant to Articles 11 and 19.1 of the DSU. Indeed, these provisions envisage a situation in which a measure (and hence a violation) still exists. Furthermore, the Panel's failure to address the EU communication on the expiry of the measure constitutes in itself a failure to make an objective assessment pursuant to Article 11 of the DSU.

3 THE PANEL ERRED IN FINDING THAT THE DSB AUTHORITY FOR THESE PANEL PROCEEDINGS HAD NOT LAPSED

7. The EU appeals the Panel's findings concerning its request for a preliminary ruling that the DSB authority for the Panel proceedings lapsed pursuant to Article 12.12 of the DSU.

8. There can be no doubt that an Article 12.12 request can be made between Panel establishment and composition.

9. First, a textual interpretation of Article 12.12 supports the EU position. Like in many other provisions in the DSU, the term "Panel" in Article 12.12 refers to an established panel, regardless of the stage of its composition. Further, the verb "suspended" includes putting something into abeyance from the very start. "[T]he work of the Panel" includes anything lawfully done in the name of the Panel, including by the Secretariat pursuant to Article 27 DSU. Finally, after 12 months without any activity, the authority of the Panel automatically lapses. Suspension can be initiated by a "request" by the complaining Member – an indication of its wishes to suspend the Panel's work. The suspension can commence "at any time" from the moment of the Panel's establishment.

10. Next, the EU submits that the final sentence of Article 12.12 has several objects/purposes, common to other provisions of the DSU which support the EU interpretation. These include setting parameters to the authority of the DSB, providing for security and predictability, limiting the reputational consequences for the accused Member, promoting the prompt settlement of disputes, and allowing both the defending Members, as well as the Secretariat to organize their limited resources so as to participate efficiently and effectively in dispute settlement or to assist Panels. Therefore, the duration of the authority flowing from the DSB is not indefinite and not in the hands of the complaining Member alone.

11. Moreover, the Panel did not consider the entirety of Article 12.12 and its reference to Article 12.9. According to the latter provision, the total period between Panel establishment and the adoption of the Panel report should not exceed 9 months, with the possibility of a suspension of 12 months (21 months in total). Allowing for an indefinite suspension after Panel establishment but before Panel composition, in addition to an Article 12.12 suspension, is irreconcilable with the time limit of Article 12.9, which begins running from the date of Panel establishment.

12. In the present case, on 11 July 2013 Indonesia informed the Secretariat that it wished to *suspend* a meeting (the only work happening at that moment), a "request", to which the Secretariat sent a confirmatory response. On 22 September 2014, more than 12 months later, the Secretariat sent a communication to the Parties, pursuant to a request from Indonesia from 19 September 2014, to resume the work of the Panel. Indonesia's suspension request was made between the Panel establishment and Panel composition and had the consequence of suspending any *future* work of the Panel for more than 12 months. The Panel, therefore, had no authority or jurisdiction to consider the matters that Indonesia raised.

13. The Panel erred by referring to the standard in *EC – Bananas III*. Indonesia was exercising, rather than relinquishing a right under Article 12.12 DSU. Furthermore, the expiry of the 12 month period did not imply that Indonesia was surrendering its right to bring dispute settlement proceedings as Indonesia had the right to bring fresh dispute settlement proceedings concerning the same matter and ask for the establishment of a new panel. Moreover, regardless of any ambiguities in Indonesia's request, it resulted in a Secretariat response, pursuant to which no panel work occurred for more than 12 months. The Panel should have made an objective assessment based on all the facts before it, pursuant to Article 11 of the DSU. The Panel, therefore, committed an error in interpretation and/or application of the law, including Article 12.12 DSU.

14. Furthermore, the Panel omitted any reference to the response to Indonesia's request from its analysis, despite it being central to the EU's argument, thereby violating Article 11 of the DSU. Moreover, the Panel's erroneously refers to the EU "insufficiently demonstrating", although there were no issues of fact and evidence. Rather, the Panel's conclusion rests upon the legal characterisation of the facts, specifically that there was no Article 12.12 request. Additionally, the Panel's comments on Indonesia's request are purely formalistic, rather than looking to the substance of the request, the response to the request and the ensuing inactivity. Finally, the Panel accepts that Article 8 and Article 12.12 of the DSU are mutually exclusive, while they actually contain concurrent obligations. Therefore, the Panel failure to analyse these matters constitutes an error in interpretation and/or application of

the DSU. All of these errors constitute a violation of the obligation to make an objective assessment pursuant to Article 11 of the DSU.

15. Having reversed the Panel's findings and conclusion on this point, the European Union requests the Appellate Body to complete the legal analysis, by finding that the DSB's authority lapsed pursuant to Article 12.12 of the DSU and reverse all of the Panel's findings and recommendations.

4 THE PANEL ERRED IN THE INTERPRETATION AND APPLICATION OF ARTICLE 6.7 OF THE ANTI-DUMPING AGREEMENT

16. The Panel erred by considering that Article 6.7 ADA requires in practice the disclosure of a description of the verification process rather than its results. While the EU agrees with the Panel that "results" in Article 6.7 refers to what is achieved or obtained during the verification, it points to the relationship between Article 6.7 and Article 6.9 and argues that the "results" are closely related to the essential factual outcomes of the verification, which may have a bearing on the authorities' decisions, enabling companies to defend their interests.

17. The Panel wrongly interpreted Article 6.7 and found that disclosure of the results of the verification requires, as a minimum, an indication of: (1) the previously supplied information for which supporting evidence was requested, (2) any other information requested, (3) the documents that were collected, (4) whether the additional information was made available, and (5) whether the accuracy of the information supplied was confirmed by the investigating authority. Most of these elements refer to the process of verification, rather than its results. Instead, the verification visit is essentially a documentary exercise that focuses upon documentary evidence.

18. In this case, there is no dispute that the requirement sub (3) was respected.

19. Moreover, since the verified firms cooperated, there was no document requested that was not supplied. In any event, information not supplied does not constitute a "result" since it was not obtained as a result of the verification.

20. Information already submitted, for which supporting evidence is required is also manifestly not an outcome of the visit. In any case, PTMM representatives were present during the visit and they were informed beforehand of the documents to be prepared for the verification. Hence, what has been verified resulted from the circumstances of the procedure.

21. Requests for information are equally not a result of the visit, but pertain to the process of verification.

22. Finally, the requirement to include a statement setting out whether or not the authorities were able to confirm the accuracy of the information supplied implies that the investigating team should assess the information collected. However, the evaluation of the evidence and information is the task of the authority and the result of the antidumping investigation and is disclosed as essential facts pursuant to Article 6.9. It cannot be performed by the verification team.

23. Additionally, the Panel considered that the behaviour of the investigated firm is irrelevant in assessing the compliance with Article 6.7. However, as no particular disclosure format is prescribed, compliance with Article 6.7 should be assessed by considering all facts of the case, including the behaviour of the investigating authority and the investigated firms. In the present case, the EU and PTMM agreed on the necessary corrections and drafted a list of documents collected during the verification. PTMM never made the point that any result of the verification had not been disclosed. By denying any relevance to those factual elements, the Panel interpreted Article 6.7 in an abstract and formalistic way.

24. Finally, the Panel went even further than the minimum disclosure that itself identified. It required a description of the verification process, detailed enough to enable the Panel to

connect any correction that was made with specific evidence that was verified or not during the investigation or with other events.

25. Therefore, the EU requests the Appellate Body to reverse the Panel's conclusion in para. 8.1.d.

5 THE PANEL ERRED IN THE INTERPRETATION AND APPLICATION OF THE DSU, PARTICULARLY ARTICLE 12.1 OF THE DSU, AND ITS ADDITIONAL WORKING PROCEDURES CONCERNING BUSINESS CONFIDENTIAL INFORMATION

26. The Panel designated as BCI and redacted from the public version of its report information which was already in the public domain. The decision to bracket this information prejudges the comprehension of the Panel report. Furthermore, the Panel erred by not requiring justifications for Indonesia's requests for specific bracketing, as well as by not requiring non-confidential summaries of the bracketed information.

27. The above constitutes an error in the interpretation and application of Article 12.1 of the DSU and Paragraphs 1 and 9 of the Panel's Additional Working Procedures Concerning BCI. For the same reasons, the Panel also acted inconsistently with Article 12.7 of the DSU by over-bracketing and, therefore, under-reporting to the DSB, as well as with Article 10.1 of the DSU. Finally, it also acted inconsistently with Article 11 of the DSU by failing to require justifications to Indonesia and by failing to comply with its own Procedures.

ANNEX B-3

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION

1 INTRODUCTION

1. In this executive summary, the European Union ("EU") summarizes the arguments presented to the Appellate Body in its Appellee Submission.

2 BACKGROUND AND THE MEASURES AT ISSUE

2. The contested measure expired on 12 November 2016, as communicated to the Panel and Indonesia soon after. Since the sole measure at issue no longer exists, Indonesia's appeal is inconsistent with provisions within Article 3 of the DSU, and, therefore, ruling on the matters raised by Indonesia is unnecessary. These claims are incorporated by reference in the present submission from the EU's Other Appellant Submission.

3. Turning to the case, in 2010 the EU initiated an anti-dumping investigation regarding imports of certain fatty alcohols and their blends, originating *inter alia* in Indonesia. Two Indonesian producers − PT Musim Mas ("PTMM") and Ecogreen, as well as their related traders − ICOF-S and EOS, respectively, were investigated.

4. A Sale and Purchase Agreement ("SPA") between PTMM and ICOF-S was among the evidence. It provides for an ICOF-S "mark-up", charged exclusively on export sales of PTMM products as payment for certain "functions, obligations and risks" − and their associated expenses − assumed by ICOF-S in respect of these sales. The SPA constitutes the entire agreement between the companies.

5. During the investigation, the issue of the appropriateness of export price adjustments for PTMM and Ecogreen, reflecting the involvement of their related traders, was deliberated. Pursuant to the EU Basic Anti-Dumping Regulation ("Basic Regulation"), an adjustment was made for both. ICOF-S was found to have similar functions to an agent on a commission basis pursuant Article 2(10)(i) of the Basic Regulation. No adjustment was made for PTMM's domestic sales. The adjustment for Ecogreen was later revised, however, PTMM's adjustment remained due to its different factual situation.

6. Another issue was whether PTMM and ICOF-S constituted a single economic entity ("SEE"). The EU did not consider so, in light of the content of the SPA, the export ICOF-S mark-up, the direct invoicing of domestic sales to PTMM and the sale activities of ICOF-S of products from other producers.

7. The findings of the investigation were crystalized in three acts − Council Regulation (EU) No. 446/2011 of 10 May 2011, Council Implementing Regulation (EU) No. 1138/2011 of 8 November 2011, and Council Implementing Regulation (EU) No. 1241/2012 of 11 December 2012. The three determinations were the subject of the panel proceedings between the parties.

3 INDONESIA'S CLAIM OF THE PANEL'S LEGAL ERROR UNDER ARTICLE 2.4 OF THE ADA

8. The Panel established its understanding of Article 2.4 as mandating for investigating authorities to make a fair comparison between export price and normal value by making allowances for proven differences which have an impact, or are likely to have an impact, on the price of the transactions in an unequal manner. It based this on the text of Article 2.4 and WTO jurisprudence, finding that adjustments must be made only for expenses linked to either the export or domestic side of a transaction, or to both but in different amounts.

9. Indonesia's claim of error is predicated on the assumption that the correct legal standard under Article 2.4 of the ADA requires an examination of the relationship between affiliated

parties. However, Indonesia did not demonstrate how the relationship between affiliated parties is relevant for adjustments for commissions paid to a related trader only for export sales. Indonesia's reading finds no support in the text of the provision, nor in the case law referred to. In fact, the Appellate Body held, in one case referred to, that an Article 2.4 adjustment may be necessary even when the reseller is an affiliated company. Moreover, in another case, "supporting" Indonesia's deliberation of the criteria for delimiting when legally separate entities form an SEE, Indonesia itself argued that an adjustment was necessary for the interference of a trader that formed a SEE with a producer.

10. Indonesia's claim of error is also based on a partial and incorrect reading of the Panel Report, further examined below. Indonesia disputes the sequence, whereby the Panel established the Article 2.4 legal standard, examined the EU's actions and only then analysed Indonesia's arguments, criticizing the drafting technique chosen by the Panel rather than the legal standard applied. However, the Report should be read in a holistic way.

11. The Panel examined Indonesia's SEE argument, however, determined that the existence of a SEE was not dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4. Regardless of the existence of a SEE, a transaction could affect export prices and normal value in different manners and, would, therefore, require allowances to be made. The Panel did not ignore the argument, nor did it misconstrue the importance of the question whether a SEE exists.

12. Finally, with regard to the amount of the adjustment, Indonesia never made a separate claim disputing it and, therefore, the Panel did not examine the issue. As this issue was not covered in the Panel Report, it should also not be examined in the appeal procedure, pursuant to Article 17.6 of the DSU.

13. Moving to the EU's factual findings, the adjustments made by the EU authorities were based on the findings that (1) the ICOF-S mark-up was exclusively linked to export sales and (2) ICOF-S had functions similar to those of an agent working on a commission basis. The Panel deemed both findings reasonable.

14. Indonesia argues that the Panel erred by finding that ICOF-S had functions similar to an agent on a commission basis, and by characterising this as a "factual" finding. The finding is irrelevant from a WTO law viewpoint and for the Panel, since no claim of "as such" inconsistency of EU domestic law with WTO law was made. The Panel rightly characterized these determinations as "factual" findings. Furthermore, the Panel did not consider this to be part of the Article 2.4 legal standard, but only examined the evidentiary support for the authorities' findings. It, nevertheless, looked at Indonesia's arguments and did not err in finding that the SPA had further functions besides being a transfer pricing agreement. ICOF-S' agent-like functions are also supported by Indonesia's own agent definition as "[n]o sale, no commission".

15. The Panel did not err in analysing whether adjustments may be made to export price for sales, general and administrative (SG&A) expenses and profits. According to Indonesia, within an SEE expenses and profits are incurred for the SEE as a whole. Its claim of error is predicated on the assumption that the degree of affiliation is crucial for Article 2.4 adjustments. The arguments of this claim were rejected by the Panel.

16. The Panel relied on jurisprudence to argue that price components reflect the particular circumstances of the sale, beginning with the cost of production and sale and an amount of profit and adding an amount for costs and profits for each successive participant in the distribution chain (their SG&A and profit). EU authorities disaggregated the mark-up into SG&A and profit components only to properly quantify the adjustment, since the mark-up was designed to cover the costs of ICOF-S' services. The Panel rejected Indonesia's SEE argument, since intervention of downstream participants may result in additional costs and profits regardless of the existence of a SEE.

17. The Panel also did not err in finding that the adjustment did not result in an asymmetrical comparison. Indonesia claims that making adjustments for SG&A expenses and profits for entities within a SEE leads to an asymmetrical, unfair comparison under Article 2.4. This is

predicated on the wrong assumption that the existence of a SEE is a key issue for Article 2.4 adjustments, which was rejected by the Panel. Furthermore, as a matter of fact, the EU did not establish a dumping margin for the SEE constituted by PTMM and ICOF-S, but established duties only with regard to PTMM's products.

18. Regarding the section of the Panel Report challenged, the Panel examined the price components of both export price and normal value, to determine whether their comparison was fair. Rightly basing itself on the P&L submitted by PTMM, the Panel found that PTMM incurred the same costs for both domestic sales and export sales, the only difference being the involvement of ICOF-S with regard, exclusively, to export sales. The Panel did not assess the correctness of the value of the allowance made, since Indonesia did not dispute it.

19. Contrary to Indonesia's argument that the deduction of SG&A costs and profits within a SEE depends on the location of the related trader (in or outside of the importing market), the EU argues that the text of Article 2.4 confirms that the existence of affiliation between companies is not dispositive of whether adjustments are warranted.

20. Finally, despite Indonesia's arguments, the EU did not treat PTMM and ICOF-S as a SEE under Article 6.10 of the ADA. This new claim was introduced at a late stage of the Panel proceedings, limiting the EU's due process rights and the interests of third parties, who could not be aware of it. Unsurprisingly, the Panel did not explore it in depth. Furthermore, Indonesia's claim would mean that the export price of a SEE should be constructed in compliance with Article 2.3, rather than through an adjustment under Article 2.4, however the Panel request does not contain any independent or principal claims based on Article 2.3. Therefore, it did not fall within the Panel's remit and should not be considered by the Appellate Body.

21. In any event, Indonesia's claim is unfounded. First, no single dumping margin under Article 6.10 was established for PTMM and ICOF-S. Second, EU authorities treated the two companies as related throughout the proceedings, but never made a SEE finding, as this was not required under WTO law. Third, since they were related, the EU, naturally, took the price for the first sale to an unaffiliated customer in the importing country as a start. Fourth, the EU did not construct the export price, but distinguished between sales from ICOF-S to unrelated customers in the EU and to the related EU trader ICOF-E. Furthermore, since ICOF-S and PTMM were related, the authorities re-examined the ICOF-S mark-up, basing their findings on facts of the case and reaching an adjustment close to the mark-up in the SPA.

4 THE PANEL'S STANDARD OF REVIEW

22. Although Indonesia claims the Panel erred in applying the relevant standard of review and sets arguments to that end, it does not seek to reverse any part of the Report, setting out such standard. Nevertheless, the EU sets out its understanding of the Panel's proper standard of review.

23. First, a balanced approach is required by the Panel with regard to the degree of control exercised over an authority – lying between complete deference and *de novo* review. Similarly, there is no absolute rule on the submission of arguments before the panel – not all arguments must have been submitted during the investigation, nor must they all be apparent from the reasoning of the contested measure. The same applies with regard to the standard of reasoning and the presentation of evidence. These should be assessed on a case-by-case basis.

24. Additionally, the entire record of evidence could be relevant in WTO proceedings. Contrary to Indonesia's view, defendants and the panel should be able to make comments on the substance of contradicting evidence, not specifically referred to in a measure, without these comments being automatically considered *ex post* rationalization or a *de novo* assessment. This depends on the substantive and procedural context of each case. Furthermore, it should be permissible for a WTO litigant to be able to refer to material beyond the "record" of a particular dispute, instead of artificially sealing it off.

25. "Silence" on the part of an authority should not entitle an interested party to assume that the evidence submitted will be expressly "used" in the measure. The authority is to examine and weigh the evidence and make determinations. A requirement to avoid "silence" would create an interminable re-iteration between the authority and parties. A better approach would be to require a panel to take into account the overall substantive and procedural context when addressing evidence on the record, which is not specifically referenced in the measure or disclosure. As panel litigation may be very complex, this approach would be balanced and reasonable.

5 SECTION 7.3.5.1. OF THE PANEL REPORT

26. Indonesia accuses the Panel of pre-judging the EU's compliance with Article 2.4 before addressing its arguments, claiming a violation of Article 2.4 and (potentially) of Article 11 of the DSU. The fact that the Panel was then, supposedly, influenced by its own analysis was a breach of the burden of proof and Indonesia's due process rights under Article 17.6 of the ADA and Article 11 of the DSU.

27. First, these claims are directed against the structure and procedure, rather than the substance of the Panel Report. Second, Section 7.3.5.1 must be assessed in the context of Section 7.3 of the Report as a whole. Before Section 7.3.5.1., the Panel set out the disputed issue, the parties' positions, and the applicable legal standard, demonstrating understanding of the matter. After it, the Panel examined Indonesia's arguments regarding the compliance of the mark-up adjustment with Article 2.4 in light of the relationship between PTMM and ICOF-S.

28. Many of the arguments, submitted by Indonesia, are matters of EU, rather than WTO law. The Panel was careful to distinguish between EU and WTO law, mindful of its obligation to make an objective assessment under WTO law, while examining the reasonableness of the EU authorities' findings in the circumstances of the measure's adoption. The EU law characterisation of a particular fact pattern as consistent or not with the Basic Regulation is a question of fact, while the consistency of the contested measure with Article 2.4 of the ADA is a question of both law and fact. The Panel first engaged with the EU law facts before proceeding to its WTO law analysis and it, therefore, did not pre-judge its assessment under WTO law. Even after finding there was sufficient evidence to support the authorities' finding of a difference affecting price comparability, the Panel examined the objectivity of the authorities' evaluation before deeming the standard of Article 17.6(i) met.

29. Indonesia neglects the carefully structured Panel Report. Indonesia disputes a section which is intermediary, rather than final for the Panel's conclusions. This drafting approach was necessitated due to the blend of WTO and EU legal arguments, presented by Indonesia to the Panel.

30. Furthermore, Indonesia wrongly claims that the Panel's actions are in violation of Article 2.4. Article 2.4 does not impose any obligations on panels. Furthermore, Indonesia does not dispute the parts of the Report, setting out the legal standard of Article 2.4 (even if it claims that the Panel did not articulate a legal standard). Moreover, a Panel Article 2.4 violation could exist only as a consequential claim to a violation of Article 11 of the DSU, however, how one follows from the other is unclear.

31. Finally, Indonesia invokes Articles 17.6(i) and (ii) of the ADA within an appeal under Article 11 of the DSU, however, those provisions refer to interpretation, while Article 11 of the DSU relates to the facts. Furthermore, Indonesia turns to the Appellate Body for "comprehensive guidance" as to how to properly present its claim, which it is not entitled to do. The same applies with regard to Indonesia's lack of explanation as to its "direct export sales" argument.

6 THE PANEL'S ALLEGED "*DE NOVO* REVIEW" OF CERTAIN EXHIBITS SUBMITTED BY INDONESIA AND THE EUROPEAN UNION

32. Indonesia accuses the Panel of conducting a *de novo* review of certain exhibits and complains that the EU offered an *ex post* explanation. It claims that a silence in the measure

precludes a panel from reviewing such matters without violating the due process rights of interested parties and conducing a *de novo* review.

33. Indonesia's extreme approach to the problem would mean that any document that is on the record but not expressly referenced in the measure that is "ambiguous" can be brought to a panel by the complainant, but in no case are the defendant or the panel allowed to engage in *ex post* explanation or *de novo* review. The complainant would, then, win on this point regardless of the substantive merits of the document in question. We argue for a more even-handed approach. In the present case the Panel was responsive to the evidence presented by Indonesia and its representations regarding it. This would not justify reversal and completion of the legal analysis of the Panel.

34. The EU also disagrees as to what *de novo* review means. A panel should not be precluded from making substantive comments on a specific piece of evidence. Indeed, the panel is obliged by Article 11 of the DSU to make an objective assessment, including of the facts.

35. Indonesia also raises certain arguments with regard to the specific exhibits of evidence it refers to. With regard to Exhibit IND-47, Indonesia does not appeal the factual findings in the Report and, therefore, the Appellate Body should rely on it, rather than Indonesia's factual assertions concerning the "nature and significance" of that evidence. The claim is a procedural, not a substantive one.

36. Regarding the company-internal verification notes, since there are no agreed written minutes of the verification, the EU argues they can only be used against Indonesia, due to their nature of an admission against interest. Regarding IND−18, 19, and 34, the Panel did indeed address the evidence, referred to. As it found the Article 2.4 legal standard to be independent of determinations on the existence of SEEs, it did not err in holding that the authority was under no obligation to refer to this evidence.

37. Regarding the substance of the Panel's analysis, it should be read in its entirety. The Panel set out the content of the SPA and considered the analysis carried out by the EU authority, and the opportunity given to PTMM to rebut these findings, concluding that the authority's findings were sound. It was reasonable for the Panel to consider these circumstances in making an objective assessment of the matter.

7 ALLEGED IGNORING OR SUMMARY DISMISSAL OF ALLEGEDLY KEY ARGUMENTS AND EVIDENCE CONCERNING THE SPA

38. Since the existence of the SPA was uncontested, the Panel relied on it and extensively referred to it in its Report. Although the Panel did not refer to each exhibit specifically, it explained why it rejected Indonesia's arguments − the irrelevance of a SEE for Article 2.4, the mark-up in the SPA as a price difference necessitating an adjustment, the "entire agreement" clause in the SPA and the exclusive application of the SPA to export sales, the allocation of risk clause, the difference in factual situations between PTMM and Ecogreen. The Panel, therefore, did not ignore any of Indonesia's arguments, even if it did not refer to them one by one.

8 INDONESIA'S REQUEST FOR COMPLETION OF THE LEGAL ANALYSIS

39. Although the Appellate Body will not reach this question, as it would not reverse the Panel's findings under Article 2.4, the EU considers that it could not complete the analysis, as the applied EU law does not indicate inconsistency with Article 2.4 of the ADA.

ANNEX B-4

EXECUTIVE SUMMARY OF INDONESIA'S APPELLEE'S SUBMISSION

1 THE EU'S APPEAL OF THE PANEL'S FINDING UNDER ARTICLE 6.7 SHOULD BE REJECTED[1]

1.1. Indonesia claimed before the Panel that the EU had failed to disclose the results of the verification visit, contrary to Article 6.7 of the Anti-Dumping Agreement. The Panel agreed.

1.2. The Panel properly interpreted Article 6.7 to require the investigating authority to provide results of verification in the sense of "what is achieved, brought about or obtained in the course of the on-the-spot verifications". The Article 6.7 obligation is a due process right of interested parties, including the investigated company and the applicants. The Panel clarified that the obligation was "unqualified" and "rest[ed] entirely on the investigating authorities".

1.3. The EU appeals both against the Panel's interpretation of Article 6.7 and its application of its interpretation to the case before it. Both aspects of the EU's appeal should be rejected.

1.4. The EU makes a general claim that the Panel required the investigating authority to provide excessively detailed "results" of the verification. However, the EU fails to show how the Panel erred in its legal interpretation of Article 6.7 or to show that the Panel's interpretation would burden investigating authorities. The EU has also failed to show any error in the Panel's application of its standard in this case.

1.5. The EU improperly attempts to conflate the requirements of Article 6.7 regarding the disclosure of the verification results with those of Article 6.9 regarding the essential facts. These are different concepts. The EU's argument that the results of the verification are limited to those matters that become "essential facts" would, in effect, read the obligation to provide the results of the verification out of the Anti-Dumping Agreement. As the Panel correctly noted, the term "results of the verification" is not limited to the facts that will eventually form the basis of the decision to impose measures.

1.6. The term "results" must also be read in the context of the information the investigating authority requests from companies during verifications. The EU is incorrect to argue that the results of a verification "are essentially the documentary evidence that th[e] firm provides … but not assertions, statements, arguments (by the firm or the investigating authority"). The answers to the verifiers' questions may provide important context for documents supplied in the questionnaire responses or at verification. This context may not be self-evident on the face of the documents themselves. In these circumstances, the answers provided by company officials may be at least as important as the documents themselves.

1.7. The four elements listed by the Panel as comprising the minimum requirements of the "results" encompass the core elements of any on-the-spot verification. The EU has failed to show in concrete terms that the Panel's standard requires an excessive level of detail, either in general or in the specific circumstances of this case.

1.8. The requirement to disclose the results of the verification is, in essence, a transparency and due process obligation. These obligations are not to be taken lightly. It is not clear why the EU resists compliance with this obligation so strenuously.

1.9. For these reasons, the EU's appeal should be rejected.

[1] This executive summary contains a total of 2,603 words (including footnotes). Indonesia's appellee's submission contains a total of 29,582 words (including footnotes).

2 THE EU'S APPEAL ON THE LAPSE OF THE PANEL'S AUTHORITY SHOULD BE REJECTED

2.1. Shortly after the establishment of the Panel, a counsellor of the WTO Secretariat sent an email to the parties to propose a meeting to hear the parties' preferences for panellists. Indonesia replied by asking to postpone the meeting "while [a]waiting the development from Brussel[s]".

2.2. Before the Panel, the EU submitted that Indonesia's reply amounted to a suspension of the Panel's work under Article 12.12 of the DSU. In its Report, the Panel rejected the EU's objection. It correctly set out a three-pronged legal standard of whether its authority had expired under Article 12.12 of the DSU. The Panel found that the EU had not met the first prong of the legal standard - i.e. whether Indonesia had made a request to suspend the work of the Panel. The Panel correctly declined to address the second and third prongs under Article 12.12.

2.3. The Appellate Body has flexibility to approach the EU's appeal from two different angles. It may assess whether, as a matter of law, the suspension of the panel's work in Article 12.12 of the DSU refers to the work of a panel that has been composed and begun its work. Alternatively, the Appellate Body may follow the Panel's approach and assess whether the EU sufficiently demonstrated that Indonesia indeed made a request to suspend the Panel's work through its email to the Secretariat.

2.4. The EU misstates the role of the Secretariat to argue that the Secretariat "act[ed] in the name of the Panel". Article 27.1 tasks the Secretariat with *assisting* panels. This provision must be read in the context of Article 8.6, which requires the Secretariat to propose names of panellists to the parties. When performing that function, the Panel is assisting the parties, not the panel.

2.5. In advancing its argument that the Secretariat acts "in the name of" a panel, the EU refers to the role of panel secretaries. Yet the EU fails to explain whether the WTO counsellor with whom Indonesia communicated was the secretary to the uncomposed panel so that it could be said that Indonesia in fact addressed the Panel in its email to this counsellor. In addition, panel secretaries merely perform tasks pursuant to the panel's instructions; they do not make decisions "in the name of the panels".

2.6. Only a composed panel may decide to suspend its work. Article 12.12 of the DSU, first sentence, starts with "[t]he panel may suspend its work at any time ...". The use of "may" affords discretion to the panel in determining whether to suspend its work following a request of the complainant. Moreover, the active voice in the phrase "[t]he panel may suspend its work ..." in the first sentence of Article 12.12 reflects the intention of the DSU negotiators to require a positive decision by the panel to suspend its work. It follows, logically, that only composed panels may take decisions pertaining to panels' work.

2.7. The context confirms that Article 12.12 refers to a *composed* panel. As is clear from Articles 6 to 16, the DSU contains a logical sequence governing all facets of a panel. The DSU does not contain a "back-and-forth" set of provisions. In addition, Article 12 of the DSU concentrates on the procedure of the panel *vis-à-vis* the parties. Article 12 thus relates to the *work* of a *composed* panel.

2.8. The EU erroneously relies on Article 12.9 to assert that Article 12 also concerns matters prior to panel composition. A holistic reading of Articles 12.8 and 12.9 yields the opposite conclusion. Article 12.8 provides a general rule of six months for panel procedures counting from the composition of a panel, at the earliest. Article 12.9 establishes the possibility of an exception to the general rule. The time-frame in the last sentence of Article 12.9 is not a time-frame for the panel's "work". Rather, it contains the maximum time a complainant may expect to have a panel report from the moment a panel is established.

2.9. Accordingly, the logical sequence of the DSU, and the structure of Article 12, confirm that the work of the panel under Article 12.12 refers to that of a composed panel.

2.10. Moreover, prior practice confirms that Article 12.12 refers to a composed panel. Panels in about 29 disputes have made a positive decision to "agree" to suspend its work upon a request of the complainant. This confirms that a panel must be composed in order to decide on the suspension of its work.

2.11. In response, the EU relies on document WT/DS420/7 in *US – Carbon Steel (Korea)* to argue that Article 12.12 may apply between panel establishment and composition. This document, however, served the purpose of informing WTO Members of Korea's communication to suspend that uncomposed panel's work. The Secretariat did not assess whether the Korean request effectively constituted a suspension under Article 12.12 of the DSU. In fact, the relevant dispute settlement sections of the WTO website reveal that the Secretariat has not treated Korea's request as a suspension under Article 12.12.

2.12. Finally, the EU raises six claims under Article 11 of the DSU. First, the EU erroneously challenges the interpretation and application of Article 12.12 under Article 11 of the DSU. This is an issue of law under Article 17.6. Second, the EU unjustifiably criticizes the Panel for adopting the standard of review it did. However, this standard complies with the Panel's duty under Article 11 of the DSU. Third and fourth, the EU incorrectly faults the Panel for not addressing issues concerning the second prong of the legal standard under Article 12.12 - whether the Panel suspended its work. Since the Panel found that the EU had not met the first prong - that Indonesia never made a request under Article 12.12 - the Panel correctly declined analysing arguments and evidence concerning the second step of the legal standard. Fifth, the EU is not correct in criticizing the Panel for regarding its finding "as a matter of fact". This finding falls under Article 17.6 of the DSU regardless of the Panel's characterization of its finding. Sixth, the Panel gave relevant and sufficient reasons to support its finding that Indonesia had not requested the suspension of the Panel's work under Article 12.12. Accordingly, all claims under Article 11 of the DSU should fail.

2.13. Accordingly, Indonesia requests the Appellate Body to dismiss the EU's other appeal concerning the Panel's finding in paragraphs 7.29 and 8.1(a) of its Report.

3 THE EU'S APPEAL CONCERNING THE APPELLATE BODY'S JURISDICTION

3.1. Indonesia is very disappointed by the EU's assertion that Indonesia is "misus[ing]" the appeal procedure. Indonesia is simply making use of its right to appeal parts of a WTO panel report.

3.2. The EU fails to provide any arguments under Article 17 of the DSU, which is the provision governing Appellate Body jurisdiction. The EU questions the Appellate Body's jurisdiction on the basis of the measure at issue. But once a measure is properly before a panel, nothing in Article 17 (or, indeed, Article 6) of the DSU suggests that the Appellate Body may not have or may lose jurisdiction of appeals of questions of law contained in the panel report regarding that measure. The EU never argued before the Panel that the measure challenged by Indonesia was not properly within the Panel's jurisdiction.

3.3. The EU also appears to argue that the Appellate Body should decline to exercise its validly established jurisdiction. But Article 17.12 directly contradicts the EU's argument. Moreover, the Appellate Body has previously stated that Articles 11 and 23 of the DSU preclude a panel from declining to exercise validly established jurisdiction. These considerations apply equally to the Appellate Body. It is impossible to see how the Appellate Body would fulfil its obligations under Articles 11, 17.6 and 17.12 of the DSU if it were to decline to exercise its jurisdiction.

3.4. Moreover, when the Appellate Body is called upon to review a panel's findings, these findings already exist and could be adopted by the DSB, with all the legal consequences that this adoption entails. Before the Panel's findings have these effects, Indonesia is entitled by the DSU to have these findings reviewed by the Appellate Body. This is precisely why Article 17.12 requires the Appellate Body to address "each of the issues" brought before it. This is also why the Appellate Body does not exercise "judicial economy".

3.5. The EU also argues that, because the measure has expired, the dispute has ceased to exist. But the Appellate Body has consistently found that panels maintain jurisdiction with respect to measures that expired after the panel's establishment. The only difference is that panels are not entitled to make recommendations. These principles continue to apply when the Appellate Body is seized of an appeal against a panel report. The Appellate Body's jurisdiction builds on that of the Panel. The Appellate Body's task also does not hinge on the continued legal force of a measure. The Appellate Body is not called to determine, principally, whether a measure is consistent or not with WTO law. Instead, the Appellate Body's mandate is to review a panel's findings.

3.6. Moreover, contrary to what the EU alleges, Indonesia is not seeking to obtain an authoritative interpretation under the WTO Agreement. The EU also incorrectly quotes Indonesia's statements to the panel, arguing that this demonstrates that Indonesia agreed with the EU on certain points of principle. These quotes have nothing to do with the issue at hand, and were made at the beginning of the panel proceedings, on a different issue, well before a panel ruling was issued and before the measure expired.

3.7. The Panel also correctly maintained its recommendations in this dispute, because the expiry of the EU's measure came after the panel record had closed. This was entirely consistent with the Appellate Body's guidance concerning new evidence in late stages of panel proceedings.

4 THE EU'S APPEAL CONCERNING THE PANEL'S TREATMENT OF BCI SHOULD BE REJECTED

4.1. The EU further challenges on appeal the Panel's treatment of three sentences as business confidential information (BCI). These three sentences were submitted by Indonesia as Exhibit IDN-33 (BCI) and Exhibit IDN-24 (BCI) appended to Indonesia's first written submission and were clearly marked as BCI.

4.2. The EU's arguments should be rejected for several reasons. First, Indonesia bracketed the information that had been treated as confidential during the investigation. Moreover, the fact that the EU's General Court disclosed that information is not sufficient to remove protection of that information. The question is whether that information has properly been disclosed. Second, the EU bore the burden to prove that the General Court was authorized to disclose this information, despite it being treated as confidential during the investigation. The EU failed to meet that burden. Third, the EU raised its objection too late in the Panel's proceedings - a year after Indonesia submitted the bracketed information. The EU's objection was, therefore, untimely.

4.3. Moreover, the EU's argument that the Panel should have asked Indonesia to provide justifications for treating certain information as confidential and to submit a non-confidential summary has no foundation in the DSU or in previous practice. The EU's appeal would place an excessive burden on the parties (especially developing countries) and panels. Particularly, as a recurrent user of the WTO dispute settlement mechanism, the EU should reflect on whether this is the standard it wishes to be adopted.

4.4. Accordingly, the Appellate Body should reject the EU's appeal concerning the treatment of certain information as BCI.

5 CONCLUSION

5.1. For the above reasons, Indonesia respectfully requests that the EU's appeal be dismissed in its entirety and the Appellate Body uphold all of the Panel's findings challenged by the EU.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION

I. ARTICLE 2.4 OF THE AD AGREEMENT[1]

1. Indonesia argues that the Panel applied an incorrect legal interpretation of Article 2.4 in determining that the authorities' deduction to the export price for a commission paid to a trader was not improper. Indonesia claims the Panel erred in finding that a determination of whether the producer and trader formed part of a single economic entity ("SEE") was not dispositive.

2. The essential requirement for any adjustment under Article 2.4 is that the relevant factor must affect price comparability. The United States agrees with the Panel that whether an entity constitutes an SEE would not be dispositive of the need for adjustments under Article 2.4, and that depending on the underlying facts, transactions between affiliated entities may impact price comparability.

II. ARTICLE 17.6 OF THE AD AGREEMENT AND DSU ARTICLE 11

3. Indonesia claims the Panel failed to engage in an objective assessment, as required by Article 11, because it concluded that the authorities did not act inconsistently with Article 2.4 of the AD Agreement *before* addressing Indonesia's arguments and evidence. The United States does not view a panel's task to be resolving claims independent of the specific arguments that are raised by the parties. However, not every error rises to the level of a breach of Article 11. In this case, the Panel did address Indonesia's arguments later in its report. The United States also notes that a panel has no obligation to address in its report all arguments and evidence raised by a party.

III. THE CONTESTED MEASURE'S ALLEGED EXPIRY

4. The EU argues that the Panel erred in making recommendations and that Indonesia's appeal should be dismissed because the contested measure expired before the Panel's report was circulated. However, this alleged expiry is not a fact found by the Panel, and the Appellate Body may not consider new facts on appeal. Therefore, the EU's appeal must be rejected.

5. The Appellate Body and panels have consistently refused to consider new evidence submitted during interim review. Since the EU submitted evidence of the expiry after the Panel concluded its interim review, the Panel appropriately did not consider it. The Appellate Body also may not consider it, since DSU Article 17.6 limits the scope of Appellate Body review to legal matters developed by the panel. Nothing in the DSU suggests that the Appellate Body or the Director-General could modify the record of the Panel's proceedings to add the evidence of expiry.

6. The evidence of expiry was also irrelevant. Panels are tasked with determining whether the measures at issue are consistent with the relevant obligations at the time of establishment of the Panel. The alleged expiry of the EU measure just before circulation of the panel report is not relevant to the legal situation as of the date of the Panel's establishment.

7. Based on the foregoing, the Appellate Body's analysis of the EU's appeal should end there.

8. To the extent the Appellate Body considers the EU's substantive arguments, the United States considers the Panel's making of recommendations on the contested measure to be consistent with the requirements of the DSU. Pursuant to Articles 7.1 and 6.2, it is the challenged measures, as they existed at the time of the panel's establishment, that are within the panel's terms of reference and on which the panel should make findings. Pursuant to Article 19.1, a panel *must* make a recommendation where it has found a measure within its terms of reference to be

[1] This executive summary contains a total of 1230 words (including footnotes), and the U.S. third participant submission contains 13241 words (including footnotes).

inconsistent with the relevant Member's obligations. The expiry of the measure does not change this.

9. Other panels and the Appellate Body have reached similar conclusions. Statements by the Appellate Body suggesting that a recommendation may not be required, for example in *US – Certain EC Products*, were made in *obiter dicta*. That Appellate Body report does not examine the text of DSU Article 19.1 nor seek to reconcile its *obiter dicta* with the clear meaning of that text.

10. Defining the scope of a dispute based on the measures at the time of panel establishment benefits parties by balancing the interests of complainants and respondents, and by preventing Members from avoiding compliance by withdrawing, then re-imposing, offending measures.

11. The United States also views the EU's request that Indonesia's appeal be dismissed to be inappropriate and without legal authority. The Appellate Body is charged by the DSU to address the issues raised by the parties and to recommend that an offending Member bring any WTO-inconsistent measure, as it existed at the time of panel establishment, into conformity. This duty is not affected by expiry of the measure.

IV. ARTICLE 12.12 OF THE DSU

12. The EU appeals the Panel's finding that the DSB authority for the panel proceedings had not lapsed under Article 12.12.

13. The United States submits that 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. Further, the "work" of the panel refers to the examination by the panel, once composed, of the matter referred to it. 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*." The United States also considers that the proper interpretation and application of Article 12.12 lead to a desirable policy outcome.

V. ARTICLE 6.7 OF THE AD AGREEMENT

14. The EU argues that the Panel's interpretation of Article 6.7 requires, in practice, a description of the investigation process.

15. The United States considers that, at a minimum, Article 6.7 requires that the authority's verification report include discussion of information that was verified, not verified, or corrected with respect to essential facts referenced in Article 6.9. For example, the term "essential facts" relates necessarily to the determination of normal value and export prices, *as well as* to the data underlying those determinations. Accordingly, information verified or corrected at verification relating to these "essential facts" must be disclosed. On the other hand, trivial or immaterial aspects of the verification need not be disclosed.

VI. BUSINESS CONFIDENTIAL INFORMATION ("BCI")

16. The EU argues that the Panel's handling of BCI was inconsistent with DSU Articles 12.1 and 12.7 and the Panel's Additional Working Procedures.

17. The United States considers that Article 12.1 does not provide an adequate legal basis for the EU's claim. Even if the Panel's bracketing could be considered contrary to DSU Appendix 3 or the Additional Working Procedures, there is no basis to say that the Panel's decision to do "otherwise" after consulting the parties is inconsistent with the requirements of Article 12.1. The United States also considers that Article 12.7 does not require a panel to disclose all factual findings in its report. In determining whether the Panel complied with Article 12.7, there must be consideration of the degree to which a bracketed fact is material to the "basic rationale behind any findings and recommendations."

ANNEX D

PROCEDURAL RULINGS

ANNEX D-1

PROCEDURAL RULING OF 13 JUNE 2017

1 REQUESTS BY INDONESIA

1.1. On 11 May 2017, Indonesia addressed a letter to the Presiding Member of the Appellate Body Division hearing this appeal. In its letter, Indonesia made two requests. First, Indonesia requested the Division to adopt, pursuant to Rule 16(1) of the Working Procedures for Appellate Review (Working Procedures), additional procedures for the protection of certain business confidential information (BCI) in these appellate proceedings. Second, Indonesia requested leave to modify the executive summary of its appellant's submission, which was submitted on 10 February 2017, by replacing the information enclosed within double brackets in paragraph 7.9 of that executive summary with non-confidential information.

2 BACKGROUND AND ARGUMENTS OF THE PARTICIPANTS

2.1. On 13 July 2015, following consultations with the parties, the Panel in this dispute adopted Additional Working Procedures Concerning Business Confidential Information (Panel's BCI Procedures)[1]. For purposes of the Panel proceedings, the first paragraph of those procedures defined BCI as follows:

> … 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.

2.2. The Panel's BCI procedures set out a number of modalities concerning how the parties, third parties, and the Panel would treat BCI in the course of the Panel proceedings. In accordance with those procedures, the Panel redacted certain BCI from the version of its Report that was circulated to WTO Members on 16 December 2016.[2]

2.3. On 10 February 2017, Indonesia appealed certain issues of law and legal interpretation covered in the Panel Report. Indonesia's appellant's submission, the executive summary thereof, and its appellee's submission are all marked as containing BCI, and certain information in those documents is enclosed within double brackets. On 15 February 2017, the European Union filed a Notice of Other Appeal and an other appellant's submission. The cover page of the European Union's other appellant's submission states "[[Contains information designated by Indonesia and the Panel as "BCI", subject to adjudication, as marked]]". The European Union's appellee's submission similarly states "[[Contains BCI as marked, subject to adjudication]]", and both of these EU submissions contain information enclosed within double brackets.

2.4. At the time of filing its other appellant's submission, the European Union noted that no procedures governing the treatment of BCI had been adopted in these appellate proceedings. The European Union observed that, while the Panel's BCI Procedures do not bind the Appellate

[1] Panel Report, para. 1.7. The Panel's BCI Procedures are attached as Annex A-2 to its Report.

[2] The information redacted from the circulated version of the Panel Report was less extensive than the information placed within double brackets in the interim report provided by the Panel to the parties on 29 July 2016. During the interim review stage, the European Union requested the Panel to review the designation of certain information as BCI in the interim report on the grounds that some such information was in the public domain and should thus not be treated as BCI. The extent of bracketing of BCI and of redaction of the same from the circulated version of the Panel Report is the subject of a claim of error raised by the European Union on appeal. (See the European Union's Notice of Other Appeal, WT/DS442/6, pp. 2-3)

Body, Indonesia had designated certain information as BCI in its appellant's submission and bracketed it accordingly. For the European Union, Indonesia was in effect requesting confidential treatment of such information pursuant to Article 18.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). According to the European Union, this meant that the European Union and the third participants were to treat such information as confidential. Likewise, the Appellate Body was required not to disclose the designated information in its Appellate Body Report. The European Union considered this to be an acceptable way of proceeding, adding that this approach had the "advantage of not troubling the Appellate Body with the adoption of BCI procedures where that is not necessary."[3]

2.5. The European Union explained that, based on this understanding, it had also bracketed certain information in its other appellant's submission. However, the European Union emphasized that this was without prejudice to its claim that the Panel "over-designated" information as confidential in the Panel proceedings. Furthermore, the European Union reserved its right to address the extent of the bracketing in Indonesia's appellant's submission.[4]

2.6. On 17 February 2017, Indonesia sent a letter requesting the Appellate Body Division hearing this appeal to agree to the confidential treatment of certain information designated as BCI pursuant to Article 18.2 of the DSU. Indonesia indicated that it had designated certain confidential information in its submissions as BCI by means of double brackets ("[[" and "]]"), and that this information matched the information designated and treated as BCI by the Panel in this dispute. In its letter, Indonesia set out its understanding of what confidential treatment under Article 18.2 would entail in the appeal proceedings. Indonesia further stated that, to the extent that the Appellate Body agreed with its understanding, Indonesia did not request the adoption of separate procedures for the protection of BCI for these appellate proceedings.

2.7. By letter dated 20 February 2017, the Division invited the European Union and the third parties to comment on Indonesia's letter. By letter dated 23 February 2017, the European Union indicated that it shared Indonesia's understanding of the nature and consequences of Indonesia's request that certain information be treated as confidential, namely that such treatment flows directly from the DSU and that, therefore, no additional ruling was necessary. The European Union nevertheless cautioned that this was without prejudice to its challenge regarding "the extent of the bracketing of information in the public domain, and the need for meaningful non-confidential summaries". None of the third parties commented on Indonesia's letter.

2.8. By letter dated 16 March 2017, the Division informed the participants that it did not "share the understanding of the treatment of sensitive information pursuant to Article 18.2, outlined in Indonesia's letter of 17 February 2017". The Division explained that, pursuant to Articles 17.10 and 18.2 of the DSU, the confidentiality of any submissions or information submitted in these appellate proceedings was to be maintained. However, to the extent the participants in this appeal wanted the Division to undertake specific procedural steps not expressly contemplated under the DSU or the Working Procedures, such as excluding or redacting certain information from its Report, or imposing conditions on the composition of delegations or the content of discussions in an oral hearing, then the participants needed to request the specific treatment sought, explain why it was needed, and why the information in question warrants special and additional protection.

2.9. In addition, the Division noted that paragraph 7.9 of Indonesia's executive summary of its appellant's submission contained information enclosed within double brackets. The Division understood such brackets to indicate that the information contained therein was designated as BCI in the proceedings before the Panel. The Division pointed out, however, that, as indicated in the last paragraph of the Guidelines in respect of Executive Summaries of Written Submissions in Appellate Proceedings set out in the Appellate Body's Communication of 11 March 2015 (WT/AB/23), as well as in the letter dated 6 January 2017, from the Director of the Appellate Body Secretariat to the European Union and Indonesia, executive summaries submitted by participants are annexed in an addendum to the Appellate Body Report, and the content of such executive summaries is neither revised nor edited by the Appellate Body.

2.10. Lastly, the Division indicated that although it was unable to agree to the request as formulated by Indonesia in its letter of 17 February 2017, this was without prejudice to any

[3] European Union's other appellant's submission, para. 1.
[4] European Union's other appellant's submission, para. 2.

decision that the Division might take if it were to receive a request containing reasons for adopting additional procedures for the protection of BCI in this appeal.

2.11. On 11 May 2017, Indonesia submitted a revised request to the Division. First, Indonesia requests the Division to adopt additional procedures pursuant to Rule 16(1) of the Working Procedures. Indonesia considers that the adoption of these procedures, above and beyond the standard or "general" layer of protection of confidential information reflected in Articles 18.2 and 13.1 of the DSU, is necessary in the interest of fairness and orderly procedures. Indonesia proposes BCI procedures similar to those adopted by the Appellate Body in *US – Washing Machines*.[5] Indonesia further suggests that, pending the Appellate Body's findings on the European Union's claims on appeal regarding the Panel's treatment of certain information as BCI, the Appellate Body extend BCI protection to all the information covered by Indonesia's request on a provisional basis, including the information for which the European Union argues that no BCI treatment is warranted. Second, pursuant to Rules 16(1) and 18(5) of the Working Procedures, Indonesia requests leave to replace the bracketed information, at paragraph 7.9 of the executive summary of its appellant's submission, with non-confidential information. In Indonesia's view, such an adjustment would in no way change the meaning of this paragraph.

2.12. Indonesia explains that it seeks BCI protection for the following two categories of information: (i) information contained and treated as BCI in the Panel Report; and (ii) any additional information submitted as BCI by either party to the Panel, in the course of the Panel proceedings, where that information was marked as BCI and was treated as BCI in the anti-dumping investigation and fell into the same categories as the information marked as BCI by the Panel.

2.13. Indonesia advances several reasons to justify its request, and contends that the identified information warrants additional protection on the basis of "objective criteria", including some of those identified by the Appellate Body in *EC and certain member States – Large Civil Aircraft*.[6] Indonesia highlights that, other than the three instances of BCI protection in the Panel Report that have been explicitly challenged by the European Union on appeal, there appears to be "full agreement" between the European Union and Indonesia that the information designated as BCI by the Panel warranted additional protection. Indonesia emphasizes the importance of ensuring continuity between the protection of BCI in domestic investigations, as provided for under Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and the protection of BCI in WTO dispute settlement proceedings. For Indonesia, it follows that the fact that the information for which BCI protection is being sought in WTO dispute settlement was accorded BCI treatment in the underlying anti-dumping investigation is a relevant objective criterion for adopting BCI procedures in WTO dispute settlement. Indonesia adds that additional procedures are needed so as to ensure that the protection afforded to certain information in the domestic anti-dumping proceedings and in the Panel proceedings is not lost in these appellate proceedings.

2.14. In its request, Indonesia also explains that the information treated as BCI by the Panel is proprietary to the two privately held companies concerned, PT Musim Mas (Indonesia) and ICOF-S (Singapore). These companies are not required to, and do not, publish information such as their corporate and ownership structure, nor about their operations, sales procedures, or mode of interaction between various sub-entities. Indonesia also maintains that the information for which BCI protection is being sought is, by its nature, confidential, because it relates to the corporate structure, ownership, or operations of the two companies, including the details of their respective responsibilities in sales and marketing activities. In Indonesia's view, disclosure of this information could give rise to commercial harm and to an unfair advantage for the companies' competitors. In further support of its request, Indonesia sets out a table identifying in detail the five types of information in respect of which BCI protection is being sought[7], and, for each of these: (i) an

[5] Appellate Body Report, *United States –Anti-Dumping and Countervailing Measures on large Residential Washers from Korea*, WT/DS464/AB/R/Add.1, Annex D-1, Procedural Ruling of 9 May 2016, paras. 17-20.

[6] Appellate Body Report, *EC and certain member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[7] Indonesia seeks BCI protection for: (i) information concerning ownership and control structures with respect to PT Musim Mas, ICOF-S, and the Musim Mas Group, as well as the relationship between shareholders; (ii) information on the detailed content of investigation exhibit "Attachment PTMM-18"; (iii) the content of organizational charts setting out PT Musim Mas' corporate structure; (iv) PT Musim Mas' and ICOF-S' financial and other business data and figures from annual reports, other documents submitted in the investigation

indication of where in the Panel Report and in Indonesia's submissions such information is included; and (ii) identification of the "objective criteria" that justify the adoption of additional procedures to protect the information.

2.15. On 12 May 2017, the Division invited the European Union and the third participants to comment on Indonesia's letter. By letter dated 16 May 2017, the European Union stated that it has no objection, in principle, to BCI procedures of the kind proposed by Indonesia, even though it is of the view that such additional procedures may not always be necessary. The European Union also agrees with Indonesia's proposal to designate provisionally certain information as BCI, pending the outcome of the bracketing issues that the European Union has raised in this appeal. However, the European Union stresses that the fact that its challenge on appeal concerns only a limited number of instances of bracketing in the Panel Report does not mean that it agrees with all other instances of BCI designation by the Panel. Thus, notwithstanding that it does not object to Indonesia's request, the European Union expresses doubts as to the merits of some of Indonesia's arguments. For instance, the European Union has difficulty accepting the proposition that information about ownership and control structures is by nature confidential because the companies concerned are not publicly held and therefore do not publish their financial reports. The European Union also questions the confidential nature of information contained in a document submitted in the investigation (Attachment PTMM-18[8]) that allegedly shows how the two companies concerned cooperate. However, the European Union acknowledges that it has not raised the bracketing of such information on appeal and doubts that these issues warrant further consideration.

2.16. As regards Indonesia's second request, the European Union has no objection, given the specific factual circumstances of this case, to Indonesia's request to amend the executive summary of its appellant's submission.

2.17. None of the third participants commented on Indonesia's letter of 11 May 2017.

3 ANALYSIS

3.1. Turning first to consider Indonesia's request for additional procedures to protect BCI, we recall the Appellate Body's observation in *EC and certain member States – Large Civil Aircraft* that:

> The confidentiality requirements set out in [Articles 17.10 and 18.2 of the DSU, as well as paragraph VII:1 of the Rules of Conduct for the [DSU]] are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect adequately the confidentiality of that information.[9]

3.2. On such occasions, it is the duty of the participants to request and justify the need for additional protection of confidential information.[10] While it is for the participants to request additional protection of confidential information, pursuant to Article 17.9 of the DSU and Rule 16(1) of the Working Procedures, it is for the Appellate Body, relying upon objective criteria, to determine whether the information submitted by the participants deserves additional protection, as well as the degree of protection that is warranted.[11] Such objective criteria could include, for example: whether the information is proprietary; *whether it is in the public domain or protected*;

(e.g. spreadsheets) and documents provided by the European Commission to PT Musim Mas and ICOF-S (e.g. disclosures); and (v) direct quotations, data, or figures from the PT Musim Mas and ICOF-S Sales & Purchase Agreement.

[8] Panel Exhibit IDN-47.

[9] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8. See also Appellate Body Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless steel Seamless Tubes ("HP-SSST") from the European Union,* WT/DS460/AB/R, para. 5.315.

[10] Appellate Body Reports, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by* Mexico, WT/DS381/AB/RW, para. 5.3; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 10; *China – HP-SSST (EU)*, para. 5.311.

[11] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3, referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

whether it has a high commercial value for the originator of the information, its competitors, customers, or suppliers; the degree of potential harm in the event of disclosure; the probability of such disclosure; the age of the information and the duration of the industry's business cycle; and the structure of the market.[12]

3.3. Any additional procedures adopted by the Appellate Body to protect sensitive information must conform to the requirement in Rule 16(1) of the Working Procedures that such procedures not be inconsistent with the DSU, the other covered agreements, or the Working Procedures themselves.[13] Moreover, the Appellate Body must ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudicative process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other hand.[14] Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. The measures should go no further than required to guard against a determined risk of harm that could result from disclosure.[15] When additional procedures to protect BCI are adopted, the Appellate Body must also "adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential".[16]

3.4. Turning to the case before us, we consider whether, in the circumstances of this appeal, and taking account of the nature of the relevant information, the general confidentiality requirements of the DSU and the Rules of Conduct for the DSU should be particularized through the adoption of special procedures to protect the confidentiality of that information. [17]

3.5. Indonesia explains that it seeks BCI protection for the following two broad categories of information: (i) information contained and treated as BCI in the Panel Report; and (ii) any additional information submitted as BCI by either party to the Panel, in the course of the Panel proceedings, where that information was marked and treated as BCI in the underlying anti-dumping investigation and fell into the same categories as the information marked as BCI by the Panel. We understand the second category identified by Indonesia to encompass only that information which the Panel treated as BCI in the course of its proceedings. In this regard, we recall that, at the interim review stage of the Panel proceedings, the European Union objected to the treatment of certain information as BCI in the Panel Report. Consequently, the Panel made some changes to its bracketing of information, resulting in an overall reduction of redacted information in the Panel Report.[18] We also bear in mind that the European Union has appealed the Panel's redaction of information from five paragraphs of its Report. We observe that Indonesia requests, and the European Union does not object to, provisional BCI protection being granted to the contested information pending the outcome of the European Union's claims on appeal.

3.6. Indonesia classifies the information in respect of which BCI protection is being sought into five types: (i) information concerning ownership and control structures with respect to PT Musim Mas, ICOF-S, and the Musim Mas Group, as well as the relationship between shareholders; (ii) information on the detailed content of investigation exhibit "Attachment PTMM-18"; (iii) the content of organizational charts setting out PT Musim Mas' corporate structure; (iv) PT Musim Mas' and ICOF-S' financial and other business data and figures from annual reports, other documents submitted in the investigation (e.g. spreadsheets) and documents provided by the European Commission to PT Musim Mas and ICOF-S (e.g. disclosures); and (v) direct quotations,

[12] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[13] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8.

[14] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15).

[15] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 9.

[16] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (quoting Appellate Body Report, *China – HP-SSST (EU)*, para. 5.311).

[17] Appellate Body Report, *China – HP-SSST (EU),* para. 5.315 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8).

[18] Examples of paragraphs of the Panel Report in which the Panel reduced the extent of the redacted information include paragraphs 7.64 and 7.83.

data, or figures from the Sales and Purchase Agreement between PT Musim Mas and ICOF-S. With respect to each of these types, Indonesia maintains that the information is, by its nature, confidential and proprietary, and that any publication of the information could potentially provide an unfair advantage for the companies' competitors.

3.7. We note that in its request, Indonesia refers to examples of objective criteria identified by the Appellate Body as relevant for an adjudicator's assessment of whether to grant BCI protection to information submitted to it, as discussed at paragraph 3.2. above. In particular, Indonesia claims that the following criteria apply to the information for which it requests additional protection: whether the information is proprietary; whether it is in the public domain or protected; and the degree of potential harm in the event of disclosure.[19] We note that the European Union is doubtful as to whether some of Indonesia's arguments can be justified. In particular, the European Union finds it difficult to accept the proposition that information about ownership and control structures is by nature confidential because PT Musim Mas and ICOF-S are not publicly held companies and therefore do not publish their financial reports. We observe that, in some jurisdictions, the ownership and control structures of certain types of companies are a matter of public record, as the European Union points out. However, we recognize that different rules on corporate regulation apply in different jurisdictions. Accordingly, we do not dismiss the possibility that the information for which BCI protection is being sought in this case is sensitive and proprietary within the context of the markets within which the two companies operate.

3.8. Furthermore, in our view, the potential risk of harm to the two companies in question, highlighted by Indonesia, should not be ignored. At the same time, we are alive to our obligation to preserve the integrity of the adjudication process, the participants' rights to due process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large.[20] As mentioned above, the European Union has raised a claim on appeal challenging the Panel's treatment of certain information, in five paragraphs of its Report. We also observe that the significance of Attachment PTMM-18 is one aspect of Indonesia's appeal of the Panel's findings under Article 2.4 of the Anti-Dumping Agreement. Accordingly, we consider that there will be an opportunity in the course of these appellate proceedings for us to adjudicate on whether BCI treatment is warranted for the specific information in respect of which the European Union has raised its concerns. Moreover, Indonesia's request does not propose denying access to the information designated as BCI to the third participants in these proceedings. It follows that we do not consider that according additional protection would undermine the rights of the third participants. Nor do we consider that the proposed BCI protection would prejudice the rights and systemic interests of the WTO Membership at large while these appellate proceedings are ongoing. At the same time, we are cognizant that the interests of Members in having access to reasoning that discloses the basis for findings and conclusions must also be protected, and that the public version of our Report, circulated to all Members, be understandable.[21]

3.9. As Indonesia and the European Union acknowledge, the scope and extent of protection of sensitive business information in WTO dispute settlement proceedings must be determined by WTO panels and the Appellate Body, and not by domestic investigation authorities. As the Appellate Body has noted, "any additional procedures to protect the confidentiality of sensitive business information should go no further than necessary to guard against a determined risk of harm (actual or potential) that could result from disclosure, and must be consistent with the DSU, the other covered agreements including the Anti-Dumping Agreement."[22] We further note that the information covered by Indonesia's request for additional protection was treated as BCI in the Panel proceedings and that it was treated as confidential by the EU authorities in the underlying anti-dumping investigation. In this regard, we observe that the Panel did not simply accept, without question, the BCI nature of documents submitted to it and designated as such by the parties. Rather, the Panel employed certain objective criteria to define BCI, and provided for a procedure to adjudicate any disagreements between the parties on the BCI treatment of information submitted into the Panel record. Indeed, at the interim review stage of its

[19] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[20] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15).

[21] Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R, para. 279.

[22] Appellate Body Report, *China – HP-SSST (EU)*, para. 5.311.

proceedings, the Panel adjudicated a dispute between the parties regarding whether some information was properly designated as BCI.

3.10. Moreover, the fact that both the EU authorities and the Panel granted BCI protection to the information at issue is relevant but not dispositive as to whether that information warrants BCI protection at the appellate review stage. As the Appellate Body stated in *China – HP-SSST (EU)*, while Article 6.5 of the Anti-Dumping Agreement regulates the issue of designation of information in domestic anti-dumping duty proceedings, Article 17.7 deals with the issue of confidentiality in an anti-dumping proceeding before a WTO panel. Thus, whether information treated by the domestic investigating authority as confidential, upon a showing of "good cause" pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the WTO adjudicator.[23] We also consider it useful to recall that whether information warrants BCI protection may evolve over the course of dispute settlement proceedings.

3.11. In this dispute, we note that the Panel Report contains 55 references to information that was designated as BCI, and these 55 references have been redacted from the circulated version of that Report. All of the submissions by the participants in this appeal contain multiple instances in which information that was treated as BCI in the Panel proceedings has been cited and enclosed within double brackets. Moreover, the European Union has raised a claim of error on appeal challenging the Panel's designation of some information as BCI. We further note that the BCI procedures proposed by Indonesia in this appeal are modelled on the BCI procedures adopted by the Appellate Body in *US – Washing Machines.* Yet, we see important differences between the circumstances of that dispute and those in this dispute. The panel report in *US – Washing Machines* did not include any BCI, no redactions were made in the circulated version of the report and the submissions filed by the participants on appeal likewise contained no BCI. By contrast, in this dispute, it cannot be ruled out at this stage that it may be necessary to refer to information that the Panel treated as BCI in our eventual Report. This suggests that there may be need for us to adopt further modalities to supplement the BCI procedures proposed by Indonesia in this appeal.

3.12. On balance, and without prejudice to our adjudication of the participants' claims on appeal, we consider that additional protection is warranted for the information marked by the participants as BCI and enclosed within square brackets in their submissions to the Appellate Body. We also consider that additional protection is warranted for the information designated by the Panel as BCI in its Report and in the Panel record. This excludes any information in respect of which the Panel removed the BCI designation following the parties' comments at the interim review stage.

4 RULING

4.1. First, for the above reasons, and in light of the previous rulings by the Appellate Body on the issue of additional protection of BCI, we have decided to accord additional protection to the following information in these proceedings: (i) the information marked by the participants as BCI and enclosed within square brackets in their submissions to the Appellate Body; and (ii) the information designated by the Panel as BCI in its Report and in the Panel record. With specific respect to the information that the European Union has claimed on appeal did not warrant BCI protection by the Panel, the additional protection that we are granting is provided on a provisional basis, pending resolution of the claims raised by the European Union. The additional BCI protection in these appellate proceedings is provided according to the following terms, bearing in mind that the participants and third participants have already filed their written submissions:

a. No person may have access to information that qualifies as BCI, except a member of the Appellate Body or the staff of the Appellate Body Secretariat, an employee of a participant or third participant, or an outside advisor for the purposes of this dispute to a participant or third participant. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the underlying anti-dumping investigations in this dispute.

[23] Appellate Body Report, *China – HP-SSST (EU)*, paras. 5.315-5.316.

b. A participant or third participant having access to BCI shall treat it as confidential, and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant and third participant shall have responsibility in this regard for its employees as well as for any outside advisors employed for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

c. A participant or third participant that submits a document (including written submissions and oral statements) containing BCI to the Appellate Body after the adoption of these BCI procedures shall clearly identify such information in the document filed. Submissions filed prior to the adoption of these BCI procedures need not be marked retroactively. The participant or third participant shall mark the cover and/or first page of the document containing BCI, and each subsequent page of the document, to indicate the presence of such information. The specific information in question shall be placed within double brackets, as follows: [[…]].

d. A participant or third participant that intends to make an oral statement at the hearing containing BCI shall inform the Division in advance, such that the Division can ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

e. The Appellate Body 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 Appellate Body may, however, make statements of conclusion drawn from that information.

f. Before circulating its Report to the Members, the Appellate Body will decide whether to adopt further modalities, for example to verify the designation of certain information as BCI, and to ensure both the non-disclosure of BCI in the Report to be circulated and that the analysis and findings set out in that Report can be readily understood in the event of any redaction of such BCI.

4.2. Second, pursuant to Rules 16(1) and 18(5) of the Working Procedures, the Division accepts Indonesia's request for leave to amend the executive summary of its appellant's submission as set out in its letter dated 11 May 2017. More specifically, the Division authorizes the removal of all references to BCI markings on the cover page of Indonesia's Executive Summary as well as in the headers on each page and, with respect to paragraph 7.9 of that Executive Summary, accepts Indonesia's request to: (i) replace the text enclosed within the first set of double brackets with the words "particularly close relationship"; (ii) replace the text within the second set of double brackets with the word "close"; and (iii) remove all double brackets. The amended version of this executive summary will be annexed to our Report in this dispute, in accordance with the Guidelines in respect of Executive Summaries of Written Submissions in Appellate Proceedings (WT/AB/23).